

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER**

**ITA No.5430/M/2015
Assessment Year: 2009-10**

M/s. Shivalik Ventures Pvt. Ltd., Plot No.746, Staney Fernandes Wadi, D.S. Babrekar Marg, Dadar (West), Mumbai – 400 028 PAN: AALCS7683R	Vs.	ACIT-CC-4(2), Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Vijay Mehta, A.R.
Revenue by : Shri V. Justin, D.R.

Date of Hearing : 14.11.2018
Date of Pronouncement : 24.01.2018

ORDER

Per D.T. GARASIA, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 29.09.2015 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2009-10.

2. The only ground in this appeal is against the confirmation of penalty of Rs.14,97,826/- on the income appearing in 26AS.
3. The brief facts of the case are as under:-

The assessee has filed the original return of income under section 139(1) of the Act on 31.12.09 declaring income of Rs.2,44,52,972/-. A search and seizure action under section 132(1) was conducted in assessee's company by investigation wing. During the assessment proceeding assessee was asked as to why the income of Rs.44,06,667/- on which the TDS was deducted of Rs.1,99,88,551/- as per 26AS has not been offered in return of income filed under section 139(1). In reply, assessee submitted that inadvertently forgotten to consider the same while filing the return under section 139(1) but AO did not consider and imposed penalty under section 271(1)(c) of the Act.

4. Before us, the Ld. A.R. submitted that as per the decision of Hon'ble Delhi High Court in the case of CIT vs. Nalwa Sons Investments Ltd. (327 ITR 543, 553) wherein the High Court has considered that imposing the penalty under section 271(1)(c) has been amended w.e.f. 2015 to cover the situation for levying the penalty whenever the income under normal provision is less and then the income declared for the purpose of section 115JB of the Act. This amendment is prospective and applicable w.e.f. 01.04.2016. In this case, as per the chart the income computed under the MAT provisions. As per section 271(1)(c) of the Act the penalty has to be imposed when there is a difference between tax on assessed income and tax on return income. In this case since no addition was made under section 115JB of the Act the return income and assessed

income under section 115JB remains the same. Therefore, no penalty can be levied.

5. The Ld. D.R. has relied upon the orders of the Revenue Authorities.

6. We have heard the rival contentions of both the parties. We find that pursuant to search, assessment order was passed u/s 143(3) r.w.s. 153A of the Act. During the course of assessment proceedings, on perusal of Form 26AS, it was observed by the AO that the assessee had not offered an income of Rs.44,06,667/- on which TDS of Rs.9,98,551/- was deducted. In view of the same, the AO made an addition of Rs.44,06,667/- to the total income of the assessee under the normal provisions of the Act whereas no addition of the said income was made while computing income u/s 115JB of the Act. Since the tax on income computed u/s 115JB was higher than tax on income computed under normal provisions, assessment was completed by assessing the income u/s 115JB of the Act. Penalty proceedings were initiated u/s 271(1)(c) of the Act on the above addition. We find that during the course of hearing, the Ld. A.R. has given the chart which is reproduced as under:

Sr. No.	Particulars	Income (under normal provisions)	Income (under MAT provisions)
1.	As per computation of income and order passed u/s 143(3) of the Act	2,80,93,425/-	301,08,27,550/-
2.	Add: Income as per 26AS	44,06,667	NIL
3.	Assessed income in order passed u/s 143(3) r.w.s 153A of the Act	3,25,00,092	301,08,27,550

As per the above chart, the tax on income computed under section 115JB is higher than tax on income computed under normal provisions of the Act and hence the assessment was completed by AO by assessing the income u/s 115JB of the Act. It is evident from the above chart that tax on income computed under section 115JB Act was higher than the tax computed under normal provisions of the Act. Hence, the assessment was completed by AO assessing the income under section 115JB of the Act. We find that as per Explanation 4 to section 271(1)(c), the quantum of penalty is determined by calculating the amount of tax sought to be evaded by the assessee. We find that no addition was made under section 115JB of the Act on the return of income and assessed the income under section 115JB of the Act. Hence, no penalty can be levied under section 271(1)(c) of the Act. We find the judgment of Hon'ble Delhi High Court in the case of CIT vs. Nalwa Sons Investments Ltd. (supra) is in favour of the assessee.

7. Respectfully following the same, we find that no penalty can be levied. Hence, we delete the penalty.

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

Order pronounced in the open court on 24.01.2018.

Sd/-
(N.K. Pradhan)
ACCOUNTANT MEMBER

Sd/-
(D.T. Garasia)
JUDICIAL MEMBER

Mumbai, Dated: 24.01.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.