

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'A', HYDERABAD**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUH RAHMAN, ACCOUNTANT MEMBER**

ITA No. 1352/Hyd/2014
Assessment Year: 2006-07

Dy. Commissioner of Income-tax, Circle – 16(2), Hyderabad. vs. Maheshwari Mega Ventures Ltd., Hyderabad.

PAN – AADCM9780D

Appellant

Respondent

Revenue by: Shri J. Siri Kumar
Assessee by: Shri K.C. Devdas

Date of hearing: 15/11/2017
Date of pronouncement: 24/01/2018

ORDER

PER S. RIFAUH RAHMAN, AM:

This appeal is filed by the revenue against the order of CIT(A) - V, Hyderabad dated 28/02/2014 for the AY 2006-07.

2. Briefly the facts of the case are, assessee company is engaged in the business of real estate, constructing flats, sale of land and restaurant. For the AY 2006-07, it filed its return of income on 20/11/2006 admitting income of Rs. 1,00,39,650/- under normal provisions and book profit of Rs. 2,35,67,546/- under the provisions of section 115JB. The same was processed u/s 143(1) on 07/11/2007. Subsequently, the case was selected for scrutiny.

2.1 Survey u/s 133A was conducted on 20/10/2008 in the case of the assessee. The AO after discussing with the assessee and also based on statements recorded in course of

survey, completed the assessment by making the following additions/disallowances:

3. Disallowance of development expenditure claimed on sale of lands under the head income from capital gains:

3.1 In the return of income filed by the assessee for the AY 2006-07, the assessee showed sale consideration of lands at Rs. 12,50,00,000/- (5 acres sold @ 2.50 crores per acre.) The assessee claimed cost incurred towards development of these lands at Rs. 2,31,50,000/-. The indexed cost of the lands was shown at Rs. 9,18,10,345/-. Accordingly, the long term capital gains on sale of these lands were shown at Rs. 1,00,39,655/- and paid taxes on the same.

3.2 During the course of survey, AO noticed that the assessee did not incur any development expenses in respect of the above lands, as no vouchers for development expenses were found during the course of survey and no details of expenses were also available in the books of account. When asked, the director of the assessee company Shri Rajkumar Malpani, to explain what was the nature of above development expenditure and why they were claimed as expenditure, the Director stated that the accountant misunderstood the payments and wrongly claimed as expenditure of the company in computing capital gains. He stated that he had no objection in disallowing the expenditure in computing capital gains income in the hands of the company and voluntarily admitted to pay the taxes on the wrong development expenses booked by his accountant. Accordingly, the AO disallowed the above expenditure of Rs. 2,31,50,000/- in computation of profits of the above lands.

4. Computation of profit on sale of land under the head income from business instead of long term capital gains:

4.1 The AO observed that the assessee company showed profit on sale of lands and computed long term capital gains tax at Rs. 1,00,39,655/-. When asked to explain as to why the profits on sale of the lands should not be taxed as business income, the assessee submitted that the first MoU was entered with the land lord on 05/04/2002 by its Director in his individual capacity and therefore, the period should be reckoned from this date for computing long term capital gains, even though it was not in existence during the relevant period. It was observed by the AO that the assessee company is a builder and developer and these land were purchased with an intention to sell and make the profit. The AO, therefore, was of the view that there was no merit in the explanation of the assessee for taxing these land under the head long term capital gains and profit on sale of lands was treated to be taxed as business income.

5.. Rejection of assessee's claim that the Long Term Capital Gains shown by it was on notional basis and not liable for tax at all:

5.1 During the year under consideration, the above lands of 5 acres were sold for Rs. 12,50,00,000/- to Prakruti Infrastructure and Developers (P) Limited and received advances of Rs.4 crores from the purchaser in respect of the above lands. An MOU was entered with the Prakruti Infrastructure and Developers (P) Limited for sale of these lands. The assessee company was taking the stand that it has no rights over the lands sold as the same are not yet registered in its name due to certain legal disputes. The assessee requested that the Capital Gains income offered by

it in the return of income should not be taxed as it has offered the same under the wrong understanding of law.

5.2 After considering the explanation of the assessee, the AO observed that the MOU entered by the assessee-company for sale of lands to Prakruti Infrastructure and Developers (P) Limited clearly states that the assessee-company was an assignee and the agreement holder from the landlord and it has got the rights to develop the property and also to settle disputes and claims. Further, he observed that it also states that it has got the power to deal with third parties out of the agreed area and realize the sale amount for making payment to the assignor. Under this MOU, the assessee-company sold the lands for Rs.12.50 crores. This MOU also clearly states that the assessee-company being the assignee has got all the rights and powers to enter MOU with the Prakruti Infrastructure & Maheshwari Mega Ventures Ltd & Developers (P) Limited. Similarly, it was observed that the agreement entered by the assessee company with the landlord clearly states that it has obtained all the rights to purchase the lands with a right of development entered by its Director through MOU on 5-4-2002 and the fresh MOU is entered on 6-1-2006 only to change the rights from the Director to the Company's name. The MOU clearly indicates that the assessee-company is having rights over the lands and also made part payment to the landlord and it has right to sell these lands and therefore, the profit accruing on sale of these lands is taxable in the hands of the assessee-company as business income even though there may be some litigations on the land. It was also observed that the assessee-company passed the entries in the books of account regarding purchase of these lands and the amount payable to the landlord was shown as liability and the lands purchased are shown as assets in the Balance Sheet.

The AO opined that it is only an afterthought on the part of the assessee-company to withdraw the Capital Gains offered in the return of income. Therefore, the assessee's request for not taxing the Profit on sale of these lands, was not accepted. Accordingly, the computation of Income on sale of lands by considering the above three issues was done as under in the said order:

Sale consideration received - Rs. 12.50,00,000	
Less: Purchase cost of lands - Rs. 7,50,00,000	

	Rs. 5,00,00,000
Less: Development expenses as Discussed above	<u>Rs. Nil</u>
Income on sale of lands	Rs. 5,00,00,000
	=====

6. Disallowance of Contract payments u/s 40(a)(ia):

6.1 On verification of the details, the AO noticed that the assessee-company though deducted the TDS on contract payments amounting to Rs.84,610/-, yet failed to remit the same to the Central Government within the time stipulated. As such, the assessee fails to comply with the provisions of TDS. In view of this, the expenditure of Rs.84,610/- is not allowable one as per the provisions of Section 40(a)(ia) of the Act. Accordingly, the amount of Rs.84,610/- was disallowed and added back.

7. Disallowance of ROC Charges paid for increase in authorized share capital:

7.1 The AO observed that during the year under consideration, the assessee had debited an amount of Rs.10,02,600/- to Profit & Loss account towards Registration

Fee paid for increase in authorized share capital. Since this expenditure was a capital expenditure, AO disallowed the same relying on the decision in the case of Bharat Carbon & Ribbon Mfg. Co. Ltd Vs. CIT [1981] 127 ITR 239 (Delhi).

8. Addition of direct depreciation on construction equipment to the WIP of Projects under construction:

8.1 The AO observed that during the year, the assessee-company claimed depreciation @ 15% on PROPS (centring equipment) of Rs.24,80,498/-. The depreciation claimed comes to Rs 3,72,74/-. He held that as this was direct depreciation relating to the projects under construction, the same was disallowed and added to the WIP of the projects under construction.

9. Addition of indirect expenses to the Work-in-Progress (WIP) of projects under construction:

9.1 AO observed that during the year under consideration, the assessee-company was constructing a Commercial Complex in Himayatnagar and a Five Star Hotel in Yellareddyguda. Banjara Hills and Hotel City Park in Abids. The assessee-company showed the construction expenditure and related interest on this project as Capital WIP. Similarly, the construction expenditure and interest relating to the project of Himayatnagar was shown under the head WIP. No profit was shown on the advances received in respect of Himayatnagar project on the ground that construction of the Commercial Complex was in the initial stage. The WIP/direct expenditure shown in respect of Himayatnagar Project for the year under consideration was Rs.1 ,69,23,458/-

9.2 Further, AO observed that similarly, the direct expenditure incurred for the Five Star Hotel during the year

was Rs.4,02,40,278/-. During the year, Hotel City Park was also constructed and the cost of construction for this year was shown at Rs.19, 76,481/-.

9.3 AO noted that apart from the above works, during the year under consideration, the assessee company has done contract work and the direct expenditure of this contract work was shown at Rs.87,26,923/-. Similarly, the assessee-company was running a restaurant and the operating expenditure of this restaurant is shown at Rs.28,10,174/-. During the year, the assessee showed profit/income only on contract work and restaurant. The total expenditure of the company incurred during the year in respect of the above projects/contracts/restaurant comes to Rs. 7.6 crores (approx.). The expenditure in respect of contract works and restaurant comes to Rs 1.15 crores (approx.). The above expenditure shows that about 84% of the work of the company during the year relates to the construction of projects under construction. Only 16% of the work of the company relates to contract work/restaurant works. The assessee incurred indirect expenditure in the shape of administrative and general expenses of Rs.41,84,365/- which excludes ROC charges, salaries to staff including Directors' salaries of Rs.42,32,673/- and depreciation of Rs.17,38,030/- which was exclusive of depreciation on Hotel buildings and Hotel plant & machinery of Rs. 19,67,339/-. However, the assessee-company not allocated any indirect expenditure other than interest to the projects under construction even though these account for around 84% of the assessee's business. Non-allocation of the indirect expenses to the WIP resulted in under estimation of WIP of the projects under construction affecting the profit shown on the contract income and restaurant income. For example, the contract receipts shown by the assessee are

Rs.1.40 crores and the direct expenditure relating to this contract works was Rs.87.26 lakhs. This gives a gross profit of around Rs.53 lakhs on contract works. However, in reality, the net profit on the contract receipts shown by the assessee was loss due to allocation of entire indirect expenses to this work only. The assessee was requested to explain why the indirect expenses should not be allocated to the projects under construction based on the ratio of total expenditure. The authorized representative stated that the administrative expenditure, salaries and depreciation should not be added to the WIP of the projects under construction as these are not directly related to the projects. The explanation of the assessee was considered and found not acceptable. Non-allocation of the indirect expenses to the projects under construction results in showing lower profits in respect of other divisions and the profit gets postponed to the subsequent years.

9.4 In view of the above observations, the AO relying on the judgement of the Hon'ble Supreme Court in the case of CIT Vs. British Paints India Ltd., 188 ITR 44, opined that the allocation of indirect expenses to the projects under construction is necessary to work out the correct WIP. The total of indirect expenses as discussed above comes to 1,01,55,068/- (Adm. Rs. 41,84,365 + salaries: Rs.42,32,673 + depreciation: Rs.17,38,030). As held in the earlier paras, 84% of the work relates to construction of the projects, which are under construction, the indirect expenses to the extent of 84% debited to Profit & Loss account were disallowed and added to the WIP values of the projects under construction. The disallowance on this count comes to Rs.85,30,257/-.

10. The assessee preferred an appeal before the CIT(A) against the order of AO and contested the following three additions:

1. Disallowance of development expenditure claimed on sale of lands under the head income from capital gains- Rs. 5,00,00,000/-
2. Addition of direct depreciation on construction equipment to the WIP of projects under construction - Rs. 3,72,074/-.
3. Addition of indirect expenses to the work-in-progress (WIP) of projects under consideration - Rs. 85,30,257/-.

10.1 The CIT(A) gave relief in the respect of 1st issue and confirmed the other two additions.

10.2 When assessee carried the matter in appeal before the ITAT, the ITAT upheld the order of AO.

11. Thereafter, the AO initiated penalty proceedings u/s 271(1)(c) on the ground that the assessee had furnished inaccurate particulars of income and thereby sought to evade tax and issued a notice accordingly.

12. The assessee contended that the additions were made on the basis of material already available on record and taking a different view from that of the assessee and also in view of various judicial decisions, the penalty proceedings u/s 271(1)(c) cannot be initiated against the assessee. Further, it was contended that the AO has not established in the assessment order that the assessee has concealed the particulars of income or furnished inaccurate particulars of income.

12. Rejecting the submissions of the assessee, the AO levied a minimum penalty of Rs. 2,01,92,479/- u/s 271(1)(c) of the Act.

13. Against the said penalty order, the assessee preferred an appeal before the CIT(A).

14. Before CIT(A), The AR of the assessee submitted that mere fact of upholding of additions by the Hon'ble ITAT would not tantamount to establishing of concealment of particulars of income. It was mentioned that penalty proceedings u/s. 271(1)(c) are independent proceedings and concealment of the facts are to be established before levying penalty. The AR laid reliance on the following cases:

- a. *Banaras Textorium Vs CIT (169 ITR 782) (All)*
- b. *CIT Vs Saraf Trading Corporation (65 ITR 60) (Ker)*
- c. *CIT Vs D Ratnam (1995) (Tax LR 504, 506)*
- d. *DILIP N SHROFF Vs JCIT, 2007, (291 ITR 519 SC)*
- e. *T.Ashok Pai Vs JCIT (292 ITR 11) (SC)*

14.1 Further, the AR mentioned that as observed by the Hon'ble ITAT Lucknow bench in the case of Star International (P) Ltd. v. Asst. CIT [2009] 122 TTJ 380 unless the assessing officer give a finding that assessee did not substantiate the explanation offered, the same was not bonafide and all the facts and material relating to the computation of total income was not disclosed, there was no scope to levy penalty u/s 271(1)(c) of the Act.

14.2 Thus, the AR of the assessee vehemently argued before the CIT(A) that in the facts and circumstances of the case of the assessee there was no scope to levy penalty u/s.271(1)(c) of the IT Act and therefore the same was liable to be deleted.

15. The CIT(A) after examining all the additions made by the AO elaborately, deleted the penalty levied u/s 271(1)(c) of the Act by observing as under:

9.3 After going through all the facts and circumstances of the case as well as arguments put forth by the AR of the appellant the conclusions that can be arrived at are:

i. The assessee filed all details regarding land transaction along with the return of income declaring the profit under the head capital gains.

ii. The assessing officer after going through the relevant details reworked out the profit in that land transaction arriving at the conclusion that the same should be brought to tax under the head business.

iii. The claim of the expenditure as deduction was Withdrawn by the assessee though there was no specific information on record to establish that the same was bogus.

iv. As discussed in the earlier part of this order, the issue involved with regard to assessing of the profit accrued in land transaction under a specific head is a debatable issue.

v. Disallowance u/s.40(a)(ia) of the I.T Act cannot be considered as a ground for levy of penalty u/s.271(1)(c) of the IT Act in the light of decision of the Hon'ble ITAT, Hyderabad.

vi. The Expenditure incurred towards ROC charges was debited to the profit and loss account and thus the relevant information was disclosed by the assessee in the financial statements. Disallowance of claim of deduction by the assessing officer because the same was of capital nature, in my view does not amount to concealment of particulars of income or furnishing of inaccurate particulars of income.

vii. The assessing officer disallowed the claim of the depreciation basing on the facts already declared by the assessee in the return of income.

viii. The assessing officer reworked out the work-in-progress attributable to projects under construction, ignoring the consistent procedure adopted by the

assessee in his accounts and such reworking out basing on the details already available on record may not constitute concealment of particular of income.

9.4 Thus, the assessing officer made the additions / disallowances basing on the financial statements which were filed by the assessee along with the return of income. Under these circumstances, I am of the opinion that there is no case to conclude that the assessee concealed particulars of income or furnishing inaccurate particulars of income.

9.5 In the light of detailed discussion, I am of the opinion the penalty u/s.271(1)(c) was levied basing on conclusions arrived at in the assessment order and basing on additions/disallowances made while computing the total income. There is no indication in the penalty order that the additions/disallowances made by the assessing officer constituted concealment of particulars of income or furnishing of inaccurate particulars of income for the purpose of levy of penalty u/s.271(1)(c) of the IT Act. In the absence of any independent supporting evidence with regard to conclusion arrived at regarding concealment of income for the purpose of levy of penalty there is no scope to uphold the action of the assessing officer. Hence, the penalty levied u/s.271(1)(c) of the IT Act is deleted.”

16. Aggrieved by the order of the CIT(A), the revenue is in appeal before us raising the following grounds of appeal:

“1. The Order of the CIT(A) is erroneous in law and on facts of the case.

2. The CIT(A) ought to have upheld the penalty as the additions were also sustained by the ITAT.

3. The CIT(A) ought to considered that the penalty was levied on the grounds that the assessee company furnished inaccurate particulars and resulted to disallowance.

4. Any other ground(s) that may be urged at the time of hearing.”

17. Ld. DR submitted that because of survey proceedings only, the issues came to light, otherwise, it would have gone unnoticed. Further, he submitted that Hon'ble ITAT has

confirmed all the additions contested by the assessee. AO has discussed elaborately in the penalty order to justify the levy of penalty. He relied on the decision in the case of CIT Vs. Anwer Ali 76 ITR 697 (SC). He brought to our notice the para 4.10.1 and para 9.3 of CIT(A) order to submit that CIT(A) has ignored that assessee has submitted inaccurate particulars and came to wrong conclusion. Further, he relied on the findings of Hon'ble ITAT on these additions (page 40 of paper book).

18. Ld. AR submitted that revenue department has raised only effective ground i.e. ground No. 3 of grounds of appeal that the disallowance made by the AO is automatic to confirmation of penalty. He further submitted that the survey was conducted only on development expenses and the same was accepted by the assessee and paid the tax dues voluntarily. The AO has changed the head of income, which was disputed before the CIT(A). It is relevant to note that CIT(A) has allowed the appeal in favour of the assessee. The development expenses were not the subject matter of the assessment and appeals, the issue was only the head of income. It is only the difference of opinion and will not lead to furnishing of inaccurate particulars. He relied on the decision of Hon'ble Supreme Court in the case of Concord of India Insurance Co. Ltd., Vs. Smt. Nirmala Devi & Others, 118 ITR 507 (SC) to suggest that as per the professional advice, assessee has formed the opinion as the head of income. Moreover, AO has not recorded in assessment order that it has furnished inaccurate particulars of income.

18.1 With regard to ROC charges, AR submitted that there are conflicting decisions on this issue, some are in favour of assessee. The assessee has followed the advice of counsels,

AO cannot frame penalty under this back ground, he relied on Vijay Vishin Meghani Vs. DCIT, 398 ITR 250 (Bom.)

18.2 With regard to WIP valuation, AR submitted that assessee has two different independent businesses, the expenses were allocated to the business which is running profitably and by mistake it was not allocated to the project under construction. He relied on the decision in the case of BR Ltd. Vs. VP Gupta, CIT (SC) 113 ITR 647 (placed at page 1 of paper book III).

18.3 With regard to centring material depreciation, AR submitted that there are two views possible and assessee has regularly followed the same method of accounting. He relied on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Anwal Ali [1970] 76 ITR 696 and CIT Vs. Reliance Petroproducts Pvt. Ltd., [2010] 322 ITR 158 (SC).

19. Considered the rival submissions and perused the material on record. In the instant case, with regard to ground No. 2, the explanation offered by the assessee in respect of the additions is bonafide. There is no fraud or any gross or willful neglect on part of the assessee. It is a settled law that the penalty proceedings and the assessment proceedings are distinct and separate. The findings in the assessment proceedings though relevant and good for making the quantum addition does not automatically justify the imposition of penalty as the regular assessment order is not the final word in penalty proceedings and howsoever relevant and good the findings in the assessment order may be, they are not conclusive so far as the penalty proceedings are concerned. For the above proposition reliance is placed on the following decisions:

(i) *Banaras Textorium Vs. OT (1988) 169 ITR 782 (All.)*

- (ii) *CIT VS. DharamchandL Shah (1993) 204 ITR 462 (Bom.)*
(iii) *National Textile Corporation Vs. CIT(2000) 164 OR 209 (Guj.)*

19.1 In the given case, the assessee has claimed development expenses by mistake due to wrong understanding of accountant. This was not the dispute before appellate authorities as the same was accepted and paid tax dues during the assessment proceeding stage itself. With regard to charging of income under the head 'business income, which was finally accepted by ITAT, but, CIT(A) has adjudicated in favour of assessee i.e. as capital gains. Therefore, this issue is debatable considering the fact that there are two possible views. Therefore, this cannot be a point which will fall under furnishing of inaccurate particulars and is not fit case to attract the provisions of section 271(1)(c). With regard to other issue of ROC charges, allocation of expenses and depreciation, the assessee has relied on the opinion of experts and possibility of different views. All the issues under dispute are part of information filed before the AO, it is not the case of unearthing information from outside the books of account. Therefore, it cannot be treated as furnishing of inaccurate particulars of income.

19.2 In our considered view, we do not find any infirmity in the order of the CIT(A) in deleting the penalty levied by the AO u/s 271(1)(c) and accordingly, we dismiss the grounds raised by the revenue.

20. In the result, appeal of the revenue is dismissed.
Pronounced in the open court on 24th January, 2018.

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMBER

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Hyderabad, dated 24th January, 2018

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Copy forwarded to:

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3. CIT(A) – V, Hyd.
4. CIT - IV, Hyd.
5. The DR, ITAT, Hyderabad
6. Guard File