

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI**

BEFORE SHRI R.C. SHARMA(AM) AND SHRI SANDEEP GOSAIN (JM)

**ITA Nos. 165 & 167/MUM/2014
Assessment Years: 2003-04 & 2004-05**

ITO 25(1)(4)
R.No. 308, 3rd Floor,
C-10 Pratyakshkar Bhavan
Bandra Kurla Complex
Bandra (E), Mumbai

Vs.

Sh. Narendra K. Sodhi,
1 Yashodhan,
Chandavarkar Rd,
Borivali (E)
Mumbai - 400051

PAN No. AAJPS9126J

(Appellant)

(Respondent)

Appellant by : Shri. Randhir Gupta
Respondent By : None

Date of Hearing : 25/07/2016

Date of pronouncement : 29/07/2016

ORDER

PER SANDEEP GOSAIN, JM :

Both the appeals are filed by the Revenue against the order of Ld. CIT(A)-35, Mumbai, dt. 14/10/2013. ITA No. 165/Mum/2014 relating to Assessment Year 2003-04 and ITA No. 167/Mum/2014 relating to Assessment Year 2004-05 are against the order of CIT(A) deleting the penalty levied by AO upon the assessee.

2. First of all we shall take up appeal No. 165/Mum/2014 for Assessment Year 2003-04 in which following grounds have been raised:

i) " On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not considering the fact that the assessment was not set aside de nova by the Hon'ble ITAT but for limited purpose of verification of expenses."

ii) " On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s 271(1)(c) without appreciating the fact that the order passed u/s 143(3) r.w.s 254 of the Act has already been passed on 31/10/2012 by the AO and the addition made in original assessment has been retained."

iii) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s 271(1)(c) of the Act, while the quantum addition exists in the order passed u/s 143(3) r.w.s 254 of the I.T. Act."

iv) " The appellant prays that the order of Ld. CIT(A) on the above grounds be set aside and that of the AO be restored."

Since all the grounds raised by the Revenue are interconnected and interrelated therefore we deem it proper to adjudicate these grounds together. These grounds of appeal of the Revenue relates to deleting the penalty by Ld. CIT(A).

3. Brief facts of the case are that the assessment under s. 143 r.w.s 147 of the Income Tax Act, 1961 was completed on 24/12/2008, wherein the total income of the assessee was assessed at Rs. 1,02,54,300/- as against returned income of Rs. 5,41,235/-.

The major addition made by the AO in the case of the assessee is on account of gross profit. In the light of detailed discussion made in the order of assessment passed by the AO and against the additions, the assessee went in appeal before the Ld. CIT(A) however the CIT(A) while deciding the appeal filed by the assessee in his favour, directed the AO to allow expenses. Thereafter penalty proceedings were initiated against the assessee under s. 271(1)(c) of the Income Tax Act, and the order of penalty thereby levying penalty of Rs. 30,36,310 /- was passed by ITO under section 271(1)(c) of the Act.

4. Aggrieved by the order of levy of penalty, the assessee preferred appeal before the Ld. CIT(A) and the CIT(A) allowed the appeal thereby deleting the penalty.

5. Aggrieved by the order of Ld. CIT(A), the assessee has preferred the appeal before us on the grounds mentioned herein above.

Before we decide the merit of the case, it is necessary to evaluate the orders passed by the Ld. CIT(A) while dealing with the said grounds. The operative para of the CIT(A) order is reproduced below:

3. *Against the above addition, the assessee went in appeal before the Ld. CIT(A)-XXV, Mumbai who in turn vide order dated 12/06/2009 in Appeal No. CIT(A)-XXV/ACIT-25(1)/IT.333 & 334/08-09 upheld the findings of the A.O. in light of judgements in the case of Champion Construction Co. 5 ITD 495 and also of Purna Premises Pvt. Ltd. 7 SOT 288 held that project is deemed to have been completed in A.Y. 2003-04.*

4. *During the course of penalty proceedings, vide this office letter dated 21/02/2011 assessee was required to show cause as to why penalty u/s 271(1)(c) of the I.T. Act-1961 shall not be levied in respect to the above addition made in the assessment order. In reply to the same, assessee's AR vide his letter dated 25/03/2011 has submitted as under:*

"1. The assessee has diligently furnished all the information required by the assessing officer during the course of the assessment.

2. In respect of the disallowance of the motor depreciation and other expenses which has been contended by the assessing officer as being of personal nature the assessee has not furnished any inaccurate particulars or concealed any particulars as all the details of the above expenses are available on record submitted by the assessee.

3. In respect of the Rose Garden Project the assessing office has made various additions in the total income as well as disallowed certain expenses by treating the project undertaken by the assessee as completed which is rebuttal of claim of the assessee that the project has not been completed. The assessing officer has based his contention on the detail which has been diligently furnished by the

assessee. The assessee has not furnished any inaccurate particulars nor has the assessee furnished incorrect information to the learned assessing officer.

4. The question as to whether the project ought to be treated as completed and when the profit from the sale of the flats be taxed is a question of interpretation of Law. The assessing officer has made the additions to the income as per the return furnished by the assessee based in his contention that the project should be treated as being completed and the sale in respect of the flats be booked in the preceeding assessment years as against the claim of the assessee. The assessee has nor furnished any incorrect particulars of income as the assessee assessee contents that the assessee has calculated its returned income based on the belief that the project is in progress. The assessee has clearly shown in its profit and loss account all the required details as per contention of the assessee. Mere treatment of the project being complete by the Assessing Officer does not signify that assessee has furnished incorrect particulars of income."

6. We have heard the rival submissions of both the parties and perused the material placed on record before us.

7. We find that the Ld. CIT(A) has categorically mentioned in his order that the Revenue went in appeal against the quantum order for which the order of Hon'ble ITAT has been received in ITA Nos. 4734, 4735 & 4736/Mum/2009 for Assessment Years 2003-04 to 2005-06. The Ld. CIT(A) has also mentioned that in the said order, the Hon'ble ITAT has held that though the expenses would remain allowable. However, since the Assessing Officer has not been able to provide an opportunity to verify the said expenses, therefore an opportunity to verify was given.

It was further noted by Ld. CIT(A) that while the matter was subjudice before the ITAT, the AO has passed the order under section 271(1)(c) of the Act. Therefore, considering the decision of ITAT in quantum appeal, the Ld. CIT(A) held that the penalty proceeding have become infructuous.

8. After considering the aforementioned fact and legal position we are also of the considered view that since in a quantum appeal the ITAT in quantum

appeal numbers 4734, 4735 & 4736 /Mum/2009 for Assessment Years 2003-04 to 2005-06 has also set aside the order of Ld. CIT(A) in quantum proceeding and remit the matter back to the file of the AO with a direction to verify the expenses and then the same may be allowed. Therefore in such circumstances when the basis of levying penalty i.e; the order of AO has also been reversed by CIT(A) in quantum proceeding therefore any penalty arising out of that order is not sustainable, therefore, considering facts of the present case we also remit the matter back to the file of the AO with a direction to pass a fresh order of penalty if any keeping in view the order of Ld. CIT(A) and ITAT in quantum appeal.

9. In the result this appeal of the revenue is allowed for statistical purposes.

10. Now coming to the appeal No. 167/Mum/2014, since the fact and findings on the issue in this appeal are identical to that appeal which we have discussed above in ITA No. 165/Mum/2014, therefore our decision given in ITA No. 165/Mum/2014 is also applicable in this appeal also and hence same directions are also applicable in this appeal.

11. In the result both the appeals of the Revenue are allowed for statistical purposes.

Order pronounced in the open court on 29th July, 2016.

Sd/-
(R.C. SHARMA)
ACCOUNTANT MEMBER

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 29/07/2016

आदेश 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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai

AG (On Tour)