

IN THE INCOME TAX APPELLATE TRIBUNAL
“H” Bench, Mumbai
Before Shri B.R. Baskaran (AM) & Shri Ravish Sood(JM)
I.T.A. No. 3692/Mum/2013 (Assessment Year 2005-06)

M/s. Health Colonies & Construction Pvt. Ltd. 3 rd Floor, Millennium Tower Behind IOC Petrol Pump, Powai Mumbai-400 076. PAN : AABCH0363D	Vs.	DCIT 10(3) Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

Assessee by	Shri Rajiv Khandelwal & Shri Neelkanth Khandelwal
Department by	Shri M.C. Omi Ningshen
Date of Hearing	3.8.2017
Date of Pronouncement	31.10.2017

ORDER

Per B.R. Baskaran (AM) :-

The appeal filed by the assessee is directed against the order dated 05-03-2013 passed by Ld CIT(A)-40, Mumbai confirming the penalty of Rs.4.59 lakhs levied by the AO us 271(1)(c) of the Act for the assessment year 2005-06.

2. The facts relating to the issue are discussed in brief. The assessee is a builder. For the year under consideration, the assessee declared total income of Rs.32.99 lakhs. The AO noticed that the assessee had claimed deduction u/s 80IB(10) of the Act in respect of a project named “Crystal Care” to the tune of Rs.12,52,230/-. The assessee had declared income from that project under percentage completion method calculated at 10% of the value of flats sold. In support of its claim, the assessee furnished a certificate from Architect as per which the area of plot of land on which the building was constructed was more than one acre; it was constructed as per BMC plan and area of each flat was less than 1000 Sq.ft.

3. The AO carried out survey operations u/s 133A of the Act on 24.9.2007. During the course of survey operation it was noticed that the Investigation wing had also carried out another survey operation on 18.1.2007. It was noticed that the adjoining flats have been joined making the combined area of flat more than 1000 Sq.ft. Accordingly it was noticed that the assessee has tried to manipulate the records for availing deduction u/s 80IB(10) of the Act. During the survey proceedings conducted by the investigation wing, it was noticed that the profit was estimated at around Rs.2.00 crores for the year ending 31.3.2007. It was further noticed that the assessee did not make any claim u/s 80IB(10) of the Act for AY 2006-07. When it was questioned by the investigation wing, the assessee submitted that it had changed the method of accounting from percentage completion method to project completion method in AY 2006-07 and hence no profit was offered from the project as the project was not complete. The assessee further submitted that it would be revising the income offered in AY 2005-06 also by withdrawing income offered as well as the deduction claimed u/s 80IB(10) of the Act. Accordingly, the AO asked the assessee to explain the same. In response thereto, the assessee filed a revised computation withdrawing income as well as deduction claimed u/s 80IB(10) of the Act. The AO did not accept the action of withdrawal of income of Rs.12.52 lakhs, but accepted the withdrawal of deduction u/s 80IB(10) of the Act for the year under consideration. Accordingly the income of the assessee increased by a sum of Rs.12.52 lakhs, on which the AO levied penalty of Rs.4.59 lakhs was levied for concealing particulars of income and furnishing inaccurate particulars of income. The Ld CIT(A) also confirmed the same and hence the assessee has filed this appeal.

4. The Ld A.R submitted that the assessee has declared income under percentage completion method for its project named "Crystal court". It has changed the method of accounting income from Percentage completion method to Project completion method as the same suited the business conditions. He submitted that the method of accounting was changed in AY 2006-07 itself,

well before the completion of assessment proceedings for AY 2005-06. Hence it cannot be said that the withdrawal of deduction was after detection by the revenue. Under the project completion method, the income will be offered and the deduction u/s 80IB(10) shall be claimed only in the year in which the project was completed. Accordingly the assessee filed revised computation of income for AY 2005-06 during the course of assessment proceedings as per the new method of accounting for income. He submitted that the joining of two adjacent flats was done by the prospective buyers and hence the assessee could not be found fault with the same. He submitted that, in any case, the question of violation of conditions of provisions of sec.80IB(10) is a debatable one and hence the impugned penalty is liable to be deleted. On legal ground, the Ld A.R submitted that the assessing officer has initiated penalty proceedings for furnishing inaccurate particulars of income, whereas he has levied penalty for concealing the particulars of income and for furnishing inaccurate particulars of income. Accordingly he submitted that the AO has changed the limb for levying penalty and hence the impugned penalty order is liable to be quashed.

5. The Ld D.R submitted that the assessee did not raise the legal ground in its grounds of appeal and hence the said contentions should not be admitted. He further submitted that the assessee has withdrawn the deduction u/s 80IB(10) when he was caught for violation of the conditions of sec. 80IB(10). Accordingly the Ld D.R submitted that the surrender was after detection by the revenue and hence the penalty imposed by the tax authorities should be sustained.

6. We heard the rival contentions and perused the record. We notice that the AO has noted the alleged violation of conditions of sec. 80IB(10) during the course of survey proceedings conducted by him. However, prior to that, the investigation wing had conducted another survey operations and during the course of the same, the assessee has stated that he is withdrawing both the income offered by him under percentage completion method as well as the

deduction claimed u/s 80IB(10) of the Act. Following question and reply are relevant here:-

Q.28 It is seen that in AY 2005-06, you have claimed deduction u/s 80IB(10) but in AY 2006-07, no such claim is made? Kindly explain why?

Ans.: We have claimed 80IB(10) in AY 2005-06, but we are revising the said computation withdrawing 80IB(10) claim made there w.r.t. change of accounting system for the project "Crystal court" from work-in-progress method to Project Completion method.

So the offer of the assessee to withdraw income as well as deduction was due to the change in the method of accounting, as per which the assessee has withdrawn the income offered by it and consequently the question of claiming deduction u/s 80IB(10) does not arise.

7. We notice that the assessee has taken the decision to change the method of accounting much prior to the survey operations, which is evidenced by the fact that the assessee did not offer any income and claim deduction u/s 80IB(10) in AY 2006-07. Hence, in our view, it cannot be said that the assessee has withdrawn deduction u/s 80IB(10) for the year under consideration, after detection of violations, if any, by revenue. Hence the main reasoning on which the Ld CIT(A) had confirmed the penalty would fail. We notice that the AO did not recognize the change in the method of accounting and hence assessed the income of Rs.12.52 lakhs. However, in our view, the explanation of the assessee cannot be rejected altogether in penalty proceedings, as the same is backed by the return of income filed for subsequent years. The Ld A.R further submits that the said question is a debatable one as the flats as per the plan complied with the conditions of sec. 80IB(10) and the modifications have been carried out by the buyers. The provisions imposing condition that no more than one residential unit should be allotted to any person etc. was inserted into sec. 80IB(10) w.e.f. 1.4.2010. Hence, in our view, there is merit in this contention also.

8. Under these set of facts, we are of the view that the impugned penalty cannot be sustained, since the change in the method of accounting was permanent one and further the said decision was taken by the assessee prior to the commencement of present assessment proceedings. Further there is merit in the contention of the assessee that the impugned issue is debatable one. In view of the foregoing discussions, we set aside the order passed by Ld CIT(A) and direct the AO to delete the impugned penalty levied u/s 271(1)(c) of the Act.

9. In the result, the appeal filed by the assessee is allowed.

Order has been pronounced in the Court on 31.10.2017.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 31/10/2017

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

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BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai