

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A" NEW DELHI

BEFORE SHRI S.V. MEHROTRA : ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE: JUDICIAL MEMBER

ITA no. 6058/Del/2015

Asstt. Yr: 2009-10

Wave Impex Pvt. Ltd., Vs. Income-tax Officer,
E-696, LGF Chittranjan Park, Ward 18(2), New Delhi.
New Delhi.
PAN: AAACW 6046 P
(Appellant) (Respondent)

Appellant by : Shri V.K. Sabharwal Adv.
Assessee by : Sh. T. Vasantan DR

Date of hearing : 07/04/2016.

Date of order : 26/04/2016.

ORDER

PER S.V. MEHROTRA, A.M:

This is assessee's appeal against the order dated 3.9.2015 passed by the CIT(Appeals)-IX, New Delhi in appeal no. 244/14-15, confirming the levy of penalty of Rs. 5,71,600/- levied by the AO u/s 271(1)(c) of the Income-tax Act, 1961, relating to AY 2009-10.

2. Brief facts of the case are that the assessee company, in the relevant assessment year, was engaged in the business of investment and development of real estate. It had filed return of income declaring total loss of Rs. 10,46,349/-. The AO observed that assessee had not started its business activities. He further observed that during the year assessee had

income only from bank interest, the amount being Rs. 5,01,797/-. There were expenses to the tune of Rs. 15,46,436/- and, therefore, assessee had filed return at a loss of Rs. 10,46,349/-. He noted from the books of a/c that the book value of Zuari River Land, Goa was reduced as on 31.3.2009 from Rs. 5,03,07,820/- (as on 31/3/2008) to Rs. 4,13,57,820 (as on 31/3/2009). He, thus observed that there was a difference of Rs. 89,50,000/- in the value. He examined the ledger account of Zuari River Land, Goa and noted that as per the ledger account of Zuari River Land, Goa, there was a credit of Rs. 1 crore. He, therefore, show caused the assessee to explain as to why the difference of Rs. 10,50,000/- be not deemed as sale proceed of Zuari River Land, Goa and brought to tax. After considering the assessee's submissions, as reproduced at page 2 of the assessment order, he made an addition of Rs. 10,50,000/-.

3. He further made an addition of Rs. 8 lakh which was on account of commission expenses claimed by assessee as revenue expenditure. The AO was of the opinion that this expenditure was capital in nature.

4. The AO initiated penalty proceedings u/s 271(1)(c) in respect of both the additions and levied a penalty of Rs. 5,71,600/- as assessee did not attend the proceedings. Ld. CIT(A) dismissed the assessee's appeal. Being aggrieved, the assessee is in appeal before us and has taken following grounds of appeal:

"1. That the penalty order passed on 21.03.2014 U/S 271 (1)(c) of the Act, are perverse to the provisions of law and to the facts of the case, because no finding if any has been given as per the provisions of law contained uls 271 (1)(c) of the Act, prior to levy the penalty ofRs.5716001-.

2. *That the penalty order passed is further illegal and bad in law because no satisfaction if any has ever been recorded by the Assessing Officer as the legislature intends prior to initiate the penalty proceedings in a mechanical manner.*
3. *That the penalty orders passed are further illegal as not tenable because the Assessing Officer has failed to appreciate that the deductions claimed were not tantamount to either concealment of income or furnishing its inaccurate particulars thereof, for which the penalty has been initiated U/S 271(1)(c) of the Act, in a mechanical manner without recording any satisfaction thereof.*
4. *That the penalty orders passed are further wrong as not tenable, because the Assessing Officer has also not adjudicated the provisions of law contained under Explanation-1 of Section 271(1)(c) of the Act, prior to levy the penalty.*
5. *That the penalty orders passed are further bad in law because no proper opportunity if any has ever been afforded by the Assessing Officer prior to levy the penalty of Rs. 5716001-uls 271(1)(c) of the Act, as the notices alleged to be issued for 17.02.2014 and 25.02.2014 by the Assessing Officer were not received 1 served to the appellant.*
6. *That the Ld. CIT(A) was also not justified and had erred in law to uphold the penalty of Rs. 571600/- on the ground that there is no requirement of law to records satisfaction by the Assessing Officer prior to initiate the penalty as there is no any specific Performa available with him, as discussed by him under Para-3 of the Appellate Order.*
7. *That the Ld. CIT(A) was further not correct under the law to hold that the decisions cited and relied upon by the appellant of the Hon'ble Delhi High Court on recording of satisfaction prior to initiate the penalty are distinguishable.*

8. *That the penalty orders passed are also bad in law because the CIT(A) has failed to adjudicate the submission filed by the appellant during the course of hearing with citation of decisions given by the Hon'ble High Court of Delhi even by the Larger Bench of Hon'ble High Court of Delhi on the identical issue in favour of the appellant.*

9. *That while passing the penalty order the Ld. CIT(A) failed to rely upon the information provided, documents produced, filed and placed upon records as he has only relied upon the contents of the Assessing Officer appearing in the penalty order.*

10. *That the appellant assessee assails his right to amend, alter or change any grounds of appeal at any time even during the course of hearing of this instant appeal”.*

5. Ld. counsel for the assessee submitted that AO did not record the requisite satisfaction as contemplated u/s 271(1)(c). He further submitted that the penalty has been levied qua two issues- first being deemed sale consideration and second commission paid by assessee being treated as capital in nature. Qua first issue ld. counsel pointed out that since there was no execution of sale-deed during the year, ownership did not pass and, therefore, there was no question of any deemed sale. As regards commission expenses, ld. counsel submitted that commission was paid for making investment in Sinqerm Land in Goa and, therefore, this was treated as revenue expenditure.

6. Ld. counsel further pointed out that no appeal was filed against quantum addition and, therefore, the observations of ld. CIT(A) in para 4.2 are not correct.

7. Ld. DR relied on the order of Id. CIT(A).

8. We have heard rival submissions and perused the record of the case. As far as the assessee's plea relating to non-recording of satisfaction by AO, as contemplated u/s 271(1)(c), is concerned, we do not find any merit in the same because, as rightly observed by Id. CIT(A), there is no specific proforma for recording satisfaction. Since the AO had discussed facts in detail and then levied the penalty, therefore, this plea of assessee is devoid of any merit. Further, by Finance Act, 2008 with retrospective effect from 1.4.1989, clause (1B) has been inserted to Explanation 7 to section 271(1)(c), which reads as under:

“(1B) Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and the said order contains a direction for initiation of penalty proceedings under clause (c) of sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c).”

9. In the present case, AO has initiated penalty proceedings in the assessment order. Therefore, these grounds are dismissed.

10. As far as penalty qua addition of Rs. 10,50,000/- is concerned, we find that the facts are not clear from the record as to when the sale deed was actually executed. In the assessee's submissions, as reproduced at page 2 of the assessment order, the sale-deed referred to is with reference to Baga Land, Goa.

11. Under such circumstances, we restore this issue to the file of AO to examine afresh the factual aspects. If on verification AO finds that no sale was concluded during the year, then no penalty can be levied on the basis of deemed sales. In the result penalty qua addition of Rs. 10,50,000/- is set aside to Id. AO for the limited purpose of finding out the date of final execution of sale deed.

12. As far as addition of Rs. 8 lacs is concerned, we find that admittedly assessee company was engaged in the business of investment and development of real estate and had made fresh investment in Sinqerm Land, Goa of Rs. 2,13,54,940/-. The AO was of the opinion that this commission expense should have been capitalized in the cost of acquisition of Sinqerm Land, Goa, because of following reasons:-

- (a) During the year there were no receipts from this business.
- (b) The payment of commission was towards building basic frame work of the profit making apparatus.
- (c) The impugned amount was outside the purview of section 37 and was incurred in connection with bringing the actual asset into existence and to put it in a ready condition.

13. In the present context this reasoning cannot be sustained merely because there was no business receipt. AO has himself observed that assessee was engaged in the business of investment and development of real estate.

14. Even if the commission was to be capitalized in the cost of land, still it was allowable as a purchase consideration on being sold. Under such circumstances, it cannot be said that assessee had advanced a false claim

before the revenue authorities. The main reason for treating it as capital in nature by AO was that assessee did not start its business activities. It is not doubted that assessee had set up its business and under such circumstances no penalty for concealment or furnishing of inaccurate particulars can be imposed on this count.

15. In the result, assessee's appeal stands allowed for statistical purposes accordingly.

Order pronouncement in open court on 26/04/2016.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 26/04/2016.

MP

Copy of order to:

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.

Sd/-
(S.V. MEHROTRA)
ACCOUNTANT MEMBER