

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "डी" मुंबई**  
**IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JM AND SHRI RAJESH KUMAR, AM**

आयकर अपील सं./I.T.A. No.1501/Mum/2015  
(निर्धारण वर्ष / Assessment Year : 2005-06)

M/s Diamond Investments and Properties, 1 <sup>st</sup> floor, Diamond Palace, Hill road, Bandra (W), Mumbai-400050	<b>बनाम/</b> <b>Vs.</b>	Income Tax Officer-19(3)(1), Mumbai (jurisdiction changed to ITO -23 (1), Mumbai.
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**स्थायी लेखा सं./ PAN :AADFD2804Q**

अपीलार्थी ओर से / Assessee by	Shri Hariom Tulsian
प्रत्यर्थी की ओर से/ Revenue by	Shri Shivaji Ghode

सुनवाई की तारीख / **Date of Hearing** : **9.11.2016**  
घोषणा की तारीख / **Date of Pronouncement** : **18.11.2016**

**आदेश / ORDER**

**PER RAJESH KUMAR, AM**

The appeal filed by the revenue is directed against the order dated 8.1.2015, passed by the CIT(A)-32, Mumbai, for the assessment year 2005-06.

2. Grounds of appeal taken by the assessee are as under :

*"1. On the facts and in the circumstances of the case and in law the Id. CIT(A) erred in confirming the penalty of Rs.49,17,063/- levied by the AO on addition made on the following grounds even though;*

*a) The department did not possess any incriminating material to establish concealment of income by the appellant and there was*

*nothing to support the case of the department other than suspicion to make an addition of Rs.24,46,000/-*

*b) The addition of Rs.1,02,49,074/- towards allotment of flat to erstwhile tenant was not established on facts to be non-genuine and the matter has been admitted by the High Court as an issue involving substantial question of law.*

*c) The disallowance of expenses of Rs.76,519 was not attributable to either concealment of particulars of income or of furnishing inaccurate particulars of income”*

3. At the outset, the Id. AR submitted before us that the issue raised in Ground No.1 is against the imposition of penalty by the AO and confirmation of it by the Id CIT(A) of Rs.49,17,063/-.

4. The Id. AR submitted before us that the additions as mentioned in Ground 1(a) and 1(b) Rs.24,46,000/- and Rs.1,02,49,074/- respectively, the quantum has been confirmed by the Mumbai Bench of the Tribunal against which the question of has been framed and admitted by the jurisdictional High Court. The Id. AR submitted that since the question of law has been framed and admitted by the Hon'ble Jurisdictional High Court the issues have become debatable and therefore the penalty be deleted and in advance of his arguments, the Id. AR placed reliance on the decision of jurisdictional High Court in the case of CIT V/s Nayan Builders and Developers (2014) 368 ITR 722(Bom). On the basis of this decision of Jurisdictional High Court, the Id.AR submitted that the penalty be deleted.

The Id. AR also submitted that the penalty has been imposed by the AO on the disallowance of expenses incurred by the assessee and paid to Arjun Centre on the ground that onus was on the assessee to prove the above claim as genuine and correct. Accordingly, levied penalty by invoking the Explanation 1 to section 271(1) (c) of the Act by holding that the assessee failed to offer any explanation or offered explanation which was false. The Id. AR further submitted that in a case of bonafide claim which is supported by the bills and vouchers and claimed under bonafide belief the said claim is admissible and the Explanation (1) to section 271(1) (c) cannot be applied. The Id. AR prayed that the penalty levied by the AO on the additions as stated in Ground No.1(a) and 1(b) be deleted on the ground that the substantial question of law has been admitted by the Hon'ble Jurisdictional High Court in respect of ground no. 1(a) and in respect of Ground No.1(b), the Hon'ble Supreme Court has directed the jurisdictional High Court to frame question of law. As regard the third addition of Rs.76,519/- which was genuine claim of the assessee as the assessee has disclosed full facts in the books of accounts. Therefore, the Explanation (1) to section 271 (1)(c) was not attracted be deleted accordingly. In support of his contention, the Id. AR has filed a copies of orders passed by the Hon'ble Supreme Court in assessee's own case in Civil Appeal N0.6559 of 2015 (arising out of SLP ( C ) No.24346 of 2015 CC 19339/14) stayed the action

of the Jurisdictional High Court. (2) in Income Tax Appeal No.14 of 2012 filed against the order passed in ITA No.5537/Mum/2009. He therefore, prayed that under the legal proposition the penalty imposed by the AO be deleted.

5. On the contrary, the Id.DR reiterated the facts of the case and supported the orders of authorities below.

6. We have considered the rival submissions and perused the material placed before us including the orders of authorities below including the orders relied upon by the parties. We have also considered the judgment of the Hon'ble Supreme Court in assessee's own case in Civil Appeal NO.6559 of 2015 (arising out of SLP (C) No.24346 of 2015 CC 19339/14) stayed the action of the Jurisdictional High Court by holding as under :

*"Delay condoned.*

*Leave granted.*

*Heard Mr. Parcival Billimoria, learned counsel for the appellant and Mr. Ranjit Kumar, learned Solicitor General for the respondent. Having heard learned counsel for the parties, we are of the considered opinion that the High Court should have framed the substantial question of law pertaining to the issue whether in the facts and circumstances of the case, the assessee had taken recourse to any kind of colourable device to evade the tax. The appeal stands allowed accordingly. No order as to costs".*

Respectfully following the decision of the Hon'ble Apex Court and the decision of the Jurisdictional High Court in the case of Nayan Builders and

Developers (supra), in respect of the addition raised in ground no. 1(a), we direct the AO to delete the penalty on the addition of Rs.24,46,000/-. We order accordingly.

7. With regard to the addition of Rs.1,02,49,074/-towards allotment of flat to erstwhile tenant, we have also considered the decision of jurisdictional High Court in this regard in assessee's own case in Income Tax Appeal No.14 of 2012 filed against the order passed in ITA No.5537/Mum/2009 wherein the High Court has admitted the appeal against the addition confirmed by the ITAT and therefore, the issue is pending before the Hon'ble Jurisdictional High Court for final disposal and the matter is become is sub-judice. The relevant portion of decision rendered in ITA No.14 of 2012 is reproduced below :

*"6.However, after having perused the orders of the Income Tax Appellate Tribunal and the Assessing Officer with regard to allotment of two flats to one Mr.Vinay Bhasin that we are of the opinion that in so far as the burden is concerned, that prima facie could not have been cast on the appellant and who have claimed that Mr.Vinay Bhasin was a tenant in the erstwhile structure. In that regard, having relied on the order of the Assessing Officer in the case of Vinay Bhasin, to that extent and going by the language of section 28 (iv) of the Income Tax Act, the appeal deserves admission as it raises substantial questions of law. It is therefore, admitted on this aspect and on the following substantial question of law:*

*"(i) Whether in law and in the facts and circumstances of the case, the view of the Hon'ble Tribunal that tenancy of Shri Vinay Bhasin is not genuine, is perverse being arrived at without considering the relevant documents on record?*

*(ii) Whether in law and in the facts and circumstances of the case, the Hon'ble Tribunal is justified in holding that the finding in the block assessment proceedings of Shri Vinay Bhasin that Vinay Bhasin was a tenant of the old building, is irrelevant?*

*(iii) Whether in the facts and circumstances of the case, the Hon'ble ITAT erred in not appreciating that the allotment of two flats to Shri. Vinay Bhasin free of cost cannot be taxed in the hands of the Appellant under Section 28(iv) or any other provisions of the Income Tax Act, 1961 ?"*

We find that the question of law has been admitted by the Hon'ble Jurisdictional High Court. Therefore, by following the same precedent laid down in the case of Nayan Builders and Developers (supra), we direct the AO to delete the penalty imposed on Rs.1,02,49,074/-

8. On the issue of disallowance of expenses of Rs.76,519/-, the disallowance of Rs.76,519/-, the assessee has paid a sum of Rs.76,519/- to M/s Arjun Centre and claimed expenses under bonafide belief and therefore, in our opinion the genuineness of the said claim of the assessee could not be doubted by the AO invoking Explanation (1) to Section 271(1)(c) of the Act to levy penalty is not correct. The assessee has incurred expenses and the recipient of payment is also stated to be made to M/s Arjun Centre. In the case of CIT V/s Reliance Petroproduct Pvt.Ltd -322 ITR 158 (SC), it has been held by the Hon'ble Supreme Court that the "*claim which may be wrong or not accepted or was not acceptable to revenue, that by itself would not attract penalty under section*

271(1)(c) of the Act." Accordingly, the order of the Id.CIT(A) cannot be confirmed on this issue. Accordingly, we direct the AO to delete the addition.

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

Order has been pronounced in the Open Court on 18.11.2016.

Sd  
**(MAHAVIR SINGH )**  
**Judicial Member**

sd  
**(RAJESH KUMAR)**  
**Accountant Member**

**मुंबई Mumbai; दिनांक Dated :18.11.2016**

Sr.PS:SRL:

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

**आदेशानुसार/ BY ORDER,**

True copy

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**  
**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**