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, JUDICIAL MEMBER
AND SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA No.1014/Chd/2014**
निर्धारण वर्ष / Assessment Year : 2008-09
&
\आयकर अपील सं./ **ITA No.1015/Chd/2014**
निर्धारण वर्ष / Assessment Year : 2008-09

Sh.Parminder Singh Mavi, Near Municipal Committee, Morinda.	बनाम	The Income Tax Officer, Ward 2,(4), Ropar.
स्थायी लेखा सं./PAN NO: CROPS4461G		

निर्धारिती की ओर से/Assessee by: Shri Tej Mohan Singh, Adv.
राजस्व की ओर से/ Revenue by : Shri Ankur Alya, Sr. DR

सुनवाई की तारीख/Date of Hearing : 15.11.2018
उदघोषणा की तारीख/Date of Pronouncement: 11.02.2019

आदेश/ORDER

Per Annapurna Gupta, Accountant Member

Both the present appeals have been preferred by the same assessee against separate orders of the Commissioner of Income Tax (Appeals), Chandigarh [hereinafter referred to as CIT(A)], dated 1.10.2014 confirming the levy of penalty u/s 271(1)(b) and u/s 271(1)(c) of the Income Tax Act,1961(hereinafter referred to as "Act") respectively.

We shall first be taking up the appeal of the assessee in ITA No.1015/Chd/2014.

ITA No.1015/Chd/2014:

2. The assessee in the present appeal has challenged the order of the Ld.CIT(A) confirming the levy of penalty u/s 271(1)(c) of the Act amounting to Rs.40,59,136/-.

3. Brief facts relating to the case are that no return of income for the impugned year i.e. assessment year 2008-09 was filed by the assessee. Thereafter the Assessing Officer (in short referred to as 'A.O.' initiated proceedings u/s 147 of the Act issuing notice u/s 148 of the Act on information in his possessiuon that the assessee had earned capital gain which had not been returned for tax.. No return was filed in response to notice issued u/s 148 also. Thereafter several notices u/s 142 of the Act was served upon the assessee, but the same remained uncomplied with. Finally the assessee filed return of income declaring income of Rs.29,88,230/- under the head Long Term Capital Gain. The A.O. noted that the proceedings u/s 147 of the Act had been initiated against the assessee as information available with the Department revealed that the assessee was a Member of M/s Defence Services Co-operative House Building Society, Mohali. which was having 27.3 acres of land in village Kansal, District SAS Nagar and society had entered into a tripartite agreement on 27.4.2007 with M/s Tata Housing Development Builders Ltd. and M/s Hash Builders Pvt. Ltd. for sale of land to them. That the

members were to get the consideration in cash as well as in kind as per their plot size. That the assessee during the relevant period had received Rs.32 lacs as his proportionate share. As per the agreement each "member of The Defense Services Co-operative House Building Society Ltd. having a plot of 500 sq.yd. in the society would receive Rs. 80,00,000/- as monetary consideration. Accordingly, a total monetary consideration of Rs 124,72,89,000/- was receivable by all the individual members of the society taken together. In addition to this, as consideration in kind, each such member owning 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. As the assessee was the owner of 500 Sq. yds of plot in that Society, as per the agreement he was entitled for the full consideration comprising of Rs. 80,00,000/- as monetary consideration and one furnished flat of 2250 Sq. ft as consideration in kind. The total cost of the furnished flats was valued at Rs.1,01,25,000/- determined/estimated at the rate of Rs. 4,500/- per sq. ft. Thus the total consideration or the full consideration accruing to the assessee was worked out at Rs. 1,81,25,000/-. The A.O. after perusing the contents of the Joint Development Agreement held that the assessee had transferred its plot through the society to M/s Tata Housing Development Company Ltd. for which consideration had been settled in the form of cash as well as kind. He, therefore, held that the provisions of section 2(47)(v) of the Act r.w.s.

53A of the transfer of Property Act were attracted on entering into the Development Agreement and the assessee had come within the purview of section 45 of the Act as per which it was chargeable to tax in the capital gains earned by taking in to consideration both the cash as well as kind component of the consideration. He accordingly computed Long Term Capital Gain earned by the assessee at Rs.1,79,13,228/- and added the same to the income of the assessee. Penalty proceedings u/s 271(1)(c) of the Act for concealing/furnishing inaccurate particulars of income were initiated by the A.O. and notice issued to the assessee to show cause as to why penalty be not levied. During the pendency of the penalty proceedings the quantum addition made in the case of the assessee was confirmed by the CIT(A), whose order in turn was upheld by the I.T.A.T. Thus the addition made to the income of the assessee was confirmed by the I.T.A.T. who had followed their own order in the case of Charanjit Singh Atwal Vs. ITO in ITA No.448/Chd/2011 while upholding the addition. In the penalty proceedings before the A.O. the assessee requested that the same be kept in abeyance since the appeal had been filed by the assessee to the Hon'ble High Court. The A.O. rejected the same and levied penalty on the addition made to the income of the assessee @ 100% of the tax sought to be evaded on the same which came to Rs.40,59,136/-.

