

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'D' BENCH, KOLKATA****Before Shri P.M. Jagtap, Accountant Member and
Shri S.S.Viswanethra Ravi, Judicial Member****I.T.A. No. 1938/KOL./2016
Assessment year: 2005-2006*****Oberoi Buildings and Investments Pvt. Limited,.....Appellant
4, Mangoe Lane, 6th Floor,
Kolkata-700 001
[PAN: AAACO 2860 R]*****-Vs.-*****Deputy Commissioner of Income Tax,.....Respondent
Circle-5, Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700 069*****Appearances by:*****Shri A.K. Gupta, FCA, for the assessee
Shri Arindam Bhattacharjee, Addl. CIT, D.R., for the Department***

Date of concluding the hearing : February 12, 2018

Date of pronouncing the order : February 16, 2018

O R D E R**Per Shri P.M. Jagtap, Accountant Member :**

This appeal filed by the assessee is directed against the order of Id. Commissioner of Income Tax (Appeals)-2, Kolkata dated 01.07.2016 whereby he confirmed the penalty of Rs.2,16,597/- imposed by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961.

2. The assessee in the present case is a Company, which is engaged in Real Estate Business. The return of income for the year under consideration was filed by it on 06.10.2005 declaring total income of Rs.1,32,710/-. In the said return, the rental income of Rs.13,90,260/- received by the assessee-company from sub-letting of shopping area in the Hotel EIH Limited in Mumbai was declared as business income and various expenses against the same were claimed as deduction. In the

assessment completed under section 143(3) vide an order dated 26.02.2007, the said rental income was brought to tax by the Assessing Officer in the hands of the assessee-company under the head "Income from House Property" and subsequently the claim of the assessee for deduction on account of various expenses was restricted by him determining the total income of the assessee at Rs.11,43,020/-. He also initiated penalty proceedings under section 271(1)(c) in respect of addition made to the total income of the assessee as a result of change of Head of rental income and since the explanation offered by the assessee in response to the show-cause notice issued during the course of said proceedings was not found acceptable by him, the Assessing Officer imposed the penalty of Rs.2,16,597/- under section 271(1)(c) being 100% of the tax sought to be evaded by the assessee in respect of the addition made to its total income.

3. The penalty imposed by the Assessing Officer under section 271(1)(c) was challenged by the assessee in the appeal filed before the Id. CIT(Appeals) and the following submissions were filed by the assessee in writing before the Id. CIT(Appeals) in support of its case that the penalty imposed by the Assessing Officer under section 271(1)(c) was not sustainable:-

"In the assessment order passed under section 143(3) of the Act, following adjustments/additions has been made by the Assessing Officer.

1. Contribution from shops given on leave and license amounting to Rs.13,90,260/- was treated by the AO under the head 'Income from house property' as against offered by the assessee under the head 'Income from business' leading to increase in assessed Income by Rs.6,43,482/- relying on the decision of CIT vs Poddar Cement Ltd reported in 226 ITR 625.

The abovementioned disallowance was confirmed by the Hon'ble ITAT, Kolkata. The Id. AO opined that the appellant has furnished inaccurate particulars of income and accordingly passed an order u/s. 271(1)(c) of the Act levying 100% of the tax sought to be evaded as penalty u/s 271(1)(c) of the Act.

During the penalty proceedings, the appellant pointed out that since inception "contribution from shops" was being assessed as "business income" as claimed in return. Mere reporting of income

under a different head would not characterize the particulars reported as "inaccurate" to attract levy of penalty under section 271(1)(c).

Again it reiterated before your goodself that merely because the Assessing Officer was of the opinion that the income falls under some other head cannot be reason enough to treat the particulars reported in the return as "inaccurate particulars".

Reliance in this regard is placed on the decision of CIT -vs.- Amit Jain (2013) 351 ITR 74, wherein the above issue come up before the Delhi High Court. The Delhi High Court's ruling is based on the Supreme Court ruling in CIT -vs.- Reliance Petro Products Pvt. Ltd. (2010) 322 ITR 158.

Even otherwise, it is submitted that the appellant has filed appeal before the High Court against the order of the abovementioned ITAT order on the basis of which the AO has passed on order imposing penalty, it is pertinent to note that the order of the ITAT confirming the disallowance does not have binding effect on the appellant inasmuch as the operation of the said order has been stayed by the Hon'ble Kolkata High Court (copy of High Court order is enclosed as Annexure....).

It has been held in a plethora of cases by venous courts that once an order is put to stay of operation, It will not have any binding effect on the other decisions.

In this regard, reliance is placed on the decision of Bangalore ITAT rendered in case of Mysore Sales International Limited -vs.- Commissioner of Income Tax reported in (2012) 138 ITD 422.

The relevant aspect of the High Court order is reproduced as follows:-

"We grant unconditional stay of operation of the impugned judgment and/or order of the learned Tribunal for a period of three weeks from date within the time aforesaid if Dr. Pal's client deposits a sum of Rs.3,90,000/- which is impugned herein, with the department, then the order of stay will continue until further order of this court".

Under the above circumstances, it is submitted that the captioned appeal may kindly be kept in abeyance till further order from the High Court for the relevant year in respect of the concerned issue".

4. The ld. CIT(Appeals) did not find merit in the submissions made by the assessee as above and proceeded to confirm the penalty imposed by the Assessing Officer for the following reasons given in his impugned order:-

"I have considered the submissions of the authorized representative of the appellant as well as the penalty order framed in the light of the materials available on record before the assessing officer

during the assessment as well as penalty proceedings. The addition as made by the AO was duly upheld by the ITAT. The assessee had shown the rental income as business income and claimed expenses of Rs.10,60,560/- against the returned income of Rs.13,90,260/- showing the net income of Rs.3,29,700/-. However, after considering it as income from house property the taxable net income comes to Rs.9,73,182/-. This clearly establish that the assessee has made a wrong claim even after several Judgments are against the claim made by the assessee. Hence, the contention of the assessee is not acceptable and it has been considered that the assessee has furnished wrong particulars of income”.

Aggrieved by the order of the ld. CIT(Appeals), the assessee has preferred this appeal before the Tribunal.

5. We have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that the impugned penalty under section 271(1)(c) is imposed by the Assessing Officer and confirmed by the ld. CIT(Appeals) in respect of addition made to the total income of the assessee as a result of change in the head of rental income from “profits & gains of business or Profession” to “income from house property”. In the case of CIT -vs- Indersons Leather (P) Limited [196 Taxman 103] cited by the ld. counsel for the assessee, the assessee had made a claim declaring his rental income as business income while the Assessing Officer held the same to be income from house property. The Assessing Officer also levied penalty under section 271(1)(c), which was cancelled by the Tribunal by holding that the assessee was not guilty of any concealment or furnishing of inaccurate particulars and the claim made by the assessee was in respect of a debatable issue. The appeal filed by the Department against the order of the Tribunal cancelling the penalty under section 271(1)(c) was upheld by the Hon’ble Punjab & Haryana High Court. As rightly submitted by the ld. counsel for the assessee, the issue involved in the present case is similar to the case of Indersons Leather (P) Ltd.(supra), inasmuch as the claim of the assessee for rental income being its business income was accepted by the Assessing Officer himself consistently in the earlier years and the issue relating to the head of income under which the rental income in question

is assessable to tax was not only a debatable one, but even the claim made by the assessee was bonafide. Moreover, as pointed out by the Id. counsel for the assessee, the appeal filed by the assessee against the order passed by the Tribunal in the quantum proceedings confirming the action of the Assessing Officer in taxing the rental income as house property income has already been admitted by the Hon'ble Calcutta High Court, which again goes to show that the issue is highly debatable. As held by the Hon'ble Bombay High Court in the case of CIT -vs.- Nayan Builders & Developers (Income Tax Appeal No. 415 of 2012 dated 08.07.2014) cited by the Id. counsel for the assessee, penalty imposed under section 271(1)(c) is liable to be deleted where the Hon'ble High Court has admitted substantial question of law on the issue in quantum proceedings on the basis of which such penalty was levied. In our opinion, the issue involved in the present case relating to levy of penalty under section 271(1)(c) thus is squarely covered in favour of the assessee by the decision of the Hon'ble Punjab & Haryana High Court in the case of Indersons Leather (P) Ltd. (supra) as well as that of the Hon'ble Bombay High Court in the case of Nayan Builders & Developers (supra). At the time of hearing before us, the Id. D.R. has not raised any material contention in this regard and has relied only on the orders of the authorities below in support of the revenue's case. We, therefore, respectfully follow the order of the Hon'ble Punjab & Haryana High Court in the case of Indersons Leather (P) Ltd. (supra) as well as that of the Hon'ble Bombay High Court in the case of Nayan Builders & Developers (supra) and cancel the penalty imposed by the Assessing Officer under section 271(1)(c) and confirmed by the Id. CIT(Appeals).

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

Order pronounced in the open Court on 16th day of February, 2018.

Sd/-
(S.S.Viswanethra Ravi)
Judicial Member

Kolkata, the 16th day of February, 2018

Sd/-
(P.M. Jagtap)
Accountant Member

- Copies to :
- (1) ***Oberoi Buildings and Investments Pvt. Limited,
4, Mangoe Lane, 6th Floor,
Kolkata-700 001***
 - 2) ***Deputy Commissioner of Income Tax,
Circle-5, Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700 069***
 - (3) *CIT(Appeals)-2, Kolkata,*
 - (4) *CIT- , Kolkata,*
 - (5) *The Departmental Representative*
 - (6) *Guard File*
- TRUE COPY**

By Order

*Senior Private Secretary,
Head of Office/DDO,
Income Tax Appellate Tribunal
Kolkata Benches, Kolkata*

Laha/Sr. P.S.