IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 211 OF 2018

The Pr. Commissioner of Income Tax-9,
Aaykar Bhavan, M.K. Road,
Churchgate, Mumbai-400 020. ....Appellant

V/s

M/s. E-City Investments & Holdings
Company Private Limited,
844/4, Shah Industrial Estate,
Off. New Link Road,
Opp. Laxmi Industrial Estate,
Mumbai-400 053.
PAN No.AAACE8030F ....Respondent

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Mr.Suresh Kumar for appellant.
Mr.Ravi Sawana i/b Mr. Sriram Sridharan for respondent.

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CORAM : DHIRAJ SINGH THAKUR AND ABHAY AHUJA, JJ.
Date : 18th AUGUST 2022

PC :

1. This is an appeal under section 260A of the Income Tax Act, 1961 ('the Act') against the order dated 15th February 2017 passed by the Income Tax Appellate Tribunal, Mumbai ('ITAT') for the assessment year 2008-09, by virtue of which the Tribunal allowed the appeal preferred by the assessee and set aside the order, whereby penalty was levied under section 271(1)(c) of the Act.

2. The following question of law has been proposed for our consideration :

> "Whether on the facts and circumstances of the case, the ITAT erred in law deleting the penalty levied by the Assessing Officer u/s 271(1)(c) of the Income Tax Act thereby ignoring the provisions of section 271(1)(c) of the Act?"

3. Briefly stated the material facts are as under :

(a) The assessee filed its return of income for the relevant assessment year 2008-09 declaring a total business loss of Rs.1,75,537/-. Later on, a revised return was filed declaring a total loss of Rs.6,71,20,385/-. The return was processed under section 143(1) of the Act, and necessary order was passed under section 143(3)(ii) of the Act, after making among others, an addition of Rs.6,63,78,465/- on account of disallowance of interest under section 36(1)(iii) of the Act. According to section 36(1)(iii) of the Act, the amount of interest paid in respect of capital borrowed for the purposes of business or profession has to be allowed as a deduction in computing the income tax under section 28 of the Act.

The A.O. also initiated penalty proceedings under Section 271(1)(c) of the Act on the ground that the Assessee had furnished inaccurate particulars of income &

suppressed its real income by Rs.6,63,78,465. The A.O. finally levied a penalty of Rs.2,25,62,040.

(b) An appeal preferred by the assessee in regard to the issue of disallowance under Section 36(1)(iii) of the Act was dismissed by the CIT(A).

(c) The matter was further challenged by the assessee before the ITAT which allowed the quantum appeal by virtue of Order dad 3rd February 2016. The ITAT in the said order, while placing reliance *inter alia* upon the case of ***S.A. Builders Ltd. Vs. Commissioner of Income-tax (Appeals), Chandigarh*** [1], came to a conclusion that the money advanced by the assessee, as a holding company to its subsidiaries, was on account of 'business expediency', as the assessee had significant interest in the business of its subsidiaries, which was similar in nature. It was also held that no disallowance had been made in the assessment year 2007-08 or earlier, and therefore, while allowing the appeal filed by the assessee, it reversed the decision of the CIT(A).

4. It would be pertinent to mention that the Hon'ble Apex Court in the case of ***S.A. Builders Ltd.*** (Supra) held :

1 [2007] 158 Taxman 74 (SC)

> "24 In our opinion, the High Court as well as the Tribunal and other Income Tax authorities should have approached the question of allowability of interest on the borrowed funds from the above angle. In other words, the High Court and other authorities should have enquired as to whether the interest free loan was given to the sister company (which is a subsidiary of the assessee) as a measure of commercial expediency, and if it was, it should have been allowed."

5. This judgment was also followed by this Court in ***The Principal Commissioner of Income tax-9 Vs. M/s.E-City Investments & Holdings***[2]***.*** However, Ld. counsel for the respondent stated that the principles of law laid down in ***S.A. Builders Ltd.*** (Supra) by the Hon'ble Supreme Court were being reconsidered in the case of ***Additional Commissioner of Income-tax Vs. Tulip Star Hotels Ltd.*** [3]*,* and further that vide order dated 30th April 2012, the SLP preferred in the case of ***The Principal Commissioner of Income tax-9 Vs. M/s.E-City Investments & Holdings,*** had been directed to be tagged along with ***Tulip Star Hotels Ltd.*** (Supra).

6. In so far as penalty proceedings are concerned, an appeal preferred by the assessee before the CIT(A) came to be dismissed vide Order dated 28th Mach 2013 & the penalty of Rs.2,25,62,040/- was upheld.

7. Finally the assessee filed an appeal before the Income Tax

2 Income Tax Appeal No.213 of 2017 dt. 22nd April 2019.
3 [2012]21 taxmann.com 97 (SC)

Appellate Tribunal, Mumbai Bench "E", which was allowed by virtue of the order dated 15th February 2017, on the ground that since the quantum appeal of the assessee had been allowed and the order of CIT (Appeals) reversed, the order confirming the penalty levied by the Assessing Officer did not survive. The Tribunal accordingly deleted the penalty of Rs.2,25,62,040/- levied under section 271(1)(c) of the Act.

8. Counsel for the appellant urged that since the SLP preferred by the revenue against the order of the Tribunal, dated 3rd February 2016 was pending before the Hon'ble Supreme Court, and the ratio of the judgment in the case of ***S.A. Builders Ltd.*** (Supra) was being reconsidered as held by the Hon'ble Supreme Court in the case of ***Tulip Star Hotels Ltd.*** in its order dated 30th April 2012, it was not open to the Tribunal to delete the penalty levied under section 271(1)(c) of the Act.

9. Counsel for the respondent, on the other hand, urged that the question of law which has been proposed for consideration by the revenue in the present appeal, in fact, would not get affected by the ultimate decision that might be rendered by the Hon'ble Apex Court in the aforementioned two matters pending before it as making unsustainable claim could neither amount to concealment nor amount to furnishing inaccurate particulars of income.

10. Reliance was placed upon the judgment of Hon'ble Supreme Court in the case of ***Commissioner of Income-tax, Ahmedabad Vs. Reliance Petroproducts (P.) Ltd.*** [4] to buttress the point that a mere making of a claim which was not sustainable in law by itself would not either amount to concealment of income or furnishing inaccurate particulars of income in terms of section 271(1)(c) of the Act. In the aforementioned judgment the Apex Court held :

> "10............. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the Legislature."

11. In the present case, it can be seen that penalty proceedings had been initiated against the assessee only on account of the fact that the deduction, which was claimed by the assessee had been disallowed. The issue being squarely covered by the judgment of the Hon'ble Apex Court in the case of ***Reliance Petroproducts (P.) Ltd.*** (Supra), no substantial question of law, as proposed, arises in

4 [2010] 189 Taxman 322 (SC)

the present case.

12. The appeal is dismissed. No order as to costs.

[ABHAY AHUJA, J.] **[DHIRAJ SINGH THAKUR, J.]**