

आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI
BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.2730/Mum/2016

(निर्धारण वर्ष / Assessment Year : 2011-12)

Waman Hari Pethe Sons Private Ltd., 110, Vikas Paradise, LBS Marg, Mulund (W), Mumbai 400080	बनाम/ v.	DCIT 10(3),Mumbai
स्थायी लेखा सं./ PAN : AAACW9453A		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Deepak Tikekar Shri Rahul Kelkar	
Revenue by :	Shri Vidhyadhar (Sr.DR)	

सुनवाई की तारीख /**Date of Hearing** : **08.05.2018**

घोषणा की तारीख /**Date of Pronouncement** : **10.05.2018**

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 2730/Mum/2016 , is directed against appellate order dated 25.01.2016 passed by learned Commissioner of Income Tax (Appeals)-24, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2011-12, the appellate proceedings had arisen before learned CIT(A) from penalty order dated 30.09.2014 passed by learned Assessing Officer (hereinafter called "the AO") u/s 271(1)(c) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2011-12.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

"1. On facts, in circumstances of the case and in law, learned Commissioner of Income Tax (Appeals) erred in confirming levy of penalty of Rs. 30,40,000/- by A.O. in respect of claim for depreciation

on building amounting to Rs. 91,31,916/- given up in course of assessment proceedings.

2. *The appellant craves leave to add, alter, modify or delete the above Ground of Appeal.”*

3. The brief facts of the case are that the assessee is into manufacturing, retail trading and servicing of gold, silver and diamond ornaments. The business of M/s. Waman Hari Pethe Sons (The Firm) was transferred to the assessee company with effect from 01.04.2010 . The AO observed that WDV of the building as on 31.03.2010 in the hands of the said firm stood at Rs. 3,67,36,754/- , whereas WDV of the Building as on 01.04.2010 is at Rs. 12,80,55,911/- in the hands of the assessee company. The AO, thus , observed that the assessee has claimed excess depreciation on the additional amounts of Rs. 9,13,19,157/- . During the course of assessment proceedings before the AO , the assessee submitted that the said difference of Rs. 9,13,19,157/- was on account of revaluation of assets (building) which was done in the hands of the firm . It was submitted that valuation of the Building was increased by Rs. 9,13,19,157/- and revaluation reserve of Rs. 9,13,19,157/- was credited in the capital accounts of the partners namely Shri. Subodh Pethe and Smt Sonali Pethe (partners of the firm) . The assessee on being asked by the AO during the course of assessment proceedings offered additional income of Rs. 91,13,916/- being depreciation difference in closing w.d.v. as on 31-03-2010 and opening w.d.v. on 01-04-2010, in respect of the building which was claimed @10%. Since the time allowed for filing of revised return of income u/s. 139(5) had already expired, the revised return of income could not be filed but the additional tax of Rs. 39,40,448/- was paid by the assessee on account of additional income offered on account of change in w.d.v. of Building during the course of assessment proceedings before the AO . The assessee company revised its return of income for AY 2012-13 and 2013-14 and paid the additional taxes due thereon for these two years also by withdrawing the claim for excess depreciation. The AO accordingly framed assessment u/s. 143(3)(ii) vide assessment order dated 13.03.2014 for AY 2011-12 wherein the said withdrawal of claim for excess depreciation was accepted by the AO. The AO also initiated penalty proceedings against the assessee u/s. 271(1)(c) for

furnishing of inaccurate particulars of income which found mentioned in the assessment order dated 13-03-2014 passed by the AO.

4. The AO initiated penalty proceedings u/s. 271(1)(c) with respect to the aforesaid claim of excess depreciation to the tune of Rs. 91,31,916/- w.r.t. Building for which notices u/s. 271(1)(c) r.w.s. 274 were issued to the assessee by AO on 13.03.2014.

5. The assessee submitted during course of penalty proceedings u/s 271(1)(c) that the assessee was incorporated on 30.03.2010 and is engaged in jewellery business. It was submitted that the main object of the assessee company as stated in the Memorandum of Association is to takeover of running business of the said firm M/s Waman Hari Pethe Sons as a going concern along with all its liabilities and assets. It was submitted that the partnership firm M/s Waman Hari Pethe Sons was taken over by the assessee with all its assets and liabilities as on 31.03.2010 w.e.f. 01-04-2010 and the assessee started its business w.e.f. 01-04-2010. The partners of the partnership firm M/s Waman Hari Pethe Sons were paid net consideration by the assessee by issuance of shares of the assessee company. It was submitted that the company filed its first return of income for AY 2011-12 with income to the tune of Rs. 11.66 crores which was computed after taking into effect depreciation on revaluation of two shops. It was submitted that there was revaluation done by erstwhile firm M/s Waman Hari Pethe Sons of two shops and transfers were made to the assessee by the said firm after revaluation of the two shops. The assessee submitted that the assessee took over these assets on revalued figures and the depreciation is claimed on the actual cost of acquisition by the assessee which was the revalued figures of the two shops. The said difference in valuation on account of revaluation of two shops was credited to the partners accounts of the said firm M/s Waman Hari Pethe Sons on 30-03-2010 while the takeover took place on 01-04-2010. It was submitted that excess depreciation was claimed based upon the opinion of Advocate of Supreme Court Shri. V.H. Patil dated 12.08.2010 which was later re-confirmed again by the said Advocate on 08.02.2013 wherein the said advocate opined that the assessee is entitled for depreciation on revalued figures of these two shops. It was submitted during penalty proceedings u/s

271(1)(c) that later during the course of assessment proceedings, the said excess claim on excess depreciation on revalued amount of shops was withdrawn and taxes were paid by taking a conservative view with an object to end litigation and buy peace. It was submitted that based on the above filing of revised income for AY 2011-12 and payment of taxes, the assessee also revised return of income for AY 2012-13 and 2013-14 wherein claim for excess depreciation was withdrawn and due taxes paid to Revenue for those years also. The assessee in nutshell has taken the above propositions before AO and learned CIT(A) during penalty proceedings u/s 271(1)(c) and appellate proceedings respectively, which ultimately did not found favour with both the authorities.

The AO rejected the contentions of the assessee as the assessee has filed return of income in which it has claimed excess depreciation to the tune of Rs. 91,31,916/- which was later withdrawn during scrutiny proceedings. It was also observed by the AO that the assessee did file revised return of income on 18-06-2012 but the claim towards excess depreciation was not withdrawn even in this revised return of income filed with the Revenue. No revised return of income was filed by the assessee withdrawing the said excess depreciation. The AO observed that the assessee was under obligation to file true and correct details of income in the return of income filed with the Revenue. It was observed by the AO that there is no merit in the argument of the assessee that it sought opinion of the Advocate and acted as per Advocate opinion. Thus the AO levied penalty to the tune of Rs. 30,40,000/- u/s 271(1)(c), which was later confirmed by learned CIT(A). The view of learned CIT(A) was that the takeover of assets took place w.e.f. 01-04-2010 while the first opinion of the Advocate is dated 12.08.2010 which was confirmed by second opinion on 08-02-2013 and hence it could not be said that the revaluation of the two shops were done by the assessee based on the Advocate opinion. Thus, it was held by both the AO and by learned CIT(A) that it is only after the assessee was cornered by Revenue that the assessee withdrew its claim of excess depreciation and the explanation offered by the assessee is not bonafide to take it out of clutches of penalty provisions within mandate of Section 271(1)(c).

6. Aggrieved by losing at both the forums viz. AO and learned CIT(A) , the assessee has come in an appeal before the tribunal . The Ld. Counsel for the assessee submitted before the tribunal that assessee was incorporated on 30.03.2010 with an object to take over partnership firm namely M/s Waman Hari Pethe Sons . The said firm revalued its building consisting of two shops on 30-03-2010 by upward revision amounting to Rs. 9.13 crores from existing w.d.v. of Rs. 3.67 crores to Rs. 12.80 crores , which differential amount in valuation stood credited to the partners capital accounts on 30-03-2010. The assessee has taken over the assets and liabilities of the firm M/s Waman Hari Pethe Sons w.e.f. 01-04-2010 at its revalued figures and the agreement entered into by the assessee with the said firm dated 01.04.2010 is placed in paper book /page no. 73 to 110. It was submitted that there was a valuation report which was obtained which valued the said two shops at Rs. 12.80 crores . It was submitted that the genuineness of said increased valuation is not disputed by the Revenue and no such allegation is made by the Revenue that any fraud is perpetrated by the assessee in claiming higher valuation of the said two shops . It was submitted that advice/opinion of Shri. V.H Patil , Advocate of Supreme Court was obtained on 12.08 2010 and again second opinion was obtained from the same advocate on 08 02.2013 , which are placed in paper book page no. 111 to 129 . It was submitted that the said advocate has clearly given the opinion that the assessee is entitled for higher depreciation on the revalued valuation of the two shops. The assessee relied upon the said opinion dated 12.08.2010 of the Advocate of the Supreme Court vide filing its return of income filed on 29.09.2011. The assessee relied upon decision in the case of Ashwin Vanspati Industries v. CIT , 255 ITR 26(Guj.) and decision in the case of CIT v. Hotel Sabar P. Ltd. 264 ITR 381(Guj.). It was submitted that the said claim of excess depreciation was withdrawn during assessment proceedings. Since the time had expired for filing revised return of income u/s. 139(5) , the assessee withdrew the claim for excess depreciation during the course of assessment proceedings before the AO and paid due taxes to Revenue. It was submitted that for subsequent years i.e. AY 2012-13 and 2013-14, the assessee filed the claim of excess depreciation which was voluntarily withdrawn by filing revised return of income and dues taxes were paid. It was submitted under these circumstances no penalty can be levied u/s. 271(1)(c) as true and complete particulars were

filed in the return of income filed with the Revenue . It was submitted that the valuation was based on the valuation report and the said revaluation report was not doubted by revenue. It was submitted that Section 43 defines the actual cost of asset but does not talk about any bar on valuation/cost in case the assets are acquired by one entity from another entity and hence this a is debatable issue and no penalty can be levied under these circumstances as it was a bona-fide claim which was subsequently withdrawn by the assessee . It was submitted that on the date of filing of the claim of excess depreciation vide return of income filed with Revenue on 29-09-2011, the advocate opinion was very much in possession of the assessee on which the assessee relied and which form the basis/foundation for making such claim of excess depreciation. The assessee relied upon on the decision of Hon'ble Supreme Court in the case of CIT v. Reliance Petroproducts Private Ltd.(2010) 322 ITR 158(SC) and submitted that making of claim which is not accepted by revenue does not lead automatically to levy of penalty u/s 271(1)(c). The Ld. DR relied upon decision of authorities below and submitted that it was not a case of acquisition but succession of partnership into a company. Our attention was drawn to provisions of Section 47(xiii).

7. We have considered rival contentions and have perused the material on record including case laws relied upon by both the parties. We have observed that the assessee is into manufacturing, retail trading and servicing of gold silver and diamond ornaments. We have observed that the assessee was incorporated on 30.03.2010 with an object to take over the assets and liabilities of the partnership firm M/s. Waman Hari Pethe Sons which was infact taken over w.e.f. 01.04.2010 . The agreement entered into by the assessee with the said firm wherein the said firm M/s. Waman Hari Pethe Sons was succeeded by the assessee company is placed in paper book/page 73-110. Before the said succession/ take-over of the said firm by the assessee w.e.f. 01-04-2010, the said firm M/s. Waman Hari Pethe Sons revalued its building consisting of two shops by upward revision from Rs. 3.67 crores to Rs. 12.80 crores on 31.03.2010 . The assessee , inter-alia, took over the said building consisting of two shops at a revalued figure of Rs. 12.80 crores as on 01.04.2010. The assessee claimed depreciation at the rate of 10% on its building at the revalued figure of Rs. 12.80 crore at which

