

**IN THE INCOME TAX APPELLATE TRIBUNAL  
[ DELHI BENCH "S.M.C." : DELHI ]**

**BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER**

**आ.अ.सं./I.T.A Nos. 2285, 2286 and 2287/Del/2023  
निर्धारणवर्ष /Assessment Years: 2011-12, 2013-14 & 2015-16**

M/s. Heidelberg Cement India Ltd., 3 <sup>rd</sup> Floor, Vanijya Nikunj, HSI IDC Building, Udyog Vihar, PH.V, Near Shankar Chowk, NH-8, Gurugram, Haryana - 122 002.	<b>बनाम Vs.</b>	DCIT,  Circle : 2 (1)  Gurugram.
<b>PAN No. AABCM2359J</b>		
<b>अपीलार्थी / Appellant</b>		<b>प्रत्यर्थी / Respondent</b>

<b>निर्धारितकीओरसे /Assessee by :</b>	Shri Nikhil Ranjan, Adv.; & Shri Kamal Arya, Advocate;
<b>राजस्वकीओरसे / Department by :</b>	Shri Om Parkash, Sr. D. R.;

<b>सुनवाईकीतारीख/ Date of hearing :</b>	04/10/2023
<b>उद्घोषणाकीतारीख/Pronouncement on :</b>	11/10/2023

**आदेश / O R D E R**

**PER C. N. PRASAD, J. M. :**

1. All these three appeals are filed by the assessee against different orders of the Id. Commissioner of Income Tax (Appeals) [hereinafter referred to CIT (Appeals)]/National Faceless Appeal

Centre [NFAC] dated 12.06.2023 for assessment years 2011-12, 2013-14 and 2015-16 in sustaining the penalty levied under section 271(1)(c) of the Income Tax Act, 1961 (the Act).

2. Brief facts are that the assessee company engaged in the business of manufacture and sale of high quality of cement filed its return of income for all these three assessment years claiming additional depreciation on certain replacement of plant and machinery as integral part of plant and machinery. However, the Assessing Officer denied additional depreciation on replacement of certain parts of machinery on the ground that additional depreciation is allowed on acquisition and installation on new plant and machinery and not for replacement of plant and machinery already in existence/use. Similarly the Assessing Officer restricted the depreciation on coal shed and new GI sheets to 5% as against 7.5% claimed by the assessee. The assessee claimed depreciation treating the assets as plant and machinery whereas the Assessing Officer restricted the depreciation treating the assets as building other than residential. On appeal the action of the Assessing Officer was sustained by the Id. CIT (Appeals) as well as by the Tribunal.

3. Before us the Id. Counsel for the assessee submits that it is not a case of furnishing of inaccurate particulars or concealment of income by the assessee, but the claim was made by the assessee relying on various case laws on the subject. The Id. Counsel submits that from a reading of the Explanation 1 to Section 271(1) of the Act that penalty under Section 271(1)(c) of the Act shall not be imposed on a person who offer a bona fide

explanation and the facts relating to the same and material to the computation of his total income have been disclosed by him. In the instant case, it is undisputed that the Appellant had offered an explanation that the Appellant is claiming depreciation in certain headings, further merely because the claim of the Appellant is disallowed by Hon'ble the Tribunal does not make the explanation as fake. As, at the time of filing return of income, the Appellant had belief that he is eligible to claim additional depreciation and same was given as the explanation to the AO and the NFAC. The Ld. Counsel submits that the Appellant had offered a bona fide explanation and it is also undisputed that the Appellant had made complete disclosure in its return of income tax audit report and have also provided all information as and when required by the AO and the NFAC. Therefore, the NFAC erred in holding that it is a case of furnishing inaccurate particulars of income, whereas the case is fully covered by the Explanation<sup>1</sup> to Section 271(1) of the Act. Hence on this ground alone the Impugned Order ought to be set aside. The Ld. Counsel submits that the NFAC grossly erred in upholding the penalty imposed by the AO without appreciating that the Appellant had made full disclosure in its return of income, tax audit report etc. and provided all information as and when required during the course of assessment proceedings. Therefore, the allegation that the Appellant has furnished inaccurate particulars of income is baseless, hence on this ground alone the Impugned Order ought to be set aside. The Ld. Counsel submits that NFAC grossly erred in upholding the penalty imposed by the AO without appreciating that penalty cannot be imposed on only ground that the bona fide claim of the Appellant is disallowed by Hon'ble the

