

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

**BEFORE SHRI ABY T VARKEY, HON'BLE JUDICIAL MEMBER**

**AND**

**SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NO. 3048/MUM/2023 (A.Y: 2017-18)**

Fayz E Husayni Trust 167/169, Shivdas Chapsi Marg Dongri, Mumbai – 400008  <b>PAN: AAATF0013G</b>	v.	Income Tax Officer (Exemption)-1(3) Piramal Chambers, Lalbaugh Mumbai - 400012
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee Represented by</b>	<b>:</b>	<b>Ms. Usha Gopalan</b>
<b>Department Represented by</b>	<b>:</b>	<b>Shri C.T. Mathews</b>
<b>Date of conclusion of Hearing</b>	<b>:</b>	<b>17.01.2024</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>21.02.2024</b>

**ORDER**

**PER S. RIFAUR RAHMAN (AM)**

1. This appeal is filed by the assessee against order of Learned Commissioner of Income-Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld. CIT(A)"] dated 09.03.2023 for the A.Y.2017-18.

**2.** Brief facts of the case are, Assessee has filed its return of income on 18.10.2017 declaring a total income of ₹.NIL. Subsequently, the case was selected for scrutiny through CASS and notices under section 143(2) and 142(1) of Income-tax Act, 1961 (in short "Act") were issued and served on the assessee along with questionnaire. In response assessee filed the relevant information as called for which includes return of income along with the computation of income, copy of audited income and expenditure account and balance sheet, audit report in Form – 10B, details of Trust, certificate of registration and bank details.

**3.** The assessee trust is registered with the Commissioner of Income-Tax (Exemption), Mumbai under section 12A of the Act and also it is registered with Charity Commissioner, Mumbai. The assessee is engaged in the charitable activities. The main object of the trust is to arrange and provide assistance and facilities to pilgrims visiting holy places such as Mecca and Madina etc., the other objects includes providing housing, medical and educational facilities and general charity.

**4.** During the course of assessment proceedings, Assessing Officer observed that assessee has claimed depreciation of ₹.28,58,361/-. It was observed that assessee has claimed depreciation and also capital

expenditure i.e., addition to fixed assets in the computation of income as it amounts to double deduction. By issue of notice under section 142(1) of the Act dated 28.11.2019, the assessee was asked to explain why the claim of depreciation should not be disallowed. In response assessee submitted reply vide letter dated 03.12.2019, the same is reproduced below: -

*"During the year under consideration the Assessee Trust has claimed depreciation of Rs. 28,58,361/-. Though the claim of depreciation was bonafide, but inadvertently the Assessee Trust did not suo moto disallow the depreciation claim in the Computation of Income. The Assessee Trust merely followed the Computation of previous assessment year in claiming depreciation and in the process missed out the amendment and the provisions to section 11(6) of the Act. w.e.f. 01.04.2015. The error is bonafide/unintentional and it does not impact the revenue as it will be a NIL Return even otherwise.*

*Sir, in order to ratify the inadvertent claim of depreciation, I am enclosing herewith the Revised Computation of Total Income for the Assessment Year under reference. You are kindly requested to accept the same."*

**5.** After considering the above submissions, the Assessing Officer observed that the similar additions were made in assessee's case in earlier assessment years. The claim of the assessee is not allowable as it tantamount to double deduction. First by way of claiming the capital expenditure towards the purchase of fixed assets and second by way of depreciation.

**6.** The Assessing Officer discussed the nature of receipts of the assessee and the basis of claiming the capital expenditure as well as depreciation. After discussing the various aspects of claiming double deduction, Assessing Officer disallowed the depreciation claimed by the assessee.

**7.** Subsequently the Assessing Officer initiated penalty proceedings under section 270A of the Act by issue of notice under section 274 of the Act. The assessee was asked as to why the order imposing penalty under section 270A should not be imposed. In response assessee submitted its reply and reproduced the letter submitted on 29.06.2020. In the submission the assessee requested the Assessing Officer to drop the penalty proceedings initiated under section 270A stating the non-disallowance of depreciation is an inadvertent mistake and it has cooperated in the assessment proceedings with all the facts. Further, they submitted that there is no revenue implication as the assessee is a charitable trust and its loss is only reduced. For the sake of clarity, the letter submitted by the assessee is reproduced below: -

*"In this connection your attention is invited to the Assessment Order passed U/s. 143(3) of the Act, from where it would be very clear that during the course of assessment proceedings all details desired by your honour were submitted including the details of depreciation claimed.*

*As regards the claim of depreciation is concerned, it has to be submitted that the same was claimed and allowed till A.Y.2015-2016 as per the law that existed then. However, the same became disallowable only from A.Y.2016-17 and onwards, consequent to an amendment to Section 11(6) of the Act. In other words, the depreciation amount claimed had to be added back while computing the Income and the same inadvertently remain to be done. Needless to mention that the same was done by submitting revised statement of computation of income during the course of assessment proceedings i.e. the inadvertent mistake was corrected even before the assessment was completed.*

*Thus, from the Assessment Order and other documents submitted, it would be very clear that there is no under-reporting of income whatsoever and therefore, no penalty is leviable U/s. 270A of the Act and the proceedings initiated may kindly be dropped.*

*Without prejudice to the above, the following may also be kindly considered;*

*(i) All the factual details pertaining to the claim of depreciation were furnished well before the assessment was completed, thereby indicating clearly that nothing was hidden and under-reported.*

*(ii) That the Assessee Trust being a Charitable Trust, no tax is payable in view of the provisions of Section 11 and the error committed does not have any impact on the revenue. In other words, there is no revenue loss.*

*(iii) As stated earlier, the error / mistake is bonafide and unintentional and the same has been rectified even before the assessment order was passed."*

**8.** After considering the submissions of the assessee, the Assessing Officer rejected the same and observed that onus is on the assessee to furnish complete disclosure of income voluntarily while filing return of income under section 139 of the Act. Further, he observed that as per the submissions of the assessee the assessee has only offered the correct computation only during the course of assessment and observed

that as per Para No. 5.3 of the assessment order similar addition was made in assessee's case in earlier assessment years also. Therefore, the assessee contentions that the error / mistake is bonafide is also not tenable and therefore not accepted. Accordingly, he imposed 50% of the tax payable on under reported income and he determined the penalty at ₹.4,41,617/-.

**9.** Aggrieved, assessee preferred appeal before the Ld. CIT(A) and filed detailed submissions which is reproduced at Page Nos. 8 to 11 of the appellate order. After considering the submissions of the assessee, Ld.CIT(A) has dismissed the various grounds raised by the assessee with the following observations: -

*"6. I have considered the facts of the case, penalty order and submission of the appellant. The AO noted that in the original return filed u/s. 139(1) of the Act, the assessee trust wrongly claimed depreciation of Rs. 28,58,361/- which was otherwise not allowable to it. According to the AO, such a failure of duty on the part of assessee, constituted an element of under-statement of income, which is in consequence of mis-reporting thereof warranting levy of penalty u/s. 270A of the Act. Accordingly, the AO levied a penalty u/s. 270A of Rs. 4.41,617/- being 50% of tax on under-reported income of Rs. 28,58,361/-. In response to notice u/s. 250 of the Act, the appellant has submitted that the depreciation expense was disallowable only from A.Y. 2016-17 and onwards, consequent to an amendment to Section 11(6) of the Act and as such the depreciation amount claimed had to be added back while computing the income but the same was inadvertently remained to be done then. The appellant has further stated that after realizing mistake of claiming depreciation and missed the amendment; the trust submitted revised statement of computation of income, during the course of assessment proceedings. The*

