

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH “B”, MUMBAI**  
**BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND**  
**SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA No.6915/Mum/2011 (Assessment Year- 2008-09)

ITA No.5131/Mum/2014 (Assessment Year- 2008-09)

M/s Bakhtawar Construction Pvt. Ltd., Darabshaw House Level 1, Narottam Morarji Road, Ballard Estate, Mumbai-400001 <b>PAN:AABCC5838L</b>	<b>Vs.</b>	DCIT- 2(1) (1) Room No. 561, 5 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.
(Appellant)		(Respondent)

Assessee by : Shri Amogh M. Ghaisas (AR)

Revenue by : Shri Suman Kumar (DR)

Date of hearing : 08.02.2018

Date of Pronouncement : 20.04.2018

**Order Under Section 254(1) of Income Tax Act**

**PER PAWAN SINGH, JUDICIAL MEMBER:**

1. These two appeal by assessee under section 253 of Income Tax Act ('the Act') are directed against the separate order of Ld. Commissioner of Income-Tax (Appeals)-4, Mumbai, [for short the ld. CIT(A)] dated 16.08.2011 & 17.04.2013. In ITA No. 6915/Mum/2011, the assessee has challenged the addition sustained by Ld CIT(A) in quantum assessment. However, in ITA No. 5131/Mum/2014, the assessee has challenged the penalty order levied under section 271(1) (c) of the Act. Both the appeal relates to Assessment Year 2008-09. In ITA No. 6915/Mum/2011, the assessee has raised the following grounds of appeal:

1. The order of the CIT(A) has erred in confirming disallowance of Rs. 34,97,576/- incurred towards Establishment and other expenses under the head

“Business” on the ground that no business activity was actually carried out during the year.

2. The Id. CIT(A) has erred in confirming assessability of interest of Rs.19,39,412/ under the head “Income from Other Sources” against the ‘Business Income’.

2. Brief facts of the case are that during the assessment year 2008-09, the assessee-company derived income from house property, capital gains, interest income & dividend income. The assessee-company filed its return of income for Assessment Year 2008-09 on 28.07.2009 declaring total income at Rs. 1,25,31,779/-. The assessment was completed on 30.09.2010 under section 143(3) of the Act. The Assessing Officer assessed the income at Rs.1,71,33,594/-. The Assessing Officer while passing assessment order, besides the other additions and disallowance, disallowed the expenses of Rs.34,97,567/- holding that no business activity was undertaken by the assessee during the relevant period. The Assessing Officer also treated the Interest Income of Rs. 19,39,412/- under the head “Income from Other Sources” as against “Business Income” claimed by the assessee. The Assessing Officer also initiated penalty under section 271(1)(c) of the Act. The assessing officer initiated penalty on the total additions/ disallowance of Rs. 54,96710/-. On appeal before the Id. CIT(A), in quantum assessment the action of Assessing Officer was confirmed. Thus, further aggrieved by the order of Assessing Officer, the assessee filed present appeal before us.
3. We have heard the Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the Revenue and perused the material available on record. The Id. AR of the assessee argued that assessee-company

was incorporated in 1958. The main object of the assessee-company was construction and development of property, manufacturing of tile and link chain. The assessee-company had undertaken various other business activities in the past year. The assessee-company was also in the business of manufacturing of beer which was carried out in the name of Associated Breweries & Distilleries. It was a partnership firm and the assessee-company was having 65% share in the said Firm. In the year 2001, the business of beer was taken over by United Breweries Ltd. The share of the assessee on which capital gain was earned/received on the sale of beer business was deposited/invested R. 3.11 crore in NABARD capital gain bonds in accordance with the provisions of section 54EC. The assessee earned interest on NABARD bond of Rs. 16,17,000/- such deposit and Rs. 3,22,212/- on other bank interest, the same should be treated as "Business Income". It was further argued that there was temporary lull in the business activities of the assessee. The expenses incurred during the period were disallowed by lower authorities on their observation that no business activity was undertaken. The assessee incurred the expenditure wholly and exclusively which is allowable expenses. In support of his submissions the Id. AR for the assessee filed a long list of following decision.

- (i) CIT Vs Baharat Nidhi Ltd , 60 ITR 520 (Punjab),
- (ii) Mrs Sarojini Rajah Vs CIT 71 ITR 504 (Madras),
- (iii) V.VE. Vairavan Chettiar Vs. CIT, 72 ITR 114(Madras),
- (iv) Karsondas Ranchhoddass Vs. CIT, 83 ITR 1 (Bombay),
- (v) Hindustan Chemical Works Ltd. Vs. CIT, 124 ITR 561 (Bombay),
- (vi) CIT vs. Ganga Properties Ltd, 199 ITR 94 (Calcutta),
- (vii) Lakshmi Narayan Board Mills Pvt. Ltd. Vs. CIT, 205 CTR 359 (Kerala),

- (viii) Akarsh Printers Ltd. Vs. ITO, Calcutta Tribunal ITA No. 2279 of 2000,
- (ix) ITO Vs. Good Value Marketing Co. Ltd., Bombay Tribunal Appeal No. 3180 of 2011,
- (x) ITO Vs. Mrs. Vanishree Karunakaran, 86 ITD 373 (Chennai ITAT),
- (xi) Bechtel International Vs. ADIT ITA No. 2188/M/2010 dated 10.06.2011,
- (xii) ITO Vs. Mokul Finance (P) Ltd, 110 TTJ 445 (Delhi Tribunal),
- (xiii) CIT vs. Integrated Technologies Ltd., ITA No. 520 of 2011 (Delhi High Court,
- (xiv) King Prawns Ltd. Vs. ITO (Bombay Tribunal ITA No. 60 of 2010,
- (xv) Dolphin Drilling Ltd vs. DIT ITA No. 6393/Del/2012 dated 12.10.2012,
- (xvi) C.R.H. Readymoney Pvt. Ltd. Vs. ITO in ITA No. 1778/Mum/2010 dated 27.05.2011,
- (xvii) Jng Builder Pvt. Ltd. Vs. DIT in ITA No. 3873/Del/2011 dated 02.08.2013,
- (xviii) Sheela Overseas Pvt. Ltd. Vs. DIT in ITA No. 4687/Del/2009 dated 19.02.2010,
- (xix) M/s. Ventura Texperts Pvt. Ltd. Vs. ITO in ITA No. 7637/Mum/2014 dated 08.10.2015.

However, while making submissions the ld. AR referred and relied on decision in CIT Vs Ganga Property, 199 ITR 94 (Calcutta)

4. On the other hand, the ld. DR for the Revenue supported the order of authorities below. The DR submits that assessee claimed expenses of Rs.55,09,120/- against the business loss of Rs. 34,20,076/-. The assessee offered income under the head "Income from House Property" and claimed deduction under section 24 at the rate of 30% of Annual Letting Value (ALV). The assessee claimed the business expenses against the Income from House Property which amounts to double deduction. The Assessing Officer allowed the legitimate expenses due to the corporate structure of the assessee and the balance expenses claimed by the assessee was correctly disallowed. For treatment of interest income as Income from Other Sources, the ld. DR submits that the assessee is not in the business of money lending business or surplus fund is not invested by the assessee. The assessee has not provided any head for such income; therefore, the income has to be assessed under the head

“Income from Other Sources”. At the time of conclusion of submission of submissions by Id representatives of the parties the Id. AR for the assessee was directed to file the copy of the assessment order, one year prior to the present assessment year and for subsequent assessment years.

5. We have considered the rival submission of the parties and perused the material available on record. We have also gone through the written submission and the various decisions filed by assessee on record. Ground No.1 of the appeal relates to the disallowance of Rs. 34,97,576/-. During the assessment proceedings, the assessing officer noted that the assessee has claimed expenses of Rs. 55,09,210/- and declared loss of Rs.34,20,076/-. The assessing officer issued show cause notice to disallow the expenditure as no business income was shown by the assessee. The assessee filed its reply on 23.09.2010. In the reply the assessee contended that the company has not declared positive income under the head ‘business income’. However, the company had to incurred heavy expenses of litigation in its tenanted premises. The loss under the head ‘business income’ has arisen mainly on account of the legal expenses the tenants of the company at Jogeshwari property. The contention of the assessee was not accepted by the assessing officer. The assessing officer took the view that income from Jogeshwari property has been offered by the assessee under the head ‘income from house property’ and the assessee has claimed deduction under section 24 of the Act at the rate of 30% of the annual letting Value. Thus, the expenses incurred by the assessee on

account of this property actually amount to double claim of the same expenses on the part of the assessee. However, keeping you the corporate structure of the assessee the other expenses like professional tax of Rs. 500/-, expenses of Rs.10,000/- of ROC fees and Audit fees was allowed and the remaining expenses of Rs. 34,07,576/- was disallowed. The Id. CIT(A) confirmed the disallowance holding that the huge expenditure is not justified and there is no business activities and business receipt. The Id. CIT(A) also considered the fact that if there is temporary lull in the business or it is a closure for long time. The assessee contended that they have revived business only after two years for which return of income was yet to be filed. The CIT(A) concluded that the claim of revival of business is yet to be examined by the Assessing Officer as no such return of income has filed by assessee as disclosed/informed during the appellate proceeding. Thus, the contention of temporary lull was not accepted by Id. CIT(A). The Id. CIT(A) further concluded that the professional fees and other legal expenses incurred on defending the title of properties, these expenses should be added to the cost of respective properties at appropriate stage. We have examined the fact of the case independently and found that the assessee has not brought any evidence on record to substantiate the contention that there was temporary lull in the business of assessee. To ascertain the contention of assessee, we directed the Id. AR of the assessee to file the assessment order for subsequent Assessment Year. Despite direction, the Id. AR of the assessee has not filed assessment order for subsequent Assessment

Year i.e. for AYs 2009-10, 2010-11, 2011-12 & 2012-13 & 2013-14. The Id. AR of the assessee filed copy of assessment order for Assessment Year 2015-16 passed under section 143(3) dated 04.12.2017. The perusal of the order reveals that assessee declared total income declaring loss of Rs. 41,85,198/-. No other piece of evidence is placed on record in the form of Profit & Loss A/c, Audit Report or any other documentary evidences to substantiate that business was revived in subsequent years. The assessee vide its letter dated 08.03.2018 contented that *“the office of assessee is located in an old building and it has leakage in the monsoon of last two years. It spoilt the furniture and the papers/ records and attracted the while ants as well. Assessee is carrying out structural and other tenantable repairs to its office at present. Whatever record could be salvaged has been sent to warehouse, packed in boxes and, therefore, it is not easily possible to check and retrieve the papers **until the assessee’s office becomes functional again**”*. Thus, the assessee failed to substantiate its contention that there was a temporary lull in the business. Even the self-serving statement contended in its letter dated 08.03.2018 goes against the assessee, which shows that office of assessee is not functional. The various decision relied by Id. AR of the assessee is not helpful. The assessee mainly relied the decision of Calcutta High Court in CIT vs. Ganga Properties (supra). The fact of this case is entirely different. In that case the assessee-company was retaining clerical staff, Secretary, Accountant and also made expenditure on incidental expenses. However, in the present case, the assessee has not

claimed expenses on employee cost. Moreover, the expenses to maintain the corporate entity were allowed by Assessing Officer. Though we have also gone through the other decisions relied by Id. AR of the assessee as referred above, none of the decision is favourable to the assessee. The assessee miserably failed to prove that there is temporary lull in the business activity. Hence, we do not find any reason to interfere with the finding of Id. CIT(A). In the result, this ground of appeal is dismissed.

6. Ground No.2 relates to treating the interest income under the head “Income from Other Sources” against the “Business Income” claimed by assessee. The Assessing Officer on perusal of Profit & Loss Account noted that the assessee has credited a sum of Rs. 19,39,412/- as interest from Bank and NABARD Capital Gain Bonds. The assessee treated the same as Business Income in its computation of total income. The assessee was asked to explain as to why the income should not be treated under the head “Income from Other Sources”. The assessee in its reply contended that the interest includes, interest on NABARD Capital Gain Bonds of Rs. 16,17,200/- and Rs. 3,22,212/- represent interest on Bank Deposit. The sale of capital asset and investment of proceed with NABARD for tax exemption is part and partial of business activities of the assessee and cannot be regarded as “Income from Other Sources” merely because it is in the nature of interest. The contention of the assessee was not accepted by the Assessing Officer. The Assessing Officer concluded that assessee is not in the business of money lending for earning interest income.

The underlying source of income is not business. The contention of the assessee that investment out of sale proceeds of a capital asset can be a business was also not accepted. The Assessing Officer concluded that the nature of income and its head depend upon the underlying source of its investment made out of surplus funds. As there is no specified heads provided for such income, the same has to be assessed under the head "Income from Other Sources". The Id. CIT(A) while considering the contention of the assessee observed that while sale of shares (sale of asset of breweries), the assessee was not under legal obligation to purchase a capital bond. The assessee had option to pay tax and utilize the remaining fund for business purpose any other purpose as per their wishes. The assessee opted to purchase a capital bond, therefore, the possibilities of using it for business income have been ruled out by the assessee of its own. Thus, by any stretch of imagination, the interest income is neither a substitution of business income nor it is a decision under compulsion by the assessee. Thus, under the ordinary course and under the provisions of Income-tax, the income will be treated as per its nature and thus, under the head "Income from Other Sources". The assessee has not shown or filed any assessment order either for previous year or for subsequent year in granting different treatment of such interest income by the Revenue. Thus, we do not find any illegality or infirmity in the treatment of interest income under the head "Income from Other Sources". In the result, this ground of appeal is dismissed.

7. In the result, appeal of the assessee is dismissed.
8. In ITA No. 5131/Mum/2014, the assessee has raised the following grounds of appeal:

(1) The Learned C.I.T (Appeals) has erred in not cancelling the order imposing penalty of Rs.20,00,000/- passed by the Assessing Officer. The Appellant submits that on the facts and circumstances of the case, no penalty whatsoever is leviable under Section 271 (1) (c) of the Income Tax Act.

(2) The Learned C.I.T (Appeals) has erred in holding in Para 5.1 of his order that if 30% of the Annual Letting Value is allowed as deduction under Section under Section 24 in computation of income from house property, no expenses on account of legal fees for litigations in respect of the tenanted property can be considered as allowable under the head of "business" and if the appellant has claimed, it amounts to concealment.

(3) The Learned C.I.T (Appeals) has also erred in ignoring the well settled principle that mere change of head of income, under which the income is declared by an assessee and the head under which the income is assessed by the Assessing Officer, does not warrant levy of concealment penalty. The assessee declared the income earned in respect of NABARD Capital Gain Bonds under the head "Business Income", which the learned Assessing Officer has taxed under the head "Income from Other Sources". The assessee respectfully submits that this does not amount to concealment of income.

(4) The Learned C. I. T (Appeals) has erred in not appreciating the fact that "Particulars of Income" is not a mere arithmetic figure. What it connotes is the details of income or expenditure. Therefore, the learned C.I.T (Appeals) ought to have appreciated that when an assessee is required to upload the Return of Income electronically, the assessee has no scope to mention anything apart from the arithmetic figures which are required to be filled in while completing filling in of the Income Tax Return electronically. Therefore, the assessee does not get any opportunity to clarify the assessee's stand in respect of any deduction claimed at the time of filing the Return of Income or to furnish any additional particulars of income or expenditure. Therefore, it cannot be held as furnishing inaccurate particulars of income considering the changed scenario after introduction of E-filing of Tax Returns.

(5) The Learned C.I.T (Appeals) has also erred in holding that because only a small percentage of income tax returns are picked up for scrutiny by the Assessing Officer, it would give a free hand to the assessee to make untenable and unsustainable claims. The Appellant submits that there has to be an objective assessment of a case and only if provisions of a penalty section are attracted, can a penalty be imposed. Selective scrutiny assessments is a criteria adopted by the department and no adverse presumptions can be made against the assessee by that.

(6) The Appellant submits that in order to attract Explanation-I, it needs to be seen if the assessee is not in a position to offer any explanation or whether the explanation offered is either false or the assessee is not able to substantiate that

the explanation is bonafide and that all evidence relating to the same and the material to the computation have been disclosed by him. The Learned C.I.T (Appeals) has not given any consideration to this requirement of law.

(7) The Learned C.I.T (Appeals) failed to appreciate that after all an assessee is required to maintain the books of accounts as per the Accounting Standard and, therefore, the assessee is bound to debit all expenses to Profit and Loss Account irrespective of treatment given under the Income Tax Act to various items of income and expenditure. Therefore, merely because 30% of the rental income is deductible under Section 24, it does not automatically mean that the claim of expenditure in the Profit and Loss Account results in furnishing inaccurate particulars of income.

9. We have noted that the assessee has raised as many as seven grounds of appeal, however, as per our considered view, the substantial ground of appeal is “If the ld. CIT(A) erred in upholding the order of penalty levied by Assessing Officer under section 271(1)(c) of the Act”.
10. Brief facts as we have narrated above that the total income of the assessee was assessed under section 143(3) at Rs.159,39,355/- against the returned/disclosed of Rs. 125,31,779/-. The Assessing Officer made disallowance of total addition of Rs. 54,96,710/-. As we have already noted earlier, the addition/disallowance was confirmed by ld. CIT(A) in quantum assessment. And on further appeal before the Tribunal, the addition/disallowance on account of expenses and treatment of interest income under the head “Income from Other Sources” has been upheld by assessee in the preceding para.
11. The Assessing Officer initiated penalty under section 271(1)(c) and issued notice for filing inaccurate particulars of income vide notice 30.09.2010. After the dismissal of appeal before the ld. CIT(A), a fresh show-cause notice dated 07.01.2013 was issued to the assessee. In response to the notice, the assessee contended that the Assessing Officer has not doubted the genuineness of the

expenditure. Full details of expenses were furnished. There was no concealment of income or furnishing of inaccurate particular to attract the penalty. The contention of the assessee was not accepted by the Assessing Officer. The Assessing Officer concluded that the assessee declared the business loss with the intention to show more expenditure. The assessee claimed rental income, wherein it has already got benefit of expenditure by way of standard deduction and assessee should not have claimed the deduction on expenditure again. The claim of expenditure resulted in inaccurate particulars of income on incorrect facts. The Assessing Officer observed that the minimum penalty @ 100% on the income sought to be evaded is Rs. 181,39,184/- and maximum penalty @ 300% is Rs. 56,04,995/-. The Assessing Officer on his satisfaction quantified the penalty at Rs. 20,00,000/-. On appeal before the Id. CIT(A), the order of Assessing Officer was confirmed. Thus, further aggrieved, the assessee has filed the present appeal before us.

12. We have heard the Id. AR of the assessee and Id. DR for the Revenue and perused the material available on record. The Id. AR of the assessee submits that the assessee has neither concealed any particular of income nor furnished inaccurate particulars, all details, income, expenditure were disclosed at the time of furnishing return of income. Since, the Assessing Officer has taken a different view and disallowed the expenditure which cannot be a basis for levying the penalty. On the other hand, the Id. DR for the Revenue supported the order of authorities below. The Id. DR for the Revenue submits that the

Assessing Officer initiated penalty for filing inaccurate particular of income. The disallowance made by Assessing Officer was confirmed by First Appellate Authority.

13. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have also perused the assessment order. We have noted while making disallowance of the expenses, the Assessing Officer has not initiated penalty. The Assessing Officer at the end of assessment order noted "issue notice under section 274 r.w.s. section 271(1)(c) of the I.T. Act". We have noted that the Assessing Officer while making disallowance of expenses initiated penalty under section 271(1)(c) for furnishing inaccurate particulars of income and concealing of income. We have noted the Assessing Officer has not recorded its satisfaction that the assessee actively concealed the particular of income or intentionally furnished inaccurate particular. For no other disallowance except the disallowance of expenditure of Rs. 34,07,576/-, the penalty was initiated by Assessing Officer. In our view, when the assessee made the claim in its return of income, which the revenue authorities interpreted differently. This means that only on the facts, there was difference in opinion, as to how to characterise the claim related with head of income or the co-relation of expenditure vis-a-vis the activities of the assessee. In such a case, where there is a difference of opinion between the assessee and the Assessing Officer, no penalty is leviable. The Hon'ble Apex Court in CIT Vs Reliance Petroproducts

(P.) Ltd. [2010] 322 ITR 158(SC) held that merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the revenue, that, by itself, would not attract the penalty under section 271(1)(c). If the contention of the revenue was accepted, then in case of every return where the claim made was not accepted by the Assessing Officer for any reason, the assessee would invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature. Thus, in our considered view, the Assessing Officer was not justified in levying the penalty under section 271(1)(c) of the Act.

14. In the result, this appeal of the assessee is allowed.

Order pronounced in the open court on 20<sup>th</sup> day of April 2018.

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

Mumbai; Dated 20/04/2018

S.K.PS

Copy of the Order forwarded to :

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

Sd/-  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

BY ORDER

(Asstt.Registrar)  
**ITAT, Mumbai**