

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'डी' ,मुंबई।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'D' MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री राजेश कुमार, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and
Shri Rajesh Kumar, Accountant Member**

**ITA No.5629/Mum/2015
Assessment Year: 2007-08**

Dharti Investment & Holdings Pvt. Ltd. Jai Centre, 1 st Floor, P.D. Mello Road, Opp. Red Gate, Masjid, Mumbai-400009	बनाम/ Vs.	DCIT, Circle-6(2), Aayakar Bhavan, M.K. Road, Mubmai-400020
(निर्धारिती / Assessee)		(राजस्व / Revenue)
PAN. No. AACCD2509C		

निर्धारिती की ओर से / Assessee by	Shri Madhur Agarwal
राजस्व की ओर से / Revenue by	Shri Saurabh Deshpande-DR

सुनवाई की तारीख / Date of Hearing :	01/11/2017
आदेश की तारीख / Date of Order:	03/11/2017

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The assessee is aggrieved by the impugned order dated 09/09/2015 of the Ld. First Appellate Authority, Mumbai, confirming the penalty imposed u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter the Act), ignoring the contention of the assessee, that the assessee, neither concealed its income nor furnished inaccurate particulars of such income.

2. During hearing, Shri Madhur Agarwal, ld. counsel for the assessee, explained that no appeal was filed by the assessee on quantum addition by further contending section 94(7) of the Act is not applicable in the appeal of the assessee as the sale is not within three months. Our attention was invited to para-4 of the penalty order as well as section 94(7) of the Act. It was explained that the sale is after 19/03/2007, which fact has also been accepted by the Assessing Officer himself. Therefore, for imposing penalty u/s 94(7), all the three condition has to be fulfilled. On the other hand, the ld. DR, Shri Saurabh

Deshpande, defended the imposition/confirmation of penalty.

2.1. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee is a public limited company, engaged in the business of dealing in securities and other financial instruments. The assessee company is registered with RBI as a non-banking financial company. The assessee declared income of Rs.9,11,06,201/- in its return filed on 29/10/2007 and the assessment was completed on 30/12/2009, u/s 143(3), determining the total income at Rs.22,20,68,300/-, after making the addition of Rs.70,29,979/- u/s 94(7) of the Act. The Id. Assessing Officer imposed penalty u/s 271(1)(c) for furnishing inaccurate particulars of income. The Ld. Commissioner of Income Tax (Appeal), confirmed the penalty, which is under challenge before this Tribunal. Before adverting further, we are reproducing hereunder the provision of section 94(7) of the Act for ready reference and analysis:-

“94. (1) Where the owner of any securities (in this sub-section and in sub-section (2) referred to as "the owner") sells or transfers those securities, and buys back or reacquires the securities, then, if the result of the transaction is that any interest becoming payable in

respect of the securities is receivable otherwise than by the owner, the interest payable as aforesaid shall, whether it would or would not have been chargeable to income-tax apart from the provisions of this sub-section, be deemed, for all the purposes of this Act, to be the income of the owner and not to be the income of any other person.

Explanation.—The references in this sub-section to buying back or reacquiring the securities shall be deemed to include references to buying or acquiring similar securities, so, however, that where similar securities are bought or acquired, the owner shall be under no greater liability to income-tax than he would have been under if the original securities had been bought back or reacquired.

(2) Where any person has had at any time during any previous year any beneficial interest in any securities, and the result of any transaction relating to such securities or the income thereof is that, in respect of such securities within such year, either no income is received by him or the income received by him is less than the sum to which the income would have amounted if the income from such securities had accrued from day to day and been apportioned accordingly, then the income from such securities for such year shall be deemed to be the income of such person.

(3) The provisions of sub-section (1) or sub-section (2) shall not apply if the owner, or the person who has had a beneficial interest in the securities, as the case may be, proves to the satisfaction of the Assessing Officer—

- (a) that there has been no avoidance of income-tax, or
- (b) that the avoidance of income-tax was exceptional and not systematic and that there was not in his case in any of the three preceding years any avoidance of income-tax by a transaction of the nature referred to in sub-section (1) or sub-section (2).

(4) Where any person carrying on a business which consists wholly or partly in dealing in securities, buys or acquires any securities and sells back or retransfers the securities, then, if the result of the transaction is that interest becoming payable in respect of the securities is receivable by him but is not deemed to be his income by reason of the provisions contained in sub-section (1), no account shall be taken of the transaction in computing for any of the purposes of this Act the profits arising from or loss sustained in the business.

(5) Sub-section (4) shall have effect, subject to any necessary modifications, as if references to selling back or retransferring the securities included references to selling or transferring similar securities.

(6) The Assessing Officer may, by notice in writing, require any person to furnish him within such time as he may direct (not being less than twenty-eight days), in respect of all securities of which such person was the owner or in which he had a beneficial interest at any time during the period specified in the notice, such particulars as he considers necessary for the purposes of this section and for the

purpose of discovering whether income-tax has been borne in respect of the interest on all those securities.

(7) Where—

- (a) any person buys or acquires any securities or unit within a period of three months prior to the record date;**
- (b) such person sells or transfers—**
 - (i) such securities within a period of three months after such date; or**
 - (ii) such unit within a period of nine months after such date;**
- (c) the dividend or income on such securities or unit received or receivable by such person is exempt, then, the loss, if any, arising to him on account of such purchase and sale of securities or unit, to the extent such loss does not exceed the amount of dividend or income received or receivable on such securities or unit, shall be ignored for the purposes of computing his income chargeable to tax.**

(8) Where—

- (a) any person buys or acquires any units within a period of three months prior to the record date;**
- (b) such person is allotted additional units without any payment on the basis of holding of such units on such date;**
- (c) such person sells or transfers all or any of the units referred to in clause (a) within a period of nine months after such date, while continuing to hold all or any of the additional units referred to in clause (b),**

then, the loss, if any, arising to him on account of such purchase and sale of all or any of such units shall be ignored for the purposes of computing his income chargeable to tax and notwithstanding anything contained in any other provision of this Act, the amount of loss so ignored shall be deemed to be the cost of purchase or acquisition of such additional units referred to in clause (b) as are held by him on the date of such sale or transfer.

Explanation.—For the purposes of this section,—

- (a) "interest" includes a dividend;**
- (aa) "record date" means such date as may be fixed by—**
 - (i) a company for the purposes of entitlement of the holder of the securities to receive dividend; or**
 - (ii) a Mutual Fund or the Administrator of the specified undertaking or the specified company as referred to in the *Explanation* to clause**

(35) of section 10, for the purposes of entitlement of the holder of the units to receive income, or additional unit without any consideration, as the case may be;

(b) "securities" includes stocks and shares;

(c) securities shall be deemed to be similar if they entitle their holders to the same rights against the same persons as to capital and interest and the same remedies for the enforcement of those rights, notwithstanding any difference in the total nominal amounts of the respective securities or in the form in which they are held or in the manner in which they can be transferred;

(d) "unit" shall have the meaning assigned to it in clause (b) of the *Explanation* to section 115AB."

2.2. Section 94 of the Act deals with avoidance of tax by certain transactions in securities. As per sub-section - 7(b)(i), such securities are to be sold or transferred within a period of three months after such date, whereas, the record date (para-4 of the penalty order) is 19/12/2006 and the date of purchase is 21/09/2006 (condition-1 is fulfilled), whereas, the date of sale is after 19/03/2007 (as accepted by the Assessing Officer himself), therefore, as per the aforesaid provision, at least, the penalty is not leviable. It may be a good case for quantum addition, but in our humble opinion, not for penalty proceedings, because for imposing penalty u/s 271(1)(c) either there should be concealment of income or furnishing of inaccurate particulars of such income. At the same time, the penalty u/s 271(1)(c) is dependent upon fulfillment of all the

conditions provided u/s 94(7) of the Act. Thus, we delete the penalty.

Finally, the appeal of the assessee is allowed.

This order was pronounced in the open court in the presence of the ld. representative from both sides at the conclusion of the hearing on 01/11/2017.

Sd/-

Sd/-

(Rajesh Kumar)

(Joginder Singh)

लेखा सदस्य / ACCOUNTANT MEMBER

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 03/11/2017

Shekhar, P.S./नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Assessee.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
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