IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD ñBò BENCH

Before: Shri Amarjit Singh, Accountant Member
And Ms. Madhumita Roy, Judicial Member

ITA No. 2682/Ahd/2017
Assessment Year 2009-10

The DCIT, Circel-3(1)(1), Ahmedabad (Appellant)	Vs	M/s. Popular Estate Management Ltd. 81, New York Tower-A, Opp. Muktidham Derasar, S.G. Highway, Thaltej Cross Road, Ahmedabad PAN: AABCM0617P (Respondent)

Revenue by: **Shri Mudit Nagpal, Sr. D.R.**
Assessee by: **Shri/Ms. Dhirendra Shah & Nupur Shah. ARs**

Date of hearing : 08-03-2019
Date of pronouncement : 13-03-2019

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

The solitary ground of appeal of the revenue is against the decision of ld. CIT(A)-9, Ahmedabad dated 18th Sep, 2017 in deleting the penalty u/s. 271(1)(c) of Rs. 1.32 crores.

2. At the time of appellate proceedings before us, ld. counsel has brought to our notice that Co-ordinate Bench of the ITAT vide ITA No. 212/Ahd/2014 in the case Popular Estate Management Ltd. vs. ITO dated 29-08-2017 has deleted the quantum addition on the basis of which the impugned penalty was levied. Therefore, he has contented that since the quantum addition in the case of the assessee for the year under consideration stands deleted by the aforesaid cited order of the ITAT, therefore, penalty u/s. 271(1)(c) cannot be levied. Ld. departmental representative could not dispute this material fact.

3. With the assistance of ld. representatives, we have perused the aforesaid cited order of the ITAT and noticed that the Co-ordinate Bench of the ITAT deleted the quantum addition made by the assessing officer for an amount of Rs. 3,87,27,804/- on the basis of which the impugned penalty was levied. Relevant part of the decision of the Co-ordinate Bench of the ITAT is reproduced as under:-

> *"16. We have given our thoughtful consideration to rival submissions. We have also perused the relevant case record with able to assistance of both the learned counsel. The dispute between the parties is qua treatment of compensation receipt in question amounting to Rs.3.87crores. The assessee's case is that it is a capital receipt not taxable as business income or capital gains. The Revenue on the other hand draws support from both the lower authorities' action assessing the same as business income. The assessee admittedly is in real estate development business. It entered into the above identical verdict three development agreements with as many vendor parties followed by the latter paying it variable amounts in question totaling to Rs.3.87 crores in lieu of getting former's right to preemptive purchase or right to sue for specific performance surrendered in their favour. There is no evidence in the case file indicating the assessee to have undertaken even a single activity of development is all three parcels of land. We notice in this factual backdrop that hon'ble jurisdictional high court's decision in Baroda Cement and Chemical case (supra) holds that the amount received in lieu of such a right to sue available after a vendor breaching the relevant agreement is not an actionable claim so as to be transferred u/s.6(e) of the Transfer and Property Act giving rise to assessable capital gains. Their lordships of Calcutta High Court (supra) further reiterate the same view Mr. Madhusudan's case is that the amount in question has been rightly assessed as assessee's business income. We find no merit in the instant plea as the assessee has neither paid any consideration money nor carried out any development activity. It had merely obtained a licensee right to enter into possession into three parcels of land not creating any easement or interest therein as per Section 52 of the easement law. We further observe that the assessee developer could not have entered into full fledged*

possession in performance of the agreement in view of statutory bar u/s. 63 of the Bombay Tenancy and Agricultural Land Act, 1948 (applicable in Gujarat state). There is no material indicating the above lands being converted to non agricultural. The same sufficiently indicates that assessee's license right existed on paper only. Hon'ble Bombay high court's decision in Manoj B. Joshi's case (supra) holds that such an amount is not to be taxed as income u/s.2(24) of the Act. This tribunal's co-ordinate bench decision in Govindbhai C. Patel's case (supra) also is of the view that an identical compensation sum as in facts of the instant case is not a business income as well since not covered under specific instances u/s.28(va) of the Act. The Revenue's stands therefore holding both development and cancellation agreements in all cases is not sustainable in view of the same unregistered documents does not carry any merit as Section 17 of the Registration Law could not have been applied in view of bar on transfer of the lands in question. We thus observe that assessee's above development license acquired in its all three agreements does not amount to part performance requiring compulsory registration u/s.17 of the Registration Act. We therefore conclude in this view of all this evidence as well as legal position that the impugned compensation amount is not liable to be treated as income u/s.2(24) of the Act nor the same is taxable as capital gain for business income being in the nature of a capital receipt.

17. We now advert to Revenue's strong effort that the assessee's modus operandi is that of entering into such development agreements in order to evade payment of taxes (supra). We find instant plea as well to be devoid of merit since the department has itself accepted vendors' so called paltry capital gains in their assessments wherein they have claimed the impugned payments made to the assessee as expenses in computation of their respective income without questioning any genuineness element therein. So is the outcome of Revenue's next plea that the assessee had surrendered its right to sue without taking any legal recourse. We observe in this context with the assessee could very well be treated as an aggrieved party against its vendors' action executing sale deed in favour of third party vendees. The Revenue's argument that the cancellation document had been purchased well in advance is also not relevant since it is not mandatory that the same ought to have been purchased on the date of cancellation only. What is material in these facts is that there should be a valid document. There is no bar in stamp law that any party cannot purchase such documents in advance. The Revenue fails to quote any such rule which could be held as to have been violated in such an advance purchase of stamp papers. We find that Revenue's further argument that no prudent assessee would enter into such a transaction also does not deserve acceptance since the assessee in fact has acted as a prudent entity wherein it succeeded in excessive compensation amount not otherwise taxable being in the nature of capital receipt. We further reject Revenue's next argument that the assessee itself had shown the impugned sum as its income in its books of account in view of hon'ble apex court's decision in Tuticorin Alkali Chemicals and Fertilizers Ltd. vs. CIT (1997) 6 SCC 117 (SC) to conclude that an accounting treatment is not a determinative factor in deciding taxability of receipt.

18. The Revenue's next argument is based on the hon'ble apex court's landmark decision in Mc Dowell & Co. Ltd., Sumati Dayal and Durga Prasad More cases (supra) in seeking to treat assessee's above development and cancellation agreement to be a method employed to evade payment of tax as by adopting colorable device. We have already concluded in preceding paragraphs that assessee's above transactions are well within the four corners of law i.e. Transfer of Property Act, Indian Registration Act as well as Bombay Tenancy & Agricultural Lands Act (supra). There is no law violated in the same. Its instant case is therefore squarely covered by the above judicial precedent(s) holding the amount received of Rs.3.87 crores as a capital receipt not assessable either as capital gains or business income. We take into account the same to conclude that the above case law quoted at Revenue's behest in seeking to pierce corporate veil is without any merit as the assessee's above transactions are genuine ones in view of our forgoing discussion. We therefore delete the impugned addition of Rs.3,87,27,804/-."

After considering the aforesaid admitted fact that Co-ordinate Bench of the ITAT as supra, we observe the impugned penalty has become infructuous on deleting of quantum addition on the basis of which the penalty was levied. Therefore, we do not find any merit in the appeal of the Revenue. Accordingly, the appeal of the Revenue is dismissed.

4. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 13-03-2019

Sd/-	**Sd/-**
(MADHUMITA ROY)	**(AMARJIT SINGH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad : Dated 13/03/2019

आदेश क□□□त□ल□प **अ**े□षत / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपील□य अ□धकरण,
अहमदाबाद