

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

**BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND  
MS.KAVITHA RAJAGOPAL, JUDICIAL MEMBER**

ITA NO.4241/MUM/2023  
ASSESSMENT YEAR :2015-16

K J Somaiya and Sons Private Limited,  
45-47, Somaiya Bhavan, M.G Road,  
Fort, Mumbai – 400 001  
PAN: AAACK-1894-K

---- Appellant

Vs.

ACIT -2(2)(1), Mumbai  
Aaykar Bhavan, M.K. Road,  
Mumbai – 400 020.

--- Respondent

Appellant by : Shri Vipul Joshi  
Respondent by : Shri P.D.Chougule, Sr.DR

Date of Hearing : 09/05/2024  
Date of Pronouncement : 15/05/2024

**ORDER**

**PER B.R. BASKARAN, ACCOUNTANT MEMBER :**

The assessee has filed this appeal challenging the order dated 26/09/2023 passed by CIT(A), NFAC, Delhi for Assessment Year 2015-16, wherein he has confirmed penalty levied u/s. 271(1)(c) of the Act.

2. The facts relating to the issue under consideration are discussed in brief. The assessee filed its original return of income on 28/09/2015 declaring a total income of Rs.1.35 crores. The same was accepted by the AO in the original assessment order dated 26/12/2017 passed u/s. 143(3) of the Act. Subsequently, the case was reopened on the reasoning that the assessee has claimed depreciation of Rs.12,45,850/- on "tenancy right". According to the

AO, the assessee has not acquired any tenancy right and depreciation thereon is not allowable. Hence, the AO reopened the assessment. In response to the notice issued u/s. 148 of the Act, the assessee filed its return of income, wherein it surrendered the depreciation claimed by it in the original return of income. Accordingly, the assessee offered an income of Rs.1.47 crores. The income so returned by the assessee was accepted by the Assessing Officer in the reassessment proceedings. Thereafter, the Assessing Officer initiated penalty proceedings u/s. 271(1)(c) of the Act for “concealing the particulars of income”.

3. Before the Assessing Officer, the assessee contended that it had disclosed all details relating to acquisition of tenancy right and accordingly, contended that there was no concealment of income as alleged by the AO. Accordingly, it was contended that penalty u/s 271(1)(c) of the Act is not leviable. The Assessing Officer, however, did not agree with the contentions of the assessee. In this regard, the Assessing Officer observed that withdrawal of depreciation on tenancy right by the assessee is voluntary admission of concealment of income by the assessee. Accordingly, he levied penalty of Rs.4,23,464/- u/s. 271(1)(c) of the Act. The CIT(A) also confirmed the penalty and hence, the assessee has filed this appeal before the Tribunal.

4. The Id.A.R explained the factual background of the depreciation claimed by the assessee. He submitted that the assessee was a sub-tenant in a property. Thereafter, it became main tenant by making payments to the land owner and also the original tenant. The payments so made were treated as “tenancy right” by the assessee and depreciation was claimed thereon. He submitted that the assessee did

not conceal any of the particulars relating to the tenancy right. All the details relating thereto were duly disclosed in the books of account as well as in the return of income. Further, the details of depreciation claimed on the tenancy right were also duly disclosed in the return of income filed by the assessee. In fact, the depreciation claim was allowed by the Assessing Officer in the original assessment order passed u/s. 143(3) of the Act. The case of the assessing officer was that the assessee has not acquired tenancy right through any registered document. However, the assessee has furnished the consent order of the Court to prove the acquisition of tenancy right, which was not accepted by the tax authorities. Since the AO was making disallowance of depreciation in every year, the assessee chose to settle the dispute. Accordingly, the assessee settled the dispute in other years under Vivad Se Vishwas Act. In the current year, the assessee withdrew its claim for depreciation in the return of income filed in response to the notice issued u/s 148 of the Act in order to avoid dispute with the department. Since the assessee had furnished all particulars relating to tenancy right, there is no case of concealment of particulars of income, as alleged by the AO. Accordingly, he submitted that the impugned penalty levied by the Assessing Officer is liable to be deleted.

5. The ld.D.R, on the contrary, submitted that the assessee had withdrawn the claim of depreciation on tenancy right, only on account of the reason that the Assessing Officer has reopened the assessment u/s. 148 of the Act. By making wrong claim of depreciation on tenancy right, the assessee has concealed the income. Accordingly, he submitted that the Ld CIT(A) has rightly confirmed the penalty levied u/s. 271(1)(c) of the Act.

6. We have heard rival contentions and perused the record. We notice that the AO has issued two notices u/s 271(1)(c) of the Act and both the notices are placed at pages 85 and 86 of the paper book. On a perusal of the notice dated 10/02/2022 placed at page 85 of the paper book, we notice that the Assessing Officer has initiated the penalty proceedings for “concealment of particulars of income”. However, in the second notice dated 12.8.2022 issued by the AO, he has initiated penalty proceeding for “concealment of particulars of income and for furnishing inaccurate particulars of such income”. We noticed earlier that the AO has stated in the assessment order that the penalty proceedings are initiated for “concealment of particulars of income”. However, we notice that the penalty order is silent about the charge and the AO has stated that there is concealment of income. Thus, we notice that there is no clarity in the mind of the AO as to the limb under which he has initiated penalty proceedings u/s 271(1)(c) of the Act.

7. Be that as it may, we are of the view that there is no case of concealment of particulars of income in this case. During the course of hearing, the Ld A.R took us through the Annual report as well as income tax return filed by the assessee. We notice that the assessee has duly disclosed the details relating to “tenancy right” in the books of account as well as in the return of income. Since the AO was disputing the fact of acquisition of tenancy right, he has been disallowing the depreciation claimed by the assessee year after year. It is stated that the assessee had settled the dispute under VSV Scheme in other years and in the current year, the assessee withdrew the claim of depreciation in the return of income filed in response to the notice issued u/s 148 of the Act. At this stage, we may refer to the

following observations made by Hon'ble Supreme Court in the case of Dilip N Shroff (291 ITR 519) referring to the earlier decision rendered by it:-

“51. The order imposing penalty is quasi-criminal in nature and, thus, burden lies on the department to establish that the assessee had concealed his income. Since burden of proof in penalty proceedings varies from that in the assessment proceeding, a finding in an assessment proceeding that a particular receipt is income cannot automatically be adopted, though a finding in the assessment proceeding constitute good evidence in the penalty proceeding. In the penalty proceedings, thus, the authorities must consider the matter afresh as the question has to be considered from a different angle. [See AnantharamVeerasinghaiah& Co. v. C.I.T., Andhra Pradesh, 1980 Supp SCC 13]”.

Hence the addition made in the assessment order would not automatically lead to levy of penalty. In the instant case, the AO has initiated penalty proceedings for “concealment of particulars of income”. We have noticed that the assessee has furnished all the details relating to claim of depreciation on tenancy right. Hence, it is not a case of concealment of particulars of income as alleged by the AO. It is the submission of the assessee that it has decided to settle the dispute relating to depreciation on tenancy right under VSV Scheme in other years and accordingly withdrew the claim of depreciation in the current year. Accordingly, withdrawal of depreciation claim, in our view, cannot lead to a case of concealment of particulars of income. Accordingly, we are of the view that the AO was not justified in holding that the assessee has concealed the particulars of income. Accordingly, we are of the view that the

impugned penalty levied u/s 271(1)(c) of the Act is liable to be deleted. Accordingly, we set aside the order passed by Ld CIT(A) and direct the AO to delete the penalty levied u/s 271(1)(c) of the Act

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

Order pronounced in the open court on 15<sup>th</sup> May, 2024.

Sd/-

(KAVITHA RAJAGOPAL)  
JUDICIAL MEMBER  
Mumbai, Date : 15<sup>th</sup> May, 2024

Sd/-

(B.R. BASKARAN)  
ACCOUNTANT MEMBER

Vm

Copy to :

- 1) The Applicant
- 2) The Respondent
- 3) The PCIT/CIT concerned
- 4) The D.R, "E" Bench, Mumbai
- 5) Guard file

By Order

Dy./Asstt. Registrar  
I.T.A.T, Mumbai