

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "E", NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

AND

SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.A. No. 4827/DEL/2016		
A.Y. : 2009-10		
ITO, WARD 19(1), NEW DELHI ROOM NO. 221, 2 ND FLOOR, C.R. BUILDING, I.P. ESTATE, NEW DELHI	VS.	M/S ONKARESHWAR PROPERTIES PVT. LTD. FLAT NO. 6-5, PLOT NO. G-1/4, MODEL TOWN-III, DELHI - 110 009 (PAN: AAAC07076M)
(ASSESSEE)		(RESPONDENT)

Revenue by : Ms. Rinku Singh, Sr. Dr.
Assessee by : None

ORDER

PER H.S. SIDHU : JM

The Revenue has filed this Appeal against the impugned Order dated 27.6.2016 of the Ld. CIT(A)-7, New Delhi relevant to assessment year 2009-10.

2. The grounds raised in the appeal read as under:-

i) On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the penalty of Rs. 6,35,91,247/- levied by the AO u/s. 271(1)(c) of the Income Tax Act, 1961 by ignoring the facts of the case that the assessee company is engaged in the business of real estate, sale and purchase of land for profit is one of

the business of real estate, sale and purchase of land for profit is one of the businesses of the assessee company and it has wrongly shown such business income as capital gain whereas it should declare this income from business and profession.

ii) The appellant craves to be allowed to add any fresh ground(s) of appeal and / or delete or amend any of the ground(s) of appeal.

3. The brief facts of the case are that assessment in this case was completed u/s. 143(3) of the Income Tax Act, 1961 (in short "Act") on 13.12.2011 at an income of Rs. 55,97,44,828/- against returned income of Rs. 55,89,85,085/-. The AO has treated the income declared under capital gain as income from business which has resulted in the variation of amounts between returned and assessed income. Penalty proceedings u/s. 271(1)(c) of the Act were initiated on 13.9.2011. Since the appeal was pending before the Ld. CIT(A) the proceedings were kept in abeyance. The Ld. CIT(A) decided the appeal vide order dated 19.3.2013 in which he dismissed the appeal of the assessee. Accordingly, a show cause notice dated 5.3.2015 was issued to the assessee requiring it to show as to why penalty u/s. 271(1)(c) should not be levied in its case. In response to the same, the AR of the assessee filed reply dated 16.3.2015. After considering the reply, the AO observed that the contention of the assessee is that it has not concealed its particular of income but at the same time the fact remains that by

changing the head of income. The assessee has tried to pay lesser tax which tantamount to furnishing of inaccurate particular of its income. If the case of the assessee had not been selected for scrutiny the loss of revenue would have gone unnoticed. Therefore, it is a case clearly failing within the explanation to section 271(1)(c) and either therefore, held that penalty provision u/s. 271(1)(c) are clearly attracted in this case, accordingly, he imposed the penalty of Rs. 6,35,91,247/- vide his order dated 26.3.2015. Against the penalty order, the assessee appealed before the Ld. CIT(A), who vide his impugned order dated 27.6.2016 has allowed the appeal of the assessee. Aggrieved with the impugned order dated 27.6.2016 the Revenue is in appeal before the Tribunal.

4. Ld. DR relied upon the Order of the AO and reiterated the contentions raised in the grounds of appeal.

5. In this case, Notice of hearing to the assessee was sent by the Registered AD post, in spite of the same, assessee, nor its authorized representative appeared to prosecute the matter in dispute, nor filed any application for adjournment. Keeping in view the facts and circumstances of the present case and the issue involved in the present Appeal, we are of the view that no useful purpose would be served to issue notice again and again to the

assessee, therefore, we are deciding the present appeal *ex parte qua assessee*, after hearing the Ld. DR and perusing the records.

6. We have heard the Ld. DR and perused the records, especially the impugned order passed by the Ld. CIT(A). We find that assessment in this case was completed u/s. 143(3) of the Act on 13.12.2011 wherein the AO treated the income arising out of sale of land declared by the assessee under the head capital gain as income from business. This change of head resulted in the levy of tax at higher rate on the appellant. The Ld. CIT(A)-XVI vide order dated 19.3.2013 has dismissed the appeal of the assessee. Aggrieved with the order of the Ld. CIT(A), assessee moved an appeal before the Tribunal and the Tribunal vide its order dated 23.10.2015 in ITA No. 5754/Del/2013 has allowed the appeal of the assessee by holding as under:-

"30. In the present case the appellant company had acquired the land in the year 2005-06 as a capital asset. It has accounted for the same as capital asset. It has continued to hold the same capital asset. It has not converted that capital asset in stock in trade. There are no multiple transactions. It has declared the capital loss in the preceding year. Considering all these facts and taking into consideration all the above facts and circumstances we are of the view that the income

arising from the sale of land held as a capital asset is to be assessed as long term capital gain and the AO and Ld. CIT(A) were not right in treating the income as business income. Accordingly, the AO is directed to assess the income as capital gain. Thus the appeal is allowed."

6.1 We further note that against the aforesaid order of the Tribunal, the Department had gone in appeal before the Hon'ble High Court of Delhi which was also decided vide ITA No. 287/2016 dated 03.5.2016 by holding as under:-

"5. Having heard Mr. Dileep Learned Senior Standing Counsel for the Revenue and having examined the orders of the AO, CIT(A) and the impugned order of the ITAT. The court is not persuaded to agree with the Revenue's submission that the impugned order of the ITAT is perverse.

In the facts and circumstances of the present, no substantial question of law arises for consideration. The appeal is dismissed."

6.2 We further note that in view of the aforesaid decisions of the Tribunal as well as Hon'ble High Court of Delhi, the Ld. CIT(A) has rightly observed that the basic premise i.e. the impugned income is to be taxed as business income and not as capital gain does not survive. Therefore, there is no ground for levy of penalty u/s. 271(1)(c) of the Act. Hence, Ld. CIT(A) correctly deleted the penalty of Rs. 6,35,91,247/-, which does not need any interference on our part, therefore, we uphold the action of the Ld. CIT(A) on the issue in dispute and reject the ground raised by the Revenue.

7. In the result, the Revenue's Appeal stands dismissed

Order pronounced on 13/02/2019.

Sd/-

**[PRASHANT MAHARISHI]
ACCOUNTANT MEMBER**

Sd/-

**[H.S. SIDHU]
JUDICIAL MEMBER**

Date 13/02/2019

SRBHATNAGAR

Copy forwarded to: -

1. Assessee -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY

By Order,

Assistant Registrar, ITAT, Delhi Benches