

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "SMC" NEW DELHI)**

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER

**ITA No. 5221/Del./2014
Assessment Year: 2006-07**

| | | |
|---|------------|---|
| Gay Pictures Pvt. Ltd. 4/4, Asaf Ali Road, Stock Exchange Building New Delhi | Vs. | ITO Ward -2(1) New Delhi |
| (Applicant) | | (Respondent) |
| (PAN: AAACG0895L) | | |

Assessee by: Sh. Rajesh Jain, CA

Revenue by: Ms. Bedobina Chaudhari, Sr. DR

| | |
|-----------------------|------------|
| Date of hearing | 06/03/2017 |
| Date of pronouncement | 07/03/2017 |

ORDER

PER B.P. JAIN, ACCOUNTANT MEMBER:

1. This appeal of the assessee arises from the order of Id. CIT(A)-XV, New Delhi vide order dated 23.07.2014 for the A.Y. 2006-07. The assessee has raised the following grounds of appeal:-

"1.That the learned CIT(A) is erred in upholding the order passed by ITO, levying penalty u/s 271(1)(c) without appreciating the ground of validity of the Oder as raised by the appellant. The Order dated 15th March, 2013 u/s

271(1)(c) of the Act is illegal as show cause notice dated 12th March, 2013 has been issued by Deputy Commissioner of Income Tax, Circle 12(1), New Delhi, before whom the reply to the show cause notice was furnished but Order u/s 271(1)(c) has been passed by I.T.O ward 12(1), New Delhi without considering the reply of the appellant.

Without prejudice to the ground no 1

2. That the Learned CIT(A) erred in upholding the Order of the learned Assessing Officer, levying penalty u/s 271(1)(c) as the learned Assessing Officer levy penalty of Rs. 13,32,048/-, without initiating the same in accordance with the provisions of the law, as the reading of the Assessment Order does not prove that the Assessing Officer was prima facie satisfied during the course of assessment proceedings with regard to the assessee having concealed particulars of income or furnished inaccurate particulars and therefore the Assessing Officer was not having jurisdiction to impose penalty as held by Honorable Delhi High Court in the case of Madhushree Gupta 317 ITR 107.in spite of the fact that the same was levied without recording satisfaction as to initiation of penalty in the Assessment Order.
3. That the Learned CIT(A) erred in upholding the Order of the learned Assessing Officer, levying penalty u/s 271(1)(c) as the learned Assessing Officer did not appreciate that it is not a case of Loan but it is a case of Advances received from various parties during the course of carrying of the business against booking of plots and consequently therefore, the onus is discharged on filing of confirmation of the respective parties before the Assessing Officer.
4. That the ld. CIT (A) erred in upholding the Order of the learned Assessing Officer, levying penalty u/s 271(1)(c) as the order was passed by the Assessing Officer without considering the reply of the appellant filed on 15th March, 2012 in response to the show cause notice issued u/s 274 of the Act.

5. That the learned CIT (A) erred in upholding the order of the learned Assessing Officer, levying penalty u/s 271(1)(c) amounting to Rs. 13,32,048/- on the facts of the case and as per law.

6. The order passed by CIT (A) and the penalty order as passed by the ITO is not in accordance with the relevant law and therefore, the same is liable to be quashed.

2. The brief facts of the case are that the assessee company received advances amounting to Rs. 44,50,000/- from customers in cash. The assessee submitted the explanations which are not found satisfactory and notices were served to different parties from whom the advances were taken which according to Assessing Officer remained uncomplied with. The Assessing Officer also handed over notices u/s 131 for examination of the said parties to the Chartered Accountant to produce the said parties and confirmation or affidavits etc. so filed were not to the satisfaction of the Assessing Officer and accordingly he made an addition of Rs. 39 lac to the income of the assessee. The penalty u/s 271(1)(c) was confirmed by the Id. CIT(A).

3. I have heard the rival contentions and perused the facts of the case. The facts in the present case as stated above are that the assessee received advances from customers against picking of plots in the

upcoming project in Uttar Pradesh. The Assessing Officer was not satisfied with the explanation of the assessee. There is nothing brought on record, that the assessee has received the cash loans and not the advances from customers. The assessee has submitted necessary confirmations with PAN, bank statement of customers the advances were received from the following parties:-

| S. No. | Name of the entity & PAN | Address of the entity | Amount |
|--------|--|---|-------------|
| 1 | M/s Huba Services Pvt. Ltd. AAACH0208C | 204, Himalaya Complex, A-65, Laxmi Nagar, Delhi 92 | 4,00,000/- |
| 2 | M/s. Vibhor Garments Pvt. Ltd. AABCV4453G | R22, 201, Khaneja Complex, Shakarpur, Delhi-92 | 22,00,00/- |
| 3 | M/s. Tower Financial Services (P) Ltd. AACCT1330K | 303, Mahabir Saree House, 4771/23, Bharat Ram Road, Daryaganj, Delhi 02 | 4,50,000/- |
| 4 | M/s. Om Raj Services Pvt. Ltd. AACO0080H | 5/2860, Chuna Mandi, Pahar Ganj, Delhi | 4,00,000/- |
| 5 | Manoj Kumar AHFPK2685M | R2H-266, Raj Nagar, Part-II, Palam, Delhi 45 | 4,50,000/- |
| | Total | | 39,00,000/- |

4. The question is discharging of the onus by the assessee. The assessee having once filed the confirmations in which no defect has been pointed out, the onus on the assessee stands discharged. In response to

notice u/s 131(1) of the Act the said parties filed the affidavit, bank account, acknowledgment of filing of income tax returns directly to the Assessing Officer. The finding of the Assessing Officer that the said entities are fake is on the basis of no material on record and purely on the basis of surmises and conjectures. In fact on the other hand the assessee has proved the identity, genuineness and creditworthiness by filing various documents by the customers as mentioned here in above. Even if the creditors do not appear in response to the notice u/s 131, it is not the duty to enforce the said parties by the assessee and make them present before the Assessing Officer. The reliance is placed on the decision of Hon'ble Supreme Court in the case of CIT vs. Orissa Corporation Ltd. 159 ITR 78 where the necessary observations in para 13 and 15 are as under:-

“The assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesseees. Their index number was in the file of the Revenue. The Revenue, apart from issuing notices under s. 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the allowed loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay

on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises. It cannot, therefore, be said that any question of law arose in these cases. The High Court was, therefore, right in refusing to refer the questions sought for."

5. As regards the initiation of penalty proceedings it was argued by the ld. counsel for the assessee Mr. Rajesh Jain that the Assessing Officer simply initiated the penalty proceedings at the end of the assessment order without indicating the specific charge. He relied upon the decision in the case of Madhushree Gupta 317 ITR 107 where it has been held that:-

"The Assessing Officer will have to arrive at a prima facie satisfaction during the course of proceedings with regard to the assessee having concealed particulars of income or furnished inaccurate particulars, before he initiates penalty proceedings."

6. In the circumstances and facts of the case and on these score as discussed above the penalty so levied u/s 271(1)(c) of the Act is directed to be deleted.

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

8. Pronounced in the open court on 07.03.2017.

Sd/-
(B.P. JAIN)
ACCOUNTANT MEMBER

Dated: 07.03.2017

Narender

Copy forwarded to:

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

ASSISTANT REGISTRAR

| | Date |
|--|------------|
| Draft dictated on | 06.03.2017 |
| Draft placed before author | 07.03.2017 |
| Draft proposed & placed before the second member | |
| Draft discussed/approved by Second Member. | |
| Approved Draft comes to the Sr.PS/PS | 07.3.2017 |

| | |
|--|------------|
| Kept for pronouncement on | |
| File sent to the Bench Clerk | 07. 3.2017 |
| Date on which file goes to the AR | |
| Date on which file goes to the Head Clerk. | |
| Date of dispatch of Order. | |