IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR (SMC)

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER

I.T.A. Nos. 561/Asr/2018 & 284/Asr/2017
Assessment Year: 2006-07

Embrocia Farms Pvt. Ltd., Vill. Kotli, P.O. Jakolari, Tehsil & Distt. Pathankot [PAN: AAACE 3519P]	vs.	Dy. CIT, Circle 6, Pathankot
(Appellant)		**(Respondent)**

Appellant by : Sh. Tarsem Lal, Adv.
Respondent by: Sh. Charan Dass, Sr. D.R.

Date of Hearing: 25.02.2019
Date of Pronouncement: 21.05.2019

ORDER

Per Sanjay Arora, AM:

This is a set of two Appeals by the Assessee, i.e., in quantum and penalty proceedings. The former arises out of the Order by the Commissioner of Income Tax (Appeals)-2, Amritsar ('CIT(A)' for short) dated 18.10.2018, contesting the dismissal of the assessee's application under section 154 of the Income Tax Act, 1961 ('the Act' hereinafter) dated 15/5/2017 for assessment year (AY) 2006-07, claiming amendment of the appellate order dated 15/01/2014 partly allowing the assessee's appeal contesting its assessment u/s. 143(3) of the Act dated 19/12/2008 for the said year. The second appeal (in ITA No. 284/Asr/2017) is in respect of confirmation of the penalty u/s. 271(1)(c) levied by the Assessing Officer (AO) for the said year on 13/3/2015, by the ld. CIT(A) vide his order dated 03/02/2017.

2.1 The facts, briefly stated, are that the assessee-company sold its' feed mill Unit during the relevant year for a lump-sum consideration of Rs.280 lacs (vide sale deed dated 10.01.2006), returning short-term capital gain (STCG) at Rs.2,09,00,417. In the view of the AO, it is only the Written Down Value (WDV) of the said Unit (at Rs.44.93 lacs) and not of the total assets (i.e., Rs.71 lacs), i.e., inclusive of the other (poultry farm) Unit as well, that could be deducted in computing the STCG. Two, as the assessee had sold land (measuring 5 kanals, 8.53 marlas), purchased on 17.11.1981, along with, the capital gain attributable thereto would require being worked out separately. He, accordingly, vide order dated 19.12.2008, computed long-term capital gain (LTCG) (on land) at Rs.26,98,636 and STCG (on other assets) at Rs.207.92 lacs, i.e., at a total of Rs.234.91 lacs. The assessee had, in his view, thus understated capital gain by Rs.25.90 lacs (Rs.234.91 lacs – Rs.209.01 lacs), also initiating penalty proceedings for furnishing inaccurate particulars of income.

2.2 In appeal, the assessee disputed the computation of STCG as well as that of LTCG. The first appellate authority decided thus (vide order dated 15.01.2014):

'6. Under the given facts and circumstances of the case, I am of the considered opinion that whereas a composite sale deed has been executed without giving separate details for depreciable assets and non depreciable assets including a separate parcel of land measuring 5 kanals 8.53 marls not appurtenant to the feed mill unit, the AO is quite justified in computing separately net long term capital gain on the sale of the above parcel of land not appurtenant to the feed mill at Rs.2698636/- [Rs.2714500 less indexed cost of such land at Rs. 15864/- based on its cost price of Rs.3192/-] and thereby separately working out net assessable short term capital gain of Rs.2,07,92,053/- [Rs.25285500 less Rs.4493446/- cost price of depreciable assets] against the declared short term capital gain of Rs.2,09,00,272/-, resulting into under-statement of capital gain to the tune of Rs.25,90,272/-, subject to the finding that the AO may ensure that for working out short term capital gain, set off of WDV of all and

entire Plant & machinery, building, etc. should be given instead of only of feed unit as poultry (unit) and feed units were part of same poultry farm as one unit. In the totality of facts and circumstances, I am of the considered opinion that the AO's action being in order does not require any interference thereto and his action is hereby confirmed in respect of computation of long term capital gain as land.'

In short, he accepted the assessee's claim for deduction of WDV at Rs.71 lacs, allowing the assessee, thus, a relief of Rs.26.06 lacs (Rs.71 lacs – Rs.44.94 lacs), while upholding the separate working of LTCG on the value attributable to land.