the said two shops stood transferred to the assessee. The said firm M/s. Waman Hari Pethe Sons credited the differential valuation of the two shops in its books of account by crediting the same to partners capital account. The assessee company issued shares to the partners for the net consideration for takeover on 01-04-2010 which included amount credited for revalued figure of two shops at Rs. 12.80 crores. The assessee claimed depreciation @10% on these two shops at its acquisition cost of Rs. 12.80 crores at which the said two shops were taken over by the assessee which led to claim of excess depreciation to the tune of Rs. 91,31,916/- . The assessee had claimed to have obtained opinion from an Advocate Sh. V H Patil on 12-08-2010 wherein he opined that the assessee is entitled for depreciation with respect to these two shops at the cost of acquisition to the assessee which was Rs. 12.80 crores. The assessee filed return of income on 29-09-2011 claiming that its claim for excess depreciation was based on the opinion of said Advocate. The said advocate again gave opinion on 08-02-2013 reconfirming its stand that the assessee is entitled for depreciation on the two shops on its cost of acquisition which was undisputedly Rs. 12.80 crores. The assessee also filed its revised return of income on 18-06-2012 but did not withdraw its claim for excess depreciation. The agreement which the assessee entered into with the said firm namely M/s. Waman Hari Pethe Sons and the two opinions given by the Advocate are placed in paper book. During the course of assessment proceedings , the assessee withdrew its claim for excess depreciation to the tune of Rs. 91,31,916/- taking a conservative view to end litigation and buy peace. The assessee paid due taxes of Rs. 39.40 lacs to Revenue on withdrawal of said claim of excess depreciation . However, the said claim could not be withdrawn by filing revised return of income as the time had expired for filing of revised return as is provided u/s. 139(5) . However for subsequent years i.e. assessment years 2012-13 and 2013-14 returns of income were revised by the assessee wherein the said claim of excess depreciation was withdrawn by the assessee and due taxes paid to the Revenue. It is pertinent mention here that the impugned AY under consideration is effectively first year of operation of the assessee company as it was incorporated on 30-03-2010 and the turnover declared by the assessee was Rs.263.69 crores with an income of Rs. 11.66 crores was offered for taxation within provisions of 1961 Act on the very first year of operations which by any standards is not a meagre income. The

assessee has claimed that it relied on opinion of an advocate of Hon'ble Supreme Court Shri. V.H. Patil who has given an opinion that assessee is entitled for depreciation on revalued figure of the two shops at which the said shops stood acquired by the assessee , vide opinion dated 12.08.2010 which was later reconfirmed by him vide opinion 08.02.2013 . The said opinions are placed in paper book filed with the tribunal. The genuineness of the said revaluation of the two shops which was done by the said firm M/s. Waman Hari Pethe Sons from Rs. 3.67 crores to Rs. 12.80 crores was not doubted by the Revenue. It is not the case of the Revenue that the said revaluation of shops were done with an intent to defraud the Revenue . We have also observed that ITAT/Courts has taken a view in catena of judgments that the tax-payer is entitled for depreciation on actual cost of acquisition by a company when the business is taken over by the taxpayer company from firm unless genuineness of the said transaction is doubted by Revenue by invoking explanation (3) to Section 43(1), for which following decisions are relevant :

- a) Ashwin Vanaspati Industries v. CIT 255 ITR 26(Guj HC)
- b) Poulouse & Matthen Private Limited v. DCIT (1992) 43 ITD 141(ITAT-Cochin)
- c) DCIT v. Prakash Chemical Agencies Private Limited (2012) 136 ITD 222(ITAT-Ahd.)
- d) Modular Infotech Private Limited v. DCIT (2010) 131 TTJ 243(ITAT-Pune)

In our considered view keeping in view totality of the factual matrix of the case and without commenting on the merits of the claim for such excess depreciation in quantum, the assessee has in-fact furnished true and complete particulars of its income before the AO. It is another matter that the claim filed by the assessee towards excess depreciation which was based on the opinion of advocate of Supreme Court was later withdrawn by the assessee during the course of assessment proceedings taking conservative view to avoid litigation and buy peace . It is well established by catena of judgments that mere making of a claim which did not found favour with the Revenue will not automatically lead to levy of penalty u/s. 271(1)(c) for furnishing of inaccurate particulars of income or for concealment of income.

The decision of Hon'ble Supreme Court in the case of Reliance Petroproducts Private Ltd (supra) is relevant keeping in view factual matrix of the case before us. Thus, we are of the considered view that no penalty is exigible u/s 271(1)(c) in the instant case before us as the assessee did offered bonafide and plausible explanations in the penalty proceedings as detailed above to take it out of the clutches of provisions of Section 271(1)(c) . We , thus, hereby order deletion of the penalty levied by the AO u/s 271(1)(c) of the Act as confirmed by learned CIT(A) , to the tune of Rs. 30,40,000/- . The assessee succeeds in this appeal. We order accordingly.

8. The appeal of the assessee is allowed as indicated above.

Order pronounced in the open court on 10.05.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 10.05.2018 को की गई ।

Sd/-

(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 10.05.2018

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

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BY ORDER

DY/ASST. REGISTRAR
ITAT, MUMBAI

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