

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "B" KOLKATA**

Before **Shri, P.K Bansal, Accountant Member** and
Shri Mahavir Singh, Judicial Member

ITA No.1029/Kol/2014
Assessment Year :2009-10

Ranglal Bagaria (HUF) 46, Strand Road, Kolkata . 700 001 [PAN No.AADHR 8942 M]	V/s.	Commissioner of Income Tax Kolkata- XV, Kolkata
अपीलाथ /Appellant	..	प्रत्यथ/Respondent

अपीलाथ क ओर से/By Appellant	Shri N.M. Bansali, Advocate & Shri M.D. Shah
प्रत्यथ क ओर से/By Respondent	Shri Ravi Jain, CIT-DR
सुनवाई क तारख/Date of Hearing	15-06-2015
घोषणा क तारख/Date of Pronouncement	15-06-2015

आदेश /O R D E R

PER P.K.Bansal, Accountant Member:-

This appeal has been filed by the assessee against the order of Commissioner of Income Tax-XV, Kolkata dated 29-03-2014 passed u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as the Act) for assessment year 2009-10.

2. We have heard rival submissions and carefully considered the same. We noted that in this case CIT has issued show cause notice u/s. 263 of the Act dated 24-03-2014 on the basis that Assessing Officer has dropped the penalty proceedings initiated u/s 271(1)© of the Act on the ground that it is a voluntary surrender by assessee and ultimately CIT set aside the order of AO and directed him to pass a speaking penalty order u/s 271(1))© of the Act.

After making further enquiries as has been directed by him. In our opinion, for invoking the jurisdiction u/s. 263 of the Act, both the conditions that the order passed by AO is erroneous as well as prejudicial to the interest of the Revenue must be satisfied. The AO in case takes a possible view. It cannot be said that the order passed by the AO is erroneous until and unless the order, the view taken by the AO is unsustainable in law. The order can also be regarded to be as erroneous if the AO has not made any enquiry or has not examined the issue in the impugned case, even though the Ld. DR vehemently relied on the order of CIT but could not adduce evidence before us that the action taken by the AO to drop the proceeding u/s 271(1)© of the Act was illegal. In this case, we noted that the AO has issued show cause to the assessee in respect of the penalty initiated u/s. 271(1)© of the Act. The assessee duly replied to the notice of the AO vide letter dated 27.01.2012 and gave the explanation that the sum of 14,11,817/- is not the income liable to taxation under the Income Tax Act as per the various courts decisions. But he offered the said amount for taxation vide letter dated 14.07.2011 to buy peace and multiplicity of the litigation. Therefore, in this regard, he relied on the decisions of jurisdictional High Court in the case of Commissioner of Income-Tax v. *Dhoolie Tea Co. Ltd.* (1998) 231 ITR 65 (Cal); decision of Hon^{ble} Supreme Court in the case of *Hindustan Steel Ltd. v. State of Orissa* (1972) 83 ITR 26 (SC); decision of Hon^{ble} jurisdictional High Court in the case of Commissioner of Income-Tax v. Calcutta Credit Corporation (1987) 166 ITR 29 (Cal); decision of Hon^{ble} Bombay High Court in the case of *Commissioner of Income-Tax v. Dharamchand L. Shah* (1993) 204 ITR 462 (Bom) and the decision of Hon^{ble} Supreme Court in the case of *Commissioner of Income-Tax v. Reliance Petroproducts Pvt. Ltd.* (2010) 322 ITR 158 (SC).

3. The AO after considering the explanation of the assessee as well as nature of the addition dropped the penalty proceeding vide order dated 27.02.2012 by observing as under:-

“Considering the written submission filed by the assessee and nature of addition, the penalty proceedings u/s. 271(1)© of the Act is hereby dropped.”

In view of this fact, we noted that the AO has duly examined the issue regarding the imposition of the penalty on the assessee and after considering the written submission of the assessee which was filed by the assessee on 24.02.2012 that it is not a fit case for levy of penalty and according he dropped the proceedings for the levy of penalty u/s. 271(1)© of the Act. It is not a case of lack of enquiry on the part of AO whether the penalty u/s. 271(1)© of the Act can be invoked; it is not a case where the AO without applying his mind just drop the proceeding initiated u/s. 271(1)© of the Act. In our opinion, the case of the assessee is duly covered by the decision of the Hon^{ble} Supreme Court in the case of *Malabar Industrial Co. Ltd. vs. CIT* 243 ITR 83 (SC) wherein their lordships has held as under:-

“The pre-requisite to the exercise of jurisdiction by the Commissioner under section 263 is that the order of the AO is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the assessing officer sought to be revised is erroneous; and (ii) is prejudicial to the interests of the revenue. If one of them is absent- if the order of the Assessing Officer is erroneous but is not prejudicial to the revenue – recourse cannot be had to section 263(1). There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the assessing officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase ‘prejudicial to the interest of the revenue’ has to be read in conjunction with an erroneous order passed by the assessing officer. Every loss of revenue as a consequence of the order of the assessing officer cannot be treated as prejudicial to the interests of the revenue, for example, if the assessing officer has adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the assessing officer has taken one view with which the commissioner does not agree, it cannot be treated as an

erroneous order prejudicial to the interests of the revenue, unless the view taken by the assessing officer is unsustainable in law. Where a sum not earned by a person is assessed as income in his hands on his so offering the order passed by the assessing officer accepting the same without application of mind as such will be erroneous and prejudicial to the interest of the revenue."

No contrary decision brought to our knowledge by the Ld. DR. In view of the aforesaid decision of Honble Supreme Court in the case of *Malabar Industrial Co. Ltd.* (supra) we quash the order passed by CIT u/s 263 of the Act.

3. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 15/06/2015

Sd/-
(Mahavir Singh)
(Judicial Member)
Kolkata,

Sd/-
(P.K.Bansal)
(Accountant Member)

*Dkp

दिनांक:- 15/06/2015 कोलकाता ।

आदेश का प्रतिलिपि अर्पित / Copy of Order Forwarded to:-

1. अपीलार्थी/ Appellant- Ranglal Bagaria (HUF), 3A, Hare St. Room No.303 Kol-001
2. प्रत्यर्थी/ Respondent-CIT-Kolkata-XV, 3 Govt. Place (W), Kolkata-001
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. क्षेत्रीय प्रमुख, आयकर अपील अधीकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्डफाइल / Guard file.

By order/आदेश से,
/True Copy/

उप/सहायक पंजीकार
आयकर अपील अधीकरण,
कोलकाता ।