Tribunal, hence on this ground alone the Impugned Order ought to be set aside. The Ld. Counsel submits that NFAC failed to appreciate that penalty has a character of penal provision and penalty cannot be imposed automatically merely because depreciation is disallowed for certain headings. The Explanation 1 to Section 271(1) of the Act ensures that for imposing penalty there should be element of *mens-rea*. For invoking Section 271(1)(c) of the Act there shall be specific finding stating that assessee willfully and deliberately had not disclosed particulars of income. Whereas, in the instant case this requirement had not been satisfied, the Appellant had bona fide belief that he is eligible to claim depreciation in certain headings, consequently in the instant case element of *mens-rea* is absent. Hence, the NFAC erroneously and without any basis held that it is a case of consciously making a wrong claim and therefore on this ground alone the Impugned Order ought to be set aside. The Ld. Counsel submits that NFAC failed to appreciate that it is a settled principle that merely making a claim in the return which is not sustained cannot be amounted to furnishing of inaccurate particulars of income. Further, for imposing penalty under Section 271(1)(c) of the Act, there should be deliberation in filing inaccurate particulars of income. Therefore, the NFAC erred in observing that the Appellant had furnished inaccurate particulars of income merely because the Appellant's claims of depreciation had been disallowed by Hon'ble the Tribunal. The Ld. Counsel submits that the Impugned Order is liable to be set aside for being passed without any application of mind even when the Appellant had specifically submitted that the Appellant had furnished all information as and when required by the AO and the

NFAC, further the Appellant had neither suppressed nor misreported any fact or material with respect to particulars of income. However, the NFAC completely ignored the submissions of the Appellant and without any basis concluded that the Appellant had furnished inaccurate particulars of income. Further, the Appellant vide its written submissions dated 18.09.2019, dated 06.02.2020 and dated 28.04.2021 had specifically pleaded that the instant case is covered by various case laws pronounced by the Supreme Court and Jurisdictional High Court, and therefore penalty should not be imposed. However, the NFAC had not dealt with these submissions while passing the Impugned Order. It is settled principle of law that an order should be passed after examining the contentions raised in an appeal and not otherwise. Therefore, the Impugned Order is passed without application of mind, and it is liable to be set aside on this ground itself.

4. On the other hand, the Id. DR submits that the assessee has furnished inaccurate particulars of income by making a wrong claim of depreciation on the assets. The Id. DR placed reliance on various decisions to support his contention.

5. Heard rival submissions perused the orders of the authorities below. The claim for additional depreciation on replacement of machinery was denied by the Assessing Officer on the ground that the additional depreciation is eligible only for the new plant and machinery and not on the replacement of parts of the machinery. Similarly the depreciation claimed by the assessee treating the coal sheds and the new GI sheets placed at factory building as part of plant and machinery was not accepted by the Assessing Officer and

restricted the depreciation and allowed treating the said assets as building other than residential. It is observed that the assessee has disclosed in its return of income the claim for depreciation and made the specific claim which was denied by the Assessing Officer and the Id. CIT (Appeals). In my opinion there is only a difference of opinion whether these assets fall under plant and machinery or building other than residential. Similarly it is only a difference of opinion as to whether the additional depreciation is allowable on replacement of parts of machinery or not.

6. The Hon'ble Supreme Court in the case of CIT Vs. Reliance Petro Product [322 ITR 158 (SC)] held that mere making a claim which is not sustainable in law by itself will not amount to furnishing of inaccurate particulars regarding the income of the assessee. Here is a case where the assessee made a conscious claim and has given a bonafide explanation before the Assessing Officer as well as the Id. CIT (Appeals). Simply because the claim of the assessee is not sustained by the authorities, it cannot be held that the assessee has furnished inaccurate particulars of income so as to attract the penalty under section 271(1)(c) of the Act. In the circumstances the Assessing Officer is directed to delete the penalty levied under section 271(1)(c) of the Act for all the three assessment years i.e. 2011-12, 2013-14 and 2015-16.

7. In the result appeals of the assessee are allowed.

Order pronounced in the open court on : 11/10/2023.

Sd/-  
( C. N. PRASAD )  
JUDICIAL MEMBER

Dated : 11/10/2023.

*\*MEHTA\**

Copy forwarded to :-

1. Appellant;
2. Respondent;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi.

Date of dictation	05.10.2023
Date on which the typed draft is placed before the dictating member	06.10.2023
Date on which the typed draft is placed before the other member	11.10.2023
Date on which the approved draft comes to the Sr. PS/ PS	11.10.2023
Date on which the fair order is placed before the dictating member for pronouncement	11.10.2023
Date on which the fair order comes back to the Sr. PS/ PS	11.10.2023
Date on which the final order is uploaded on the website of ITAT	11.10.2023
Date on which the file goes to the Bench Clerk	11.10.2023
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	