

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI KULDIP SINGH, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA.NO.1402/MUM/2022 (A.Y: 2012-13)

Dy. Commissioner of Income Tax- 1(3)(1) Room No. 535, 5 th Floor Aayakar Bhavan, M.K. Road Mumbai- 400020	v.	M/s Fern Infrastructure Pvt. Ltd., 109, Wing, Akruti Comm. Complex Next to Akruti Centre Point Central Road, Andheri (E) Mumbai- 400093 PAN: AABCF2322C
(Appellant)		(Respondent)

Assessee Represented by	:	None
Department Represented by	:	Shri Nimesh Yadav
Date of Hearing	:	28.11.2022
Date of Pronouncement	:	08.02.2023

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the revenue against order of the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 18.11.2021 for the A.Y.2012-13.

2. Brief facts of the case are, assessment u/s. 143 of Income-tax Act, 1961 (in short "Act") for the A.Y. 2012-13 was completed on 16.03.2015 accepting the returned loss declared in the return filed on 30.09.2012. Subsequently, Assessing Officer issued notice u/s. 154 of the Act dated 23.10.2015 wherein assessed income was sought to be rectified with regard to erroneous claim of depreciation. Assessee agreed with the proposed rectification, accordingly, Assessing Officer passed rectification order u/s. 154 of the Act dated 29.06.2018 wherein assessee's claim regarding carry forward of loss of ₹.13,53,82,605/- was disallowed and further, claim regarding depreciation was restricted to ₹.14,71,20,377/- as against ₹.19,96,45,361/- claimed by the assessee.

3. With regard to the above said adjustments, Assessing Officer initiated the penalty proceedings u/s. 271(1)(c) of the Act. Not satisfied with the submissions furnished by the assessee, Assessing Officer levied the penalty u/s. 271(1)(c) amounting to ₹.6,06,66,618/- being 100% of tax sought to be evaded.

4. Aggrieved assessee preferred an appeal before the Ld.CIT(A). Before Ld.CIT(A) assessee filed the detailed submissions:

"7. Rectification of claim of depreciation

a. Appellant states that it has made a genuine and bonafide address in the return filed by appellant u/s 139 of the Act which was subsequently rectified u/s154 of the Act. This error was a genuine and bonafide error that has occurred due to oversight.

b. Attention is also invited that depreciation is not an actual expense but a charge on the asset. The regular wear and tear of a depreciable asset and erosion of its realisable value is recorded in the books as depreciation which is an allowable expense u/s 32 of the Act.

c. Attention is invited that depreciation is timing cost, claimed over the life of the asset and irrespective of the rate at which it has been claimed would even out as the claim of excess depreciation in earlier year would result in lower claim in later years and/or vice versa. Considering the same any excess claim in a present year is off set in later years and the loss, if any, is only due to a timing difference/gap.

Presently after going through the facts of the case, appellant has accepted that there was an error in the claim of depreciation. Appellant company states that the error in computation of loss is however due to oversight and a bonafide mistake. The genuinity of the mistake can be vouched by the fact that the above does not result in any tax on the appellant and only results in lower carry forward of loss. Further considering that even in later years the claim for brought forward loss is not utilised, there is no revenue impact to the detriment of the revenue either. The above is a genuine mistake which had been admitted by the appellant company.

8. NO PENALTY WHEN THERE IS NEITHER CONCEALMENT OF INCOME NOR FURNISHING OF INACCURATE PARTICULARS OF INCOME:

The appellant submits that it is not liable for any penalty u/s 271(1)(c) as it has neither concealed any income nor has furnished any inaccurate particulars of income. Penalty u/s 271(1) (c) is leviable if either of the above-mentioned conditions are satisfied. The relevant provisions of section 271(1) (c) of the Act. are reproduced below for your reference -271(1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person-

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty.....

As can be seen from the above provisions, the basic conditions for the levy of penalty are

(i) concealment of the particulars of income or

(ii) furnishing of inaccurate particulars of such income

The income is said to be concealed if the same is hidden from the department and particulars of the same are not disclosed. Obviously, this is not the case here as no income is hidden from the department. Hence, the first limb is obviously not applicable to the facts of the appellant company's case.

The other limb of the provision provides that penalty is leviable if the appellant has furnished inaccurate of income. Even this limb is not satisfied, as the appellant had not furnished any inaccurate particulars of income. The term "inaccurate particulars of income" would imply the making of patently incorrect or false claim not in conformity with the facts or truth. However, this is not the case here. Presently, the addition is on account of a genuine and bonafide error. All details were submitted before your honour and the error was brought to light only due to the submissions of the appellant. Thus, in no way it can be termed that the appellant had furnished inaccurate particulars of income.

Considering the above facts of the case, appellant requests that the penalty proceedings be dropped.

9. The Company further submits that none of the Explanation from 1 to 7 of Section 271 (1)(c) are also applicable in Company's case as explained below:

1 2	Explanation	Reason for non-application in Company's case
3 4 5 6 7	Failure to offer an explanation - offering of false explanation - offering an explanation which assessee is not able to substantiate and fail to disclose the facts relating to same	There was a genuine mistake by the appellant. It is not the case presently that any false explanation was offered by the assessee or full facts were withheld and not disclosed.

Source of any receipt, deposit, outgoings or investments from any an amount which has been added in computing the total income in earlier assessment year but in respect of which no penalty levied in those years	N.A.
Failure to furnish return	N.A.
The expression – 'Tax sought to be evaded' has been defined.	There is no tax evaded as the assessee has losses covering the said addition.
Where in the course of a search under section 132, the assessee is found to be the owner of money bullion, Jewellery etc.	N.A.
Where any adjustment made in the income or loss declared in the return u/s 143(1)(a) and additional tax charged	NIL. There is no impact on the taxability of the company in the current year.
Where any international transaction entered – any amount added / disallowed in computing the total income u/s 92(4)	N.A.

The company has neither concealed any income nor furnished any inaccurate particulars of his income. The company therefore prays Your Honour, in view of above decisions to drop the penalty proceedings.

10. NON-LEVY OF PENALTY FOR MAKING AN INCORRECT CLAIM IN LAW- THE DECISION OF THE COMMISSIONER OF INCOME TAX VS. RELIANCE PETROPRODUCTS (P) LTD. (2010) 322 ITR 158 [SC]
Facts:

Penalty under s. 271(1)(c)-Concealment-Disallowance of claim for deduction-In order to attract the provisions of s. 271(1)(c), there has to be concealment of income or furnishing of inaccurate particulars of his income by the assessee-In the instant case, assessee claimed deduction of interest on loans taken by it for purchase of shares-AO disallowed such interest-Admittedly, no information given in the return was found to be incorrect or inaccurate-Hence, the assessee cannot be held guilty of furnishing inaccurate particulars-Making an incorrect claim in law cannot tantamount to furnishing of inaccurate particulars-Merely because the assessee claimed deduction which has not been accepted by the Revenue, penalty under s. 271(1)(c) is not attracted-If the contention of the Revenue is accepted, the assessee would be liable for penalty under s.271(1)(c) in every case where the claim made by the assessee is not accepted by the AO for any reason-That is clearly not the intendment of the legislature.

Held:

A glance at the provision of s. 271(1)(c) would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. Present is not the case of concealment of the income. That is not the case of the Revenue either. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in the s. 271(1)(c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. Therefore, it is obvious that it must be shown that the conditions under s. 271(1)(c) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the return filed because that is the only document, where the assessee can furnish the particulars of his income.-CIT vs. Atul Mohan Bindal (2009) 225 CTR (SC) 248: (2009) 28 DTR (SC) 1: (2009) 9 SCC 589 followed. (Paras 7 & 8)

Reading the words "inaccurate" and "particulars" 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. 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 s. 271(1)(c). 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. 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 attract the penalty under s. 271(1)(c). If the contention of the Revenue is accepted then in case of every return where the claim made is not accepted by AO for any reason, the assessee will invite penalty under s. 271(1)(c). That is clearly not the intendment of the legislature. The Tribunal, as well as, the CIT(A) and the High Court have correctly reached this conclusion.

