

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

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO.445/MUM/2019 (A.Y: 2010-11)

ACIT Circle – 16(1) Room No. 439, 4 th Floor Aayakar Bhavan, M.K. Road Mumbai – 400 020	v.	M/s. United Home Entertainment Pvt. Ltd., 1 st Floor, Building No. 14 Solitaire Corporate Park Guru Hargovindji Marg, Chakala Andheri(E), Mumbai – 400 093 PAN: AAACU6681D
(Appellant)		(Respondent)

Assessee by : Shri Heman Chandariya

Department by : Shri Bheraram

Date of Hearing : 03.03.2020

Date of Pronouncement : 13.03.2020

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the Revenue against the order of the Learned Commissioner of Income Tax (Appeals) – 4, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 16.11.2018 for the Assessment Year 2010-11.

2. The only grievance of the Revenue in its appeal is that the Ld.CIT(A) deleted the penalty levied u/s. 271(1)(c) of the Act on the ground that

quantum additions/disallowance were deleted by the Hon'ble ITAT vide order in ITA.No. 1602/Mum/2015 dated 12.07.2017 for the Assessment Year 2010-11.

3. Learned Counsel for the assessee submitted that, in this case the Hon'ble Bench had deleted the additions/disallowances made in the Assessment Order passed u/s. 143(3) of the Act which was the basis for levying the penalty u/s. 271(1)(c) of the Act. Learned Counsel for the assessee submitted that since the Tribunal deleted the additions/disallowance in the quantum proceedings the penalty u/s.271(1)(c) of the Act will not survive and therefore the Ld.CIT(A) has rightly deleted the penalty.

4. Ld. DR vehemently supported the order of the Assessing Officer.

5. We have heard the rival submissions, perused the orders of the authorities below. It is the finding of the Ld.CIT(A) that the Tribunal had deleted the additions/disallowances made in the quantum proceedings in ITA.No. 1602/Mum/2015 dated 12.07.2017. The Tribunal in quantum proceedings deleted the addition observing as under: -

"5. We find that as far as the disallowance made by invoking the provisions of section 40A(2)(b) of the Act, the CIT(A) agreed with the assessee that the same cannot be applied in the absence of any market standard and Revenue has not preferred the appeal against this finding. It means that the deletion made by CIT(A) for disallowance under section 40A(2)(b) of the Act has become final.

The learned counsel for the assessee also drew out attention to Tribunal's order in assessee's own case for AY 2008-09, wherein Revenue's appeal was dismissed by the Tribunal on the very same issue by observing as under: -

"8. When we put it to the learned Departmental Representative as to how the conditions under section 40A(2)(b) are satisfied in this case, he did not have much to say beyond placing his reliance on the stand of the Assessing Officer. We can understand his plight. The stand of the Assessing Officer is indeed indefensible. As learned counsel points out, the efforts of applying disallowance under section 40A(2) on the notion of group entities, without specifically fulfilling the conditions set out in Section 40A(2)(b), have been repelled by Hon'ble High Court in the case of CIT Vs VRV Breweries & Bottling Industries Ltd [(2012) 347 ITR 249 (Del)]. While doing so, Their Lordships have, inter alia, observed as follows:

23. This brings us to the issue as to whether the AO could have invoked the provisions of s. 40A(2)(a) of the Act in the facts and circumstances of the present case. As is noticed in the earlier part of our judgment, the AO in the asst. yr. 1997-98 after recording that the shares of the assessee were held by six (6) entities goes on to observe that the assessee "became a subsidiary of Shaw Wallace Group of Companies"¹¹. There is no finding recorded by the AO that SWCL had acquired substantial interest i.e., 20 per cent or more of the share capital with attending voting rights, whether directly or beneficially. If that is so, then the provisions of s. 40A(2)(a) could not have got triggered. It is noticed that the CIT(A) in the asst yr. 1998-99 has returned a finding that there were five (5) limited companies apart from two (2) individuals who held shares in the assessee, but none of the entities adverted to, by the AO, both in the asst yr. 1997-98 and 1998-99 is SWCL As a matter of fact, the CIT(A) in asst yr. 1998-99 records that not a single share in the assessee is held by SWCL. The CIT (A) further records a finding of fact that, on a perusal of list of shareholders, it is clear that even the employees of SWCL did (sic-not) have ownership of a controlling share holding interest in the assessee. CIT(A) records that six (6) individuals held ten (10) shares each in the assessee while, one gentleman by the name of Mr. Suraj P. Gupta held 8,61,610 shares who was neither an employee of the assessee and nor was any payment made to Mr Suraj P. Gupta or his relative or

to a company of which he was a director. The CIT(A) went on to hold that, in the instant case, payments had not been made to persons specified under s. 40A(2)(b) and therefore, the provisions of s. 40A(2) were not applicable. Both CIT(A) as well as the Tribunal have also accepted the explanation given by the assessee with regard to difference in payment of bottling charges vis-a-vis Balbir Industries Ltd. and the assessee. The reference to which we have already made hereinabove. We find no perversity in the findings of the Tribunal and those recorded by CIT(A) in asst yr. 1998-99.

24. Therefore, for the foregoing reasons, we are of the view that the Tribunal in the impugned judgment and the CIT(A) in its order dt 15th May, 2000 passed in the asst yr 1998-99 has correctly appreciated the provisions of s. 40A(2) of the IT Act thus the contention of the Revenue even on this aspect has to be rejected.

9. In view of these discussions, as also bearing in mind entirety of the case, we approve the well-reasoned findings of the learned CIT(A) and decline to interfere in the matter."

Hence, the deletion by the CIT(A) on account of disallowance u/s 40A(2)(b) of the Act has become final and need no interference."

6. Since the addition made in the quantum proceedings was deleted by the Tribunal, the Ld.CIT(A) followed the order of the Tribunal and also the decision of the Hon'ble Supreme Court in the case of KC Builders [265 ITR 562] deleted the penalty observing as under: -

"Since the addition on which penalty was imposed by the Ld. AO is no more sustainable. 'In view of Hon'ble ITAT 'F' Bench judgement as discussed above therefore, no such penalty can be sustained. In support of its claim, appellant placed reliance on judgement of Hon'ble Apex Court in case of KG Builders (265 ITR 562, 569) wherein the Apex Court has laid down the principle that where additions made in the assessment order on the basis of which the penalty is levied are deleted, there remains no basis at all for levying the penalty and therefore is such a case no penalty can survive and the same is liable to be cancelled. Appellant further placed reliance on judgement of Hon'ble Jurisdictional High Court in case of Nandlal

& Co (341 ITR 646)(Bom), Brahmaputra Consortium Ltd. (348 ITR 339)(Del), P. Balasubramanian (354 ITR 116)(Mad).

Since the addition on which penalty was imposed is no more in existence, therefore, respectively following judgment of Hon'ble Apex Court in case of KG Builders (supra) and Jurisdictional High Court in case of Nandlal & Co. vs. CIT (supra), penalty of ₹.1,22,00,000/- imposed by AO is deleted and appeal of the assessee is allowed."

7. On a perusal of the order of the Ld.CIT(A) we do not find any infirmity in the order passed in deleting the penalty since the very basis for levy of penalty i.e. addition made in the assessment proceedings was deleted by the Tribunal and in which case penalty will not survive. Hence the Ld.CIT(A) rightly deleted the penalty. Thus, we confirm the order of the Ld.CIT(A) in deleting the penalty. Ground raised by the Revenue is rejected.

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

Order pronounced in the open court on the 13th March, 2020.

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai / Dated 13/03/2020
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

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.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mum