4. The matter was carried in appeal before the Ld.CIT(A) who upheld the order of the A.O. holding that the assessee's

case was clearly covered under the provisions of Explanation-3 to section 271(1)(c) of the Act, as per which a person is deemed to have concealed his particulars of income within the meaning of section 271(1)(c) of the Act if he fails to file his return of income without a reasonable cause if he has taxable income. The Ld.CIT(A) held that since the assessee had taxable income which is evident from the return filed, his case was squarely covered by the Explanation-3 to section 271(1)iii) of the Act and, therefore, upheld the levy of penalty. He further held that the assessee had declared an income only when proceedings u/s 147 were initiated and, therefore, also the declaration of income in the return could not be said to be suo moto and thus the assessee was liable to penalty. He relied upon the decision of the Hon'ble Delhi High Court in the case of Zoom Communication Pvt. Ltd., 271 ITR 510 in this regard.

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

> *"1. That the Learned CIT(A) has failed to appreciate the facts and circumstances of the case and has thereby erred in sustaining penalty u/s 271 (l)(b) of the Income Tax Act, I961.*
>
> *2. Since the appellant resides in United Kingdom and the notice was not received by him. There was non-compliance on the part of the representative of the appellant.*
>
> *3. Moreover, the order passed by the Assessing Officer is without jurisdiction as the assessee being non - resident is assessable by ACIT(international Taxation) Chandigarh.*
>
> *4. In view of the above stated facts and circumstances it is prayed that penalty order may kindly be quashed or such other relief be granted as is deemed fit."*

6. During the course of hearing before us the Ld. counsel for assessee contended that firstly penalty was not leviable on the entire capital gain assessed since the decision of the I.T.A.T. in the case of C.S. Atwal & Others (supra), which was followed by the Ld.CIT(A) while confirming addition in assessee's case, had travelled right upto the Hon'ble High Court, who had held that the assessees in such facts and circumstances were liable to capital gains only on the land which was actually transferred and thus sold and consideration received by them. The Ld. counsel for assessee, therefore, contended that in any case that the assessee had correctly returned capital gains in the return of income fled by him on the component of consideration actually received by him during the year as per the judgment of the Hon'ble High Court. He further stated that vis-à-vis the issue of penalty, the Hon'ble I.T.A.T. had dealt with the same in the case of C.S. Atwal & Others (supra) where penalty was levied on identical fact situation deleting the entire penalty levied holding that the assessee was of the bonafide belief that the transfer would be completed only when the Joint Development Agreement would succeed and further on finding that on similar facts and circumstances the ITAT Chandigarh Bench had deleted the penalty levied u/s 271(1)(c) of the Act. The I.T.A.T. also held that the issue was debatable since the A.O. had taxed the capital gain in the hands of the society on protective basis since the JDA

referred the society as the "owner". Our attention was drawn to the findings of the I.T.A.T. at para 13 of his 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.*
>
> *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 prorate 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."

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

8. We have carefully considered the contentions of both the parties. Admittedly, identical issue of levy of penalty on capital gains earned on account of transfer of land through Joint Development Agreement entered into by cooperative societies of members with M/s Tata Housing Development Builders Ltd. and M/s Hash Builders Pvt. Ltd. (supra) has already been dealt with by the I.T.A.T. in the case of C.S. Atwal (supra) holding that it was not a fit case of levy of penalty since the issue was debatable and that the assessee bonafidely had not returned tax

initially believing that the capital gain would accrue only when the Joint Development Agreement would mature. Since no distinguishing facts have been brought to our notice by the Ld. DR, the decision of the I.T.A.T. would squarely apply to the facts and circumstances of the present case, following which we direct the deletion of entire penalty. We may add that the penalty in any case was not leviable on the addition which was not sustainable in view of the decision of the Hon'ble Jurisdictional High Court in the case of C.S. Atwal (supra), who had directed addition only to the extent of land transferred by the assessee and consideration received by him, directing deletion of balance of the addition. In view of the above, the entire penalty levied is directed to be deleted.

The appeal of the assessee is allowed.

ITA No.1014/Chd/2018

9. In this case, penalty has been levied for non compliance of four notices issued to the assessee u/s 142(1) of the Act. It was contended that the assessee was residing abroad in U.K. Notices had been served on his representative who in turn forgot to attend the proceedings. The Revenue has not controveted this fact that the assessee was residing abroad when the notices were served. Therefore, considering the same, we find that the assessee had reasonable cause for not

attending the hearings and penalty levied u/s 271(1)(b) of the Act is directed to be deleted.

The appeal of the assessee thus stands allowed.

10. In the result, both the appeals of the assessee are 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: 11th February, 2019

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