

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "C", MUMBAI

Before Shri Rajesh Kumar, Accountant Member  
& Shri Amarjit Singh, Judicial Member

ITA No.5614/Mum/2013  
Assessment Year: 2006-07

ACIT Central Circle-21 408, 4 <sup>th</sup> Floor, Aaykar Bhawan M.K.Marg Mumbai-400 020	Vs.	M/s Prime Down Town Estates Pvt.Ltd., 11 <sup>th</sup> Floor, Plaza, Panchasheel Hughes Road, 55 Gamdevi Mumbai-400 007  PAN AAACP2635B
(Revenue)		(Assessee)

&

ITA No.2959/Mum/2015  
Assessment Year: 2006-07

M/s Prime Down Town Estates Pvt.Ltd., 11 <sup>th</sup> Floor, Plaza, Panchasheel Hughes Road, 55 Gamdevi Mumbai-400 007  PAN AAACP2635B	Vs.	DCIT Central Circle-21 Mumbai
(Assessee)		(Revenue)

**Revenue By : ShriAwungshi Gimson**  
**Assessee By : Shri SashiTulsian**

<b>Date of Hearing :07.03.2019</b>	<b>Date of Pronouncement : 30.04.2019</b>
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**ORDER**

**Per Rajesh Kumar, Accountant Member**

1. The above cross appeals one by the Revenue and the other by the assessee have been preferred against the order dated 12/06/2013 of the Ld. Commissioner of Income-Tax (Appeals)-

39 hereinafter called [CIT(A)] relevant to assessment year 2006-07.

The grounds raised by the Revenue are as under:

*i) "Considering the facts and circumstances of the case, the Ld. CIT(A) erred in directing the AO to adopt the opening WIP at Rs. 45,04,41,983/- citing the earlier order by CIT(A) which however specifically asked the assessee to produce necessary details and document to AO to verify the cost of construction and various expenditure related aspects. The documents asked were not presented by the assessee."*

*ii. "Considering the facts and circumstances fo the case, the Ld. CIT(A) erred in directing the AO to rectify the mistake u/s. 154, when A.O. did not have power to examine the issue in detail under the section."*

*iii. "The Ld. CIT(A) erred in directing the AO to look into the facts and verify which tantamount to setting aside of the case a power which is not entrusted with CIT(A)*

*2. The Appellant craves to leave to add, to amend and/or to alter any of the grounds of appeal, if need be.*

*3. The Appellant, therefore, prays that on the grounds stated above, the order of the CIT(A)-39, Mumbai, may be set aside and that of the Assessing Officer restored.*

2. The issue raised in the first ground of appeal is against the direction of CIT(A) to AO to adopt opening WIP at Rs.45,04,41,983/- on the basis of earlier order by CIT(A) by ignoring the fact that direction was given to the assessee also to produce the necessary details and documents before AO to verify the construction cost and other expenses which were not produced by the assessee. The revenue has also challenged the order of CIT(A) directing the AO to rectify the mistake u/s 154 when AO did not have the power to examine the details under the section 154 of the Act and also further directing the AO to look into the facts and verify amounts by setting aside the issue which is not within the powers of the ld CIT(A). The facts in brief are that assessee is engaged in the business of construction of building and other developmental of properties and is following

projection completion method for the purpose of revenue recognition for AY 2005-06,2006-07 and 2007-08. A search was conducted u/s 132 of the I.T. Act 1961 on 13/03/2008 at registered business premises of Bharath Shah group and the assessee was also under the said search. A notice u/s 153A of the Act was issued on 14/10/2008 which was complied by the assessee by filing return of income on 16/12/2008 declaring Nil income. Finally the assessment was framed vide order dated 29/08/2009 passed u/s 143(3) read with section 153 of the Act assessing the income at Rs.13,23,85,140/-. Thereafter in the appellate proceedings CIT(A) vide order dated 29/02/2012 partly allowed the appeal of the assessee while restoring and setting aside the issue to the file of the AO with the following direction:

