

IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, 'A', CHANDIGARH

BEFORE SHRI A.D. JAIN, VICE PRESIDENT &
SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 114/CHD/2020

निधारण वर्ष / Assessment Year : 2012 - 13

M/s Headmaster Saloon Pvt. Ltd. SCO 16-17, Sector 8-C, Chandigarh	Vs. बनाम	The DCIT, Circle 1(1), Chandigarh
थायी लेखा सं./PAN NO: AABCH2736C		
अपीलाथ /Appellant		यथ /Respondent

Hearing through video Conferencing

निधारती क ओर से/Assessee by : Sh. Tej Mohan Singh, Advocate

राज व क ओर से/ Revenue by : Smt. Amanpreet Kaur, Sr.DR

सनवाई क तारख/Date of Hearing : 16.01.2023

उदघोषणा क तारख/Date of Pronouncement : 27.01.2023

□□□/Order

Per A.D. Jain, Vice President:

This is assessee's appeal for assessment year 2012-13 against the CIT(A) order dated 19.12.2019 confirming the levy of penalty u/ s 271(1)(c) of the Income Tax Act, 1961 (hereinafter called 'the Act') .

2. The following grounds have been raised :-

1. *That the Learned Commissioner of Income Tax(A) has failed to appreciate the facts and circumstances of the case and has thereby erred in upholding penalty u/ s 271(l)(c) of the Income Tax Act, 1961 on merits as well as in law. The direction of the Hon'ble ITAT had been brushed aside without appreciating the facts and legality of the case.*

2. *That there was no concealment of income or furnishing of any inaccurate particulars of income and also the Assessing Officer had erred in failing to mention whether notice u/s 271(l)(c) of the Income Tax Act, 1961 was issued for concealment of income or furnishing of any inaccurate particulars of income.*

3. At the outset, the ld. counsel for the assessee has contended that he does not wish to press ground No.2. Rejected, as not pressed.

4. Apropos ground No.1, in the assessment proceedings, the Assessing Officer (AO) noticed that during the F.Y. 2011-12, relevant to the assessment year under consideration, i.e., assessment year 2012-13, there was an increase of Rs. 2,68,12,425/- worth of fixed assets of the assessee. As per the tax Audit Report, major capital expenditure had been incurred on three items, as under:-

Item purchased	Name of the party	Bill No.	Date	Date when put to use	Amount
Purchase of saloon Plants / Equipments etc.	Pevonia Spa Care Pvt. Ltd.	008/PSC/201	25-Sep-11	25-Sep-11	1,32,09,000
Purchase of saloon Plants / Equipments etc.	Pevonia Spa Care Pvt. Ltd.	007/PSC/201	25-Sep-11	25-Sep-11	72,17,520
Plant & Machinery purchased	Purchase Imprest	-	10-Nov-11	10-Nov-11	27,94,120

5. The AO further noticed that the assessee had capitalized interest amounting to Rs. 6,95,836/-, which indicated that some machinery had not been put to use, for which, the interest had been capitalized. From

the bills produced by the assessee, the AO observed that invoices were dated 7.10.2011 on three items, the assessee had claimed that the assets had been put to use on 25.09.2011. Thus, the AO found the assessee to be claiming depreciation @ 15%, i.e., for the full year, whereas it was eligible for depreciation @ 7.5%, i.e., for half year only. As such, depreciation of Rs. 15,31,989, was disallowed and was added to the income of the assessee.

6. The AO further observed that the assessee had not been able to produce invoices for the assets purchased for Rs. 27,94,120/-. The assessee had stated that it had lost the bills. The AO observed that as per the tax Audit Report, the items had been booked under the head 'Plant and Machinery'. From this, the AO was of the view that the assessee's auditor had not verified as to which item had been purchased, as there was neither any bill number, nor any party name, which could have helped the assessee to establish the purchase to be genuine. Thus, the AO observed that the assets had in fact not been purchased and were not put to use. As such, depreciation of Rs. 2,09,559/- was disallowed and added back to the income of the assessee. The WDV of the total fixed assets was reduced by an amount of Rs. 27,94,120/-.

7. Thus, the AO, by virtue of the assessment order dated 29.09.2015, made addition of Rs. 15,31,989/- on account of wrong claim of

depreciation and that of Rs. 2,09,559/-, on account of claim of depreciation on purchase of machinery of Rs. 27,94,120/-.

8. The assessee did not prefer any appeal against the aforesaid order.

9. In the penalty proceedings, the assessee was asked to show cause as to why penalty be not imposed u/s 271(1)(c) of the Act, for furnishing of inaccurate particulars of income. The assessee maintained the stand taken during the assessment proceedings. With regard to the issue of addition on account of wrong claim of depreciation of Rs. 15,31,989/-, the assessee stated that the assets had been received in advance, whereas the bills were received later. This, however, could not be substantiated by producing any evidence regarding receipt of machinery. It could also not be proved that the machinery had been put to use in September, 2011. The AO was, thus, of the view, that the assessee had failed to produce any concrete evidence or explanation and it had, therefore, failed to discharge its onus.