*appellant has pleaded that since the error was unintentional and there was no loss of revenue to the Department, the penalty imposed u/s. 270A may be dropped. Considering the facts of the case, I am not inclined to agree with the appellant's claim. The present case is clear cut case of under-reporting of income. It is a fact that only when enquiry was initiated during the course of scrutiny proceedings, the appellant came forward and accepted its mistake of claiming depreciation of Rs. 28,58,361/-. Had no scrutiny proceedings initiated in this case, the appellant would have succeeded in claiming unallowable depreciation. The cases cited by the appellant have been duly considered, but the facts of the instant case and cases cited by appellant are different. I find it relevant to rely on following decisions in this regard:-*

*In the case of P. C. Joseph & Brothers vs. CIT (240 ITR 808), the Hon'ble Kerala High Court observed that "Simply because assessee agreed to addition of concealed income after detection thereof by spreading the amount over four years and filed returns in response to notice u/s. 148 offering additional income, it cannot escape penalty under s. 271(1)(c)."*

*In the another case of CIT vs. R. Kesavan Nair, 287 ITR 276, the Hon'ble Kerala High Court held that "imposition of penalty is not dependent upon the consent or otherwise of the assessee or on the basis of agreement or concession."*

*The Hon'ble Allahabad High Court in the case of CIT vs. Rakesh Puri, 331 ITR 458 held that "Where the assessee was found to have tried his best to escape from communicating the relevant information called for by the AO regarding the genuineness of the sale of shares, surrender of income could not be said to be voluntary but under compulsion being cornered by Revenue, and this being a case of concealment of income, levy of penalty under s. 271(1)(c) was justified".*

*The Hon'ble Apex Court's judgement in the case of K.P. Madhusudhan vs. CIT reported in 251 ITR 99 (SC) held that it is for the assessee to prove that his failure to return the correct income was not due to fraud or neglect. If he fails to do so, assessee should be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and consequently liable for penalty provided by the section. It has been held by various judicial Authorities that upon invoking provisions of section 271(1)(c) there is no further onus on the AO to establish mens rea and it is for the assessee to satisfactorily discharge the onus of proving the bonafides with*

*regard to claim of expenses. The appellant in this case, has failed to do so.*

*6.1 Though these above referred decision are rendered in the context of concealment of penalty u/s. 271(1) (c) of the Act but ratio laid down in these judgments also holds well in present case.*

*6.2 As regards the appellant's claim that there was no loss of revenue to the Department and hence, penalty should be dropped, I find that the AO already negate this contention of the assessee by stating that loss is nothing but a negative income and the IT Act provide to set off such losses in future with certain conditions.*

*6.3. At this juncture, it is relevant to refer to section 270A(6) which provides the cases which do not amount to underreporting of income. They are as follows:*

*"(a) the amount of income in respect of which the assessee offers an explanation and the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, is satisfied that the explanation is bona fide and the assessee has disclosed all the material facts to substantiate the explanation offered*

*(b) the amount of under-reported income determined on the basis of an estimate, if the accounts are correct and complete to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, but the method employed is such that the income cannot properly be deduced therefrom;*

*(c) the amount of under-reported income determined on the basis of an estimate, if the assessee has, on his own, estimated a lower amount of addition or disallowance on the same issue, has included such amount in the computation of his income and has disclosed all the facts material to the addition or disallowance,*

*(d) the amount of under-reported income represented by any addition made in conformity with the arm's length price determined by the Transfer Pricing Officer, where the assessee had maintained*

*information and documents as prescribed u/s. 92D, declared the international transaction under Chapter X, and, disclosed all the material facts relating to the transaction, and*

*(e) the amount of undisclosed income referred to in section 271AAB."*

*However, the present appellant's case does not fall in the exception given section 270A(6) of the Act. Accordingly, ground nos. 1 & 2 raised by the appellant regarding this issue are dismissed.*

*7. As regards the appellant's contention that the AO erred in calculating the amount of tax payable and therefore calculated incorrect amount of penalty, I find no infirmity in AO's action in calculating the amount of tax payable because the appellant failed to establish any error in tax calculation. The AO rightly imposed the penalty u/s. 270A of Rs. 4,41,617/- being 50% of tax calculated at 8,83,234/- on underreported income of Rs. 28,58,361/-. The Ground No. 3 raised by the appellant regarding this issue is dismissed.*

*8. In view of the facts discussed above and judicial precedents cited supra, it is held that appellant's case squarely attracts penal proceedings u/s. 270A of the Act and thus, the AO was justified in imposing the penalty u/s. 270A of the Act amounting to Rs. 4,41,617/-, the same is hereby confirmed. All the grounds raised by the appellant regarding this issue are dismissed."*

**10.** Aggrieved assessee, is in appeal before us raising following grounds in its appeal: -

*"1. The learned CIT erred in dismissing the appeal filed by the appellant and passed order under Section 250 of the Income Tax Act, 1961.. He erred in not appreciating that the appellant has not underreported any income He erred in not considering the decision The Income Tax Appellate Tribunal Delhi Bench in "Grih Kalyan Kendra Board, Grih Kalyan Kendra, Samaj Sadan, Lodhi Road*

*Complex, Delhi vs ITO Ward-1/2), Delhi". (Income Tax Appeal No. 1993/DEL/2021).*

*2. The learned CIT erred in not allowing the appeal by not dropping the penalty order and not appreciating the fact that there is no loss of revenue as the disallowance only resulted in reduction of loss.*

*3. The learned CIT erred in understanding that in first place, if the appellant have not claimed the depreciation, then the computation would have been still the same, he is not appreciating the fact that there is no element of understatement of income which is in consequence of misreporting u/s 270A of the Act.*

*4. The learned CIT erred in not appreciating the fact that the appellant is a trust indulging in charitable activities which would never intend to evade tax and appellant had filed the rectification even before the assessment order was passed. There is no point of misreporting of income as the learned AO itself had all rectified computation submitted by appellant."*

**11.** At the time of hearing, Ld.AR of the assessee submitted that assessee has claimed depreciation during the current assessment year inadvertently since assessee was regularly claiming depreciation in the earlier assessment years. The same pattern of claim was made thereon this assessment year also. However, he submitted that the Trust has declared the taxable income as NIL considering the fact that the expenditure is more than the income earned by the assessee during the year. Therefore, by inadvertently claiming the depreciation has no impact on the taxable income and also the unclaimed or excess expenditure for which setoff is not allowable in the provisions of the Act.

In this regard he brought to our notice Page No. 66 of the Paper Book to submitted that assessee has never claimed any set off by bringing computation of income in the A.Ys. 2017-18 to 2022-2023. He prayed that the inadvertent claim made by the assessee itself cannot come under penalty proceedings.

**12.** On the other hand, Ld. DR relied on the orders of the lower authorities.

**13.** Considered the rival submissions and material placed on record, we observe that assessee has claimed depreciation as well as investments in fixed assets as application of funds. As per the amended provisions of section 11(6) of the Act w.e.f 01.04.2015 w.e.f from A.Y.2016-17, the Charitable Trust cannot claim both depreciation as well as application of funds on utilization of funds in the capital assets. In the present case, assessee has claimed the depreciation inadvertently and it is also fact on record that the total expenses of the trust are more than the total income earned by the assessee during the current assessment year as well as it is brought to our notice in the subsequent assessment years also the trend continues. For the sake of clarity, we

are reproducing the income and expenditure account for the  
A.Y. 2017-2018 to 2022 to 2023: -