Copy of case law - Exhibit 7

11. GENUINE MISTAKE MADE IN RETURN FILED U/S 139 OF THE ACT:

Without prejudice, appellant states that as it is accepted that there had been a mistake on part of the appellant in return filed u/s 139 of the Act, the mistake being bonafide, there is no question of the appellant concealing its income. There is also no question of the appellant furnishing any inaccurate particulars. The present case is that the appellant has made a bonafide disallowance. That the appellant should have been careful cannot be doubted, but the absence of due care, in a case such as the present does not mean that the assessed is guilty of either furnishing inaccurate particulars or attempting to conceal its income.

Attention is invited to the Hon'ble Supreme Court of India in Price Waterhouse Coopers (P) Ltd. v. Commissioner of Income-tax, Kolkata-appeal [2012] 25 taxmann.com 400 (SC) wherein it was decided that "Section 271(1)(c), read with section 37(1), of the Income-tax Act, 1961-Penalty- For concealment of income - Bona fide mistake - Assessment year 2000-01 -Assessee firm filed its return of income along with tax audit report - In its tax audit report it was indicated that provision towards payment of gratuity was not allowable but it failed to add provision for gratuity to its total income Whether it was a bona fide and inadvertent error Held, yes - Whether assessee was not guilty of either furnishing inaccurate particulars or

*attempting to conceal its income - Held, yes - Whether imposition of penalty was unjustified - Held, yes [Para 20] [In favour of assessee]
Copy of caselaw - Exhibit 8*

12. Appellant further states that mere fact that addition is made/sustained would not by itself justify the imposition of penalty:

Appellant states that the criteria for sustaining addition or disallowance are altogether different from the criteria to be followed for considering the levy of penalty being warranted or not. Therefore, the legality of the levy of penalty must be considered independently and uninfluenced by the findings given to sustain the addition to income. The proceedings relating to the assessment and appeal on the quantum of income assessed/assessable cannot and should not be the basis nor the findings given therein, to sustain penalty on the appellant.

Appellant submits that proceedings under the assessment and under the penalty are different proceeding. Appellant reproduces the head note and a para in the case of the Bombay High Court decision.

COMMISSIONER OF INCOME TAX vs. BALRAJ SAHANI (1979) 119 ITR 36 (BOM)

*Penalty under s. 271(1)(c)-Validity-Finding reached in quantum appeal that a particular income is liable to be added as income of the assessee is not binding in penalty proceedings-Tribunal, on consideration of the unreliable state of evidence on record regarding concealment, was justified in setting aside the order of penalty
Conclusion*

Findings in quantum proceedings are not binding in penalty proceedings and the Tribunal, on consideration of unreliable state of evidence regarding concealment, was justified in deleting penalty.

8. The scope of penalty proceedings was considered by this Court in CIT vs. Gokuldas Harivallabhdas (1958) 34 ITR 98 (Bom)-, where it was pointed out that the proceedings under s. 28(1)(c) of the Indian IT Act, 1922, in their very nature are penal proceedings and the gist of the offence under s. 28(1)(c) is that the assessee concealed the particulars of his income or deliberately furnished inaccurate particulars of such income. Therefore, the Department must establish that the receipt which is said to have been concealed constitutes income of the assessee. It was held in that case that it is perfectly open to the ITO in the penalty proceedings to consider his own finding that the receipt constituted an income for the assessment year, but he is not bound by that finding. It was then observed:

"If for instance, any other evidence was produced in the penalty proceedings, it would be open to him to come to a different conclusion. If it was open to the ITO to come to a different conclusion, clearly equally it was open to the Tribunal to come to a different conclusion on this point." Copy of caselaw-Exhibit 9

These observations have been approved by the Supreme Court in CIT vs. Anwar Ali (1970) 76 ITR 696 (SC). "

Copy of caselaw - Exhibit 10

The Kerala High Court has earlier held in CIT vs. P.K. Narayanan (1999) 238 ITR 905 (Ker) that the addition being made and sustained in assessment and appellate proceedings would not toy itself justify penalty for concealment being levied.

Likewise, the Gujarat High Court in National Textiles vs. CIT (2001) 249 ITR 125 (Guj) has also held that the imposition of penalty cannot be justified merely because of additions being sustained and similar view was earlier expressed by the same High Court in CIT vs. S.P. Bhatt (1974) 97 ITR 440 (Guj) and CIT vs. Vinay Chand Hiralal (1979) 120 ITR 752 (Guj) for penalty not to be levied and it was further made clear that when two views are reasonably possible on the facts and circumstances, the imposition of penalty cannot be justified.