*“In view of the above, I direct the A.O to find out the accounting year in which the occupation certificate or possession of flat/unit is given (whichever date is earlier) and take the amount received and receivable towards the sale as income and deduct all the expenses related to the development of the flat/units and determine the income and assess it to determine the tax, interest ect. Accordingly, in the assessment year relevant to the accounting year in which the possession of the flat/occupancy certificate was given for the flat whichever is earlier and assess the income in that assessment year. The appellant is directed to produce the necessary details and documents to the A.O. in this regard.”*

3. Following the said direction by CIT(A), the details and documents were filed by the assessee before the AO vide letter dated 02/05/2012 with regard to SIE project including occupation certificate up to 9<sup>th</sup> floor received on February, 2006 and it was noted that possession has been given for 10<sup>th</sup> and 11<sup>th</sup> Floor in the year for AY 2005-06 and 2006-07. Thereafter the AO passed the order dated 02/05/2012 giving effect to the CIT(A) order by computing the income at Rs.19,48,87,140/- as under:

*Total income as per assessment order u/s 143(3)*  
*Dated 29/12/2009 for the A.Y. 2006-07*      *Rs. 13,23,87,140/-*

*Addition made by the CIT(A):*

- (i)      *On account of development rights to KBK*  
            *Associates on the Residential project*      *Rs. 6,25,00,000/-*  
            *Revised Total income*                              *Rs. 19,48,87,140/-*

4. This said order was rectified on 27/06/2012 giving credit for tax paid period amounting to Rs. 3 crores with the income remaining same at Rs.19,48,87,140/-. Thereafter assessee filed rectification application on 20/07/2012 and 31/07/2012 requesting to rectify the order dated 02/05/2012 carrying out the directions of the CIT(A) as regard determination of income and it was also pointed out the necessary documentations and evidences stood furnished along with letter dated 02/05/2012 filed before the AO. The AO called for certain details vide letter dated 13/12/2012 regarding number of floors of the building, occupation certificate for the entire building, the date wise details of the flats sold, the date of such sale and the amounts received on such sales and also cost of construction of the project duly certified by the Auditor, which was replied by the assessee vide letter dated 28/12/2012 submitting the details of occupation certificates besides submitting all the relevant documents being occupation certificates, possessions certificates for filed vide letter dated 02/05/2012 regarding the flats sold and cost of construction thereof. It was submitted by the assessee that the same were provided to the AO during the assessment proceedings and are part of the assessment record. The assessee submitted before the AO that CIT(A) while passing the order have clearly given the direction to limited extent of finding

the date of commencement certificate and possession certificates. The assessee submitted that the directions of the CIT(A) were mandatory and specific and the AO has no jurisdiction and authority to go beyond the same. Otherwise it would be the review of the assessment order which was beyond the mandate of the directions of the CIT(A). Thus the AO was requested to rectify the order giving effect to CIT(A) order in the light of direction given by the Ld. CIT(A). The AO finally rejected the rectification application by passing order u/s 154 of the act dated 15/02/2013 wherein the AO held that the assessee was not furnishing the required information which was necessary in order to implement the directions of CIT(A) and thus justified the passing the order of giving appeal effect dated 02/05/2012 computing the income of at Rs.19,48,87,140/-. The AO further observed that the said order was correctly passed and there is no apparent mistake in the order, It was also noted that the assessee was not entitled in absence of information/details from the assessee. The direction of CIT(A) to compute the business income from SIE project could not be carried out for the said reasons. In the appellate proceeding Ld. CIT(A) partly allowed the appeal of the assessee by observing that in the order dated 29/02/2012 ld CIT(A) directed the AO to arrive at the correct income from SIE project after examining the requisite information and details for the purpose of the determination of such income. Thus Ld. CIT(A) held that by calling details in respect of amount received as sales and the expenses related to the project, AO has not exceeded his jurisdiction as AO cannot determine the income

