आयकर अपीलीय अधिकरण "ए" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

श्री संजय अरोड़ा, लेखा सदस्य **एवं** श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI SANJAY ARORA, AM AND SHRI AMIT SHUKLA, JM

आयकर अपील सं./I.T.A. No. 258/Mum/2011

(**निर्धारण वर्ष /** Assessment Year: 2005-06)

Shubhmangal Portfolio Pvt. Ltd. B-1, Tulsi Vihar, Dr. A. B. Road, Worli Naka, Mumbai-400 018	**बनाम**/ Vs.	CIT, City-7, Aayakar Bhavan, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AABCS 1968 D		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Nishit Gandhi
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Asghar Zain

सुनवाई की तारीख / **Date of Hearing**	:	26.02.2015
घोषणा की तारीख / **Date of Pronouncement**	:	13.03.2015

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-13, Mumbai ('CIT(A)' for short) dated 09.09.2010, confirming the levy of penalty u/s.271(1)(c) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2005-06 vide order dated 30.01.2008.

2. Opening the arguments furnished for and on behalf of the assessee, it was submitted by the ld. Authorized Representative (AR), the assessee's counsel, that penalty stands levied in the instant case *qua* two additions/disallowances, i.e., assessment of rental income as 'income from house property' as against 'business income' returned by the assessee and, two, disallowance u/s. 14A. In fact, therefore, the first is only a recategorisation of the assessee's income. Surely, a different treatment of the same

income, particulars of which have been duly returned as rental income, should not entail levy of penalty u/s. 271(1)(c) in-as-much as there is no concealment or furnishing of inaccurate particulars of income. As regards the second disallowance; true, the assessee had not made any *suo motu* disallowance of expenditure u/s. 14A *qua* the dividend income of Rs.8,56,036/-, but then the fact of the matter is that no expenditure had in fact been incurred by the assessee against the said tax-exempt dividend income, investment in respect of which stands made in the past. No penalty could be levied on the basis of a presumption alone.

The ld. Departmental Representative (DR) would, on the other hand, submit that in-as-mush as the adjustments to the returned income have tax implications, the same would carry penalty implication as well, as that is what, i.e., a deterrence for evasion of tax, the levy of penalty u/s. 271(1)(c), a civil liability, is all about.

3. We have heard the parties, and perused the material on record. We shall take up each of the two adjustments to the returned income *qua* which penalty stands levied and confirmed in the instant case, separately, as under:

a) Assessment of rental income as income from house property

The assessee's argument supra of the same being only a differential treatment of the very same, i.e., rental, income, so that there has been thus neither any concealment nor furnishing of inaccurate particulars of income, though appealing, is misconceived. The reason is simple. Yes, the assessee has apparently stated the quantum and nature of the income correctly. However, penalty u/s 271(1)(c) is not only *qua* the misstatement of fact/s but also of law. When the law is clear and well settled, as in the facts of the present case, the so called 'differential treatment', which the law does not admit of, i.e., *qua* the admitted nature of the income, is only admittedly a wrong claim in law. This is more so where the said claim has tax implication. Income has to be necessarily computed under separate, mutually exclusive heads of income, allowing deductions as per the computational provisions of the respective head of income, and toward which the Assessing Officer (A.O.) has relied on *United Commercial Bank Ltd. vs. CIT* [1957] 32

ITR 688 (SC) and *CIT vs. Chugandas and Co.* [1965] 55 ITR 17 (SC). In fact, the 'differential treatment' would be rendered as of no consequence, so that no penalty could be levied, where it carries the same or a similar tax burden; the whole premise thereof being only a lesser tax liability, so that whole issue therefore boils down to whether it is the case of tax avoidance, which is legally permissible, or of tax evasion, which the law seeks to penalize, and which therefore has to be adjudged on the basis or edifice of the assessee's explanation for its adopted treatment. The term 'differential treatment', which is thus to be examined on the touchstone of the validity or plausibility, or otherwise, of the legal claim, carries no legal meaning in itself. *How could, one may ask, the assessee justify its' claim of the declared nature of the income as 'rent', when it declares as it as 'business income', claiming all expenses there-against*? That is, could it be said that the assessee has furnished accurate particulars of income when it, *de hors* settled law, claims all regular, business expenditure, including depreciation on building, there-against, so that the assessee's claim of having stated 'fact/s' correctly is also highly suspect. In fact, the tax implication in the instant case arises only on account of and, further, despite the fact that rental income is subject to a statutory deduction for repairs @ 30% of rental value, which stands allowed (refer para 3(b)), the claim/s of such expenditure.

True, it would be a different matter altogether where the assessee has an arguable case and, thus, a plausible explanation on facts, for returning the income thus, i.e., as business income, as where the letting is complex, forming part of a composite activity. No such contention has been raised, much less exhibited. The assessee's case, both in the quantum and the penalty proceedings has been that it had allowed the user of a part of its premises, i.e., which was not being used for its business purposes, by its sister concerns, M/s. Hind Aluminum and M/s. Nirav Commercial Ltd., for a compensation, and which must therefore be considered as, or as a part of, its business income in-as-much as the same represents or arises by way of exploitation of a business asset. The argument, though attractive, is misconceived. The law, per section 22, seeks to bring to tax the inherent hereditament of a house property to yield profit, which is defined as its 'annual value', also prescribing the manner for its determination, to tax. As such, where his house

property is not being used by an assessee for his own business or profession, its' annual value is liable to tax, which thus is on the deemed income from a property, and not a tax on the property itself (refer: *Chelmsford Club vs. CIT* [2000] 243 ITR 89 (SC)). That profit stands actually realized in the instant case by letting it, which is thus not considered under the Act as a business in itself, is only incidental, and only in realization of that inherent potential. The identity of the tenant or the user of the property, i.e., a sister concern or not, is irrelevant. The house property so let is, to that extent, in fact, no longer, or ceases to be, a business asset. The apex court as far back as in *Sultan Brothers (P.) Ltd. vs. CIT* [1964] 51 ITR 353 (SC) clarified that whether a particular letting is business has to be decided in the circumstances of each case, while no such case, as observed earlier, has been made out. As regards the argument of the house property being a commercial asset, it was clarified by it that a thing is not by its very nature a commercial asset. The commercial asset is only an asset used in a business and nothing else, and business may be carried on with particular all things. Therefore, it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on. The plea of 'differential treatment' is thus an *alibi* or a false plea, and not valid, both on facts and in law. This would also meet the assessee's reliance on the decision, where so, on *CIT vs. Reliance Products (P.) Ltd.* [2010] 322 ITR 158 (SC), and toward which we may rely on the decisions in the case of *CIT vs. Zoom Communication (P.) Ltd.* [2010] 327 ITR 510 (Del.); *CIT vs. Escorts Finance Ltd.* [2010] 328 ITR 44 (Del); and *CIT vs. Usha International Limited* [2013] 214 Taxmann.com 519 (Del), besides *Mak Data (P.) Ltd. vs. CIT* [2013] 358 ITR 593 (SC).

Coming to the assessee's reliance on other case law, i.e., *qua* the assessment of rental income either u/s. 28 or u/s. 56, i.e., as 'business income' or as 'income from other sources', we have already noted absence of any circumstances which could in law admit of such a claim, for which the law itself provides for under certain circumstances, specified in section 56(2) (iii). Further, even as observed and admitted by the ld. AR during hearing, all the case law relied upon is prior to the decision by the apex court in *Shambhu Investments vs. CIT* [2003] 263 ITR 143(SC). In fact, per the said decision,

apex court only follows its' constitutional bench decision in *Sultan Brothers Pvt. Ltd.* (supra), and is in conformity of its earlier decisions, as in *East India Housing and Land Development Trust Ltd. vs. CIT* [1961] 42 ITR 49 (SC). The matter with regard to the taxability of rental income, whereby the law seeks to bring to tax the rental or the hire capacity of a house property, irrespective of whether it is actually let and, thus, yields rent or not, stands settled per a series of decisions, including those cited supra, as in *D. M. Vakil vs. CIT* [1946] 14 ITR 298 (Bom); *Liquidator of Mahamudabad Properties (P.) Ltd.* vs. CIT [1980] 124 ITR 31 (SC); *Bhagwan Dass Jain vs. Union of India* [1981] 128 ITR 315 (SC) (at pg. 320), to cite some.

In our view, therefore, penalty stands rightly levied *qua* the assessee's claim of rental income as business income. We decide accordingly.

b) Disallowances u/s. 14A

We are, equally, unable to fathom the Revenue's case in respect of levy of penalty *qua* this disallowance. The reason is again simple. The *suo motu* disallowance could only be made by the assessee in the computation of business income, which does not survive for assessment; the rental income being assessed u/s.22, and against which only specific, statutory allowances/claims, which have nothing in common with the administrative expenses disallowable *qua* the dividend income, are valid. In sum, there is absence of any tax sought to be evaded in the facts and circumstances of the case, which would be apparent from the computation of assessed income, as under: (Amount in Rs.)

Income from house property			
Office premises at Lower Parel			
Rent Received		3,60,000	
Less: Deduction u/s.24(a) @ 30%		1,08,000	2,52,000
Income from Business			
Net Profit (As per statement of income)		(-) 8,92,420	
Less: Income considered separately			
Rent received		3,60,000	
		(-) 12,52,420	
Add: As discussed above:			
Depreciation on Office premises	2,98,010		
Society Maintenance Charges	16,360		

Proportionate expenditure (u/s.14A)	9,38,050	12,52,420	Nil
Total income			2,52,000

No penalty, accordingly, *qua* disallowance u/s. 14A, which is clearly missing in the computation afore-stated, shall arise. We, therefore, though of the clear view that no penalty *qua* the said disallowance could arise in the facts and circumstances of the case, may clarify that our reason for so holding is wholly different from the basis on which the assessee argued its case before us, i.e., of the disallowance u/s. 14A being made on the basis of a presumption. Why, no addition /disallowance, much less penalty, could be effected on the basis of a presumption, unless of course it has a sound basis on facts and is well supported by law, in which case the statutory presumption has to be given effect to. We decide accordingly.

4. In the result, the assessee's appeal is partly allowed.
परिणामतः निर्धारिती की अपील आंशिक स्वीकृत की जाती है ।

Order pronounced in the open court on March 13, 2015

Sd/- Sd/-

(Amit Shukla) (Sanjay Arora)

न्यायिक सदस्य / Judicial Member लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 13.03.2015

व.नि.स./Roshani, Sr. PS

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,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**