



officer u/s 271(1)(c) of the Income-tax Act, 1961 (in short 'the Act') whereas Revenue is aggrieved by the action of the CIT(A) in deleting the remaining part of penalty.

3. The brief facts of the case are that the appellant before us is member of the Punjabi Cooperative Housing Building Society Ltd. The society consisted of 95 members and was the owner of 21.2 acres, of which 500 square yards plots were held by 65 members, 1000 square yards plots by 30 members and the remaining 4 plots of 500 square yards each were being retained by it. A tripartite Joint Development Agreement (JDA) dated 25.02.2007 for 7 development of 21.2 acres of land in the village Kansal. This JDA was entered into between the owner i.e. Punjabi Cooperative Housing Building Society Ltd., Hash Builders Pvt. Ltd., Chandigarh (HASH) and Tata Housing Development Company Ltd. (THDC). Under the JDA, it was agreed that HASH and THDC viz., the developers, will undertake to develop 21.2 acres of land owned and registered in the name of the society. The agreed consideration was of Rs. 237,03,75,000/- (Rs. 106,42,50,000/- in cash and Rs. 103,61,25,000/- in kind being value of 129 flats of 2250 sq. feet each to be constructed ) payable on pro-rata transfer of land. Rs. 3.87 crores received as adjustable advance to be disbursed by THDC through Hash to each individual member of the society, and different amounts and flats were payable and allotable to members having different plot sizes. Society's members having 500 sq. yds. plot were to get Rs. 82,50,000/- + 1 Flat valued at Rs. 1,01,25,000/- and those having 1000 sq. yard plot were to get Rs. 1,65,00,000/- + 2 flats valued a Rs. 2,02,50,000/-. The

developers were to make payments in four installments. A sum of Rs.3.87 crores was paid on execution of the JDA. Rs.15.48 crores was to be paid against a registered sale deed for land of an equivalent value of 3.08 acres, earmarked on the demarcation plan annexed to the JDA, which was effected by a registered conveyance dated 02.03.2007. The second installment payment, being Rs. 23.22 crores, was for land of an equivalent value of 4.62 acres, also earmarked on the demarcation plan, which was effected by a registered deed of conveyance, dated 25.04.2007. The third installment payment of Rs.31.9275 crores was to be made within six months from the date of execution of the agreement or within two months from the date of approval of plans/design and drawings and grant of the final license to develop, whichever was later. This was to be for land of an equivalent value of 6.36 acres, also earmarked on the demarcation plan. The balance payment of Rs. 31.9275 crores was to be made within two months from the date of the last payment, towards full and final settlement of the entire payment of Rs. 106.425 crores, for which a registered sale deed for land of an equivalent value being 7.14 acres, also earmarked on the demarcation plan, was to be conveyed.

4. Due to pending legal proceedings, first in the Punjab and Haryana High Court and thereafter in the Delhi High Court, the necessary permissions for development were not granted, as a result of which the JDA did not take off the ground. For the previous year relevant to the assessment year 2007-08, the assessee filed an

original return of income on 07.12.2007, declaring an income of Rs.2,50,171/-. The return of income tax for the assessment year was later revised, on 07.10.2009 (belatedly), declaring an income of Rs.30,08,606/-, which included capital gains of Rs.27,58,436/-. According to the assessee, Rs.36 lakhs received in the subsequent assessment year 2008-09 were also offered for tax under the head “capital gains”, but by way of revised return.

5. The Assessing Officer vide an order dated 30.12.2009, passed under Section 143(3) of the Act, held that since physical and vacant possession had been handed over under the JDA, the same would tantamount to “transfer” within the meaning of Sections 2(47)(ii), (v) and (vi) of the Income Tax Act. He further held that, in the case of an assessee owning a 1000 square yards plot, the full value of consideration would be Rs.3.675 10 crores less cost of acquisition of Rs.12,81,724/-. The long term capital gain was, therefore, stated to be Rs.3,54,68,276/-.

6. The Commissioner (Appeals) dismissed the appeal upholding the order passed by the Assessing Officer. Aggrieved by the order, the assessee filed appeal before the Income Tax Appellate Tribunal (ITAT), which was also dismissed by the ITAT.

7. The assessee further preferred appeal before the Hon'ble Punjab & Haryana High Court. The Hon'ble High Court vide order dated 22.7.2015 reported in (2015) 59 taxman.com 359 (P&H) allowed all the appeals of the assessee holding as under:-

“1. Perusal of the JDA dated 25.02.2007 read with sale deeds dated 02.03.2007 and 25.04.2007 in respect of 3.08 acres and 4.62 acres respectively would reveal that the parties had agreed for pro-rata transfer of land.

2. No possession had been given by the transferor to the transferee of the entire land in part performance of JDA dated 25.02.2007 so as to fall within the domain of Section 53A of 1882 Act.

3. The possession delivered, if at all, was as a licensee for the development of the property and not in the capacity of a transferee.

4. Further Section 53A of 1882 Act, by incorporation, stood embodied in Section 2(47)(v) 11 of the Act and all the essential ingredients of Section 53A of 1882 Act were required to be fulfilled. In the absence of registration of JDA dated 25.02.2007 having been executed after 24.09.2001, the agreement does not fall under Section 53A of 1882 Act and consequently Section 2(47)(v) of the Act does not apply.

5. It was submitted by learned counsel for the assessee-appellant that whatever amount was received from the developer, capital gains tax has already been paid on that and sale deeds have also been executed. In view of cancellation of JDA dated 25.02.2007, no further amount has been received and no action thereon has been taken. It was urged that as and when any amount is received, capital gains tax shall be discharged thereon in accordance with law. In view of the aforesaid stand, while disposing of the appeals, we observe that the assessee-appellants shall remain bound by their said stand.

6. The issue of exigibility to capital gains tax having been decided in favour of the assessee, the question of exemption under Section 54F of the Act would not survive any longer and has been rendered academic.

7. The Tribunal and the authorities below were not right in holding the assessee-appellant to be liable to capital gains tax in respect of remaining land measuring 13.5 acres for which no consideration had been received and which stood cancelled and incapable of performance at present due to various orders passed by the Supreme Court and the High Court in PILs. Therefore, the appeals are allowed.”

8. The Department preferred appeal before the Hon'ble Supreme Court, however, the Hon'ble Supreme Court dismissed the appeal of the Department vide order dated 4.10.2017 along with other appeals with the title case ‘ CIT Vs. Balbir Singh Maini’ & others (2017) 157 DTR 273 (SC) observing as under:-

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*“20. The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of Section 53A. In short, there is no agreement in the eyes of law which can be enforced under Section 53A of the Transfer of Property Act. This being the case, we are of the view that the High Court was right in stating that in order to qualify as a “transfer” of a capital asset under Section 2(47)(v) of the Act, there must be a “contract” which can be enforced in law under Section 53A of the Transfer of Property Act. A reading of*

*Section 17(1A) and Section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in Section 53A. The ITAT was not correct in 30 referring to the expression “of the nature referred to in Section 53A” in Section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Finance Act of 1987 w.e.f. 01.04.1988. All that is meant by this expression is to refer to the ingredients of applicability of Section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in Shrimant Shamrao Suryavanshi (supra) that the Section applies, and this is what is meant by the expression “of the nature referred to in Section 53A”. This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression “of the nature referred to in Section 53A” would somehow refer only to the nature of contract mentioned in Section 53A, which would then in turn not require registration. As has been stated above, there is no contract in the eye of law in force under Section 53A after 2001 unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, 31 since the JDA has no efficacy in the eye of law, obviously no “transfer” can be said to have taken place under the aforesaid document. Since we are deciding this case on this legal ground, it is unnecessary for us to go into the other questions decided by the High Court, namely, whether under the JDA possession was or was not taken; whether only a licence was granted to develop the property; and whether the developers were or were not ready and willing to carry out their part of the*

*bargain. Since we are of the view that sub-clause (v) of Section 2(47) of the Act is not attracted on the facts of this case, we need not go into any other factual question.”*

.....

*“27. In the facts of the present case, it is clear that the income from capital gain on a transaction which never materialized is, at best, a hypothetical income. It is admitted that, for want of permissions, the entire transaction of development envisaged in the JDA fell through. In point of fact, income did not result at all for the aforesaid reason. This being the case, it is clear that there is no profit or gain which arises from the transfer of a capital asset, which could be brought to tax under Section 45 read with Section 48 of the Income Tax Act.”*

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9. In the meantime, the Ld. ITO / Assessing officer vide her impugned orders dated 22.3.2012, visited the assessee with penalty of Rs. 79,53,140/- for concealment on the amount of additions that were made in the assessment order on accrual basis. At that point of time, she only had the support of order of Ld. CIT(A) and the orders of the Hon'ble ITAT in Revenue's favour. The order of the Hon'ble High Court was, however, delivered much later. The Ld. CIT(A)-II, Ludhiana, on assessee's appeal against penalty order, deleted the penalty in respect of quantum additions which stood deleted as per the decision of the Hon'ble High Court (supra). He, however, upheld the levy of penalty in respect of the amount of consideration received by the assessee in two installments on pro-rata transfer of

land by way of registered conveyance deed as noted above, broadly on following points:-

- i) That the revised return filed by the assessee on 7.10.2009 was treated by the Assessing officer as non est as it was filed beyond time. Also, it was filed subsequent to availability of the information about the transfer of land, with the department.
- ii) That the gain declared was not voluntary by the appellant and the return was revised only when the department initiated enquiries. That in the case of *Prempal Gandhi Vs. CIT 335 ITR 23 (2009) (P&H)*, it was held that when the return is revised on coming to know about the detection of concealment by department, it is not a case of bonafide voluntary disclosure.
- iii) That there being no bonafide cause for not declaring the capital gain the original return, the levy of penalty was confirmed.

10. Now the assessee has come in appeal agitating the action of the Ld. CIT(A) in confirming the penalty for the concealment of income received by the assessee by way of first two installments on pro-rata transfer of land as discussed above and Revenue, on the other hand, has now come in appeal agitating the action of the CIT(A) in deleting the penalty in respect of additions considered on accrual basis taking into consideration the entire sale consideration receivable by the assessee as per JDA.

11. Before us, Ld. Counsel for the assessee has made the following submissions:

- i) The JDA was to facilitate development of 21.2 acres to build up flats at builders cost after obtaining necessary approvals from m concerned departments.
- ii) JDA was not a simple 'sale deed' to infer accrual of capital gain on the very date of its execution i.e. 25.02.2007. Only advance money was received leading to bonafide belief that capital gain would accrue on completion of project.
- iii) 'JDA' not being registered, as mandated under the Indian Registration Act and Other Related Laws (Amendment) Act, 2001, was not enforceable u/s. 53A of Transfer of property Act, hence no transfer took place u/s. 2(47)(v) of I. Tax Act.
- iv) Sale consideration had two components - cash and in kind i.e. build up flats. Cash received was only one part with flats no where in the offing. Hence, capital gain was not computable only on part payment received in respect of 3.08 acres and 4.62 acres land transferred.
- v) On a review of the matter, the return was suo moto revised on 07.10,2010 offering capital gain on Rs.30 lacs received in this year to avoid any penal action.
- vi) Since the said issue was not confronted by AO till the revised return was filed, it was a voluntary return, so as not to invite penalty u/s. 271(1)(c).
- vii) The issue was highly debatable, when CIT(A)-II Ludhiana took a view different in Satpal Gosain's case from CIT(A)'s view taken in assessee's case. Also, department was confused when the said gain was assessed in Society's hand.
- viii) The Hon'ble Apex Court, in its order dated 4.10.2017, also held (in para 20)...It being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no transfer can be said to have taken place under the aforesaid document". Again in final para 28 the Apex Court held "This being so, no profits or gains

*arose from the transfer of a capital asset as to attract section 45 and 48 of the Income Tax Act.*”

- ix) Therefore, in view of above judgement of Apex Court, when no gain in this case arose attracting sec 45 and 48, there is absolutely no question of making out a case for levy of penalty. The penalty order is therefore, not at all sustainable.

12. The Ld. DR, on the other hand, has relied on the findings of the lower authorities. He, however, has been fair enough to admit that the penalty was not leviable in respect of quantum additions that stood deleted by the Hon'ble High Court i.e. in respect of the additions which were made by the Assessing officer on accrual basis in respect of part of land regarding which neither any sale deed was executed nor any consideration was passed to the society or to the members because of the failure / non-implementation of the JDA. He, however, has vehemently submitted that the assessee had already received his share out of the consideration passed by first two installments on pro-rata transfer of the land by the society measuring 7.7 acres. That the assessee deliberately did not disclose the capital gains earned on the said amount. The revised return filed by the assessee was after the limitation period prescribed for the filing of the same and, hence, was rightly treated by the Assessing officer as non est. Even the assessee offered the capital gains only by way of belated revised return when the Department had already initiated enquiry in case of other assesseees / Members of the society. He, therefore, has submitted that the penalty is liable to be confirmed in

respect of consideration received by the assessee for the transfer of his part of land through registered sale deed.

13. We have considered the rival submissions and have also gone through the records. In our view, as the facts narrated above suggests, it was not a simple case of transfer of land. The land was owned by the Society constituting 95 Members including the assessee. The consideration settled for the transfer was in cash as well as in kind i.e in the shape of flats to be given to the Members as per their proportionate share in the property. As discussed above, though the assessee had received the cash component by way of first two installments as per the proportionate share in the land on the pro-rata transfer of the land by society, however, the consideration in kind i.e. flats was not received by the assessee as the JDA could not mature. Hence, there seems force in the contention of the assessee that he was of the bonafide belief that the transfer in this case would be completed only when the JDA would mature or succeed. As observed above, the Hon'ble Supreme Court has already held that the transfer in respect of the remaining part of the land would not fall in the definition of the transfer as provided u/s 2(47) of the I.T. Act and there was no certainty of the transactions getting successful.

The assessee suo moto revised the return though belatedly on 7.10.2009 when the regular assessment proceedings were under progress and offered the capital gains tax in respect of amount received by him as per his share out of the first two installments received by the Society on prorata transfer of land. Till the filing

of the revised return, the assessee was never confronted by the Assessing officer on this issue. The assessee thus suo moto / voluntarily offered capital gains on the amount actually received by him.

The issue was highly debatable. Even the land was transferred by the society. In the JDA, society has been referred to as 'owner'. If the society was the 'owner' then the capital gains apparently would also be taxable in the hands of the society. The Assessing officer of the society has also taxed the capital gains in the hands of the society on protective basis. Hence, it was a debatable issue whether the capital gains will be taxed in the hands of the society or in the hands of the assessee. Not only the issue regarding the nature of the transactions but also about the date on which the transfer can be said to have completed, was debatable.

Further, in the similar facts and circumstances in the case of another assessee namely Shri Balwinder Singh Dhillon, the Coordinate Chandigarh Bench of the Tribunal for the assessment year 2008-09 in ITA No. 1140/Chd/2014 vide order dated 3.8.2015 has upheld the order of the CIT(A) deleting the penalty so levied by the Assessing officer u/s 271(1)(c) of the Act. The said decision has been further followed by the Chandigarh Bench of the Tribunal in the case of 'ITO Vs. Smt. Neena Chaudhary' in ITA No. 1096/Chd/2014 for assessment year 2008-09 wherein also the Departmental appeal challenging the deletion of penalty levied u/s 271(1)(c) has been dismissed. The said decision have also been followed by the Amritsar Bench of the Tribunal in 'Shri Raghunath

Sahai Puri Vs. DCIT order dated 13.6.2016 in ITA No. 633/ASR/2014 for assessment year 2007-08. Considering the overall facts and circumstances of the case, and in view of the decisions of the Coordinate Benches of the Tribunal, in respect of income earned by the other members of the society from the same transactions, whereby, upholding the order of the CIT(A) in cancelling penalty u/s 271(1)(c) of the Act, we are of the view that this is not a case of furnishing of inaccurate particulars of income or concealment of income so as to attract the penal provisions of section 271(1)(c) of the Act. The penalty so levied by the lower authorities in this case is hereby ordered to be deleted.

14. In the result, the penalty of the assessee is hereby allowed and that of the Revenue is dismissed. .

Order pronounced in the Open Court on 20.04.2018

**Sd/-**  
**(B.R.R.KUMAR)**  
**ACCOUNTANT MEMBER**  
Dated : 20.04.2018  
Rkk

**Sd/-**  
**(SANJAY GARG)**  
**JUDICIAL MEMBER**

*Copy to:*

- *The Appellant*
- *The Respondent*
- *The CIT*
- *The CIT(A)*
- *The DR*