10. Concerning the second issue of disallowance of depreciation amounting to Rs. 2,09,559/-, in the reply to the show cause notice, the assessee merely stated that the purchase bills had been misplaced. The AO observed that such contention of the assessee could not be accepted, since if the bills had been misplaced, the assessee could have got another copy of the bills from the vendor, or, at least, it could have submitted details of the parties /vendors from whom it had purchased the

machinery on which the depreciation had been claimed; that, however, the assessee had done neither; and that thus the assessee had failed to provide any concrete evidence or explanation with regard to this addition also and had, thereby, failed to discharge its onus.

11. The AO, thus, imposed a penalty of Rs. 6,00,000/- being 111.5% of the tax sought to be evaded, holding that the assessee had furnished inaccurate particulars of its income.

12. The Id. CIT(A), by virtue of order dated 27.08.2018, upheld the levy of penalty.

13. The assessee preferred an appeal before the ITAT, wherein, the following additional ground was raised:-

“That the Ld. AO has erred in law in failing to mention whether notice u/s 271(1)(c) issued was for concealment of income or furnishing of inaccurate particulars of income and as such penalty imposed and upheld by the Commissioner of Income Tax (Appeals) in pursuance of an invalid notice is illegal, arbitrary & unjustified.”

14. The ITAT, vide order dated 05.07.2019, remitted the matter to the file of the Ld. CIT(A), for passing a speaking order on the additional legal ground. It was further directed that in the eventuality of the assessee not succeeding on the legal ground, the issue be decided on merits.

15. By virtue of the impugned order dated 19.12.2012, the Ld. CIT(A) dismissed the appeal of the assessee in toto, i.e., on both, the legal as well as the regular ground on merits.

16. Aggrieved, the assessee is again in appeal before us.

17. Challenging the impugned order, the ld. counsel for the assessee has contended that while wrongly confirming the penalty levied on the assessee, the ld.CIT(A) has erred in brushing aside lightly the directions issued by the Tribunal in the first round, without appreciating the facts and legality of the case; that the ld. CIT(A) failed to appreciate that the assessee did not furnish any inaccurate particulars of its income, but there was a mistake on the part of the Chartered Accountant; that the date on the invoice in the bills was 07.10.2011, whereas the auditors had appended the date of the assets being put to use, as 25.09.2011, on the basis of the assets received in advance; that the assessee did not furnish any inaccurate particulars of income, rather depreciation had been claimed on the basis of the working done by the auditors and the assessee had discharged its onus on the basis of calculation of depreciation, as done by the auditors; and that otherwise too, the assessee company being in profit year to year, reduction of depreciation in one year would have had an impact of higher depreciation in the subsequent year. So far as regards the second issue of disallowance of

depreciation in the absence of purchase bills, the Id. Counsel for the assessee submitted that such disallowance was misplaced as the same does not amount to furnishing of inaccurate particulars of income; and that duplicate bills could not be obtained, as the party concerned had closed shop.

18. In support of its case, the Id. Counsel for the assessee has placed reliance on the following decisions:-

Name of the Decision	Citation
1. Price Waterhouse Coopers (P) Ltd. vs. CIT	348 ITR 306 (SC)
2. CIT vs. Sidharth Enterprises	322 ITR 80 (P&H)
3. CIT vs. Rajiv Bhatara	360 ITR 121 (P&H)
4. Manoj Ahuja vs. Inspecting Assistant Commissioner	150 ITR 696 (P&H)
5. CIT vs. Deepak Kumar	232 CTR 78 (P&H)
6. Pawan Garg vs. ACIT	94 ITR (AT) 159 (Chd. Trib.)

19. On the other hand, the Ld. DR has placed strong reliance on the impugned order. It has been submitted that plea of mistake, even if it is a bona fide mistake, cannot bail out the assessee from levy of penalty; that non furnishing of evidence to support the claim made does not amount to furnishing of inaccurate particulars of income; and that the order under appeal has correctly confirmed the levy of penalty, which order be confirmed while dismissing the appeal filed by the assessee.

20. Heard. The facts are not in dispute. The issue is as to whether in the given circumstances, the assessee could be held to have furnished inaccurate particulars of income, thereby ratifying the levy of the impugned penalty. Qua the first issue, it remains undisputed that the depreciation was claimed by the assessee, as worked out by the auditors. It is also not in question that the assessee company is running in profit from year to year and if depreciation were to be reduced in one year, it would have led to increase in depreciation in the subsequent year. Thus, there is no case of furnishing of inaccurate particulars of income. The claim was a bona fide claim made by the assessee on the working of the auditors.

21 In 'Price Waterhouse Coopers (P) Ltd. Vs. CIT', 348 ITR 306 (SC), the assessee firm filed its return of income along with tax Audit Report. In the Audit Report, it was indicated that provision towards payment of gratuity was not allowable. However, the assessee failed to add provision for gratuity to its total income. It was held that this was a bona fide and inadvertent error; that the assessee was not guilty of either furnishing of inaccurate particulars or attempting to conceal its income; and that, therefore, imposition of penalty was unjustified. In the present case, similarly, depreciation was claimed on the basis of working of the auditors of the assessee. This has not been shown to be a mala fide conduct of the assessee.

22. In ‘CIT Vs. Sidhartha Enterprises’, “322 ITR 80 (P&H), the assessee claimed set off of capital loss on sale of machinery against profit of business. The AO disallowed the assessee’s claim and imposed penalty for furnishing of inaccurate particulars. The CIT(A) as well as the Tribunal deleted the penalty, recording a finding that the furnishing of inaccurate particulars was simply a mistake and not a deliberate attempt to evade tax. It was held by the Hon’ble High Court that the penalty u/ s 271(1)(c) of the I.T. Act is imposed only when there is some element of deliberate default, and not for a mere mistake; and that in that case, deletion of penalty was justified. The facts of the present case, as discussed, are on similar lines.

23. In ‘CIT Vs. Rajiv Bhatara’, 360 ITR 121 (P&H), the assessee had furnished a Certificate from the Sub-Divisional Engineer of the PWD, to the effect that the distance from the Sonapat Municipal Committee to the concerned village, where agricultural land was purchased, was 8.2 KMs. Various certificates were also available, wherein, distance had been mentioned regarding the property in question. The Hon’ble High Court held that on facts, there was no intention on the part of the assessee to furnish inaccurate particulars and, hence, no concealment penalty could be levied on the assessee. In the case at hand also, as discussed, there was no intention on the part of the assessee to furnish inaccurate particulars.

24. In ‘Manoj Ahuja Vs. Inspecting Assistant Commissioner’, 150 ITR 696 (P&H), following ‘Smt. Nirmal Khosla Vs. Union of India’, AIR 1976 Punjab & Haryana 22, it was held that no litigant should ordinarily suffer for a mistake of his counsel. Delay in filing the appeal, incurred due to wrong calculation by the counsel, was condoned. In the case before us also, undisputedly, depreciation was claimed on the basis of working of the auditors.

25. In ‘CIT Vs. Deepak Kumar’, 232 CTR 78 (P&H), where penalty was levied on the assessee on the ground that the assessee had wrongly claimed depreciation u/s 10(36) of the Act, but the Tribunal found that the assessee had acted on the advice of his counsel, the Hon'ble High Court held it to be a case of bona fide mistake and not a fit case for levy of penalty u/s 271(1)(c) of the Act. The present assessee before us, to reiterate, had, likewise, acted on the advice of the auditors and it was not held to be a mala fide action.

26. In ‘Pawan Garg Vs. ACIT’, 94 ITR (AT) 159 (Chd. Trib.), the assessee had wrongly claimed long-term capital loss in respect of a property which had been gifted by him to his son. Since the amount of capital loss had been duly disclosed in the computation of income and the assessee had also accepted at the time of assessment proceedings, that by mistake, he had considered the gift made to his son as a transfer, the assessee was held not to have concealed any material fact,

and levy of penalty u/s 271(1)(c) of the Act was held not justified. In the case at hand, similarly, the assessee had claimed depreciation on the advice of its auditors. This was a bona fide claim, may be a wrong claim. Otherwise too, the assessee earning profits year to year, reduction of depreciation in one year would have had the impact of higher depreciation in the subsequent year.

27. No decision contrary to the above decisions has been cited.

28. Apropos the issue of depreciation on purchase of machinery, as per the assessee, the duplicate bills could not be produced, as the vendor having closed shop, the assessee could not obtain the same, when the original bills stood misplaced. However, as rightly observed by the Id. CIT(A), in the event of the assessee not being able to obtain copies of the bills from its vendor, it ought to have provided the details of such vendor to the Department so as to enable it to ascertain the factual position. The assessee not having done so, an adverse inference was correctly drawn against the assessee and the penalty was rightly levied. However, the penalty ought to have been levied at the minimum rate, i.e., 100% and not @ 111.5 %, as has been done. The AO is directed to scale down the levy of penalty on this count accordingly.

29. In view of the above, on the first issue, i.e., wrong claim of depreciation of Rs. 15,31,989/-, the penalty levied is deleted. The penalty levied on the second issue, i.e., of disallowance of depreciation

of Rs. 2,09,550/-, is directed to be scaled down from the rate of 111.5% to the rate of 100%. Ordered accordingly.

30. In the result, the appeal is partly allowed.

Order pronounced on 27.01.2023.

Sd/-
(VIKRAM SINGH YADAV)
Accountant Member

Sd/-
(A.D. JAIN)
Vice President

Dated : 27.01.2023

“आर.के.”

आदेश क त्तलप अेषत / Copy of the order forwarded to :

1. अपीलाथ / The Appellant
2. यथ / The Respondent
3. आयकर आयुRत/ CIT
4. आयकर आयुRत (अपील)/ The CIT(A)
5. त्वभागीय त्तनध, आयकर अपीलाय आधकरण, च9डीगढ़/ DR, ITAT, CHANDIGARH
6. गाड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar