

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G', NEW DELHI**

**BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.4848/Del/2016
Assessment Year: 2009-10

ACIT, Circle-26(1), New Delhi	Vs.	M/s. Verve Engineering (P.) Ltd., C-148, Mayapuri Industrial Area, New Delhi
PAN :AACCV7364H		
(Appellant)		(Respondent)

Appellant by	Shri Shailesh Kumar, Sr. DR & Shri S.S. Rana, CIT(DR)
Respondent by	Shri Kapil Goel, Adv.

Date of hearing	16.10.2019
Date of pronouncement	13.12.2019

ORDER

PER O.P. KANT, AM:

This appeal by the Revenue is directed against the order dated 21.06.2016 passed by learned Commissioner of Income Tax (Appeals)-9, New Delhi, [in short 'learned CIT(A)'] for assessment year 2009-10 in relation to the penalty levied under Section 271(1)(c) of the Income-tax Act, 1961 (for short 'the Act') by the Assessing Officer. The grounds raised by the Revenue are reproduced as under:

1. *On the facts and in the circumstances of the case and in law, the Learned CIT(A) has erred :*
 - (i) *in deleting the penalty u/s 271(1)© of the I.T. Act on the addition of Rs.1,94,03,219/- made by the AO on account of interest paid disallowed.*
 - (ii) *in deleting the penalty u/s 271(1)© of the I.T. Act on the addition of Rs.1,13,50,138/- made by AO on account of income from other sources.*
2. *The appellant craves, leave or reserving the right to amend, modify, alter, add or forego any grounds(s) of appeal at any time before or during the hearing of this appeal.*

2. Briefly stated facts of the case are that during the assessment proceedings, the learned Assessing Officer made following additions:

- (i) *Interest claimed under Section 36(1)(iii) of the Act, amounting to Rs.1,94,03,2019/- was disallowed,*
- (ii) *The income from interest of Rs.1,13,50,138/- disclosed under the head 'business was shifted to income from other sources',*
- (iii) *expenses of Rs.61,191/- were disallowed.*

3. On further appeal, the learned Commissioner of Income Tax (Appeals) deleted the disallowance of Rs.61,1941/-. In respect of disallowance under Section 36(1)(iii) of the Act, thought the learned CIT(A) upheld the disallowance, he directed the Assessing Officer for netting of interest received against interest paid. On further appeal, the Tribunal reversed the finding of the learned CIT(A) on the issue of netting of interest received against the disallowance of interest under Section 36(1)(iii) of the Act. The assessee filed further appeal before the Hon'ble Delhi High Court where the appeal of the assessee has been admitted being substantial question of law involved. On partial confirmation of the appeal by the learned CIT(A), the Assessing Officer issued show-cause notice to the assessee for levy of penalty and vide his

order dated 27.03.2014, he levied the penalty in respect of additions upheld by the learned CIT(A). Further, against the order of levy of the penalty under Section 271(1)(c) of the Act, the assessee preferred an appeal before the learned CIT(A), who deleted the penalty, mainly on the ground that the issue was clearly debatable and, therefore, the Assessing Officer was not justified in levy of the penalty. The findings of the learned CIT(A) are reproduced as under:

2.2 I have considered the submission of the appellant and order of the AO and I find, the issue involved was that the assessee has claimed interest expense in P & L account of amounting to Rs. 19403219/- which was disallowed by the AO. The AO's finding was that the assessee company diverted and utilized these funds in making investments in equity shares of company. The AO held that the investment is made out of borrowed fund and no business activity was carried out. So, claim of the interest payment was disallowed and penalty was initiated u/s 271(1)(c). Further the assessee has shown interest income of Rs.11350138/- as business income which was treated by the AO as income from other source and levied the penalty u/s 271(1)(c) of the IT Act.

The order was contest before the CIT(A). The CIT(A) has passed order vide appeal 258/2011 dated 09.04.2012. The AO has mentioned the facts in the penalty order that addition Rs.61,191/- on account of expenses disallowed was deleted by the Ld. CIT (A) and other co additions were confirmed by the CIT on account of interest paid and income from other sources. Whereas the appellant has submitted that the appellate authority vide order dated 09.04.2012 partly confirmed AO's action but also directing netting of interest received. Subsequently assessee and revenue filed appeal/cross objection before the Hon'ble ITAT, Delhi and the Hon'ble ITAT decide the issue in favour of revenue. Assessee filed the appeal before the Hon'ble Delhi High Court who admit the issue as substantial question of law.

2.2.2 The appellant has argued that the issue is debatable. So penalty cannot be levied. I find that the CIT (A) has approved the theory of netting of interest paid and interest received where the Hon'ble ITAT has confirmed the order of the AO. It clearly shows that the issue is debatable. Further the appellant has filed an appeal u/s 260 A of the IT Act before jurisdictional High Court where the Hon'ble High Court framed and admitted on the substantial question of law. In this regard the Hon'ble ITAT has held in the case of Pawan Kumar Malhotra in ITA no. 5556/Del/2011 AY 2005-06.

