IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI

BEFORE PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER &
SHRI YOGESH KUMAR US, JUDICIAL MEMBER

ITA No.3794/Del/2019
(Assessment Year : 2006-07)

Shri Moni Kumar Subba 118, Subba Farm House, Vill. Sultanpur, Mehrauli Gurgaon Road Delhi – 110 030 **PAN No. AASPS 1484 J**	Vs.	**ACIT** Central Circle – 08, New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri R. S. Singhvi, C.A. Shri Satyajeet Goel, C.A. Shri Rajat Garg, C.A.
Revenue by	Shri Subhra Jyoti Chakraborty, CIT-D.R.

Date of hearing:	05.09.2024
Date of Pronouncement:	05.09.2024

ORDER

PER PRADIP KUMAR KEDIA, AM :

The captioned appeal has been filed by the assessee against the first appellate order of the Ld. Commissioner of Income Tax (Appeals) – 30, New Delhi dated 31.01.2019 arising from the penalty order dated 25.02.2015 passed by the Dy. Commissioner of Income Tax, Central Circle-29, New Delhi (hereinafter referred to as 'AO') under Section 271(1)(c) of the Income Tax Act, 1961 (the Act) concerning Assessment Year 2006-07.

2. As per the grounds of appeal, the assessee seeks to challenge imposition of penalty of Rs.8,18,54,817/- imposed under section 271(1)(c) of the Act.

3. When the matter was called for hearing, the learned Counsel for the assessee submitted that there is a chequered history involved in the case. The Assessing Officer in the quantum proceedings initially made three additions; (i). Addition on account of capital gains in respect of lease of land to M/s. Subba Microsystem Ltd. The AO treated the 'lease' as transfer of asset within the meaning of section 2(47) of the Act and consequent computed capital gains by holding refundable security deposits as sale consideration. Resultantly, LTCG of Rs.78,81,841/- and STCG of Rs.32,28,00,894/- was assessed as STCG. (ii) The AO also made certain additions under the head Income from house property by enhancing the rental income attributable to security deposits. (iii) Additions were made under section 2(22)(e) of the Act holding receipt of certain loans and advances as 'deemed dividend'.

4. The CIT(A) in the first appellate proceedings, deleted the additions on account of enhanced rental income and deemed dividend. The CIT(A) however upheld the additions under the head capital gains on first principles. For the purposes of quantification, the CIT(A) modified the methodology of capital gain taxation. The CIT(A) directed the AO to compute the capital gains on the touchstone of section 50C of the Act. Consequently, while giving appeal effect, the capital gains computed by the AO was substantially reduced to Rs.87,41,121/-. The action of the CIT(A) in the quantum proceedings was challenged before ITAT both by the assessee as well as revenue. The Co-ordinate Bench of ITAT in ITA No.4038/Del/2013 order dated 12th October, 2018 restored the quantification of capital gain tax adopted by the AO. As a result, the capital gain computed by AO was repositioned by virtue of the ITAT order.

The AO after giving appeal effect on the basis of CIT(A) order, assessed the taxable income wherein the capital gains were assessed at Rs.87,41,121/-, imposed penalty of Rs.29,42,260/- vide order dated 25.02.2015. However, based on the later findings of the ITAT in its order dated 12.10.2018, the CIT(A) re-determined the quantum of penalty at Rs.8,18,54,817/- as per the chargeable capital gains determined by the AO at the first instance.

5. In the backdrop, the learned Counsel pointed out that the assessee has challenged the imposition of penalty on capital gains arising from the first appellate order as pointed out hereinabove.

