

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F', NEW DELHI**

**BEFORE SH. O.P. KANT, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No.1812/Del/2015
Assessment Year: 2009-10

Phoenix Data Tech Services Pvt. Ltd., B-33, Shivalik, Malvia Nagar, New Delhi	Vs.	DCIT, Central Circle-17, New Delhi
PAN :AADCP9441L		
(Appellant)		(Respondent)

Appellant by	Sh. Sanjeev Agarwal, CA
Respondent by	Sh. Atiq Ahmed, Sr.DR

Date of hearing	25.06.2018
Date of pronouncement	27.06.2018

ORDER

PER O.P. KANT, A.M.:

This appeal by the assessee is directed against order dated 5th January, 2015 passed by the Ld. Commissioner of Income-tax (Appeals)-XXVI, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2009-10 in relation to penalty under section

271(1)(c) of the Income-tax Act, 1961 (in short 'the Act'). The grounds of appeal raised are reproduced as under:

1. *The learned CIT(A) erred in fact and in law confirming the penalty of Rs.48,18,083/-, which is not only bad in law but also against the facts and circumstances of the case.*

2. Briefly stated facts of the case are that the assessee company was engaged in the business of real estate. The return was filed by the assessee at loss of Rs.87,680/-. The case was selected for scrutiny. The assessment was completed on 01.02.2011 u/s 143(3) of the Income-tax Act, 1961 (for short 'the Act') at an income of Rs.1,68,08,860/-. The Assessing Officer made addition of Rs. 1,67,75,000/- on account of unexplained receipts on booking of space/area and Rs.1,00,000/- on account of unexplained receipts from Sh. Avinash Kumar Setia. Thereafter, the CIT(A) partly allowed the appeal by allowing relief of Rs.27,00,000/- and confirmed the rest of the addition of Rs.1,40,75,000/-. Consequently, the Assessing Officer levied penalty of Rs.48,18,083/- vide order dated 29.03.2014 holding that the assessee has furnished inaccurate particulars of its income with respect to the said disallowance of Rs.1,40,75,000/-. The Ld. CIT(A) vide order dated 5th January, 2015, also upheld the said penalty levied by the Assessing Officer. Aggrieved, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

3. Before us, the Ld. counsel of the assessee submitted that the quantum addition for which the penalty of Rs.48,18,083/-

was levied by the Assessing Officer, has been deleted by the Tribunal, Delhi bench in ITA No. 2463/Del/2013 vide order dated 13.06.2016. In view of the deletion of the quantum addition, he submitted that penalty can no longer survive. The Hon'ble Delhi High Court also upheld the finding of the ITAT in its order dated 06.01.2017 passed in ITA No.804/2016.

3. The Ld. DR also could not controvert this fact that the quantum addition has been deleted by the Tribunal.

4. We have heard the rival submission and perused the relevant material on record. The Assessing Officer in penalty order dated 29/03/2014 under section 271(1)(c) of the Act levied the penalty in respect of addition of Rs. 1,40,75,000/-. We further note that on appeal by the assessee against the quantum addition, the Tribunal, Delhi bench, in ITA No. 2463/Del/2013, deleted the addition with following findings:

"12. We have carefully considered the rival contentions and perused the orders of the lower authorities and the document seized. We have already discussed the brief facts of the case above. Both the issues on legal aspects as well as on merits of the addition are dealt with as under:-

13. On legal issue, admittedly, assessment has been framed by the ld. AO u/s 143(3) of the act and whole addition has been made based on seized document being page 1 of Annexure A- 12 impounded from the premises situated at 604, tower •- IIA, Rajender Palace, New Delhi during search on Thapar homes group of cases. Therefore, apparently, impounded material received by Ld. AO is in case of search on third party and he was of the view that documents belong to the assessee and it has a bearing on the determination of the total income of the appellant. With effect from 1st June 2003, provisions of section 153A-to 153C enacted, which covers the new scheme of search assessments. Accordingly, where the assessing officer is satisfied that any books of account or other documents

seized in search pertains to person or any information contained therein relates to person other than the person searched, then the books of accounts etc, or seized documents shall be handed over to the AO having jurisdiction over such other person. On receipt of such information, AO shall proceed against such other person and issue notice and assessee or reassess the income of the other person in accordance with the provisions of section 153 A. For this further condition is that AO satisfies that the document stated etc have a bearing on the determination of the total income of such other person for the relevant assessment year. Then provisions of section 153A rws 153C of the Income Tax Act govern assessment. In context of these provisions in the present fact, it is apparent that that impugned documents were found during the course of search on third party, which has been received by the Id. AO. Now Id. AO is duty bound to record his satisfaction about seized documents having bearing on the income of the assessee. After that, he has to proceed to assess the income of the assessee according to section 153A of the Income tax Act. The Assessing officer is empowered to assess six assessment years immediately preceding the assessment year relevant to the previous years in which search takes place. In this case, Search was conducted on 20-10-2008, previous year is F Y 2008-09 and AY 2009-10, and therefore impugned assessment year is outside the purview of section 153A of the Act. In view of this the additional ground raised by the Appellant with respect to applicability of section 153C and all other consequent issues are rejected and assessment u/s 143(3) in the present case is upheld. Therefore, additional ground of appeal of the appellant is dismissed.

14. *Coming to the merits of the case, it is necessary to analyses the document seized, certified copies of which are placed on record by the parties. It is a chart accompanied with the counterfoils of cheque books of some of the companies named in the chart. Firstly we analyze the chart which is a computerized statement found from the premises of shri B K Dhmgra This chart has 12 columns. On the top of the chart the name of three companies are mentioned i.e. (1) Prime Infoways private Limited, (2) Prime IT solutions P Limited, (3) Phoneix dataTech Services private Limited (Appellant). These chart further states the names of 66 companies. There it is mentioned ‘ names of the parties in whom favors cheques are to be issued’. Further on that chart below on top also shows the names of the above three companies purportedly written in acronyms and below that square feet and area converted in to square meter is mentioned. Then the details of 66 parties are mentioned showing area booked, rate per square feet, total advance payment, then there is bifurcation between above three companies including appellant of the square feet area, next column shows amount of cheque , amount in cash and cheques issued, balance. Subsequent documents shows the cheque book counterfoils of six companies where in the counter foils*

of cheque books were found showing issue of cheques in the name of appellant and other two entities. Namely in case of party no. 1 listed in the statement is Akshya Arogya mandir private limited from cheque book counterfoil with kotak Mahindra Bank Limited shows issue of cheque in the name of appellant of Rs 9,60,000/-. Further in case of party no 18 Micron steels limited , this companies cheque book counter foil with kotak Mahindra bank shows that a cheque of Rs 3,60,000/- is issued to the one of the three companies. Similarly, in case of three more companies such counterfoils of chequebooks were seized. Based on these evidences the addition is made by the Ld. AO and confirmed by the CIT (A). The seized documents vis a vis the reasons for addition are examined as under:-

- i. Above documents are not seized from the premises of the assessee but at the premises of third party who is neither the director nor the shareholder of the company. However neither the ld. AO as well as The Ld. CIT (A) has led any evidence that though the paper shows the names of the appellant along with two other companies but these papers are found from the third party i.e. Shri B K Dhingra and how is he associated with the appellant. Ld. CIT (A) has stated that Shri B K Dhingra is a close associate of Shri 1 M Thapar . Merely an assertion that somebody is close to one of the director cannot become the close associate of the appellant company itself. Ld. AO has not led any evidence that Shri Dhingra looks after the affairs of the company in any manner, the evidence of actual transaction of those parties and it is unaccounted income of these companies.*
- ii. On 20.8.2008 search on Thapar Homes Group as well as survey on the assessee were carried out. Admittedly, during the course of search the charts as well as the counterfoils of the chequebooks were found from Shri B K Dhingra, However, during survey no evidences with respect to the projects whether in existence or not for which the statement is found, whether the counterfoils of cheques, which were relied up on whether cleared in the bank, account of the appellant were examined. Appellant has submitted that the there is no such project, assessee received no such booking and no such cheques were received in the bank account of the assessee. Revenue has not controverted this fact. As the said cheques have not at all been received by the assessee, merely because in the counterfoil of the chequebook of issuing party, name of the appellant is mentioned, it cannot result in to addition in the hands of the assessee unless it is cleared in the bank account of the appellant.*
- iii. During assessment the appellant was not confronted with the statement of the person from whose possession these chart and*

also the counterfoils of the cheques of six companies were found. In fact, there is no averment in the order that any such statement is in possession of revenue.

- iv. Furthermore the name of all the parties in that particular statement wherein bookings in the name of those parties have been shown, appellant has filed confirmation of those parties stating that they have not booked any such premises and also apparently no payment have been made. On these confirmation Id. AO has neither issued any summons to those parties nor examined their bank statement about the issue of those cheques and whether these cheques have been cleared or not. The assessing officer and CIT (A) have brushed aside those confirmations as meaningless. In fact, on examination of those confirmations, reality of the reason for writing counterfoils of the chequebooks in the name of appellant and two other companies would have been known to revenue. The reason why those cheques were issued but were never came in to the bank accounts of the appellant and whether they are really handed over to the appellant company is also not known to revenue. It is an uncontroverted facts that those cheques remaining non-transacted. Contrary to that appellant has discharged its onus by producing the confirmation of those parties that they have neither booked any premises with the appellant company and therefore have not paid any sum.
- v. It is the allegation of the revenue that these companies are the bogus companies floated by one Shin B K Dhingra and they are used for capital formation activities. This fact merely remains a conjecture and surmises in absence of any evidences led by revenue against that person i.e. Shri B K Dhingra and his connection with the appellant company. Merely making an assertion that Shri B K Dhingra is entry operator or the companies are formed for capital formation remains unsubstantiated allegation unless there are any evidences such as assessment orders etc of entry operator or the assessment orders of those companies operated by him.
- vi. Further assuming that those companies are the bogus companies, and then 011 looking at the chart we found that there are columns of 'cash'. If these amounts are the bogus amount introduced by the appellant company then we failed to understand that how the cash is also be received from those companies, whereas in general only commission is required to be paid to the entry provider and no cash is receivable from them.

- vii. Further, it remains uncontroverted that there was no project in the name of the appellant in impugned assessment year as there was no permission also. The facts of the acquisition of land are submitted by the Ld. AR and also stated the status of the project, which is not controverted. It is highly unlikely that the builder who is not the line of the developer for considerable time would get such kind of bookings. All the counter foil of cheques showed dates of March 2008.
- viii. Further Ld, CIT (A) drew support from the provision of section 292C of the act. That provision applies in case the documents are found from the possession of the person then the presumption arises against that person. According to us, the reliance on it is unfounded as there are no documents found from the possession of the assessee or at the premises of the assessee. It was found from Shri B K Dhingra who has no business relationship with the appellant company.
- ix. Ld CIT (A) has held that details mentioned in the chart are not projections but actual transactions. This assertion of Ld. CIT (A) is also not supported by evidences because in those circumstances the cheques issued by those companies should have been reflected in the bank statements of the appellant companies. It is unassailed that these cheques have never been credited in the bank account of the appellant company, x. Ld CIT (A) relied on the decision of Honourable Delhi High court in case of CIT V Sonal Constructions 28 taxmann.com 127 (del for calculations shown in the documents, In the present case as the project is nonexistent, the cheques are not credited in the bank account of the appellant, the confirmation of the parties that they have not made any bookings and have not paid any sum to the appellant company, the facts of that case are distinguishable.

15. In view of the above reasons, we reverse the finding of the ld. CIT (A) in confirming the addition of Rs 14078000/- in the hands of the appellant on account of booking sums allegedly received from those parties. In the result, solitary ground raised in the appeal is allowed.”

5. In view of above, it is evident that the addition in question in respect of which penalty was levied, has already been deleted by the Tribunal and the Hon’ble jurisdictional High Court has also

affirmed the findings of the Tribunal in ITA No.804/2016 vide order dated 06.01.2017. In such circumstances, when the addition itself has been deleted, the penalty levied on the same cannot survive. Accordingly, we direct the Assessing Officer to cancel the said penalty levied.

6. In the result, appeal of the assessee is allowed.

Decision is pronounced in the open court on 27th June, 2018.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 27th June, 2018.

RK/-(D.T.D.)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Asst. Registrar, ITAT, New Delhi