13. No penalty when income disclosed in return and assessed income is NIL: Appellant states that a glance at the assessment order would reveal that the income offered u/s 139 of the Act and the income assessed is the same. The appellant has enough brought forward loss to cover the lower claim of depreciation and there is no tax impact on that account. Further the error is itself genuine and bonafide. Considering the same, appellant pleads that logically there ought not be any leviabale penalty as well. Statement of brought forward and carry forward loss - Exhibit 11

Attention is invited to the Hon'ble Supreme Court decision in Joint Commissioner of Income-tax v. Classic Industries Ltd [2017] 80 taxmann.com 220 (SC) wherein it was held that where income disclosed by assessee in return and income assessed was nil, no penalty was leviabale under section 271(1)(c).

1. Appellant invites attention that the return filed for the current year has been subjected to assessment proceedings u/s 143(3) of the Act. The LAO had passed a suitable order after verifying submissions of the appellant. Subsequently, a mistake was found by another LAO. Appellant would like to point out that while the LAO is willing to implicitly accept that his predecessor had made a bonafide error due

to oversight, the same equitable principal has not been used in the case of appellant.

2. Appellant company finally would like to add that in the complex world of taxation, there is human probability that mistakes might occur. There are legal remedies within the Act itself in the form of section 154 of the Act which allows an appellant to correct its mistakes. The fact that the rectification is allowed within a period of 4 years also underlines the fact that the Act recognises that mistakes may occur and, in such cases, corrective remedies should be available to enable an appellant to rectify mistakes and where the mistake comes to the knowledge of the Assessing Officer, allows him to rectify the same. The rectifications are not liable to penalty as they are corrective in nature. The Act of penalising is specific to actions which are with a desire to take unfair advantage and are therefore with a criminal intent. Presently, your honour will appreciate that the action of the appellant is simply a mistake apparent from records. Considering the same, appellant pleads that it should not be made liable for penal action.

16. Considering the above submission, appellant pleads that penalty be dropped."

5. After considering the detailed submissions, Ld.CIT(A) deleted the penalty levied by the Assessing Officer, with the following observations: -

"6. I have considered the facts of the case, penalty order and appellant's written submissions. The AO levied the penalty u/s. 271(1)(c) of the Act amounting to Rs. 6,09,66,618/- in respect of two additions i.e. Rs. 13,53,82,605/- on account of disallowance of excess carry forward loss and Rs.5,25,24,984/- on account of disallowance of excess claim of depreciation. The appellant has objected to the AO's action in imposing the penalty u/s. 271(1)(c) of the Act by stating that these additions are of routine nature having no relevance with any concealment of income or furnishing of inaccurate particulars of income or evasion of income and hence, penalty u/s. 271(1)(c) may be deleted. By placing reliance upon the judgment of the Hon'ble Apex Court in the case of CIT vs. Reliance Petroproducts (P) Ltd. (2010) 322 ITR 158 (SC), the appellant has vehemently argued that no penalty can be levied for making an incorrect claim in law. The appellant has also relied on the decision of decision of the Hon'ble Apex Court in the case of Price Waterhouse Cooper Pvt. Ltd. vs. CIT [2012] 25 taxmann. Com 400 (SC) to argue that where genuine mistake was made filing return of income, no concealment penalty u/s. 271(1)(c) of the Act can be levied. After

considering the appellant's written submissions, I am inclined to agree with the same. I find that none of the two additions qualify for concealment penalty u/s. 271(1)(c) of the Act. The penalty u/s 271(1)(c) is attracted only if any person has concealed the particulars of his income or has furnished inaccurate particulars of such income. I have carefully considered the nature of additions made by the AO and case-laws relied upon by the appellant. In the rectification order passed u/s. 154 of the Act, the AO made adjustment to assessed income of Rs. (-) Rs. 44,59,69,455/- by making following additions/disallowance.

- i. addition of Rs. 13,53,82,605/- on account of disallowance of excess carry forward loss*
- ii. addition of Rs. 5,25,24,984/- on account of disallowance of excess claim of depreciation,*

Considering the nature of these additions, I tend to agree with the appellant's contention that the appellant had not furnished inaccurate particulars of income or concealed its income. The amounts disallowed/added by the AO on account of carry forward loss claimed and depreciation were duly reflected in the financial statements filed by the appellant company and therefore, it cannot be said that the appellant furnished inaccurate particulars of its income. In fact, during the course of rectification proceedings, when the mistake was pointed out to the assessee, it duly agreed for proposed adjustment and submitted that this was a bonafide mistake which occurred due to oversight and has no revenue impact. The circumstances of the case indicate that it was never the intention of the appellant to conceal these incomes. In this connection, reliance may be placed on the judgment of the Hon'ble Apex Court in the case of Price Waterhouse Coopers Pvt. Ltd. vs. Commissioner of Income Tax, 25th September, 2012, (2012) 348 ITR 306 (SC): (2012) 253 CTR (SC) 1: (2012) 211 TAXMAN 40 (SC) wherein Supreme Court held that imposition of penalty would be unwarranted in a case where the assessee had committed an inadvertent and bonafide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars. The Hon'ble Court held as below:-

"Penalty u/s 271(1)(c)-Assessee, by mistake claimed a deduction in respect of provision towards payment of gratuity in its return of income, even though Tax Audit Report Indicated that such provision was not allowable-AO initiated penalty on assessee for concealing income-Held, fact that Tax Audit Report was filed along with the return and that it unequivocally stated that the provision

for payment was not allowable under s 40A(7) of the Act indicates that the assessee a computation error in its return of income-Apart from the fact that the assessee did not notice the error, it was not even noticed even by the AO who framed the assessment order-In that sense, even the AO seems to have made a mistake in overlooking the contents of the Tax Audit Report-Contents of the Tax Audit Report suggest that there is no question of the assessee concealing its income and also no question of the assessee furnishing any inaccurate particulars All that has happened in the present case is that through a bona fide. and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income This can only be described as a human error which all are prone to make-The absence of due care, in a case such as the present, does not mean that the assessee is guilty of either furnishing inaccurate particulars or attempting to conceal its income-The imposition of penalty on the assessee was not justified since the assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars-Assessee's appeal allowed

Held:

The fact that the Tax Audit Report was filed along with the return and that it unequivocally stated that the provision for payment was not allowable under s 40A(7) of the Act indicates that the assessee made a computation error in its return of income. Apart from the fact that the assessee did not notice the error, it was not even noticed even by the AO who framed the assessment order. In that sense, even the AO seems to have made a mistake in overlooking the contents of the Tax Audit Report.

The contents of the Tax Audit Report suggest that there is no question of the assessee concealing its income. There is also no question of the assessee furnishing any inaccurate particulars. It appears that all that has happened in the present case is that through a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total

income. This can only be described as a human error which we are all prone to make. The calibre and expertise of the assessee has little or nothing to do with the inadvertent error. That the assessee should have been careful cannot be doubted, but the absence of due care, in a case such as the present, does not mean that the assessee is guilty of either furnishing inaccurate particulars or attempting to conceal its income.

Given the peculiar facts of this case, the imposition of penalty on the assessee is not justified. The assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars. Under these circumstances, the appeal was allowed and the by the Calcutta High Court was set aside."

The facts leading to this addition as discussed above and consequent imposition of penalty are quite similar to the case of the Price Waterhouse Cooper vs. CIT (Supra) and therefore, as was held by the Hon'ble Apex Court, imposition of penalty is not justified in the facts and circumstances of the instant case. The appellant has not intended to either conceal its income or furnish inaccurate particulars in respect of these additions.

7. *Even otherwise, any wrong of deduction does not represent the furnishing of inaccurate particulars of income or concealing of income in view of the ratio laid down by the Hon'ble Apex Court in the case of CIT V/S Reliance Petro Products Pvt. Ltd. 322 ITR 158 (SC) which strongly supports the case of the appellant, the Hon'ble Supreme Court held as below:-*

"Penalty under s. 271(1)(c)-Concealment-Disallowance of claim for deduction-In order to attract the provisions of s. 271(1)(c), there has to be concealment of income or furnishing of inaccurate particulars of his income by the assessee-In the instant case, assessee claimed deduction of interest on loans taken by it for purchase of shares-AO disallowed such interest-Admittedly, no information given in the return was found to be incorrect or inaccurate-Hence, the assessee cannot be held guilty of furnishing inaccurate particulars-Making an incorrect claim in law cannot tantamount to furnishing of inaccurate particulars-

Merely because the assessee claimed deduction which has not been accepted by the Revenue, penalty under s. 271(1)(c) is not attracted-If the contention of the Revenue is accepted, the assessee would be liable for penalty under s. 271(1)(c) in every case where the claim made by the assessee is not accepted by the AO for any reason-That is clearly not the intendment of the legislature

Held:

A glance at the provision of s. 271(1)(c) would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. Present is not the case of concealment of the income. That is not the case of the Revenue either. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in the s. 271(1)(c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. Therefore, it is obvious that it must be shown that the conditions under s. 271(1)(c) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the return filed because that is the only document, where the assessee can furnish the particulars of his income-CIT vs. Atul Mohan Bindal (2009) 225 CTR (SC) 248: (2009) 28 DTR (SC) 1 (2009) 9 SCC 589 followed.

(Paras 7 & 8)

Reading the words "inaccurate" and "particulars" 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. 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 s. 271(1)(c). 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. 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 attract the penalty under s. 271(1)(c). If the contention of the Revenue is accepted then in case of every return where the claim made is not accepted by AO for any reason, the assessee will invite penalty under s. 271(1)(c). That is clearly not the intendment of the legislature. The Tribunal, as well as, the CIT(A) and the High Court have correctly reached this conclusion. -Sree Krishna Electricals vs. State of Tamil Nadu & Anr. (2009) 23 VST 249 (SC) applied; Reliance Petroproducts (P) Ltd. (judgment dt. 23rd Oct., 2007 of the Gujarat High Court in Tax Appeal No. 1149 of 2007) affirmed.

(Paras 9, 10 & 12)

Conclusion:

Merely because the assessee claimed deduction of interest expenditure which has not been accepted by the Revenue, penalty under s. 271(1)(c) is not attracted; 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."

8. *Moreover, during the course of rectification proceedings or during the course of penalty proceedings, the AO failed to establish that there was any malafide intent on the part of the appellant to not to disclose this income in the original return of income. It is settled law that merely a surrender of income agreeing to addition of an amount to assessee's income cannot automatically lead to an inference that assessee had concealed his income or had furnished inaccurate particulars of his income. These principles got settled from the decisions in the case of CIT vs. Suresh Chandra Mittal (251 ITR 9 SC), CIT vs. K. R. Chinni Krishna Chetty (246 ITR 121 Mad) and CIT vs. Ajaib Singh & Co. (253 ITR 630 P&H). In the case of Suresh Chandra Mittal (supra), the Hon'ble Apex Court held that High Court was justified in holding that no penalty could be levied where the Department simply rested its conclusion on the act of voluntary surrender done by the assessee in good faith. In the case of K. R. Chinni Krishna Chetty (supra), it was held that of greater importance is the necessity for a definite finding that there is concealment, as without a such finding of concealment there can be no question of imposing any penalty: that the mere revision of income to a higher figure by the Assessing Authority does not automatically warrant an inference of concealment. In the case of Ajaib Sing & Co. (supra), it has been decided that the assessee had furnished inaccurate particulars of its income and that there is concealment must be proved as a necessary corollary from the facts and circumstances established on record. The instant case of the assessee has to be decided in view of the principles emanating from the judicial decisions mentioned above.*

9. *Here I may also refer to the decision of the Hon'ble Supreme Court rendered in the case of JCIT vs. Classic Industries Ltd. [2017] 80 taxmann.com 220 (SC) wherein the Hon'ble Apex Court while disposing off Department's appeal against order dated 27th July, 2006 passed by the High Court of Gujarat by which the High Court has held that no penalty is leviable under section 271(1) (c) of the Income-tax Act, 1961 if the income disclosed in the Return and the income assessed is nil, confirmed the view of the Hon'ble Gujarat High Court and held that where income disclosed by assessee in return and income assessed was nil, no penalty was leviable under*

section 271(1)(c) of the Act. In the instant case of appellant company, the returned income as well as assessed income are in negative, therefore, the ratio of this judgment is duly applicable to the facts of the present appellant.

Considering the facts of the case and judicial precedents as discussed above, it is held that the AO is not justified in imposing penalty u/s. 271(1)(c) of the Act in respect of the two additions made in the rectification order, the penalty imposed at Rs.6,09,66,618/- is directed to be deleted. The grounds raised by the appellant regarding this issue are allowed.

6. Aggrieved revenue is in appeal before us raising following grounds in its appeal: -

1. *"Whether on the facts and circumstances and in law, the Ld. C.I.T. (A) without going into the merits of the case has directed the AO to delete the penalty levied u/s. 271(1)(c) without appreciating the fact that assessee's claim regarding carry forward of loss of Rs. 13,53,82,605/- was disallowed with assessee consent and acceptance which would otherwise result in suppression of income by way of set off of losses and thereby concealing income?"*

2. *"Whether on the facts and circumstances and in law, the Ld. CIT(A) without going into the merits of the case has directed the AO to delete the penalty levied u/s. 271(1)(c) without appreciating the fact that assessee's claim of depreciation was restricted to Rs. 14,71,20,377/- as against Rs. 19,96,45,361/- claimed by the assessee which assessee too agreed to be correct and if has been allowed would have resulted in suppression of income in subsequent years?"*

3. *The appellant craves leave to add, alter, amend any of the above grounds of appeal."*

7. In spite of issue of notice none appeared on behalf of the assessee. Therefore, we proceed to dispose of this appeal with the assistance of Ld.DR.

8. At the time of hearing, Ld. DR submitted that assessee has claimed excessive depreciation and also claimed excessive carryforward losses. In the 154 proceedings initiated by the Assessing Officer in which assessee has accepted the mistake. He submitted that Ld.CIT(A) deleted the penalty with the observation that assessee has accepted voluntarily. In this regard he submitted that assessee has not made any effort to declare the mistake, it clearly indicates that it is not a voluntary acceptance. He brought to our notice Para no. 6 of the Ld.CIT(A) order and submitted that various case law relied by the Ld.CIT(A) are distinguishable. Further, he relied on the following case law: -

(i). *Mahesh N. Thakkar v. ACIT [2015] 59 taxmann.com 272 (Bombay)*

(ii). *Samson Maritime Ltd. v. CIT [2017] 88 taxmann.com 671 (Bombay)*

9. Further, he submitted that voluntary disclosure also attract penalty, he relied on the decision of the MAK Data (P.) Ltd., v. CIT [2013] 358 ITR 593 (SC)] and at the end he submitted that no corrective efforts was made by the assessee.

10. Considered the submissions of the Ld. DR and material placed on record. We observe from the record that Assessing Officer levied the penalty u/s. 271(1)(c) in respect of two additions i.e., on account of disallowance of excess carry forward losses and on account of disallowance of excess claim of depreciation. However, we notice that, in this case excessive claim made by the assessee are brought to the notice of the assessee and assessee has accepted the above excessive claim in 154 proceedings. It is fact on record that assessee has furnished all the information in the return of income filed and it is not the case of the Assessing Officer that assessee has furnished inaccurate particulars or concealed its income, all the informations were duly reflected in the financial statements filed by the assessee.

11. Further, in the rectification proceedings when the mistake was brought to the notice of the assessee, it agreed for the proposed adjustment and submitted that this was a bonafide mistake which incurred due to oversight and has no revenue impact. Since there is no revenue impact the adjustment proposed by the Assessing Officer, hence it clearly indicate that it is not the intention of the assessee to conceal these incomes. Further, we are inclined to accept the findings of the Ld.CIT(A)

that any wrong claim of deduction does not represent the furnishing of inaccurate particulars or concealing of income as held by the Hon'ble Apex Court in the case of CIT v. Reliance Petrol Products Pvt. Ltd., [322 ITR 158 (SC)]. After considering the overall facts on record, we are inclined to agree with the findings of the Ld.CIT(A) in deleting the penalty levied by the Assessing Officer. Accordingly, we do not find any reason to interfere with the findings of the Ld.CIT(A). Accordingly, grounds raised by the revenue are dismissed.

12. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 08th February, 2023

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER
Mumbai / Dated 08/02/2023
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum