

आयकर अपीलीय अधिकरण, मुंबई “ ई” खंडपीठ
Income-tax Appellate Tribunal -“E”Bench Mumbai
सर्वश्री राजेन्द्र,लेखा सदस्य एवं, राम लाल नेगी, न्यायिक सदस्य
Before S/Shri Rajendra,Accountant Member and Ram Lal Negi,Judicial Member
आयकर अपील सं./I.T.A./1093/Mum/2016,निर्धारण वर्ष /Assessment Year: 2009-10

ACIT-17(3) Aayakar Bhavan, Room No.137, M.K. Road, Mumbai-400 020.	Vs.	M/s. Sane & Doshi Enterprises 12, Ali Chambers, Tamarind Lane, Fort, Mumbai-400 023. PAN:AAAFS 6687 D
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Shri V. Justin -CIT-DR

Assessee by: Shri S.C. Tiwari & Ms. Rutuja Pawar

सुनवाई की तारीख / **Date of Hearing:** 12.03.2018

घोषणा की तारीख / **Date of Pronouncement:** 18.05.2018

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश
Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य, राजेन्द्र के अनुसार- PER RAJENDRA, AM-

Challenging the order,dated 18/12/2015,of the CIT(A)-28 Mumbai the Assessing Officer (AO)has filed the present appeal.Assessee-firm,a builder and developer,filed its return of income on 25/09/2010,declaring total income of Rs.6.29 crores.The AO completed the assessment on 23/12/2011,determining the total income of the assessee at Rs.7.40 crores.

2.Effective ground of appeal is about deleting the penalty of Rs.41.02 lakhs,imposed by the AO,for furnishing inaccurate particulars,u/s.271(1)(c) of the Act.

Brief Facts:

During the assessment proceedings,the AO found that the assessee had recorded 'unsold stock of built up premises as stock in trade till AY. 2005-06,that thereafter the same was shown as investment w.e.f. 01.04.2005 at book value,that it had declared LTCG in the return of income on account of difference of sale consideration and indexed cost of acquisition. The AO was of the view that since the premises sold by the assessee were out of unsold stock in trade, the profit from sales should have been treated as business income.Accordingly,he added the said profit from sales as business income.

2.1.The assessee filed an appeal before the First Appellate Authority (FAA). The First Appellate Authority upheld the order of the Assessing Officer (A.O).He held that since the main business of the assessee is of builder and developer,the assessee-firm itself had develop

-ed the entire building, that at the time of acquisition of the property the intention was clearly to hold the property as stock-in-trade. The matter was further agitated by the assessee before the ITAT. Vide its order dated 28.10.2014 (ITA NO.6138/M/2012) the Tribunal also dismissed the appeal of the assessee.

3.1. In the meanwhile, the AO initiated penalty proceedings against the assessee and held that the assessee had evaded tax to the extent of Rs 41.00 lakhs by way of this change of head of income. The AO held that it was not a case where two views were possible or a difference of interpretation or opinion, that the assessee had deliberately taken advantage of the lower tax effect of capital gains and thereby evaded tax. Accordingly, the AO held that it had concealed the particulars of its income and levied a penalty of Rs 41,02,084 u/s. 271(1)(c) of the Act.

3.2. Aggrieved by the order of the AO, the assessee preferred an appeal before the FAA and made detailed submissions. After considering the same, he held that the assessee had filed copies of his balance sheet along with schedules as on 31/03/2008, 31/03/2007 and 31/03/2006, that it had declared the investment in Mayfair-I and Mayfair-II as investments in those years, that premises had been partly sold and the income therefrom was under dispute as to the head of income, that the closing stock in the balance sheets from these two projects was NIL as the same had been transferred to Investment account, that the AO did not disturb the quantum of the income computation, that the assessee had declared the profit from sale of total 4 premises at Rs. 381.05 lakhs, that the profit was credited to the P&L A/c for purposes of accounting, however extracted as a separate head of LTCG in the computation of income, that the AO had simply assessed the business income starting from the net profit as per P&L A/c, that the AO had not only accepted the sale consideration as recorded in the books but had also accepted the cost as recorded in the books, that penalty was not exigible considering the above facts. He referred to cases of *Roborant Investments P.Ltd.* (7SOT181), *Karan Raghav Exports Pvt.Ltd.* (349ITR112), *Bennet Colemann & Co.Ltd.* (259ITR383) & *Kanbay Software India (P)Ltd.* (119ITD153) and held that the assessee had furnished all facts before the AO and the explanation offered was also bonafide, that it had merely taken a different view of the same transaction which did not find favor with the AO/the higher appellate authorities, that facts were not in dispute between the AO and the assessee, that it was not the case of the AO that some material fact was concealed, that fact of sale is disclosed, the sale consideration was disclosed, that the asset was classified as investment in the balance sheet, that the ultimate

view was that the profit should be taxed as business income, that it was not a case of concealment of income. Finally, he deleted the penalty levied by the AO.

4. Before us, the Departmental Representative (DR) stated that FAA and the Tribunal had confirmed the addition made by the AO in quantum proceedings, that the AO had rightly levied the penalty. The Authorised Representative (AR) brought to our notice the judgment of the Hon'ble Bombay High Court, delivered on 09.04.2015, while deciding the appeals for the AY.2000-01 to 2008-09 (ITA 375 of 2013.). He contended that the assessee had converted the stock in trade into investment, that in subsequent years it sold the assets and profit earned on sale of investment was offered to tax, that the assessee had disclosed all the necessary details about the transactions. He relied upon the cases of Reliance Petro Products Pvt. Ltd. (322 ITR 158), S M Construction (ITA 412 of 2013) and Dalmia Dychem Industries Ltd. (234 Taxman 9).

5. We have heard the rival submissions and perused the material before us. We find that the assessee had shown unsold stock as investment in its books of accounts from 01.04.2005, that that profit arising out of the sale of the flats was offered for tax under the head capital gains, that the AO was of the opinion that the stock in trade cannot partake the character of investment, that the AO levied penalty, invoking the provisions of section 271(1)(c) of the Act, that the FAA deleted the penalty. In our opinion, the basic issue to be decided is as to whether the treatment given by the assessee to the sale proceeds of unsold stock can be treated as furnishing of inaccurate particulars. We find that the fact of sale of flats was never concealed. There is a difference of opinion between the AO and the assessee about the treatment to be given to the transaction. As far as quantum proceedings are concerned, they stand on different footing. Any addition to the income of an assessee or disallowance of a claim cannot and should not lead to automatic levy of penalty. What has to be seen is that as to whether the explanation filed by the assessee during the penalty proceedings was a plausible explanation. In the case under consideration the assessee had claimed that it was under bonafide impression that profit arising to it was taxable under the head capital gains. Taxability of an item of income under a particular head should not result in levy of penalty. After considering the peculiar facts and circumstances of the case under consideration, and taking note of the judgment of the Hon'ble High Court in appeal 375 of 2013 along with the cases cited by the AR we are of the opinion that the order of the FAA

does not suffer from any legal or factual infirmity. So, confirming his order we decide the effective ground of appeal against the AO.

As a result, appeal filed by the AO stands dismissed.

फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 18th May, 2018.

आदेश की घोषणा खुले न्यायालय में दिनांक 18 मई, 2018 को की गई।

Sd/-

(राम लाल नेगी / Ram Lal Negi)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक/Dated : 18.05.2018.

Jv.Sr.PS.

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

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "E" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ, आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.