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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 926/2017

PR. COMMISSIONER OF INCOME TAX, (CENTRAL)-3.
..... Appellant

Through: Mr. Zoheb Hossain, Sr. Standing Counsel.

versus

M/S. KOLKATTA HOTELS LTD ..... Respondent

Through: Mr. Rohit Kumar Gupta and Ms. Monika Ghai, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

O R D E R

% 10.01.2018

CM APPL. 39539/2017 *(for condonation of delay)*

For the reasons mentioned in the application, delay in re-filing the appeal is condoned.

CM stands disposed of.

ITA 926/2017

The Revenue's appeal impugns an order of the Income Tax Appellate Tribunal ('ITAT') setting aside the penalty under Section 271(1)(c) of the Income Tax Act, 1961 ('the Act'). It contends that the penalty set aside was based upon overlooking crucial and essential facts and the incorrect appreciation of the circumstances, with respect to the setting aside of the amount of Rs. 87,84,212/- added and brought to tax.

The facts necessary for deciding this case are that during assessment proceedings for Assessment Year (A.Y.) 2005-06, the Assessing Officer (AO) required the assessee to provide the details of the scrap sale. The assessee's books of account did not contain such transactions. The audit report however, contained a specific mention of payments for sales tax liability towards scrap sale. The assessee's AO therefore noted the unaccounted sales worth Rs.87,84,212/- and added that amount to the income and brought it to tax. The AO also initiated the penalty proceedings for furnishing incorrect particulars under Section 271(1)(c) of the Act.

The assessee's appeal reveals that the prayer for deletion of unaccounted sales was unsuccessful. The CIT(A) confirmed the addition and recorded the following findings:-

> *"As regard the appellant's contention that the documents did not pertain to its self certain facts merits attention. The first is that these two documents are enclosed with the bunch of almost 20 such papers and admittedly all the other documents other that these two have been accepted by the appellant to be pertaining to its self. The document relating to municipal taxes has been discussed earlier clearly pertains to the assessee company. Most of these documents appear to have been been faxed from the assessee's office at Kolkatta to the Office of Sh.* G.S. *Syal, CA, tax auditor. The document at page no. 73. The document on page No 73 is a photo copy of demand draft for payment of entertainment tax of M/s Kolkata Hotel. Several other documents are details of payment of TDS*

by the assessee company. As noted earlier, the document at page no. 74 and 78 mentions about payment of sales tax from 9th July, 2002 onwards. While the document at page no. 78 mentions that sales tax from 09-07-2002 to 18-10-2004 had been paid, the document at page no.74 contains the details of sales tax dues from 9th July, 2002 upto 18th Oct, 2005, as well as details of sales payment upto 31-03-2005. The date "09-07-2002" appears to have special significances as it is mentioned as the start date of sales tax dues on both the page74 and 78. Interestingly, page no. 78 alsomentions about the outstanding luxury I Entertainment tax from the period starting 09-07-2002 and f services tax also from the period started from 09-07-2002.

As per a letter filed by the assessee during the asstt. Proceedings on 27-12-2007 before the AO, the hotel run by the MBD Group prior to it being taken over by the DS group, the present owners, was handed over to the MBD group vide agreement dated 08-07-2002 after it was disinvested by the Govt. of India. As per the share purchase agreement dated 08-07-2002 between the President of India acting through the Joint Secretary, Ministry of Tourism, Govt. of India and MBD group and Kolkatta Hotel (P) Ltd, (a copy of which is placed in the asstt. record), the shares of the hotel were purchased by the MBD group and the assessee company become the owner of the hotel from this date. These facts indicate that the assessee company started running the hotel at Kolkattafrom 09.07.2007. These facts also corroborate the fact that the documents at page no. 74 and 78 of the return of income pertain to the assessee company its self. This is further corroborated by the fact that page no. 77 in the mentions that entertainment tax from entertainment tax payable till 08-07-2002 and page no. 78 also mentions that Service Tax from 09-07-2002 to 18-10-

2004 was paid page no. 78 is, thus, corroborated by reference to the expenditure tax on page no. 77. I am, therefore, of the view that the documents at page no. 74 and 78 pertain to the affairs of the assessee company its self which were sent by the assessee company to the auditors Sh. G.S. *Syal, CA for the purpose of the tax audit of the accounts for the year ended 31-03-2005. The appellant has not produced before the undersigned a copy of its sales tax accounts for the financial year 2004-05 with which the details of sales tax payment and payable amount mention by date on page no. 74 of the return could be corroborated. Nevertheless, in view of the facts that these documents have been furnished with the return of income their correspondence to other documents in the return of income, and the fact that they mention details about the sales tax dues and entertainment tax dues from 09-07-2002 onwards when the assessee company became the owner of the hotel at Kolkatta, I hold that the document represents the state of affairs of the assessee company."*

The addition made by the AO, and confirmed by the CIT(A), ultimately became final. The penalty proceedings culminated into inflicting an amount of Rs.87,84,212/- to tax. The CIT(A) rejected the assessee's appeal against the penalty taking note of the transaction, the returns filed and the previous findings of the appellate commissioner. The findings of the CIT(A) in the penalty proceedings are in para 3.8 of his order.

The ITAT by its impugned order, was of the opinion that the sum was deleted and consequently the penalty levied was unsustainable. It cited the judgment i.e. *'Commissioner of Income Tax* *vs. SSA Emerals Meadows',* in ITA No.389 of 2015 decided on 23.11.2015 by Karnataka High Court.

This Court has considered the records as well as the rival submissions. There is a clear error on the face of the record as to the appreciation of the circumstances by the ITAT. It is opined that the amount brought to tax was deleted by the CIT(A) in the previous quantum proceedings, is contrary to the findings rendered in actuality. On the other hand, CIT(A) sustained the addition that became final. In these circumstances, the ITAT should have considered the asseessee's appeal on the merits and the other grounds instead of allowing it summarily on the assumption that the quantum proceedings had concluded in its favour.

The Court is also of the opinion that both the AO and the CIT(A) in the penalty proceedings clearly proceeded on the assumption based upon the show cause notice that the assessee has provided incorrect particulars in the returns filed by it. Therefore, the ITAT assumed that no specific charge was made, also does not stand.

For the above reasons, the impugned order is set aside. The matter is remitted to the ITAT for considering the assessee's appeal on its merits and rendering fresh findings.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JANUARY 10, 2018/nn