

**आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI  
BEFORE SHRI D.T GARASIA, JUDICIAL MEMBER  
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 5494/Mum/2017

(निर्धारण वर्ष / Assessment Year : 2010-11)

M/s. Landmark Developers, R.B.Popat & Co.(Part), A/2 , Abhishek CHS Limited, G.D. Ambekar Marg, Dadar , Naigaon, Mumbai- 400014	<b>बनाम/</b>  v.	JCIT Range-4, Thane
स्थायी लेखा सं./PAN : AACFL0986E		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Assessee by:	Shri. R.B. Popat
Revenue by :	Shri. Saurabh Kumar Rai

सुनवाई की तारीख /**Date of Hearing** : **16-10-2017**

घोषणा की तारीख /**Date of Pronouncement** : **14.11.2017**

**आदेश / ORDER**

**PER RAMIT KOCHAR, Accountant Member**

This appeal, filed by the assessee, being ITA No. 5494/Mum/2017 for assessment year 2010-11, is directed against the appellate order dated 20-06-2017 passed by learned Commissioner of Income Tax (Appeals)-3, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2010-11, appellate proceedings had arisen before learned CIT(A) from the penalty order dated 27.09.2013 passed by learned Assessing Officer (hereinafter called "the AO") u/s 271 (1)(c) of the Income-tax Act, 1961 (hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

" 1. On the facts and in the circumstances of the case and in law, the Hon. CIT Appeal-Thane-3, order passed u/s 250 of the I.T. Act,

1961 confirming penalty on your appellant is misconceived, contrary to law, invalid and therefore bad in law on the following grounds amongst other grounds set out herein below without prejudice to one another.

2. Vide para 11 of the order of learned Income Tax officer has made' disallowance of the following expenses under several section without providing adequate opportunity and without considering the laws of the land and settled judicial pronouncements:

a. Rs. 27,16,400/- on account of cost of allocation [among plots of expenses actually incurred].

b. Rs. 46875/- Adhoc disallowances

3. Show-cause notice under section 274 to assessee was defective as it did not spell out specific grounds on which penalty was sought to be imposed, order imposing penalty was invalid and, consequently, penalty imposed is to be cancelled, we pray to set aside penalty order of Learned AO and consequently that also of CIT-Appeal on this count alone.

4. Assessing Officer had not recorded till conclusion of assessment proceedings his satisfaction that assessee had concealed particulars of income or furnished inaccurate particulars of such income, initiation of penalty proceedings under section 271(1)(c) was itself bad and, consequently, all subsequent proceedings leading up to passing of penalty order must fail, we pray to set aside order of Hon. of CIT-Appeal be set aside on this count alone.

5. Learned AO has vide para 3 on page 3 vide line no.11 to 16 have held that assessee has not preferred appeal against quantum also supports fact of debit of expenses was deliberated, leading to false claim hence he proceeded to levy penalty u/s 271 (1)(c), on this ground alone penalty order be set aside as making a claim under bonafide claim based on honest belief does not lead to concealment.

6. Mere making of claim of deduction of expenses which was ultimately found to be unsustainable would not by itself amount to furnishing of inaccurate particulars of income so as to pass a penalty. order under section 271(1)(c).

7. Not filing an appeal against quantum order is not a reason to levy penalty on your appellant, as both proceedings are different and independent.

8. Order of the learned CIT Appeal confirming penalty on your appellant is totally unwarranted, as the expenses actually incurred during the previous year which was duly accounted, documented and supported by your appellant with an honest belief of allowability of expenses should not have been denied based on mercantile system of accounting followed which is not disputed by AO. Merely due to change in accounting policy of claiming plot development expenses actually incurred during previous year of unsold plot during the previous year instead deferred to year of sale of plot] on disallowance of such expenses penalty was levied, which is against law laid down by Hon. Supreme Court.

9. Kindly expedite the hearing for which we have no objection of whatsoever nature.

10. Your appellant crave leave to add, alter, amend or delete any or all of the grounds of appeal at any time.”

3. The brief facts of the case are that the assessee firm is a land developer engaged in the business of purchase and sale of plots of land after developing which includes procurement of Non Agriculture (N.A.) and other permissions from various land/planning authorities viz. CIDCO etc. . During the course of assessment proceedings u/s. 143(3) , additions , inter-alia, were made by the AO to the tune of Rs.27,16,400/- wherein assessee has debited indirect expenses to the P&L account with respect to the unsold plots in deviation of the existing accounting policy which indirect expenses ought to have been debited by the assessee to the unsold plots as per the accounting policy consistently followed by the assessee , which deviation in accounting policy led to the reduction of profits and consequently less taxes were paid by the assessee to the Revenue during the impugned assessment year due to this change in accounting policy which as per the AO was not a bonafide change in accounting policy. The aforesaid additions were , inter-alia , made by the AO in the assessment framed u/s 143(3) which led to the assessed income being Rs. 1,61,56,050/- as against the returned income of Rs. 1,33,75,275/- , vide assessment order dated 25-03-2013 passed by the AO u/s 143(3). The AO initiated penalty proceedings u/s. 271(1)(c) which led to the issuance of notice u/s 271(1)(c) r.w.s. 274 dated 25.03.2013 for furnishing of inaccurate particulars of income. The assessee during the course of penalty proceedings before the AO replied as under:

*“ Sir, The Penalty u/s 271 (1)(c) is levied if any person has "concealed" any facts or furnished "inaccurate details".*

*Sir, in the case under review the additions done by you are mainly expenses, although are legitimate expenses of the business of the Assessee, which were claimed on the Plots sold (unlike every year where they are not claimed), during the previous year ending 31/03/2010 but according to your good selves since it was variation from routine practice and hence were not allowable.*

*Sir, the Expenses claimed were only a small amount of Total Expenses claimed & they were claimed because in that particular year there were extra ordinary situations which were definitely different Normal situations warranting us to do or vary from normal accounting methods, the situation/facts which arose were as follows-*

- a. During the Previous there were changes in Partnership.*
- b. During the year one Plot at Sativali which was sold and the expenses attributed for the reason that the full FSI of the said Plot is sold and might be in future full FSI will be left for Selling and the expenses being absorbed than is not possible.*

c. During the year, in case of Pehlar, the plots sold had to be changed to different sizes & for which they were required to Merge into 1 Big Plot & then De-Merge into 6 smaller Plots & then sold.

d. Sir, the occurrence of unusual situation has been explained and also sufficient supporting have been given to prove it.

e. Sir, if the Assessee responds to non-normal situation in such a way which seems appropriate to that situation what wrong is done? The question now is if in non-normal situation the accounting is varied whether it is justified or not and if not varied again than whether it is justified?

f. Sir, we have already accepted, that had there been No such changes the variation of accounting would have warranted or done.

g. Sir, it is very clear from all the above that there is no case for Penalty as neither there is any suppression, submission of incorrect details or any concealment of any sort.

Sir, in support of our claim 1 hereby cite a Supreme Court Judgement the details of which are as follows:

Sir, to substantiate our claim to drop penalty proceedings 1 would like to quote a case of Supreme Court Judgement of 2010 in the case of C.I.T. Ahmedabod U/s Reliance Petroproducts Pvt. Ltd. of 17th March, 2010 wherein court has rightly disallowed the claim of Revenue in imposing penalty u/s 271 (1)(c) & observed the following among other things:-

(i) It was pointed out that the disallowance made by the Assessing Authority in the Assessment Order under Section 143(3) of the Act were solely on account of different views taken on the same set of facts and, therefore, they could at the most, be termed as difference of opinion but nothing to do with the concealment of income or furnishing of inaccurate particulars of such income. It was claimed that mere disallowance of the claim in the assessment proceedings could not be the sole basis for levying penalty under section 271 (1)(c) of the Act.

(ii) It is also rightly pointed out that in case of every Return where the claim made is not accepted by the A.O for any reasons the assessee will invite Penalty u/s 271 (1)(c) that is clearly NOT the intendment of the Legislature.

2) Sir, once again to support our stand for non levy of penalty we would like to state as follows-

'Concealment of Income' and 'Furnishing inaccurate particulars' are different though both refer to deliberate acts on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of suppression veri or suggestion falsi' [Dilip N Shroff v JCIT (2007) 29 ITR 519 (SC)]

Sir, Looking at the above facts of cases we request you to kindly drop penalty proceedings & oblige."

The A.O rejected the contentions of the assessee during penalty proceedings and observed that this is not a normal situation as to merger and demerger of plots and assessee was not required to change the accounting policies for claiming expenses. It was observed by the AO that these indirect expenses were related to unsold plots of land that were debited to P&L account to

reduce the profits as the same ought to have been added by the assessee to unsold stock held as at the year end. It was observed by the AO that this is an deliberate attempt by the assessee to reduce profits and consequently taxes and explanations offered by the assessee are not bonafide . It was also observed by the AO that assessee has not preferred an appeal against assessment order in quantum passed by the A.O u/s 143(3) which also reveals that it was a deliberate action on the part of the assessee to reduce income and consequently taxes. Thus, the AO observed that assessee's explanation in penalty proceedings u/s 271(1)(c) is not bonafide and claim of the assessee is found to be false and incorrect. The AO observed that the assessee has concealed its income to the tune of Rs. 27,16,400/- by debiting expenses related to the unsold plots to Profit and Loss Account instead of debiting the same to unsold stock which led to lower taxable income as well low payment of taxes to Revenue and hence the penalty was levied by the AO to the tune of Rs. 8,39,368/- being 100% of the taxes sought to be evaded u/s. 271(1)(c) of the Act , vide penalty order dated 27-09-2013 passed by the AO u/s 271(1)(c) of the 1961 Act.

4. The assessee carried the matter in appeal before the learned CIT-A who rejected the contentions of the assessee, vide appellate order dated 20-6-2017 passed by learned CIT(A) by holding as under:-

*“ Ground of appeals including additional grounds filed by the appellant are directed against the penalty imposed of Rs.8,39,368/- u/s.271(1)(c) of the Act.*

*(i) The AO has made addition of Rs.27,16,400/- on the ground that the expenses incurred were not pertaining to the plots sold during the year, but pertains to unsold plots, and the claim of aforesaid expenses have been claimed to reduce the current year profit, therefore, it tantamount to filing of inaccurate particulars of income.*

*(iii) On the other hand, the AR of the appellant claim that the penalty imposed by the AO is not warranted as there is not concealment or filing inaccurate particulars of income on the following reasons - because of extra ordinary situations like changes in Partnership, plots had to merge into one big plot & de-merge into 6 smaller plots & than*

*sold. The appellant has relied upon in the case of CIT vs. Reliance Petroproducts Pvt. Ltd. & Dilip N. Shroff v. JCIT (2007) 291 ITR 519*

*After considering the above, I am of the opinion that, the penalty imposed by the AO is justified on the following grounds- a) the incorrect claim of expenses are pertaining to unsold plots, therefore, by claiming such expenses, the profit of the appellant in the year under consideration is reduced .b) The appellant has deliberately debited the expenses of unsold plots in the name of extra-ordinary situations. The appellant has also not filed an appeal against the addition which goes to show that, there is no difference of opinion as the claim of expenses is incorrect. It is a clear cut case of deliberate filing of inaccurate particulars to reduce the profit margin of the appellant. It is also not a mere omission or negligence. The fact that the appellant had made incorrect claim of expenses is apparent from the assessment order vis-a-vis WIP filed before me wherein it is mentioned that the appellant had sold plot Nos. 151(3), 151(2), 151(5), 149 and plot sativali (44, 45, 93) as against the expenses claimed for unsold plot no.151(1) and 151(4) in the chart of work-in-progress. (c) The case laws relied upon by the appellant are also not applicable because the facts of the case are different.”*

5. The assessee carried the matter further by filing an appeal before the tribunal.

The learned counsel for the assessee submitted before the tribunal that assessee is engaged in business of land development and the assessee has claimed indirect expenses by debiting the same to P&L account instead of unsold stock which has occurred due to exceptional circumstances wherein the plots of land were merged and later demerged . It was submitted that it was not a case of false/ bogus claim of expenses and it could not be said that the said expenses were never incurred but the assessee claimed the said indirect expenses attributable to the unsold plot of land in the instant year under consideration instead of the year when the said plots would have been sold. It was submitted that in any case these were genuine expenses which would have been allowed albeit not in this year as claimed

but in subsequent years when the plots stood sold. It was submitted that this has occurred mainly due to change of the accounting policy . The assessee relied upon decision of Hon'ble Supreme Court in the case of Reliance Petroproducts Private limited(supra). It was submitted that books of accounts were not rejected by the AO . It was also submitted that the assessee accepted quantum assessment and no appeal was filed against the assessment order passed by the AO u/s 143(3). The Ld. DR on the other hand submitted that the assessee has not challenged assessment order which attained finality . It was submitted by ld. DR that the assessee has debited indirect expenses to Profit and Loss which are related to unsold stocks which led to reduction in profits of this year leading to payment of lower taxes to Revenue and hence penalty levied by the AO u/s 271(1)(c) and as confirmed by learned CIT(A) is justified .

6. We have considered rival contentions and perused the material on record including cited case laws. We have observed that the assessee is engaged in the business of land development. The assessee has claimed indirect expenses of Rs. 27,16,400/- attributable to the unsold plot by debiting the same to Profit and Loss account in deviation to the existing accounting policy followed by the assessee wherein as per existing accounting policy , these indirect expenses attributable to the unsold stock of plot of land ought to have been debited to the cost of unsold costs of plot as per accounting policy consistently followed by the assessee . This change in accounting policy led to reduction of declared taxable profits and also reduction in tax paid to Revenue in the impugned assessment year as indirect expenses which ought to have been debited to unsold stock of plot of land instead got debited to the Profit and Loss Account in this year itself which otherwise would have been claimed as expenses being part of cost of plot of land when the said plot of land stood sold. The assessee did not contested the additions made in quantum assessment which attained finality. It is not the case of the Revenue that false/bogus expenses were claimed by the assessee which were never incurred by the assessee but the case of the Revenue is that albeit the expenses are genuinely incurred for business but the same could not have been claimed as expenses in the year under consideration but should have been claimed in the year when the unsold plots of land stood sold which led to the lower taxes being paid in

the year under consideration as the said indirect expenses even attributable to unsold stock of plot of land stood claimed in this year itself instead of the year of sale of plot of land which is in deviation of accounting policy consistently followed by the assessee. . The assessee has given an explanation that this change in accounting policy has occurred mainly due to change in constitution of partnership and also due to merger/ demerger of plots of land. This explanation did not found favour with the Revenue which led to the additions in the assessment as well penalty being levied u/s 271(1)(c) for furnishing of inaccurate particulars of income. Merely because a claim of expenses is made by the assessee which does not found favour with the Revenue is not sufficient to fasten liability of penalty u/s 271(1)(c) and ratio of decision of Hon'ble Supreme Court in the case of Reliance Petroproducts Private Limited (2010) 189 taxman 322(SC) is clearly attracted in the instant case before us. In any case these indirect expenses incurred by the assessee attributable to unsold plots are genuine business expenses duly incurred by the assessee but the same were under a bonafide belief claimed by the assessee to be expenses of the impugned assessment year which were not allowed by the Revenue as these expenses as per version of Revenue were to be added to the cost of unsold plots of land to be allowed in the year when plots are actually sold as per accounting policy consistently followed by the assessee. In our considered view, the explanation offered by the assessee is a bonafide explanation as to the assessee was under bonafide belief that due to merger and demerger of the plots and their reconstitution, the expenses are to be claimed in the year under consideration , which explanation was however not favourably considered by Revenue which led to additions in quantum assessment which assessee accepted but this is not sufficient to fasten liability to penalty on the assessee u/s 271(1)(c). Thus in the factual matrix of the case no penalty u/s 271(1)(c) is exigible in the instant case as the case of the assessee is duly covered by the ratio of decision of Hon'ble Supreme Court decision in the case of Reliance Petroproducts Private Ltd.(supra). We, therefore, order deletion of the penalty levied by the AO u/s 271(1)(c) as confirmed by the learned CIT(A). We order accordingly.

7. In the result appeal of the assessee is allowed.

Order pronounced in the open court on 14.11.2017

आदेश की घोषणा खुले न्यायालय में दिनांक: 14.11.2017 को की गई ।

Sd/-  
(D.T.GARASIA )  
JUDICIAL MEMBER

Sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

Mumbai, dated: 14.11.2017

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench, E
6. Master File

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BY ORDER  
DY/ASSTT. REGISTRAR  
ITAT, MUMBAI