by confining himself to the limited way. The Ld. CIT(A) further held that there was a force in the contentions of the assessee that the opening WIP for AY 2006-07 has been determined by the AO at Rs. 45,04,41,989/- vide his original assessment order passed A.Y. 2005-06 u/s 143(3) dated 17/12/2007 cannot be revisited. It was observed by the CIT(A) that AO had himself in the said assessment for the A.Y. 2005-06 modified the closing WIP for the said year at Rs.45,04,41,989/- as against Rs. 45,11,22,555/- shown in the books of accounts. Thus CIT(A) directed the AO to adopt the opening WIP for the AY. 2006-07 at Rs.45,04,41,989/- as has been determined by him. The Ld. AR also directed the assessee with regard to details as sought for by the Ld. AO to furnish the necessary details as directed by the CIT(A) to enable the AO to determine the income of the assessee to determine the income from the SIE project as per directions of the Ld. CIT(A). Thereafter the AO passed the order giving the appeal effect to CIT(A) order dated 27/08/2013 determining the total income at Rs.7,00,176/- by calculating the income from SIE project on the basis of information provided by the assessee as directed by CIT(A) originally .Now the department is in appeal before this Tribunal challenging the order of CIT(A) on the grounds reproduced above.

5. In the first ground (i) of appeal the revenue has challenged the order of CIT(A) directing the AO to adopt the opening WIP at Rs. 45,04,41,983/-.

6. The AO vide his original assessment order for AY 2005-06 passed u/s 143(3) of the Act dated 17/12/2007 had determined

the closing WIP at Rs.45,04,41,989/- and thus accordingly the Ld CIT(A) observed that AO had himself determined the WIP for the said year at Rs. 45,04,41,989/- as against Rs. 45,11,22,555/- shown in the books of accounts and thus directed the AO to adopt the opening WIP for the AY. 2006-07 at Rs. 45,04,41,989/- as has been determined by the AO himself.

7. After hearing both the parties and perused the material on record, we observed that the issue of WIP was nowhere in the earlier order of CIT(A) and that order only directed the AO to verify the claim of the assessee on the basis of documents and details to be furnished by the assessee and compute the income from the SIE project of the assessee and in the impugned order of CIT(A) while giving is directions to rectify the mistake apparent from record, the CIT(A) directed that WIP was already determined by the AO himself in the assessment proceedings and that was not in dispute either by assessee or by the Department and therefore it is binding upon the AO to adopt WIP as determined in the assessment of the earlier year and CIT(A) has no power to disturb the earlier order in his present appeal proceedings. Therefore, in our opinion the direction of Ld. CIT(A) is in no way in contradiction earlier directions of CIT(A) whereby the Ld. CIT(A) directed the AO to compute the income from SIE project. Therefore, we do not find any merit in the grounds raised by the revenue and accordingly same is dismissed.

8. The issue raised in second ground (ii) of appeal is against the order of CIT(A) directing the AO to rectify the mistakes u/s

154 of the Act, when AO did not have power to examine the issue of details and information under that section.

9. After hearing the both the parties and perusing the material on record, we observe that Ld. CIT(A) in his order has nowhere given separate instructions to carry out any independent investigation/ examination/ verification of records and directed te AO to carry out the direction of ld CIT(A) in his original appellate order dated 29/02/2012. The Ld. CIT(A) has only clarified and explained the directions as issued by the Ld. CIT(A) in his earlier order. In other words, Ld. CIT(A) in his order passed u/s 154 of the Act has issued the direction to the AO to follow and carry out the directions of Ld. CIT(A) and to compute income accordingly. It is clear from the facts before us that the effect has not been given despite clear and specific directions of CIT(A) given in his appellate order and thus the rectification application u/s 154 of the Act was filed wherein the mistake of not giving effect to the directions of Ld. CIT(A) was pointed and requested to be rectified. The said mistake was clearly apparent from record and thus it formed part of the rectification procedure. This is nowhere challenged by the AO also in his order u/s 154 of the Act. Thus we observe that direction u/s 154 was merely to follow and carry out the directions of the earlier CIT(A) order and AO was not directed to examine the issue in details as he was simply directed u/s 154 to carry out the directions as laid out in the earlier CIT(A). Therefore we do not find any merit in the contentions of the department that the Ld. CIT(A) directed the

AO u/s 154 to call for information details and examine the same and thus the allegation of the revenue is totally wrong.