"In the context of the appeals of the assessee we are of the considered opinion that the issue on hand is debatable, open and capable of having an

alternate view as the same is held to be representing a substantial question of law by the Jurisdictional High Court at the time of admission of appeal. Accordingly, it is appropriate for us to hold, that the assessee was under a bona fide belief for staking its claim and in the presence of these factors, no penalty under section 271(1)(c) is leviable. The Hon'ble Delhi High Court in the case of CIT vs. Liquid Investment Limited (I.T.A.No. 240/2009 vide its order dated 5.10.2010) has clearly held that where High Court has accepted substantial question of law u/s 260A, this itself shows that issue is debatable and in such a case no penalty was imposable u/s 271(1)(c) of the Income-tax Act, 1961. In view of the above, respectfully following the proposition laid down by Hon'ble Delhi High Court and Hon'ble Bombay High Court, as narrated above, we confirm the order of the Ld. CIT (A). Hence, the appeal of the department is dismissed."

Further the Hon'ble Karnataka High Court in the case of Harsha Billingady on 10.03.2015 in ITA no. 292/2014 held "We are also of the opinion that where penalty is imposed in respect of any addition where the high court has admitted the appeal on substantial question of law, then the sustainability of addition itself becomes debatable and in such circumstances penalty cannot be levied u/s 271(1)(c) of the Act."

Further, the Hon'ble High Court of Bombay has held in the case of Commissioner of income 2 versus Immortal Financial Services Pvt. Ltd that "the above facts coupled with the fact /" -at in quantum proceedings, the appeal u/s 260A of the Act has been admitted, this would by -self evidence that the issue is debatable Therefore penalty is not warranted. "

2.2.3 From the facts discussed above it is clear there are two views of the issue involved. On the issue of merit it is noticed that CIT (A) has in quantum proceeding had allowed net of interest paid and interest received which was subsequently disapproved by the Hon'ble ITAT and restore the order of the AO. Subsequently the Hon'ble High Court of Delhi has admitted the appeal of the assessee on the various substantial question of law mentioned above, which prove that the issue is clearly debatable. Once the issue is debatable, penalty is not leviable as held in the above cited decisions. So, respectfully following the ratio laid down in the above decisions and in view of the above facts the penalty levied is hereby cancelled."

4. Before us, the learned DR relied on the order of the Assessing Officer and submitted that the assessee has concealed its income by way of furnishing inaccurate particulars of income and, therefore, the Assessing Officer was justified in levy of the penalty.

5. On the contrary, the learned counsel of the assessee relied on the submission made before the learned CIT(A) and on the finding of the learned CIT(A).

6. We have heard rival submissions of the parties and perused the relevant material on record. As far as the levy of penalty in respect of change of head of 'interest income' of Rs.1,13,50,138/- from the 'profit and gains of business and profession' to 'income from other sources', is concerned, we find that the assessee has relied on the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Immortal Financial Services Pvt. Ltd. in ITA No. 2067/2013, wherein it is held that no penalty is leviable on mere change of head of income. Further, in respect of disallowance made under Section 36(1)(iii) of the Act, the assessee submitted before the learned CIT(A) that in quantum proceedings, the learned CIT(A) has granted relief by directing netting of interest income and thus, penalty levied by the Assessing Officer suffered from non-application of mind. The assessee has further submitted that mere filing of incorrect claim cannot invite penalty as held by the Hon'ble Supreme Court in the case of CIT Vs. Reliance Petro Products Pvt. Ltd., 322 ITR 158. The assessee also submitted that in view of decision of the Tribunal in quantum of proceedings, the claim of the assessee was in the nature of arguable and debatable claim. In view of the submissions of the assessee, the ld. CIT(A) has followed the decision in the case of Pawan Kumar Malhotra (supra), wherein the Tribunal has followed the decision of the Hon'ble Delhi High Court in the case of Commissioner of Income Tax Vs. Liquid Investment Ltd. (supra) that no penalty can be imposable when the issue is debatable.

The appeal filed by the assessee on disallowance of interest expenses have been admitted by the Hon'ble High Court. This fact is not under dispute. The issue of addition is thus debatable in nature. In our opinion, the ld. CIT(A) has followed the binding precedent on the issue in dispute and, therefore, we do not find any error in the order of the ld. CIT(A) and accordingly, we uphold the same. The grounds of appeal of the Revenue are accordingly dismissed.

7. In the result, the appeal of the Revenue is dismissed.

Order is pronounced in the open court on 13th December, 2019.

Sd/-
(H.S. SIDHU)
JUDICIAL MEMBER

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Dated: 13th December, 2019.

RK/-(D.T.D.)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi