आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ "बी", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH 'B', CHANDIGARH

श्री संजय गर्ग, न्यायकि सदस्य एवं श्रीमती अन्नपूर्णा गुप्ता, लेखा सदस्य
BEFORE: SHRI SANJAY GARG, JM & SMT.ANNAPURNA GUPTA, AM

आयकर अपील सं./ **ITA No.132/Chd/2016**
निर्धारण वर्ष / Assessment Year : 2007-08

Sh.Satpal Gosain C/o G.B. Auto Industries (Regd.), C-84, Focal Point, Ludhiana.	बनाम	The A.C.I.T., Circlel-1, Ludhiana.
स्थायी लेखा सं./PAN NO: ABDPG9952H		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by: Shri Tej Mohan Singh, Adv.
राजस्व की ओर से/ Revenue by : Shri J.S. Kehlon, Sr.DR

सुनवाई की तारीख/Date of Hearing : 14.11.2018
उदघोषणा की तारीख/Date of Pronouncement: 26.11.2018

आदेश/Order

PER ANNAPURNA GUPTA, AM:

The present appeal has been filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-1, Ludhiana (in short CIT(A) dated 29.1.2016 passed u/s 250 (6) of the Income Tax Act, 1961 (in short referred to as 'Act'), confirming the levy of penalty u/s 271(1)(c) of the Act.

2. The facts of the case are that during the course of reassessment proceedings, the A.O. noticed that a housing society consisting of 95 present and ex MLAs of Punjab Legislative Assembly, was the owner of 21.02 acre land in village Kansal district Ludhiana. The said housing society of

the MLAs, named as the Punjab Cooperative Housing Buildings Society Ltd., had entered into a tripartite joint development agreement with M/s HASH Building Pvt. Ltd, Chandigarh and TATA Housing Development Co. Ltd., Mumbai ,for setting up a residential cum commercial project CAMELOT. On perusal of the agreement, the AO found that Punjab Cooperative Housing Building Society Ltd., would transfer its land to TATA Housing Development Co. Ltd, Mumbai in lieu of monetary consideration and consideration in kind. As per the agreement each member of the Punjab Cooperative Housing Building Society Ltd., having a plot of 500 sq. yard in the society would receive Rs.82,50,000/- as monetary consideration. Accordingly, a total monetary consideration of Rs.1,06,42,50,000/- was receivable by all the individual members of the society taken together. In addition to this, as consideration in kind each such member (i.e. members owing plot of 500 sq. yd) would receive one furnished flat measuring 2250 sq. ft. to be constructed by M/s Tata Housing Development Company Ltd. The cost of each furnished flat @ 4500/- sq. ft. having an area of 2250 sq. ft was worked out to Rs.1,01,25,000/-. The assessee, Sh. Satpal Gosain, owned a 1000 sq. yard land in the society. As per the agreement he was entitled for full consideration comprising Rs.1,65,00,000/- as monetary consideration and two furnished flats of 2250 sq.ft. as consideration in kind. The total cost of these two furnished flat came to Rs.2,02,50,000/-. So the total consideration according to the AO was at least Rs.3,67,50,000/-. The

assessee had also received two payments of Rs.30 lac and Rs.36 lac already. Therefore, the AO made an addition of Rs.3,55,21,070/- to the income of the assessee for the impugned year and initiated penalty proceedings u/s 271(1)© of the Act.

3. During the course of the penalty proceedings, the AO asked the assessee as to why the penalty may not be imposed. The AR of the assessee replied as under:-

> *"(a) That the Hon'ble Punjab & Haryana High Court has directed that no coercive measures should be used. Coercive measures includes penalty. As per "thesaurus.com" online dictionary website penalty has been stated to be synonym of the word coercive measure.*
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> *(b) That it is submitted that the order of the worthy ITAT- Chandigarh Bench has been appealed in Punjab & Harayana High Court.*
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> *(c) That the Joint Development Agreement very clearly states that the society will be transferring the land only upon the receipt of consideration. The fact that the land only to the extent which has been transferred in favour of THDC, has been registered in favour of THDC and the ownership of the THDC in respect of this land has been registered in revenue records. The land which has not been transferred to THDC stands in the name of society till date in the revenue records. This is enough evidence that ownership in respect of untransformed land lies with the society only and the various rights given under the Joint Development Agreement are conditional and not enough to give the ownership to THDC had possession as referred by the Ld. AO been any criteria of transfer, the entire land should have been transferred in the name of THDC in the revenue records.*
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> *(d) The assessee also relied upon certain judicial pronouncements in his favour."*

But the AO was not satisfied with the reply of the assessee and imposed penalty amounting to Rs.79,72,552/- u/s 271(1)(c) of the Act for concealing his income."

4. The matter was carried in appeal before the Ld.CIT(A) who held that Hon'ble Punjab & Haryana High Court in the case of C.S.Atwal Vs. CIT & Another in its order dated 22.7.2015 had held that the capital gains tax was not payable on the consideration which had not been received during the year and which stood cancelled and incapable of performance at present due to various orders of the Hon'ble Supreme Court and the Hon'ble High Court in PILs filed. Following the same the Ld.CIT(A) held that the assessee was liable to pay tax only on the capital gains relating to the amount received by him.Consequently he held that no penalty was leviable on the capital gains which was not actually received by the assessee during the relevant assessment year, however, with regard to the amount received during the year the Ld.CIT(A) upheld the levy of penalty stating that the assessee had disclosed the said amount in its return filed in response to notice u/s 148 only after detection by the Department and not suo motto. The relevant findings of the Ld.CIT(A) at para 2.4 of his order are as under:

> *"2.4 I have considered the facts of the case, the basis of the penalty imposed by the Assessing Officer and arguments of the AR during the course of the penalty as well as the appellate proceedings. The Hon'ble Punjab & Haryana High court in the case of C.S. Atwal vs. CIT and Anr. in ITA No.200, 201, 232 to 25S, 271 to 273, 283 to*

298, 303 to 308, 310 to 316, 332 to 334, 356 to 358 and 361 of 2013, 10 to 16, 25, 26, 73, 74, 90, 110, 136, 191, 192, 253, 254, 278 and 398 of 2014 vide order dated 22.07.2015 has held as under:

"As per the order of the Hon'ble Punjab & Haryana High Court " 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."

Therefore, as per the said order of the Hon'ble Jurisdictional High Court, the appellant was not liable to pay capital gains tax on the consideration which had not been received during the year and which stood cancelled and incapable of performance at present due to various orders of the Hon'ble Supreme court and the Hon'ble High Court in PILs. Therefore, the appellant was liable to pay capital gains tax only on the amount received by him. Hence, in view of the said order of the Hon'ble Jurisdictional High Court, no penalty under sec271(l)(c) can be levied on the amount of capital gains which was not actually received by the appellant during the relevant assessment year.

However, the appellant has received an amount of Rs.24,00,000/- during the year under consideration on which capital gains tax was to be imposed. The original return of income was filed on 03.12.200/- in which income from capital gains was shown as 'nil'. Notice u/s 148 was issued on 04 01.2010 and served on the assessee on 07.01.2010. In response to the same, the appellant filed a revised return u/s 148 on 02.02.2010 which also included income from capital gains amounting to Rs.22,00,670/- after applying indexation. The Assessing Officer rejected this return by holding that the revised return filed by the assessee was beyond time prescribed u/s 139(5) and therefore was treated as non-est. The CIT (Appeals) in the quantum order for the year under consideration has held that the return filed in response to notice u/s 148 was valid. However, the fact remains that the same was furnished only after detection by the department and not suo motto, the said return is thus not voluntary but only after notice u/s 148 was issued" by the department. Therefore, there is no force in the appellant's plea that the capital gains were returned before detection by the department. Further, the appellant is advised by experts/C.As in income tax matters and is expected to be aware of the provisions of law and therefore the plea that he was verbally told by officials of TATA Housing Development Co. Ltd. & M/s HASH Builders Pvt Ltd. that the money paid

was advance money in contemplation of sale and therefore the said amount was not included in his return, is not acceptable.

The cases relied upon by the AR are distinguishable on facts. The AR has relied on the decision of the Jurisdictional Hon'ble High-Court in the case of CIT vs. Suraj Bhan (2007) 159 taxmann 26 wherein the assessee had filed revised return showing higher income and explained that the same was done to buy peace of mind and to avoid litigation and it was held that penalty cannot be imposed merely on account of subsequently declared higher income. However, in the case under consideration notice u/s 148 was issued on 04.01.2010 and the revised return filed on 02.02.2010 was treated as non-est return since it was filed beyond the time prescribed u/s 139(5) and the Assessing Officer has categorically held that the assessee has failed to disclose the profits or gains from the transfer of capital assets prior to detection by the department. Although the CIT (Appeals) held in the quantum order that The return was valid but the fact remains that it was filed after detection by the department. The AR has further relied on the case of ITO vs. Chatrabhuj Hinduji Soni of the Hon'ble ITAT Ahmadabad in ITA no. 620/Ahd/2008 wherein the revised return filed in pursuance of notice u/s 148 wherein income was surrendered was regularized by the revenue and the Assessing Officer had failed to make any objection that the income declared in the revised return or its explanation was not bonafide whereas in the instant case the Assessing Officer has declared the revised return as non-est and has recorded that the assessee had failed to disclose the said income in its return of income and that the same was not offered for tax prior to detection by the department. The AR has also placed reliance on the case of Late N.R. Palanivel vs CIT(2014) 90 CCH 0104 wherein the assessee was operating transport bus and survey was conducted u/s 133A . Further, in the said case, notice was issued u/s 148 and the revised return filed was accepted by the Assessing Officer without any addition and the explanation made on the basis of Explanation B to sec271(l)(c) was not considered by the revenue and therefore the order of Hon'ble ITAT confirming the penalty proceedings was set-aside whereas the facts in the instant case are distinguishable as discussed earlier.

It has been held in the case of Prem Pal Gandhi vs CIT 335 ITR 23 (2009) by the Jurisdictional High court that where the assessee has filed a revised return surrendering the additional income only on coming to know the detection of concealment by the department and it is not a case of bonafide voluntary disclosure, penalty u/s 271(l)(c) is leviable. Reliance is also placed on the case of Mahavir metal works vs CIT(PSH) 92 ITR 513 to hold that penalty u/s 271(l)(c) is attracted notwithstanding the fact that the assessee filed a revised return, where the omission is deliberate and where the return is revised only after the

department got information. Further, it has been held in Bhairav Lai Verma vs. Union of India (ALL) 238 ITR 855 that "voluntarily" means out of free will without any compulsion and that if the department has incriminating material with regard to the disclosed income, disclosure is not voluntary. In the instant case the disclosure was not voluntary. Therefcu^tJ^6 appellant had no bonafide cause for not declaring the said capital gains income of Rs.22,00,670/- on the amount of consideration received during the year in its return of income originally filed. Therefore, the penalty levied u/s 271(l)(c) for concealment of income as well as for furnishing of inaccurate particulars of income is confirmed on the said amount however, the balance amount of penalty levied on amount not actually received during the year is hereby deleted in view of the said judgment of the Hon'ble Jurisdictional High-Court. This ground of appeal is partly allowed."

5. Aggrieved by the same the assessee has come up in appeal before us raising following grounds:

"1. That the Ld. C1T(Appeals) grossly erred in facts and on law, in confirming the levy of penalty, as imposed by the Ld. A.O. U/S 271(l)(c) of the Income-tax Act, 1961 for alleged non- disclosure of long term capital gains.

2. That the assessee had declared long-term capital gains in his return filed U/S 148 which had been declared valid and accepted as per the order of C1T(Appeals) dated: 21.12.2011.

3. That by any reckoning, the issue being highly debatable and the assessee's bonaflde not in doubt, nor his explanation held to be false, the levy of penalty was wholly illegal and hence not sustainable.

4. That the order of Ld, CIT(Appeals) is against law and facts of the case and therefore, liable to be set aside.

5. That the appellant craves, leave to add, amend, alter, modify or substitute all or any of the above mentioned grounds of appeal when the appeal is finally heard and disposed off."

6. During the course of hearing before us the Ld. counsel for assessee pointed out that the penalty levied on identical issue of consideration received during the year on account of transfer of land by virtue of Joint Development Agreement (JDA) between Tata Housing Building Society

Ltd., M/s Hash Builders Pvt. Ltd. and Punjabi Cooperative House Building Society Ltd. in which the assessee owns a plot has been dealt with by the ITAT Chandigarh Bench in the case of Shri Charanjit Singh Atwal Vs. ITO in ITA No.66/Chd/2016 dated 20.4.2018. It was pointed out that the I.T.A.T. had held the issue of charging the capital gains earned on transfer of land made during the year as a debatable issue and directed the deletion of penalty levied on the same. Our attention was drawn to the relevant findings of the I.T.A.T. at para 13 of the order as under:

> *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.*
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> *The assessee suo mo to 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 prorate transfer of land. Till the filing of the revised return, the assessec was never confronted by the Assessing officer on this issue. The assessee thus suo moto /I 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(l)(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(l)(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(l)(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(l)(c) of the Act. The penalty so levied by the lower authorities in this case is hereby ordered to be deleted."

7. The Ld. counsel for assessee, therefore, stated that the issue was directly covered by the aforesaid decision of the I.T.A.T. and no penalty was leviable interest he present case.

8. The Ld. DR, on the other hand, relied upon the order of the CIT(A).

9. We have heard the rival contentions, gone through the orders of authorities below and also the decisions referred to before us. Admittedly the penalty in the present case has been levied on the capital gains liable to tax in the impugned year by virtue of the decision of the Hon'ble Jurisdictional High Court in the case of C.S.Atwal (supra). We have also gone through the order passed by the I.T.A.T. on the issue of penalty levied on the said capital gains in the case of C.S.Atwal (supra) itself and find that it had found the issue of charging the capital gains to tax in the impugned year as a debatable issue. The I.T.A.T. had held that the land was transferred by the society and even JDA referred the society as the owner, therefore the capital gains should have been taxed in the hands of the society, which the A.O. had done on protective basis. On this basis the I.T.A.T. held that the issue whether the capital gains were taxable in the hands of the assessee was a debatable issue. The I.T.A.T. also held that even the date on which the transfer could be said to have been completed was debatable since while the Revenue of the view that the transfer took place when JDA was entered into, the Hon'ble High Court had held otherwise and had subjected to tax only capital gains earned on transfer of land which had actually taken place. The ITAT also held that there was force in the contention of the assessee that he was of the bonafide belief that the transfer would be completed only when the JDA would mature since the consideration in kind had not been received as the JDA could not mature. Since the facts and

circumstances leading the levy of penalty in the present case are identical to the case of C.S.Atwal (supra) and Ld. DR has not brought to our notice any distinguishing facts with regard to the said case, the decision rendered therein will apply squarely to the present case also, following which we delete the penalty levied.

10. The assessee has also raised legal ground before us but no arguments were made vis-à-vis the same. The same, therefore, is dismissed.

11. In effect, the appeal of the assessee is partly allowed.

Order pronounced in the Open Court.

Sd/-	Sd/-
संजय गर्ग	**अन्नपूर्णा गुप्ता**
(SANJAY GARG)	**(ANNAPURNA GUPTA)**
न्यायकि सदस्य/ Judicial Member	**लेखा सदस्य/ Accountant Member**

दिनांक /Dated: 26th November, 2018
रती

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar