

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "C": NEW DELHI  
BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 443/Del/2015  
(Assessment Year: 2009-10)

Geeta Rani Yadav, Sector-62, Shastri Nagar, Ghaziabad PAN: AAXPY3625N	Vs.	ITO, Ward-1(2), Ghaziabad
(Appellant)		(Respondent)

Assessee by :	Shri Ajit Kumar Jha, Adv
Revenue by:	Ms Ashima Neb, Sr. DR
Date of Hearing	21/06/2018
Date of pronouncement	31/07/2018

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the Id CIT(A)- Ghaziabad dated 08.12.2014 for the Assessment Year 2009-10.
2. The assessee has raised the following grounds of appeal:-
  - "1. *In confirming the penalty of Rs. 1276500/- imposed by the Id AO on addition of cost of improvement under "Income From Capital Gain" (Rs. 5637567/-) without giving the proper opportunity of being heard."*
3. The brief facts of the case shows that assessee is an individual who filed return of income declaring income of Rs. 175680 on 20/3/2010. Assessment under section 143 (3) was passed on total income of Rs. 5813250/-. The assessee filed her return of income wherein she has sold a plot of land for Rs. 50 Lacs Stamp value of which as per circle rate was Rs. 79.85 Lacs. The assessee filed the computation of total income considering the deemed sale consideration of Rs. 79.85 Lacs and

computed the capital loss of Rs. 12,128/- . The assessee has claimed cost of acquisition indexed at Rs. 15,32,264 as well as claimed cost of improvement of the asset at Rs. 64,64,864/-. Therefore, according to the assessee the capital gain was not chargeable to tax on sale of property.

4. During the course of assessment proceedings, the Ld. AO verified the computation of capital gain of the assessee on sale of the above property and found that that property sold was a plot of land having a boundary wall along with two rooms and one tin shed. As per the sale deed filed the total area of 57.02 square meter is constructed and the cost of construction was Rs. 5500/- per square meter. Thus the Ld. assessing officer computed the cost of construction at Rs. 463610/-. In the above cost of construction Rs. 1.50 lakhs was construction cost of boundary wall and the balance was construction cost of 2 rooms and tin shed. Furthermore as per the sale deed dated 23/6/2008 the cost of improvement as mentioned at Rs. 463610 whereas the assessee has claimed the cost of improvement at Rs. 38.79 Lacs. The assessee was asked to explain the difference as to why the cost of improvement sold by her should not be disallowed and instead of the cost of improvement is taken at Rs. 463610/-. The assessee did not file any reply before the Ld. assessing officer. Therefore as the sale deed mentions the cost of improvement and assessee failed to substantiate her claimed cost of improvement mentioned in the sale deed was recalculated and the capital gain was worked out at Rs. 56.37 Lacs considering the deemed sale consideration of Rs. 79.85 Lacs and granting the indexed cost of acquisition of Rs. 15.32 lakhs and cost of improvement of Rs. 8.15 Lacs. Consequently the assessment order under section 143 (3) was passed on 20/12/2011 and penalty proceedings under section 271 (1) (c) was initiated.

5. The assessee preferred an appeal before the Ld. CIT.A who vied order dated 30/7/2012 dismissed the appeal of the assessee and upheld the addition made by the AO stating that as appellant has failed to fulfill its responsibility so claim of deduction was correctly disallowed.
6. Therefore Id AO gave further opportunity to the assessee to explain why penalty is should not be levied.The assessee submitted reply dated 17/1/2004 requesting to keep the penalty proceedings in abeyance as the assessee has preferred an appeal before the ITAT .
7. The Ld. AO did not wait for the same and levied the penalty of Rs. 1 276491/- vied order dated 7/2/2014. The assessee challenged the same before the Ld. CIT (A) who confirmed the same and therefore assessee is in appeal before us.
8. Ld. authorized representative submitted that that the order passed by the coordinate bench is subject to miscellaneous application under section 254 (2) for recall of the order and restoration of the appeal under the proviso to rule 25 of the income tax appellate tribunal rules, 1963. He submitted that miscellaneous application is still pending for recalling the order. He further submitted that the penalty has been levied by the Ld. assessing officer without specifying any charge whether the assessee has concealed the income or furnishing inaccurate particulars of its income. He further referred to the penalty order wherein it is mentioned that penalty proceedings were initiated for concealment of income and furnishing inaccurate particulars of the income of the assessee i.e. on twin charges. He further referred to the assessment order to show that that penalty has been initiated in the assessment order stating that inaccurate particulars of income have been filed by the assessee and true and full disclosure of income has not been made. He therefore submitted that the penalty should not have been levied on the assessee as the appeal of the assessee is pending before the coordinate bench.

9. Ld. departmental representative vehemently submitted that the appeal of the assessee is not at all pending before the coordinate bench now as same has been disposed of for non-appearance by the assessee. In view of this he submitted that penalty is rightly levied by the Ld. assessing officer as there is no provision to keep the penalty proceedings pending after the passing of the order of the Ld. CIT – A wherein the appeal of the assessee on quantum is dismissed.
10. We have carefully considered the rival contention and the orders of the lower authorities on the quantum proceedings as well as penalty proceedings. The assessee has submitted before the Ld. assessing officer as well as before the Ld. CIT – A that her appeal is pending before the coordinate bench on quantum matter therefore till the issue is decided by the coordinate bench penalty proceedings maybe kept in abeyance. However, without considering the request of the assessee both the lower authorities have decided the appeal of the assessee against the assessee. By virtue of this it is apparent that assessee did not get any opportunity to show that there is no concealment of income or furnishing of inaccurate particulars of income before the both the authorities. Sub-section (1) of section 275 of the Income-tax Act, 1961, commences with the words “no order imposing a penalty under Chapter XXI shall be passed” in a case where the relevant assessment or other order is the subject-matter of an appeal before the Commissioner (Appeals) under section 246 or section 246A , after the expiry of the financial year in which the proceedings in the course of which action for the imposition of penalty has been initiated are completed, or six months from the end of the month in which the order of the Commissioner (Appeals) is received, whichever is later. Thus, there are two limbs to clause (a) of section 275(1). According to the section, no order imposing a penalty shall be passed after the expiry of one of the two periods, which have been

mentioned therein, which expires later than the other. The first time-limit is until the expiry of the financial year in which the assessment proceedings during which the penalty proceedings initiated, are completed. The period stipulated in the second time-limit is six months from the end of the month in which the order of the Commissioner (Appeals) is received by the Commissioner or the Principal Commissioner. However, Hon'ble Delhi High Court in case of CIT versus mohair investments and trading Co private limited 345 ITR 051 has held that The period of six months provided for imposition of penalty under section 275(1)(a) of the Income-tax Act, 1961, starts running after the successive appeals from an assessment order has been finally decided by the Commissioner (Appeals) or the Tribunal, as the case may be, whichever period expires later. The proviso to section 275(1)(a) has only the effect of extending the period of imposing penalty from six months to one year within the receipt of the order of the Commissioner after June 1, 2003. The proviso thus carves out an exception from the main section inasmuch as in cases where no appeal is filed before the Tribunal the Assessing Officer must impose penalty within a period of one year to be reckoned from the date of receipt of the order by the Commissioner. Section 275(1A) which was introduced later on does not dilute or in any manner render nugatory the main provision, which can only be read to mean that the limitation period for levy of penalty, only in the case of order of the Tribunal, to be as provided under the main section and not otherwise. The proviso to section 275(1)(a) of the Act does not nullify the availability to the Assessing Officer of the period of limitation of six months from the end of the month when the order of the Tribunal is received by the Assessing Officer. Therefore, in view of the facts of the case where the assessee has not been granted any opportunity of hearing on merits of the penalty and further as the appeal of the assessee is though disposed of the I the coordinate

bench but is subject to miscellaneous application filed by the assessee for recalling of the above order, we in the interest of Justice set aside the appeal of the assessee back to the file of the Ld. CIT – A with a direction to decide the penalty matters on receipt of the order of the Miscellaneous applications or final order of coordinate bench. It is further directed to the assessee that assessee shall appear before the Ld. CIT – A and submit its reply on show cause notice after the outcome of its appeal before the tribunal. Accordingly, the appeal of the assessee is set aside to the file of the Ld. CIT – A to decide it afresh after affording the assessee a reasonable opportunity of hearing. The Ld. CIT – A may also grant an opportunity of hearing to the Ld. assessing officer on the explanation submitted by the assessee for non-levy of penalty.

11. In the result appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 31/07/2018.

-Sd/-

(SUDHANSHU SRIVASTAVA)  
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 31/07/2018  
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi