

IN THE INCOME TAX APPELLATE TRIBUNAL  
“D” Bench, Mumbai  
Before S/Shri B.R. Baskaran (AM) & Sandeep Gosain (JM)

I.T.A. No. 5585/Mum/2016 (Assessment Year 2010-11)

ITO-2(1)(2) 543, Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Dhanrajgir Business Pvt. Ltd. G-43, Dhanraj Mahal CSM Marg, Apollo Bunder, Colaba Mumbai-400 039. PAN : AABCD3080D
(Appellant)		(Respondent)

Assessee by	Shri Ram Tiwari
Department by	Shri Firoze Andhyarujina
Date of Hearing	5.4.2018
Date of Pronouncement	5.4.2018

ORDER

Per B.R. Baskaran (AM) :-

The appeal filed by the Revenue is directed against the order dated 15.6.2016 passed by the learned CIT(A)-4, Mumbai and it relates to A.Y. 2010-11. The Revenue is aggrieved by the decision of the learned CIT(A) in deleting the penalty of ₹ 16.93 lakhs levied by the Assessing Officer u/s. 271(1)(c) of the Act.

2. We have heard the parties and perused the record. The assessee-company was formed with the object of dealing in house property including letting out to sophistic customers like foreigners, consultants and expatriates etc. The company lets out its own property and also properties taken on leave and license basis. The assessee also collected contract charges for providing amenities. The assessee offered all three receipts as its business income. The Assessing Officer, however, assessed the income received from letting out properties under the head income from house property. The contract charges received by the assessee were assessed as income under the head ‘income from other sources’. In the appeal filed before the learned CIT(A), the first appellate

authority partly allowed the appeal of the assessee by upholding the action with regard to rental income received from own property. Thereafter the Assessing Officer levied penalty on the assessee u/s. 271(1)(c) of the Act. The learned CIT(A), however, deleted the penalty and hence the Revenue has filed this appeal before us.

3. Learned DR submitted that the assessee has declared house property as its business income with the malafide intention of claiming various expenses and reducing the tax. He submitted that the said action of the assessee is liable for penalty u/s 271(1)(c) of the Act. In this regard, learned DR placed reliance on the decision rendered by Hon'ble Delhi High Court in the case of Zoom Communication (327 ITR 510). Learned DR also placed reliance on the decision rendered by Hon'ble Supreme Court in the case of Dharmendra Textile (306 ITR 277) and contended that the learned CIT(A) was not justified in deleting the penalty.

4. On the contrary, learned AR submitted that the assessee did not conceal any particulars of income or furnish any inaccurate particulars of income. The assessee has duly declared all its income under the head 'income from business'. The Assessing Officer has merely changed head of income. He submitted that an identical issue was contested before the ITAT in A.Y. 2009-10 by taking support of Hon'ble Supreme Court in the case of M/s. Chennai Properties (Civil Appeal No. 4494/2004 dated 9.4.2015) since the object for which the company was incorporated was, inter alia, to let out the property. Hence, the ITAT restored the matter to the file of the Assessing Officer in A.Y. 2009-10 in ITA No. 2488/Mum/2013 dated 14.8.2015. During the year under consideration the assessee accepted the order passed by the learned CIT(A), since the majority of its receipts was directed to be assessed as business income by the learned CIT(A). The learned AR further submitted that there are plethora of judgments which laid down the proposition that mere change of head of income could not give rise penalty u/s. 271(1)(c) of the Act. The Learned AR placed reliance on the order passed by Hon'ble Gujarat High Court in the case of CIT Vs. Sambhav Media Ltd. (2013) 32 taxamnn.com 371,

wherein it was held that when there is bonafide difference of opinion between the assessee and the department regarding allowability of claim, imposition of penalty u/s. 271(1)(c) of the Act was not justified. The Ld A.R accordingly submitted that the Ld CIT(A) has rightly held that the issue relating to the head of income is a debatable one and accordingly contended that the order passed by the learned CIT(A) does not call for any interference.

5. We noticed that the learned CIT(A) has deleted the penalty with the following observations :-

*3.3 I have considered the reasons of the Assessing Officer given in penalty order for levy of penalty u/s. 271(1)(c) of the Income Tax Act and rival submissions of the Appellant, carefully. I find that this is not a case of intentional concealment of income or furnishing of inaccurate particulars of income. Here is the case where claim of the Appellant as business income being rental income as well as service charges/contract charges has been treated as "Income from house property" which has been confirmed by the CIT(A) vide order dated 29.10.2013. As far as rental income, service charges from sub-tenancy charges are concerned, the Ld. Assessing Officer had taxed the same as "Income from house property". However, the learned CIT(A) has held that such rental income and corresponding service charges are assessable as "Income from Business & Profession" u/s. 28 of the I.T. Act, 1961 considering the decision of Hon'ble Bombay High Court, in the case of GIT v/s. Mumbadvi Co-owners Co-operative 143 TR 150 (Bom) and Hon'ble Supreme Court's decision in the case of Mercantile Corporation Vs. CIT 83 ITR 700(SC). Thus, the issue under appeal has been disputable issue. Further it is very evident that the Assesses has disclosed all the information in Return of income/Balance Sheet and computation of income, hence there is nothing which can show that there is concealment of income, hence, merely in change of heads of income, penalty could not be levied. It is also pertinent to mention that against the order of Ld. CIT(A) in A.Y.2009-10, the Appellant has filed an appeal before the ITAT in Income-Tax Act, 1961 No.2488/Mum/2013 dated 14.08.2005 has set aside the issue to the file of the assessing Officer for deciding afresh.*

*3.4. Considering the latest decision of Hon'ble Supreme Court in the case of Chennai Properties Civil Appeal No. 4494 of 2004 dated 9.4.2015, obviously, issue under appeal is having disputable element, merely on the ground that the claim of the Assessee has not been accepted by the department, penalty could not be levied, vide CIT v/s. Reliance Petro 322 ITR 158 (SC). Further, if there is a mere change of the head of income, no penalty can be levied as held in the case of Pr. CIT v/s. G.K. Properties 377 ITR 417 (T&A.P.). Further, when such issue*

*has been set aside by the Hon'ble ITAT, the matter is covered by the decision of Hon'ble Bombay High Court in the case of CIT vs. Dalmia Diachem Industries (2010) 377 ITR 133(Bom.) In this case, it has been held that if a matter has been set aside to the Assessing Officer then the interpretation placed by the Assessee of a provision of law could not be considered as dishonest, malafide hence, it could not be considered concealment of tax. Therefore, no penalty could be levied.*

*Thus, in the light of the above factual as well as legal discussion, I find that this is not a suitable case which attract penalty u/s.271(1)(c) of the Act. Thus, levy of penalty of Rs. 16,93,030/- u/s. 271(1)(c) of the I.T. Act is deleted.”*

6. We noticed that the learned CIT(A) has considered the impugned issue as debatable in nature, since there was difference of opinion about the head income under which the income received by the assessee is assessable. We noticed that the learned CIT(A) has placed reliance on the decision rendered by Hon'ble Bombay High Court in the case of Mumbadevi Co-owners Co-operative (supra) and also on the decision rendered by Hon'ble Supreme Court in the case of Reliance Petro Products (supra). Before us, the assessee has also placed reliance on the decision rendered by Hon'ble Gujarat High Court in the case of Sambhav Media Ltd, wherein it was held that the penalty u/s 271(1)(c) of the Act is not exigible, if there is bonafide difference of opinion. Since the Assessing Officer has only changed the head of income, which is due to bonafide difference of opinion, we are of the view that the learned CIT(A) was justified in holding that the issue under consideration is debatable one. Accordingly, we are of the view that he was justified in deleting the penalty levied by the Assessing Officer u/s. 271(1)(c) of the Act.

7. In the result, appeal filed by the Revenue is dismissed.

Order has been pronounced in the Court on 5.4.2018.

Sd/-  
(SANDEEP GOSAIN)  
JUDICIAL MEMBER

Sd/-  
(B.R.BASKARAN)  
ACCOUNTANT MEMBER

Mumbai; Dated : 5/4/2018

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Senior Private Secretary)  
ITAT, Mumbai

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