5.1 The learned Counsel for the assessee submitted that the penalty under section 271(1)(c) of the Act is not sustainable in law broadly on two counts; firstly, the capital gains determined to be taxable by virtue of the ITAT order was challenged under section 260A of the Act before the Hon'ble Delhi High Court. The learned Counsel adverted to an order dated 02.04.2024 passed by the Hon'ble Delhi High Court in ITA No.542/2019 to submit that the 'substantial question of law' raised by the assessee against the order of ITAT has been duly admitted by adjudication on merits. The learned Counsel thus submitted that as a legal corollary, the issue is not free from debate and requires examination of law and facts in correct perspective. Hence, an issue which may involve considerable debate should not *ipso facto* invite proceedings under section 271(1)(c) of the Act as per the established position of law. The learned Counsel further adverted to the judgment rendered by the Hon'ble Delhi High Court in the case of *PCIT vs. Harsh International Pvt. Ltd. 431 ITR 118 (Del)* to submit that the Hon'ble High Court in this case has held that the penalty cannot be levied where the substantial question of law has been admitted by the High Court as such admission

of appeal tantamounts to the issue being arguable and thus not susceptible to penalty. The learned Counsel also referred to the judgment delivered by the Hon'ble Bombay High Court in the case of *CIT vs. Nayan Builders & Developers [2014] 368 ITR 722 (Bom)* enunciating similar position of law which, in turn, has been followed by the Co-ordinate Bench in several cases. The learned Counsel thus vehemently assessed that imposition of penalty on arguable case is not justified under section 271(1)(c) of the Act on this count on a standalone basis.

5.2 Secondly, the learned Counsel submitted that the assessee has made disclosures of all relevant facts in issue which has been examined and reexamined at different levels before the AO, CIT(A) and ITAT. A mere different view on the disclosed facts by different authorities *per se* could not tantamount to 'furnishing inaccurate particulars of income' or 'concealment of particulars of income' in any manner. Thus, mere disallowance or additions in quantum proceedings *ipso facto* would not invite imposition of penalty under section 271(1)(c) of the Act.

5.3 The learned Counsel, in conclusion, thus submitted that the penalty imposed in the present case is unjust and improper and contrary to position of law annunciated by the Hon'ble Courts and Co-ordinate Benches.

6. The learned CIT-DR, on the other hand, relied upon the first appellate order and submitted that in view of the categorical finding of fact by the ITAT in the quantum proceedings, the penalty being in the nature of a civil liability, has been rightly imposed as a remedy for probable loss of revenue.

7. We have carefully considered the rival submissions and perused the material available on record. As noted above, while the Assessing Officer at the first instance, deemed transaction of lease as 'transfer' of capital asset under section 2(47) of the Act, the CIT(A) modified the action and imposed yet another deeming provision of section 50C of the Act and directed re-computation of quantum of capital gains. The ITAT in the second appellate proceedings restored the stance of the AO on the quantum of capital gains liable for taxation. On challenge by the assessee, the order of the Tribunal, in turn, has been admitted for adjudication and substantial question of law has been framed under section 260A of the Act. Thus, it is manifest from such background that issue involved towards determination of capital gains, if any is highly debatable. The judicial *dicta* in Harsh International and Nayan Builders (supra) has opined that imposition of penalty under section 271(1)(c) of the Act is not justified where the substantial question of law on the issue is found to be involved. Thus, the impugned penalty levied upon the assessee is not justified.

8. We also find force in the second plea of the assessee towards its *bonafide* in conduct in the given set of facts. The Assessing Officer has essentially invoked deeming provisions to assume lease as transfer. The CIT(A) has invoked section 50C of the Act to re-determine the quantum of deemed sale consideration on such deemed transfer. The ITAT has directed for computation of capital gains on deemed sale consideration being security deposits received by the assessee. As noted above, the Hon'ble Delhi High Court has admitted the controversy for adjudication on merits. Thus, the trappings of *bonafide* in the action of the assessee is self evident and does not call for any elaboration. In such situation, where all the relevant facts were available for consideration of the authorities for the purposes of determination of issue, it is difficult to endorse the imposition of penalty having regard to the judgment

rendered by the Hon'ble Supreme Court in the case of *CIT vs. Reliance Petro Products 322 ITR 158 (SC).* In the factual matrix, the statutory discretion vested with AO under section 271(1)(c) thus deserves to be exercised in favour of assessee.

9. Thus, judged from any angle, the impugned order passed by the learned CIT(A) cannot be upheld. The order of the CIT(A) is thus set aside.

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

Order was dictated and pronounced in the open court on 05.09.2024

Sd/-	**Sd/-**
(YOGESH KUMAR US)	**(PRADIP KUMAR KEDIA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 05.09.2024

*Priti Yadav, Sr. PS**

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI