INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI
Before Shri Saktijit Dey, Vice President
and
SHRI M. Balaganesh, Accountant Member

ITA No. 1070/Del/2023
(Assessment Year: 2017-18)

M/s. Jaypee Cement Corporation Ltd, Sector-128, Gautam Budh Nagar, Noida (Appellant) **PAN: AAACZ2168D**	Vs.	ACIT, Circle-5(1)(1), Noida (Respondent)

SA No. 192/Del/2023
(In ITA No. 1070/Del/2023)
(Assessment Year: 2017-18)

M/s. Jaypee Cement Corporation Ltd, Sector-128, Gautam Budh Nagar, Noida (Appellant) **PAN: AAACZ2168D**	Vs.	ACIT, Circle-5(1)(1), Noida (Respondent)

Assessee by :	Shri Ajay Vohra, Sr. Adv Shri V. K. Garg, Adv Shri Ashish Gupta
Revenue by:	Mr. Waseem Arshad, CIT DR
Date of Hearing	26/06/2023
Date of pronouncement	11/09/2023

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No.1070/Del/2023 and SA No. 192/Del/2023 for AY 2017-18, arises out of the order of the Commissioner of Income Tax (Appeals)/ National Faceless Appeal Centre (NFAC), Delhi, [hereinafter referred to as 'ld. CIT(A)', in short] in Appeal No. ITBA/NFAC/S/250/2022-23/1051489193(1) dated 28.03.2023 against the order of assessment passed u/s 270A of the Income-tax Act, 1961

(hereinafter referred to as 'the Act') dated 05.02.2022 by the NFAC, Delhi (hereinafter referred to as 'ld. AO').

2. The assessee has raised the following grounds of appeal:-

"1. That the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi ['Ld. CIT(A)'] has erred on facts and in law in confirming the penalty of Rs. 132,39,89,710/- under section 270A of the Act as levied by Ld. Assessing Officer ['Ld. AO'] for alleged under-reporting in consequence of misreporting of income.

2. That the alleged under-reporting in consequence of misreporting of income relates to incorrect amount of excess allowance under section 32AC of the Act claimed by the Appellant in its ITR based on bonafide inadvertent mistake in reporting of amount of deduction under section 32AC of the Act by the Tax Auditor in the Tax Audit Report. It is trite law that no penalties should be levied for inadvertent bonafide mistakes. Inter alia please refer Price Waterhouse Coopers Pvt Ltd. v CIT 348 ITR 306 (SC). As such, the penalty as levied and confirmed, deserves to be deleted in toto.

3. That on realizing the said inadvertent mistake by the Tax Auditor, the Appellant voluntarily rectified such mistake and included the said excess allowance under section 32AC of the Act during assessment proceedings before any query by Ld. AO. No penalty should be levied in case of voluntary inclusion prior to its detection or query by Ld. AO. Refer inter aliaCIT Vs Kohinoor Impex (P.) Ltd [2004] 141 TAXMAN 304 (DELHI HC); CIT -I, Mumbai v. Somany Evergree Knits Ltd (35 taxmann.com 529 (Bombay HC). As such too, the penalty as levied and confirmed, deserves to be deleted in toto.

4. That the Appellant voluntarily included the the said excess allowance under section 32AC of the Act during assessment proceedings before any notice was issued by the department regarding discovery of mistake.

5. That the bona fide mistake has also escaped the attention of the department while passing the intimation order u/s 143(1), wherein the department was also duty bound to correct the investment allowance calculation.

6. That the Ld. CIT(A) has erred on facts and in law involved in sustaining the penalty made by the Ld. AO without considering that the inadvertent error of tax auditor got translated into such inadvertent error in the return which was voluntarily suo-moto rectified by the Appellant by reducing his claim before any query & before completion of assessment. The Appellant does not deserve to be penalized for error of third party who is prescribed professional under the tax audit provisions of the Act. Refer inter alia on T Ashok Pai v CIT [2007] 161 Taxman 340 (SC); CIT v S Dhanabal [2009] 178 Taxman 242 (Delhi HC).

7. That the Appellant had duly given a bonafide explanation and disclosed all the material facts to substantiate the explanation offered. All material facts are as borne out by the records including suo-motu inclusion by the Appellant prior to detection & completion of assessment. The Appellant had duly discharged its onus. Rather it is Ld. CIT(A) and Ld. AO who have unjustifiably not accepted a clear bonafide explanation borne out by the records. The Ld. AO & Ld. CIT(A) have not

discharged their onus for levying and confirming the said penalty. As such too, the penalty as levied and confirmed, deserves to be deleted in toto.

8. That the Ld. CIT(A) has erred on facts and in law involved in sustaining the penalty made by the Ld. AO as no specific default has been pointed out in the show cause penalty notice nor it was specifically pointed out as to whether there is under-reporting of income or misreporting of income. In absence of specific notice and opportunity, the penalty as levied deserves to be quashed. Refer inter alia on CIT v SSA'S Emerald Meadows [2016] 73 taxmann.com 248 (SC); Prem Brothers Infrastructure LLP v. NFSC 142 taxmann.com 38 [2022] (Delhi HC); Schneider Electric South East Asia (HQ) PTE Ltd. v. Asst. CIT, International Taxation [TS-226-HC-2022(DEL)].

9. That penalty at 200% has erroneously been levied and confirmed under section 270A of the Act for misreporting of income. The Appellant's case does not fall in any of the cases of misreporting of income referred to in section 270A (9) of the Act. It has been wrongly alleged that the Appellant's case falls under clause (a) of Section 270A(9) of the Act i.e. "misrepresentation or suppression of facts". Clearly on facts and law involved, there is no "misrepresentation or suppression of facts" in this case.

10. That there is just and reasonable cause for the default, if any, and as such too, no penalty is leviable in this case.

11. That the penalty as levied and confirmed is based on erroneous views and / or non-appreciation of the facts or law involved and without properly considering and rebutting the material, submissions and binding case laws in favour of appellant relied upon. Moreover, the penalty is based on suspicion, conjectures and surmises without any substantive basis or cogent material. As such too the penalty deserves to be deleted in toto.

12. That the penalty as levied is without specific show cause notice and without proper specific lawful opportunity or compliance with Principle of Natural Justice. As such too the penalty deserves to be struck and deleted.

13. That the penalty order as made and as confirmed by the Ld. CIT(A) is against law and facts of the case involved.

14. That the grounds of appeal as herein are without prejudice to each other."

3. Though the assessee has raised several grounds in this appeal, we find only effective issue to be decided in the instant appeal is as to whether the ld CIT(A) was justified in upholding the levy of penalty u/s 270A of the Act in the facts and circumstances of the instant case.

4. We have heard the rival submissions and perused the material available on record. The assessee is engaged in the business of manufacturing and sale of cement, manufacturing and sale of asbestos sheets, heavy engineering workshop

and foundry. The assessee filed its return of income electronically for AY 2017-18 on 31.10.2017 declaring loss of Rs. 641,08,95,408/-. The assessment was completed u/s 143(3) on 01.10.2019 declaring loss of Rs. 4,49,80,57,749/-. In the return, the assessee claimed deduction u/s 32AC of the Act in the sum of Rs. 225,03,97,246/- which is the gross amount of investment in new plant or machinery as against its claim of 100% deduction u/s 32AC of the Act. The ld AO granted deduction u/s 32AC of the Act only to the extent of 15% of gross amount of investment in new plant and machinery which worked out to Rs. 33,75,59,587/-. For the differential disallowance of deduction u/s 32AC of the Act, the ld AO initiated penalty proceedings u/s 270A of the Act on the ground that the assessee had under-reported or misreported its income to the extent of Rs. 191,28,37,659/- (Rs. 2,25,03,97,246 – Rs. 33,75,59,587).

5. The return of income filed by the assessee was duly accompanied by tax audit report u/s 44AB of the Act, audited balance sheet, profit and loss account, among others. It is not in dispute that the assessee duly furnished the hard copy of tax audit report together with all its annexures and computation of income, audited balance sheet, profit and loss account, bank statements, Form 26AS, reconciliation of income as shown in ITR and profit and loss account and various other documents that were called for by the AO from time to time.

6. In the tax audit report in response to question No. 19, the tax auditor had reflected the figure of claim of deduction u/s 32AC of the Act of Rs. 225,03,97,246/-. Notice u/s 143(2) of the Act was issued to the assessee on 05.09.2018 and 27.09.2018. Notices u/s 142(1) of the Act were issued to the assessee on 02.01.2019 and 28.01.2019 on which dates, no query regarding the claim of deduction u/s 32AC of the Act was sought for by the ld AO. The 3rd notice issued u/s 142(1) of the Act dated 06.02.2019 was issued wherein, the ld AO sought for furnishing of complete tax audit report along with annexures. The assessee vide letter dated 02.04.2019 addressed to the ld AO submitted that deduction u/s 32AC of the Act had been erroneously claimed by the assessee @100% of the value of investment in new plant and machinery instead of eligible rate of 15% of the value thereon which worked out to Rs. 33,79,59,878/-. Accordingly, the assessee

requested the AO to consider the claim of deduction u/s 32AC of the Act only at Rs. 33,75,59,878/- instead of Rs. 225,03,97,246/-. The assessee also enclosed a certificate from the tax auditor dated 06.03.2019 duly certifying this aspect wherein, it was specifically stated that due to inadvertent mistake, deduction u/s 32AC was claimed at 100% instead of 15%.

7. The first notice u/s 142(1) of the Act was issued by the ld AO seeking clarification regarding claim of deduction u/s 32AC of the Act was only on 13.09.2019. Before this date itself, the assessee vide its letter dated 02.04.2019 had already withdrew the excess claim of deduction u/s 32AC of the Act as stated (supra). In response to the notice u/s 142(1) of the Act dated 13.09.2019, the assessee vide letter dated 18.09.2019 duly submitted the workings for claim of deduction u/s 32AC of the Act together with the revised computation of taxable income and a certificate from the tax auditor dated 06.03.2019 certifying the correct figure of claim of deduction u/s 32AC of the Act. The assessment u/s 143(3) of the Act dated 01.10.2019 was ultimately completed at the same income at the same loss figure of Rs. 449,80,57,749/- as was disclosed by the assessee in the revised computation of total income filed on 18.09.2019.

8. In response to the penalty proceedings initiated u/s 270A of the Act dated 01.10.2019, the assessee submitted a reply vide letter dated 06.12.2019 narrating the entire facts of the case and also bringing to the notice of the ld AO that the excess claim of deduction u/s 32AC of the Act was suo moto withdrawn by the assessee due to inadvertent mistake committed by the Tax Auditor in the tax audit report, before it could be detected by the ld AO. Further, it was also brought to the notice by the AO that as per section 270A of the Act, penalty was proposed to be levied for following two defaults:-

a) Misreporting of income

b) Underreporting of income.

9. It was pointed out that the cases of misreporting of income are covered u/s 270A(9) of the Act as under:-

"(9) The cases of misreporting of income referred to in sub-section (8) shall be the following, namely:—

(a) misrepresentation or suppression of facts;

(b) failure to record investments in the books of account;

(c) claim of expenditure not substantiated by any evidence;

(d) recording of any false entry in the books of account;

(e) failure to record any receipt in books of account having a bearing on total income; and

(f) failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction, to which the provisions of Chapter X apply."

10. It was pointed out that the assessee's case does not fall under any of the clauses mentioned in section 270A(9) of the Act and hence no penalty could be levied on the assessee for misreporting of income. It was pointed out that case underreporting of income are covered in section 270A(2) of the Act as under:-

"(2) A person shall be considered to have under-reported his income, if—

(a) the income assessed is greater than the income determined in the return processed under clause (a) of sub-section (1) of section 143;

(b) the income assessed is greater than the maximum amount not chargeable to tax, where no return of income has been furnished;

(c) the income reassessed is greater than the income assessed or reassessed immediately before such reassessment;

(d) the amount of deemed total income assessed or reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income determined in the return processed under clause (a) of sub-section (1) of section 143;

(e) the amount of deemed total income assessed as per the provisions of section 115JB or section 115JC is greater than the maximum amount not chargeable to tax, where no return of income has been filed;

(f) the amount of deemed total income reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income assessed or reassessed immediately before such, reassessment;

(g) the income assessed or reassessed has the effect of reducing the loss or converting such loss into income."

11. The assessee's case would fall only in clause (g) of Section 270A(2) of the Act as the ultimate assessment had the effect of reducing the loss retuned by the assessee. It was further pointed out that under reporting of income has got certain exceptions as provided in section 270A(6) of the Act as under:-

(6) The under-reported income, for the purposes of this section, shall not include the following, namely:—

(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 under section 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."

12. It was also pointed that as per section 270A(7) of the Act, the penalty under sub-section (1) of Section 270A shall be a sum equal to 50% of amount of tax payable of underreported income. Hence, for underreporting of income, penalty leviable would be 50% of tax of underreported income as per section 270A(7) of the Act and in case of underreported income in consequence of misreporting of income, penalty leviable shall be 200% of tax payable of underreported income as per section 270A(8) of the Act. It was submitted that assessee's explanation was bona fide and there was a genuine error committed in the tax audit report which stood rectified by the assessee on its own volition before it could be detected by the AO during the course of assessment proceedings. Accordingly, it was prayed that penalty shall not be leviable in the facts of the instant case. The ld AO however, did not heed to these submissions of the assessee and proceeded to ultimately levy penalty by stating the assessee has underreported income in consequence of misreporting thereof to the tune of Rs. 191,28,37,659/- (being the differential amount of claim of deduction u/s 32AC of the Act) and levied penalty in terms of section 270A(8) and (9) of the Act at @200% of tax of underreported income which

worked out to Rs. 132,39,89,710/-. This action of the ld AO was upheld by the ld CIT(A).

13. At the outset, we find that it is bounden duty of the ld AO to bring on record whether: (a) assessee has underreported his income in terms of section 270A(2) of the Act; (b) whether the assessee has misreported his income in terms of section 270A(9) of the Act; (c) whether the explanation given by the assessee falls under any of the exceptions provided in section 270A(6) of the Act ; and (d) whether the assessee has underreported his income in consequence of misreporting of income thereon so as to be invited with higher rate of penalty in terms of section 270A(8) of the Act. In the instant case from the facts narrated and sequence of events narrated hereinabove, it is very clear that the assessee had indeed claimed deduction u/s 32AC of the Act @100% value of investment in new plant and machinery in the return of income based on the figure mentioned thereon in tax audit report by the Tax Auditor. However, on noticing the mistake that had happened in the return and in view of the fact that the time limit for filing revised return has expired, the assessee voluntarily withdrew the excess claim of deduction u/s 32AC of the Act vide its letter dated 02.04.2019 wherein, clearly stating that the correct claim of deduction u/s 32AC of the Act would @15% of plant and machinery which worked out to Rs. 33,75,59,587/-. Further, the assessee also enclosed a certificate from the Tax Auditor dated 06.03.2019 wherein, Tax Auditor had duly admitted inadvertent mistake that had been committed in the tax audit report and also certified the correct figure of claim of deduction u/s 32AC of the Act to be Rs. 33,75,59,587/- only. It is pertinent to note that though several notices were issued u/s 142(1) of the Act by the ld AO dated 28.01.2019, 06.02.2019, we find no query regarding the claim of deduction u/s 32AC of the Act was even asked by the ld AO. The first query regarding the claim of deduction u/s 32AC of the Act was raised by the ld AO only vide notice u/s 142(1) of the Act on 13.09.2019, before which date, the assessee had already withdrawn the excess claim of deduction u/s 32AC of the Act by way of written letter dated 02.04.2019. The assessee again in response to notice u/s 142(1) of the Act dated 13.09.2019 had filed a reply letter dated 18.09.2019 before the ld AO wherein, it categorically stated that claim of deduction u/s 32Ac of the Act would be only Rs. 33,75,59,587/- and enclosed a certificate from the tax auditor to

that effect and further filed revised computation of total income wherein, the withdrawal of excess claim of deduction was duly reflected. It is absolutely not in dispute in the instant case that assessee is indeed entitled for deduction u/s 32AC of the Act in view of the investment made in new plant and machinery. In fact the ld AO on being satisfied about the eligibility of the assessee to claim deduction u/s 32AC of the Act had indeed granted deduction @15% of value of new plant and machinery. Hence, the preliminary objection raised by the ld DR in this regard that assessee is not eligible to claim deduction u/s 32AC of the Act, does not have any legs to stand in the eyes of law and we hold that the ld DR is trying to make out a new case before the Tribunal which is not even the case of lower authorities. All these facts collectively go to prove that the assessee had come forward voluntarily before the ld AO to withdraw the excess claim of its deduction u/s 32AC of the Act before any detection by the Income Tax Department. Hence, in our considered opinion, the assessee's case would squarely fall under the exception provided u/s 270A(6)(a) of the Act wherein, the assessee had given its bona fide explanation and had disclosed all the material facts that are relevant for the explanation offered. In view of the exception provided in section 270A(6)(a) of the Act, we hold that the present facts does not make the revenue eligible to levy penalty u/s 270A of the Act.

14. We find that the ld AR also made argument on the ground that there was absolutely no mala fide intention on the part of the assessee to claim excess deduction u/s 32AC of the Act in the facts of the instant case as even after the withdrawal of the differential 85% claim of deduction in the sum of Rs. 191 crores, the assessee still has brought forward losses to the tune of Rs. 2698.95 crores as is evident from the schedule CFL (details of loss to be carry forward) in the ITR filed for AY 2017-18. We are in agreement with this argument of the ld AR which proves the intention and behaviour of the assessee to withdraw the claim of deduction voluntarily by the assessee.

15. Further, the ld. AR argued that, in any case, a mistake of a professional cannot invite an assessee with the levy of penalty and for which, he relied on the decision of the Hon'ble Punjab and Haryana High Court in the case of CIT Vs. Deep

Tools Pvt. Ltd as reported in 274 ITR 603. Further, the ld AR also argued that in the penalty show cause notice issued u/s 270A read with Section 274 of the Act, the ld AO did not mention the specific charge of offence committed by the assessee i.e. the AO did not mention whether the assessee has either underreported his income or misreported his income or underreported in consequence of misreporting of his income. He argued that these are not inter-changeable and different rates of penalty are provided for different offences as per section 270A of the Act. Further, he also argued that there is provision for granting immunity u/s 270A of the Act in the case of underreporting of income and the same is not available for misreporting of income. Accordingly, he argued that the AO is duty bound to specifically mention the charge of offence committed by the assessee in the show cause notice itself. Reliance in this regard was also placed on the Full Bench decision of the Hon'ble Bombay High Court in the case of Md. Farhan A Sheikh Vs. DCIT reported in 125 taxmann.com 253 (Bombay) among other decisions. In our considered opinion, all these propositions made by the ld AR need not be gone into, as relief has already been granted to the assessee by applying the provisions of the Act itself considering the bonafide conduct of the assessee and the counter given by the ld DR. Hence, the other propositions made by the ld AR are hereby not adjudicated and they are left open. Accordingly, we direct the ld AO to delete the levy of penalty.

16. Since the appeal is disposed of herein, the stay application preferred by the assessee is dismissed as infructuous.

17. In the result, the appeal of the assessee is allowed and stay application of the assessee is dismissed.

Order pronounced in the open court on 11/09/2023.

-Sd/-	-Sd/-
(Saktijit Dey)	**(M. Balaganesh)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Dated:11/09/2023
A K Keot