<b>FAYZE HUSAYNI TRUST, BOMBAY</b>						
<b>Computation of Income</b>						
<b>Particulars</b>	<b>A.Y 2017-18</b>	<b>A.Y 2018-19</b>	<b>A.Y 2019-20</b>	<b>A.Y 2020-21</b>	<b>A.Y 2021-22</b>	<b>A.Y 2022-23</b>
<b>A</b>	<b>Income</b>	<b>Amount</b>	<b>Amount</b>	<b>Amount</b>	<b>Amount</b>	<b>Amount</b>
	Voluntary Contribution	6,39,02,105	11,58,12,425	8,82,09,728	7,02,44,421	1,73,63,745
	Rent	1,62,43,980	1,95,27,037	2,05,22,929	2,05,64,125	2,49,79,032
	Misc Income	202	4,17,063	11,58,427	86,884	26,81,135
	<b>Total Income</b>	<b>8,01,46,287</b>	<b>13,57,56,525</b>	<b>10,98,91,084</b>	<b>9,08,95,430</b>	<b>2,76,60,167</b>
<b>B</b>	<b>Application of funds</b>					
<b>1</b>	<b>Revenue expenditure</b>					
	Establishment Expenses	1,06,17,466	1,26,71,147	1,17,58,964	1,32,15,552	88,66,640
	Audit fees	4,60,000	4,83,800	6,07,700	4,21,850	4,13,000
	Legal & Professional fees	4,88,751	8,33,700	6,85,400	4,42,750	2,12,500
	Loss on Sale of Assets	3,85,349	2,60,182			
	Loss on Discarded Assets		-			
	Depreciation	28,58,361	-	-	-	-
	Expenditure on Objects of the trust	5,27,28,322	11,09,91,397	8,34,40,104	10,27,43,013	1,57,27,576
<b>2</b>	<b>Capital expenditure</b>	<b>6,38,08,229</b>	<b>1,39,09,515</b>	<b>4,49,332</b>	<b>5,96,665</b>	<b>47,519</b>
<b>3</b>	<b>15% of Accumulation us II(I)(d)</b>			<b>1,29,49,584</b>	<b>-</b>	<b>23,92,932</b>
	<b>Total Expenses</b>	<b>13,13,46,478</b>	<b>13,91,49,741</b>	<b>10,98,91,084</b>	<b>11,74,19,830</b>	<b>2,76,60,167</b>
<b>D</b>	<b>Excess of Application over income</b>	<b>(5,12,00,191)</b>	<b>(33,93,216)</b>	<b>-</b>	<b>(2,65,24,400)</b>	<b>-</b>
<b>E</b>	<b>Taxable Income</b>	<b>Nil</b>	<b>Nil</b>	<b>Nil</b>	<b>Nil</b>	<b>Nil</b>
<b>F</b>	<b>Excess application carried forward</b>	<b>Nil</b>	<b>Nil</b>	<b>Nil</b>	<b>Nil</b>	<b>Nil</b>

**14.** Considering the overall all facts on record, we are of the view that no doubt assessee has claimed the depreciation inadvertently or unintentionally the impact on total taxable income is NIL. Since there is

no impact on the disallowance of the expenditure, Further, the issue of disallowance of depreciation was introduced only from A.Y. 2016-17. In the earlier assessment years, the same was allowed as allowable expenses. The change of scenario, made some assessee's to adjust themselves with the new reality. Therefore, we do not see any reason to impose the penalty based on the facts brought on record. It is also brought to our notice that assessee has not claimed any depreciation in the subsequent assessment years, it has claimed the depreciation only in the current assessment year inadvertently. Considering the overall facts on record, we direct the Assessing Officer to delete the penalty levied on the assessee under section 270A of the Act. Accordingly, Ground No. 1 raised by the assessee is allowed and other grounds raised by the assessee are consequential in nature accordingly, appeal filed by the assessee is allowed.

**15.** In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 21<sup>st</sup> February, 2024.

**Sd/-**  
**(ABY T VARKEY)**  
**JUDICIAL MEMBER**  
Mumbai / Dated 21/02/2024  
Giridhar, Sr.PS

**Sd/-**  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

**Copy of the Order forwarded to:**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**