IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकरअपीलसं./ITA No.204/SRT/2021

(निर्धारणवर्ष / Assessment Years: (2016-17)

(Physical Court Hearing)

Shree Sainath Sarvajanik Sewa Mandal Trust, N.H. No.8, Near Ganesh Sisodra, Unn-396445, Gujarat.	**Vs.**	The ITO, Exemption Ward, Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AAFTS7802P**		
(Assessee)		**(Respondent)**

Assessee by: Shri Rasesh Shah, CA

Revenue by: Shri J. K. Chandnani, Sr. DR

सुनवाईकीतारीख/ Date of Hearing : 12/05/2022

घोषणाकीतारीख/Date of Pronouncement: 22/07/2022

आदेश / O R D E R

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

The captioned appeal filed by the assessee, pertaining to Assessment Year 2016-17, is directed against the order passed by the Learned Commissioner of Income Tax (Appeals), [in short 'ld. CIT(A)'] National Faceless Appeal Centre (in short 'NFAC), Delhi, in Appeal No. ITBA/NFAC/S/250/2021-22/1036051308(1) dated 30.09.2021, which in turn arises out of a penalty order passed by Assessing Officer u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

2. Grounds of appeal raised by the assessee are as follows:

"1. On the facts and circumstances of the case as well as law on the subject, the learned Commissioner of Income Tax (Appeals) has erred in confirming the action of Assessing Officer in levying penalty of Rs.4,57,504/- u/s. 271(1)(c) of the I.T. Act, 1961.

2. It is therefore prayed that penalty levied by the assessing officer and confirmed by CIT(A) may please be deleted or the matter may please be set aside to the file of the CIT(A).

3. Assessee craves leave to ad, alter or delete any ground(s) either before or in the course of hearing of the appeal."

3. The facts of the case which can be stated quite shortly are as follows: The assessee before us is a trust. During the course of assessment proceedings, the Assessing Officer noticed that assessee trust had claimed Depreciation Rs.20,83,925/-. It was noted by assessing officer that acquisition of such assets on which the assessee has claimed depreciation have been applied or accumulated or set apart for application. The assessee vide its submission dated 05.11.2018 has categorically accepted the fact that they have claimed depreciation under bonafide belief that the same is allowable deduction. In the Finance (No.2) Act, 2014, section 11(6) lays down that depreciation will not be considered as application of income if the assets on which depreciation is charged has already been considered as part of application of income earlier. In view of the above provisions of the Act, and taking into account the law in force through Finance (No.2) Act, 2014, section 11(6) of the Act, the assessing officer held that depreciation claimed of Rs.20,63,925/- is not allowable in view of section 11(6) of the Income-tax Act, 1961. Making of a patently wrong and inadmissible claim for deduction/exemption by the assessee is clearly tantamount to furnishing of inaccurate particulars of income which attracts the levy of penalty u/s 271(1)(c) of the Income-tax Act, therefore assessing officer imposed a penalty of Rs.4,57,504/- under section 271(1)(c) of the Income Tax Act, 1961.

4. Aggrieved by the order of the Assessing Officer, the assessee carried the mater in appeal before the ld. CIT(A), who has confirmed the penalty imposed by the assessing officer. Aggrieved by the order of the ld. CIT(A), the assessee is in further appeal before us.

5. Shri Rasesh Shah, Learned Counsel for the assessee, argued that on the part of the assessee there is an unintentional mistake to claim the depreciation to the tune of Rs.20,63,925/-. The ld Counsel further states that after claiming the deduction on account of depreciation, the total income of the assessee comes at

Nil. As per assessing officer, after making addition on account of depreciation, the total income comes at Nil. That is, total income computed by the assessee and assessing officer comes at Rs. Nil, hence, it is neither concealment of income nor furnishing inaccurate particulars of income, therefore penalty should not be levied. The Ld Counsel also pleaded that there is no loss of Revenue, as the total income computed by the assessee and assessing officer is Nil.

6. On merits, the ld Counsel submits that it is unintentional mistake committed by the assessee while filing return of income. To bolster his arguments, the ld Counsel relied on the order of Co-ordinate bench of ITAT, Kolkata in the case of Swapna Printing Works (P.) Ltd., 40 taxmann.com 130 (Kol.) wherein it was held that mere assessee has claimed deprecation, on basis of tax audit report and complete particulars regarding depreciation were disclosed in tax audit report, the disallowance of deprecation would not warrants penalty under section 271(1)(C) of the Act. Finally, ld Counsel prays the Bench that penalty imposed by the assessing officer may be deleted.

7. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

8. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the ld. CIT(A) and other material brought on record. We note that assessee submitted before us copy of income tax return showing gross total income at Rs. Nil, vide paper book page nos. 8 to 9. We also observe that Assessing Officer computed the total income to the tune of Rs. Nil, vide assessment order dated 28.11.2018. Therefore, we find force in the submission of the Ld. Counsel that total income computed by the Assessee as well as Assessing officer comes to Rs. Nil, therefore, there is no loss of Revenue. However, the penalty cannot be deleted based on such argument of

Ld. Counsel that total income computed by assessee and Assessing Officer is Nil.

9. We note that assessee is a charitable trust and registered u/s 12A of the IT Act. The assessee filed its return of income for A.Y.2016-17 on 21.09.2016 declaring total income at Rs. Nil and thereby claiming refund of Rs.7,20,730/-. The case was selected for scrutiny and assessment was finalized u/s 143(3) by making addition of Rs.20,63,925/- on account of disallowance of claim of depreciation not allowable u/s 11(6) of the IT Act. Hence penalty proceedings u/s 271(1)(c) of the Act were initiated for furnishing inaccurate particulars of income. Penalty notice was issued on 28.11.2019 to the assessee. In response to which the assessee trust explained that under a bona- fide belief that deduction of depreciation was allowable u/s 11(6) of the Act, it had claimed depreciation in its return of income filed. The assessee also submitted that the depreciation was shown in the Profit and Loss account of the trust following the normal account practices. As per the assessing officer, during the assessment proceedings it is noticed that the assessee trust had claimed depreciation of Rs. 20,63,925/-. On the other hand, it is seen from records by AO that acquisition of such assets on which the assessee has claimed depreciation have been applied or accumulated or set apart for application. The A.O also mentioned that in the Finance Act, 2014, section 11(6) lays down that depreciation will not be considered as application of income if the assets on which depreciation is charged has already been considered as part of application of income earlier.

10. We note that assessee trust has claimed depreciation to the tune of Rs.20,63,925/-by mistake and accepted the mistake during assessment proceedings and penalty proceedings. We note that assessee has claimed said depreciation under *bona-fide* belief that the same is allowable deduction under the Act. However, we note that Finance Act, 2014 amended the provisions of section 11(6) of the Act which lays down that depreciation will not be considered as application of income if the assets on which deprecation is charged has already considered as part of application of income earlier, thus the

deprecation claimed to the tune of Rs.20,63,925/- is not allowable in view of the provisions of section 11(6) of the Income Tax Act, 1961. However, we note that after all it is unintentional mistake committed by the assesse and assessee has accepted this mistake and moreover the total income computed by the Assessing Officer and assessee are same. Hence, merely because the assesse has committed unintentional mistake, while filing return of income, does not mean that he has furnished inaccurate particulars of income. We note that Hon'ble Gujarat High Court in the case of Oshwal Education Trust (2014) 52 taxmann.com 332 (Guj. HC), held that mere assessee trust, under bonafide belief, treated voluntary contribution, as corpus donation, Assessing Officer could not pass a penalty order under section 271(1)(c) of the Act, while taking a view that said amount was taxable as income under section 12 of the Act.

11. We note that Co-ordinate bench of ITAT, Kolkata in the case of Swapna Printing Works (P.) Ltd., 40 taxmann.com 130 (Kol.) held that mere assessee claimed deprecation on the basis of tax audit report and complete particulars regarding depreciation were disclosed in tax audit report disallowance of deprecation would not warrants penalty under section 271(1)(C) of the Act. The findings of the Tribunal are as follows:

> ***"3.*** *We have heard rival submissions and gone through the facts and circumstances of the case. The brief facts are that the assessee filed its return of income on March 31, 2007 and assessment was framed under section 143(3) of the Act, vide order dated November 5, 2008 by the Assessing Officer. The Assessing Officer while completing assessment made disallowance of depreciation at Rs. 3,80,692 on the ground that machinery were not put to use during the year. The Assessing Officer further allowed additional depreciation on xerox machine and also payment of provident fund under section 43B of the Act. The Assessing Officer initiated penalty proceedings and also imposed penalty relying on the decision of the hon'ble Supreme Court in the case of Union of India v. Dharamendra Textile Processors [2008] 306 ITR 277/174 Taxman 571. Before the lower authorities including the Assessing Officer during the course of assessment proceedings, during penalty proceedings and even before the Commissioner of Income-tax (Appeals) during appellate proceedings, the assessee claimed that depreciation was claimed on the basis of tax audit report and complete particulars regarding depreciation were disclosed in the tax audit report. Learned counsel for the assessee before us as well as before the Commissioner of Income-tax (Appeals) relied on the decision of the hon'ble Supreme Court in the case of CIT v. Reliance*

Petroproducts (P.) Ltd. [2010] 322 ITR 158/189 Taxman 322, wherein it is held as under (page 165) :

"We are not concerned in the present case with the mens rea. However, we have to only see as to whether in this case, as a matter of fact, the assessee has given inaccurate particulars. In Webster's Dictionary, the word 'inaccurate' has been defined as :

'not accurate, not exact or correct ; not according to truth ; erroneous ; as an inaccurate statement, copy or transcript.'

We have already seen the meaning of the word 'particulars' in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars.

It was tried to be suggested that section 14A of the Act specifically excluded the deductions in respect of the expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. It was further pointed out that the dividends from the shares did not form the part of the total income. It was, therefore, reiterated before us that the Assessing Officer had correctly reached the conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect ; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms ; (i) an item of receipt may be suppressed fraudulently ; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under section 271(1)(c). If we accept the contention of the Revenue then in case of every return where the claim made is not accepted by the Assessing Officer for any reason, the assessee will invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature.

In this behalf the observations of this court made in Sree Krishna Electricals v. State of Tamil Nadu [2009] 23 VST 249 as regards the penalty are apposite. In the aforementioned decision which pertained to the penalty proceedings under the Tamil Nadu General Sales Tax Act, the court had found that the authorities below had found that there were some incorrect statements

made in the return. However, the said transactions were reflected in the accounts of the assessee. This court, therefore, observed (page 251) :

'So far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the assessee's account books. Where certain items which are not included in the turnover are disclosed in the dealer's own account books and the assessing authorities includes these items in the dealer's turnover disallowing the exemption, penalty cannot be imposed. The penalty levied stands set aside.'

The situation in the present case is still better as no fault has been found with the particulars submitted by the assessee in its return.

The Tribunal, as well as, the Commissioner of Income-tax (Appeals) and the High Court have correctly reached this conclusion and, therefore, the appeal filed by the Revenue has no merits and is dismissed."

4. *He further relied on the decision of the hon'ble Calcutta High Court in the case of Usha Martin Ventures Ltd. v. ITO in G.A. No. 953 of 2011, Income-tax Appeal No. 90 of 2010, dated May 20, 2011, wherein it has been held as under :*

"In such circumstances, we are of the opinion that in view of the decision of the Supreme Court in the case of CIT v. Reliance Petroproducts (P.) Ltd. [2010] 322 ITR 158/189 Taxman 322 (SC), no penalty should be imposed upon the assessee for wrong claim of depreciation in violation of the provisions contained in the Income-tax Act.

We have already pointed out that such claim was initially made on the basis of the auditor's report and it has also been brought to the notice of the authorities below that after the detection of such mistake committed by the auditor, the said auditor was changed by the assessee.

We, thus, find that the learned Tribunal below committed substantial error of law in affirming the order of imposition of penalty which is not in conformity with the view taken by the Supreme Court in the abovementioned matter."

5. *We find that the issue is exactly similar what was before the hon'ble Calcutta High Court in the case of Usha Martin Ventures Ltd. (supra) In the facts of the present case there is no doubt the claim of depreciation by the assessee was wrong but the assessee has filed complete particulars qua these assets and also in the claim of depreciation in audit report and in the return of income and nothing was concealed from the Department. In such circumstances, respectfully following the decision in the case of Usha Martin Ventures Ltd. (supra), we are of the view that penalty levied by the Assessing Officer has rightly been deleted by the Commissioner of Income-tax (Appeals). We confirm the same. The appeal of the Revenue is dismissed.*

6. *In the result, the appeal of the Revenue is dismissed."*

12. From the above decision, it is vivid that where assessee had furnished the details of depreciation in its return of income, it is upto the Income Tax Officer

to accept its claim in the return of income or not. Merely because assessee had claimed depreciation, which claim was not accepted by Assessing Officer, that by itself, would not attract the penalty under section 271(1)(c) of the Act. Hence, based on these facts and circumstances, the penalty imposed by Assessing Officer under section 271(1)(c) of the Act is hereby deleted.

13. In the result, the appeal of the assessee is allowed.

Order is pronounced on 22/07/2022 by placing result on notice board.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

सूरत /Surat / दिनांक/ Date: 22/07/2022

SAMANTA

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

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Assistant Registrar/Sr. PS/PS
ITAT, Surat