10. The issue raised in the third (iii) ground is against the direction of the CIT(A) to AO to look into the facts and verify the same whether amounted to setting aside of a case which is not within the jurisdiction and power of the CIT(A).

11. We observed from the impugned order of Ld. CIT(A) that Ld. CIT(A) has simply given direction to follow the directions of the earlier order of CIT(A) dated 29/02/2012. No fresh and independent directions were given in his order to carry out any fresh verification and the only sole issue considered in his order passed by the CIT(A) is the direction of the Ld. CIT(A) issued in the earlier order and therefore direction of CIT(A) can in no way considered to be set aside of the matter. Ld. CIT(A) in tandem with the directions of the earlier CIT(A) has simply directed AO to compute the income arising out of the SIE project. We observed that the issue has been decided and only computation left to the AO after ascertaining and verifying the information furnished by the assessee. Therefore, we held that the order of CIT(A) directing the AO to follow the direction of CIT(A) in earlier order was not beyond the power of rectification u/s 154 and did not tantamount to setting aside of the order of the AO. Accordingly, the plea raised by the revenue is dismissed. Ground No. 2 and 3 are general in nature and do not require any adjudication.

**ITA NO.2959/Mum/2015**

12. The only issue raised in the various grounds of appeal is against the confirmation of penalty on the aggregate addition of Rs. 19,48,87,148/- comprising Rs. 7,04,87,500/- on account of sale of development rights to M/s KBK Associates, Rs. 9,60,00,000/- on account of developmental rights to M/s Prime Property Development Corporation Limited and Rs. 2,83,99,648/- for disallowances of expenses. The facts in brief are that a search u/s 132 of the Act was conducted on 13/03/2008 at the business premises of the assessee by DG(investigation). Thereafter notice u/s 153A of the Act dated 14/10/2008 was issued which was complied with by the assessee by filing return of income on 16/12/2012 declaring Nil income. The assessment u/s 143(3) read with section 153A was framed vide order dated 29/12/2009 determining the total income at Rs. 13,23,87,140/- by making three additions as under: -

- I. *Rs. 79,87,500/- on a/c of further sale of developmental rights to M/s. KBK Associates.*
- II. *Rs. 9,60,00,000/- on a/c of development rights to M/s. Prime property Development Corporation.*
- III. *Rs. 2,83,99,640/- on a/c of expenses disallowed.*
- IV. *Besides above, as books of accounts are being rejected, assessee had not been allowed to carry forward its losses of Rs.3,23,29,298/- claimed in Revised Financials.*

Besides the above additions, the books of accounts were rejected u/s 145(3) of the Act and the loss of Rs.3,23,29,298/- was not allowed to be carried forward . The assessee is engaged in the business of construction of buildings. The company owned a plot of land at Hughes Road, Mumbai, on which the company was developing a commercial project known as SIE, a residential

project in association with KBK Associates and Shopping Mall in-collaboration with Prime Property Developments Corporation Limited. The construction of commercial project known as SIE was started somewhere in 1987-88. During the course of search, it was found that assessee company has sold developmental rights regarding shopping centre (commercial centre) to M/s Prime Property Developments Corporation Limited for Rs. 7,04,87,500/- (Rs. 6.25 crores in F.Y. 2004-05 &Rs. 79,87,500/- in F.Y. 2005-06). But no income on this account has been booked or declared. Further, residential project developed by assessee company was substantially sold out, but no profit on that account has been booked by the assessee company although the company have 50% share in the project. According to the assessee declared proceeds from sale of developmental rights as disclosed during search operations u/s. 132 of the Act but while preparing the revised accounts adopted new method of accounting to suit its own needs and accordingly filed return of loss in which even after declaring income of Rs. 16.65 crores offered during search operation, the return was in loss. In the assessment framed u/s 143(3) read with section 153A of the Act dated 29/12/2009, the AO disallowed Rs. 2,83,99,340/- on ground that assessee is not furnished any explanation in respect of expenses claimed and the penalty u/s. 271(1)(c) were also initiated. In the appellate proceedings, the Ld. CIT(A) vide order dated 29/07/2012 directed the AO to assess the entire amount of Rs. 7,04,87,500/- in respect of sale of developmental rights to M/S KBL Associates and Rs. 9.6 crores on account of

development rights to M/s Prime properties Development corporation Ltd. under the head business for the year under consideration i.e. A.Y. 2006-07. The CIT(A) has not given any decision on the addition of expenses. Thereafter order giving appeal effect was passed on 02/05/2012 revising total income to Rs. 19,48,87,140/-. A show cause notice regarding penalty proceedings u/s 271 (1)(c) was issued on 23/01/2013 which was replied by the assessee by requesting the AO to dispose the rectification applications filed by the assessee first. Thereafter another show cause notice was issued dated 18/03/2013 for which no reply was received from the assessee. The AO held that the assessee has concealed the particulars of income and furnished inaccurate particulars of such income as per explanation 1 to section 271(1) of the Act also u/s. 271(1)(c) and thereby levied penalty of Rs. 6 crores vide letter dated 28/03/2013 passed under section 271(1)(c). The additional which were the penalty was levied were Rs. 16,47,16,438/- comprising of Rs. 79,87,500, 9,60,00,000/-, Rs.2,83,99,640, Rs.3,23,29,298/- amount of Rs. 5,54,43,560.

13. In the appellate proceedings Ld. CIT(A) after considering the contention of the assessee directing the AO to impose the penalty of Rs. 7,04,87,500/- on account of sale of development rights to M/s. KBK Associates and Rs. 9.6 crores to M/s. Prime property Development Corpn. Ltd. Disallowances of expenses of Rs. 2,83,99,640/- by observing and holding as under:

*5. I have very carefully considered the facts of the case, the findings of the AO and the submissions of the appellant. I **have** called for and closely examined the assessment record of the AO and it is found that to clearly understand the issues raised, the facts,*

*as is evident from the record of the AO, have to be brought on record. It is seen that there was a search and seizure action on the residential/business premises on the Bharat Shah Group of cases and the appellant was inter alia searched. In pursuant to the search, the AO issued notice under s. 153A and in response thereto the appellant filed the return of income declaring NIL income. The AO has observed in the assessment order, that during the search operation on 13.03.2008 it was discovered that though the company had sold its developmental rights regarding shopping centre to M/s. Prime Property Development Corpn. Ltd., for Rs. 9.6 crs. and sold developmental rights for residential project to M/s. KBK Associates for Rs. 7,04,87,500/-, no income on this account had been booked- Also, the residential project developed by the company had been substantially sold out but no profit from the same had been booked though the company possessed 50% share in it. According to the AO, even after declaring the proceeds from sale of developmental rights during the search conducted, the assessee revised its accounts adopting new method of accounting, and accordingly filed the return of loss, despite declaring income of Rs. 16.65 crs. as per the Statement under s. 132(4), In the circumstances, the AO rejected the books of accounts and thereby the loss claimed of Rs. 3,23,29,298/- was rejected and not allowed to be earned forward. The AO brought to tax Rs. 79,87,500/- on account of sale of developmental rights to M/s. KBK Associates and a sum. of Rs. 9,60,00,000/- on account of sale of developmental rights to M/s. Prime Properties Development Corpn., as business income for the year under consideration. Further during the course of assessment, it was revealed that there was excess claim of expenditure totaling Rs. 2,83,99,640/- and therefore the same was added back to the income of the company. The AO, thus, computed the total business income of the appellant at Rs. 13,23,87,140/-. The appellant preferred appeal before the CIT(A) and as per his order dated 29.02.2012, the CIT(A) held as under-*

*(a) After the search, in the return filed under s. 153A, the appellant had booked Rs. 6,25,00,000/- on account of sale of development rights to M/s. KBK Associates in FY. 2004-05. However, since the Development Agreement had been entered into on 05.04.2005, the entire sum of Rs. 7,04,87,500 (Rs. 6.25 crores + Rs. 79,87,500) is to be assessed in A.Y. 2006-07 as business income. This is in addition to the sum of Rs. 9,60,00,000/-booked in response to notice under s. 153A as per the return filed, being receipt on sale of development rights to M/s. Prime Property Development Corpn. Ltd. directed to be treated as business income by the CIT(A) for the impugned year.*

*(b) As regards recognition of income- from the SIE project and Residential project from which no income had been offered, and on which projects the appellant had changed its method of accounting from Project Completion Method to Percentage Completion Method, the CIT(A) gave the following directions: -*

*“6.15 In. the case of flat purchases, normally the purchasers book the flats by paying advances and later enter into agreement for sale and pays the monies as per the agreement of sale. Subsequently, the promoter completes the project and hands over the possession of the flat to the purchasers. The monies paid by the purchasers are returnable to the purchasers if the promoter is not completing the project successfully to the satisfaction of the purchasers. That stage will be achieved only when the Municipal Authorities issue Occupancy Certificate. Until then, the money paid by the customers will only partake the character of 'advance money paid' by the*

*flat purchasers. Until the possession is given/ Occupancy Certificate is obtained, there is uncertainty and the advances paid will never partake the character of income. As soon as the possession is given/Occupancy Certificate is issued, the flats are ready for occupation and it is in a fit position to be handed over to the purchaser. So, I am of the view that the date of issue of occupancy certificate/ date of possession to the purchaser will be the date of accrual of income to the appellant*

*6.16 In view of the above, I direct the AO to find out the accounting, year in which the occupation certificate or possession of flat/unit is given (whoever date is earlier) and take the amount received and receivable towards the sale as income and deduct all the expenses related to the development of the flat/units and determine the income and assess it to determine the tax, interest etc. Accordingly, in the assessment year relevant to the accounting year in which the possession of the flat/occupancy certificate was given for the flat whichever is earlier and assess the income in that assessment year. The appellant is directed to produce the necessary details and documents to the AO in this regard”.*

*5.1 From an appreciation of the said facts, it transpires that it is as a consequence of the search on 13.03.2008 that the factum of sale of development rights was revealed and that by reason of said search, appellant had no choice but to declare the receipts as income. Being cornered, the appellant declared the receipts emanating from sale of development rights as income in the relevant years as per the statement under s. 132(4) but at the same time when the returns were filed, without any sufficient reason, it suddenly changed its method of accounting. Prior to the search, the returns were filed, following the Project Completion Method, however, in the return filed subsequent to notice under s. 153A, the appellant followed Percentage Completion Method, and thereby returns were filed declaring huge sums of loss. Besides, a plea also came to be taken that the income emanating from sale of developmental rights is not business income but to be assessed under the head 'Capital Gain'. This plea was taken despite the fact that the business of the company is development, construction and sale of properties. It was not as though land was being held as investment. Such a plea before the Department reveals that the conduct of the appellant lacks bonafides and that the AO has correctly rejected the method of accounting and assessed the said sums as 'Business Income', Further in respect of its own residential and commercial projects, though all the residential projects had been sold, no profit therefrom had been offered to tax as per the returns of income filed. In the said view of the matter, there is both concealment of particulars of income as well as furnishing of inaccurate particulars of income as far as this appellant is concerned. It is also to be mentioned here that it is after scrutiny of the return, that it is discovered that there is excess claim of expenditure to the tune of Rs. 2,83,99,640/- for the impugned year. But for scrutiny, the excess claim would not have been revealed. Therefore, the finding of the AO that this is a fit case of imposing penalty under sec. 271(1)(c) is proper and accordingly upheld. But at the same time, it is to be stated here that AO could not have taken into account the claim of loss of Rs. 3,23,29,298/- as the concealed income of the appellant. The AO has already rejected the method of accounting and made additions and on the said additions the AO has reached satisfaction that these additions are liable to penalty under s. 271(1)(c). Hence, the AO is directed, to exclude the amount of Rs, 3,23,29,298/- being the claim of carry forward of losses, for the purpose of computation of penalty under s. 271(1)(c).*

6. It was noted during the hearing of the Appeal, that an apparent error has occurred in the order of penalty passed by the AO, The AO has considered only a sum of Rs. 79,87,500/- on account of sale of development rights to M/s. KBK Associates. In fact, the appellant has also agreed that the Agreement with M/s. KBK having been signed on 05.04. 2005, the entire sum of Rs. 6,25,00,000 + Rs. 79,87,500 (Rs. 7,04,87,500] is assessable in A.Y. 2006-07. The said fact is not under challenge. However, the AO had only considered Rs. 79,87, 500/- on account of sale of developmental rights to M/s. KBK Associates in the order of penalty. Therefore, the appellant was issued an enhancement notice by the CIT(A) to show cause why the entire sum of Rs.7,04,87,500/- should not be considered as the concealed income? As per its reply dated 10.02.2015, the appellant objected to the said notice stating that the said sum is already reflected in the books and hence there is no concealment. The said reply of the appellant does not address the question raised-

6.1 To sum up, it is held that from the surrounding facts and circumstances, the appellant is liable for penalty under s. 271(1)(c) on the following additions/disallowances: -

a. Rs. 7,04,87 ,500/- (Rs. 6,25,00,000 + Rs. 79,87,500]

on account of sale of developmental rights to M/s. KBK Associates.

b. Rs. 9,60,00,000/- on account of sale of development rights to M/s: Prime Property Development Corpn, Ltd.

c. Disallowances of expenses o Rs. 2,83,99,648/-

14. Ld. AR vehemently submitted that the incomes on which the penalty was confirmed by Ld. CIT(A) has duly been offered to tax while filing the return u/s 153A of the Act. Therefore, penalty for concealment of income by invoking explanation 1 is not applicable as the assessee, by filing revised return after search, has offered to tax the income which were subject matter of imposition of penalty. The Ld. AR submitted that just by virtue of the fact that such return filed u/s 153A showed a higher income, penalty under section 271(1)(c) cannot be automatically imposed as the return filed u/s. 153A substitutes the original return filed u/s. 139(1) of the Act for the purpose of levying penalty u/s. 271(1)(c). The AO has to examine any concealment of income in the return filed by the assessee u/s 153A and not vis-à-vis the original return filed u/ 139(1) of the Act. The Ld. AR in the

defence of his arguments relied heavily on the decision of Hon'ble Delhi High Court in the case of Pr. CIT vs. Neeraj Jindal (2017) 147 DTR (Del) 342. Ld AR, therefore, submitted that the income already offered to tax cannot be subjected to penalty proceedings u/s 271(1)(c) of the Act for concealment of income as in fact there is no concealment of income when the income is offered to tax in the return filed u/s 153A which takes the place and substitutes the return filed original u/s 139(1) of the Act. The Ld. AR prayed that the order of CIT(A) may be reversed and the AO may be directed to delete the penalty imposed.

15. The Ld. DR on the other hand relied heavily on the order of CIT(A) by submitting that income has been disclosed in the revised return filed u/s 153A of the Act only after it was discovered during the search. The Ld Dr submitted that had the search not conducted the said concealed income would have never been disclosed and offered to tax. Therefore the Ld. DR argued that there is no force in the arguments of Ld. AR that income was offered to tax in the revised return filed pursuant to notice issued u/s 153A. The Ld. DR submitted that at the time of search the assessee has not booked any said income in the books of accounts.

16. We have heard rival submissions and perused the relevant material on record. The undisputed facts are that during the course of search proceedings, the search team found that assessee has not offered to tax the sale proceeds of developmental rights to M/s. KBK Associates Rs. 7,04,87,500/-, sale of developmental rights to M/s. Prime properties

development corporation Pvt Ltd. To Rs. 9.60 cores which were only offered to tax in the return filed in response to notice u/s 153A of the Act. During the course of assessment, the AO also disallowed the expenses to the tune of Rs. 2,83,99,648/- for the reasons that assessee has not filed any explanation with regard to claim of said expenses. The AO levied the penalty on the following amounts (i) Sale of developmental rights to M/s. KBK Associates Rs. 79,87,500/-, (ii) Sale of developmental rights to M/s. Prime property development corporation Pvt.Ltd. Rs. 9.60 cores, disallowance of expenses 2, 83, 99,648 and loss as declared in the revised return of Rs.3,23,29,298/- on which the tax sought to be evaded was calculated at Rs. 5,54,43,560/- and thus the levied a penalty of Rs. 6 cores . In the appellate proceedings Ld. CIT(A) enhanced the penalty by directing the AO to take the sale of developmental rights to M/s. KBK Associates of Rs.7,04,87,500/- and taking other two item of offer Rs. 9.6 cores and Rs. 2,83,99,648/- same as taken by the AO. The Ld. CIT(A) directing the AO to exclude the claim of loss of Rs. 3,23,29,298/- on the ground that the said loss is not to be taken into account when the AO has already rejected the method of accounting and made the additions. Now the only legal issue before us whether the penalty can be imposed on various incomes which was not offered in the returned filed u/s 139(1) of the Act in original return of income by the assessee but duly disclosed and offered to tax in the return filed in response to the notice issued u/s 153A as the assessee has argued that the return filed u/s 153A substitutes the original return filed u/s

139(1) of the Act and the concealment, if any, has to be examined vis-à-vis return filed u/s 153A and not under file originally u/s 139(1) of the act. We have perused the decision of the Hon'ble Delhi High Court in the case of Pr. CIT vs. Neeraj Jindal and observe that the case of the assessee is squarely covered by the said decision. The relevant para of decision is reproduced as under:

*20. Therefore, the position that emerges from the above-mentioned provision is that once the assessee files a revised return under Section 153A, for all other provisions of the Act, the revised return will be treated as the original return filed under Section 139. On similar lines, the Gujarat High Court in the case of KiritDahyabhai Patel v. Assistant Commissioner of Income Tax, (2015) 280 CTR (Guj) 216, held that: "In view of specific provision of s. 153A of the I.T. Act. the return of income filed in response to notice under s. 153A of the I.T. Act is to be considered as return filed under s. 139 of the Act, as the AO has made assessment on the said return and therefore, the return is to be considered for the purpose of penalty under s. <http://www.itatonline.org> ITA 463/2016 & CONNECTED CASES Page 15 271(1)(c) of the I.T. Act and the penalty is to be levied on the income assessed over and above the income returned under s. 153A, if any." 21. Thus, it is clear that when the A.O. has accepted the revised return filed by the assessee under Section 153A, no occasion arises to refer to the previous return filed under Section 139 of the Act. For all purposes, including for the purpose of levying penalty under Section 271(1)(c) of the Act, the return that has to be looked at is the one filed under Section 153A. In fact, the second proviso to Section 153A(1) provides that "assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate." What is clear from this is that Section 153A is in the nature of a second chance given to the assessee, which incidentally gives him an opportunity to make good omission, if any, in the original return. Once the A.O. accepts the revised return filed under Section 153A, the original return under Section 139 abates and becomes non-est. Now, it is trite to say that the "concealment" has to be seen with reference to the return that it is filed by the assessee. Thus, for the purpose of levying penalty under Section 271(1)(c), what has to be seen is whether there is any concealment in the return filed by the assessee under Section 153A, and not vis-a vis the original return under Section 139.*

17. Me that as it may be ,it is very clear from the above that the return filed by the assessee u/s 153A of the Act is treated as return filed u/s 139(1) of the Act. We further observed that the Hon'ble Gujarat High Court in the case of Kireet Dahia Bhai Patel vs. ACIT 2015 280 CTR (Guj) 2016 has taken similar view. We,

therefore, respectful following the decision of the High Courts of Delhi and Gujarat hold that the penalty in the present case has wrongly been confirmed by the Ld. CIT(A) and thus order of ld CIT(A) can not be sustained. Accordingly, we set aside the order of CIT(A) and direct the AO to delete the penalty.

18. In result the appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 30.04.2019

**Sd/-**  
**(Amarjit Singh)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(Rajesh Kumar)**  
**ACCOUNTANT MEMBER**

Mumbai, Dated : 30.04.2019

**\* Thirumalesh, Sr.PS**

**Copy of the Order forwarded to :**

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'B' Bench, ITAT, Mumbai

BY ORDER

(AssistantRegistrar)  
Income Tax Appellate Tribunal, Mumbai