2.3 The assessee moved an application u/s. 154 dated 15.05.2017 (on 18.5.2017/copy on record) before the ld. CIT(A), raising two issues, as under:

(a) The AO had wrongly applied circle rate of Rs.25,000/- per marla in computing the LTCG on land in-as-much as section 50C could not have been invoked as a sale was a composite sale.
(b) The land sold was appurtenant to the feed mill, and not, as stated, not appurtenant thereto, so that the capital gain could not be separately computed.

Qua the first issue, the ld. CIT(A) held that the issue being now raised was not the subject matter of appeal and, consequently, not adjudicated u/s. 250 in the first instance. As regards the second ground, the same raised a contentious issue, i.e., which was debatable and, thus, outside the purview of section 154. The same was, even otherwise, covered u/s. 154 (1A) of the Act. Aggrieved, the assessee is in second appeal, raising the following issues:

(i) the parent order being dated 15.01.2014, the impugned order could not have been passed after 31.3.2018, and is thus barred by time u/s. 154(7);

(ii) the impugned order being passed outside the time limit of six months specified u/s. 154(8), is non-est, so that the assessee's appeal be deemed as accepted;

(iii) the circle rate (of land) could not be applied as it is a case of a composite sale; and, without prejudice,

(iv) the correct commercial rate to be applied is Rs.15,000 per marla, as the Collector had himself applied the said rate.

3. I have heard the parties, and perused the material on record.

3.1 Grounds (i) and (ii) assail the impugned order as barred by time and, thus, non-est. The same are without merit and, in fact, self-defeative. This is as the only implication of the same being time-barred is that the assessee's application u/s. 154 dated 15/5/2017 is still un-disposed. The matter also cannot be set aside as, by own contention, an order disposing the said application could not be passed after 31.3.2018. There is no question of the assessee's application being deemed as allowed, i.e., in default, as suggested by the ld. counsel for the assessee, Sh. Lal, during hearing, as section 154(4), mandatory in nature, provides for an amendment to be by way of an order in writing. Section 154(8) makes this further clear, i.e., that any order of amendment u/s. 154(1) r/w sec. 154(4) has to be a result of a conscious decision by the concerned authority to either amend or not to amend the order sought to be rectified. The time frame stipulated thereby is, even as clarified in *SBI v. ITO* (TDS) [2011] 335 ITR 287 (Pat), relied by the Revenue, directory. Further, that where the consequence/s of the breach of the time limit is not provided, the same is directory, is part of well-settled law, as explained by the Hon'ble Orissa High Court in *Bhakta Vedanta Swami Charitable Trust v. CIT* (in WP(C) 12347 of 2005 dated 9/5/2006), where the same contention, i.e., of the non-passing of orders (in that case u/s. 12AA as well as s. 80G(5) of the Act) within the stipulated time period of six months as amounting to a deemed acceptance of the relevant application/s, was negatived by the Hon'ble Court, making reference to a decision by the Privy Council; the Revenue being constrained to pass an order beyond the prescribed time limit. The operative part of decision reads as under:

`We are unable to uphold such contention. In our view the period of six months as provided in sub-section (2) of section 12AA is not mandatory. Though the word 'shall' has been used, but it is well known that to ascertain whether a provision is mandatory or not, the expression 'shall' is not always decisive. It is also well known that whether a statutory provision is mandatory or directory has to be ascertained not only from the wording of the statute but also from nature and design of the statute and the purpose which it seeks to achieve. Herein the time frame under sub-section (2) of Section 12AA of the Act has been so provided to exclude any delay or lethargic approach in the matter of dealing with such application. Since the consequence for non-compliance to the said time frame has not been spelt out in the statute, this Court cannot hold that the said time-limit is mandatory in nature nor the period of six months has been couched in negative words. Most of the time negative words indicate a mandatory intent. This Court is also of the opinion that when public duty is to be performed by the public authorities, the time-limit which is granted by the Statute is normally not mandatory but is directory in the absence of any clear statutory intent to the contrary (See: *Montreal Street Railway Company vs. Normandin*, AIR 1917 Privy Council 142 at page 144). Here there is no such express statutory intent, nor does it follow from necessary implication.

For this reason we cannot accept the contention of the learned counsel for the petitioner on the interpretation of section 12AA(2).'

The provision (s. 154(8)) is not cast in negative terms, which is indicative, and also one of the tests as pointed out by the Hon'ble Court, of the provision being directory. Contrast this with s.154(7), cast in negative terms, which is mandatory. Rather, a reading of section 154(8) makes it abundantly clear that an order u/s. 154(1) r/w s. 154(4) is to be a result, as afore-stated, of a conscious decision. This is even otherwise apparent as the order is appellable and, in fact, being an order covered u/s. 154(1)(a), itself subject to rectification, as where it bears a mistake apparent from record. The said Grounds would not hold.

3.2 The third (iii) aspect, as itself stated by the assessee in its' Ground 6, is the subject matter of appeal, on which a conscious decision has been taken by the ld. CIT(A) while passing the appellate order. The only course therefore available, where the said adjudication is considered erroneous, is for the effected party to take the matter in further appeal. True, the ld. CIT(A) has, in arriving at his

decision, regarded the land sold as not appurtenant to the Feed Mill, while the assessee states of the same being a part and parcel of the 'factory building sold'. *That, however, does not mean that his decision would be different had he not regarded it as so*. In fact, the AO, whose action he upholds, does not state so; though yet assesses the gain on land separately. That land is a separate asset from the structure thereon or the plant attached thereto, is well-settled (*CIT vs. Alps Theatre* [1967] 65 ITR 377 (SC);. *CIT vs. Citibank N. A.* [2003] 261 ITR 570 (Bom); *CIT vs. Vimal Chand Golecha* [1993] 201 ITR 442 (Raj)).

Further, it may also be that the ld. CIT(A) considers so as land, if regarded as part of the units sold, would be subject to provision of section 50B, in which case no indexation benefit would be available to the assessee and, two, only the net worth, as certified by an Accountant, of the relevant undertaking (i.e., excluding the plant and machinery of the other unit), allowed as a deduction.

It is for these reasons that the ld. CIT(A) states it to raise a contentious issue and, in any case, covered u/s. 154(1A).

3.3 The issue raised at (iv) above is the application of the correct rate. Where the rate applied is not the correct rate, the same is a mistake apparent from record. There is, however, nothing on record to show that the rate is Rs.15,000, which aspect itself was disputed during hearing by the ld. Sr. DR, Sh. Charan Dass. Be that as it may, the said 'mistake', i.e., that the rate applied is not correct, is admittedly not a part of the assessee's application dated 15.5.2017 disposed of by the ld. CIT(A) vide the impugned order. The same, where so, is a 'mistake' separate and distinct from the other mistakes raised by the assessee per its' said application. The same stands raised before the ld. CIT(A) vide application dated 09.01.2018 (PB pgs. 6-7). In-as-much as the same raises a 'new' mistake, independent of the other mistakes, the same cannot be regarded as a revision of the

application dated 15.5.2017, as Sh. Lal would state on the scope of the said application. The assessee's letter dated 09.01.2018 is, to that extent, a separate application, since undisposed. It is open for the assessee to, where so advised, seek disposal of the said application dated 09.01.2018. I say so, i.e., 'where so advised' as, as it appears, it may be of no consequence. The value (out of the total consideration of Rs.280 lacs) imputed to the other assets is the balance after deducting that ascribed to land. As such, a change in the said rate, impacting land value (cost), would imply a corresponding increase in STCG; in fact, to exactly the same extent. How, one wonders, would it assist the assessee in any manner?

3.4 Continuing further, it is precisely this that would cause the assessee's appeal agitating the levy of penalty as being liable to be accepted at the threshold. The primary (and the sole) reason for the assessment of the capital gain in a sum higher than that returned by the assessee (by Rs.25.90 lacs), on which the impugned penalty is levied, is, as a narration of the fore-going facts makes it clear, on account of non-allowance of the WDV of the entire block of asset, i.e., of both the units, i.e., as against only of the Feed Mill Unit. The difference between the two sets of the WDV – allowed by the ld. CIT(A), is Rs.26.06 lacs (Rs.71 lacs – Rs.44.94 lacs), i.e., more than the difference for which the penalty is being levied – and which is due to the allowance of (indexed) cost of land (at Rs.0.16 lacs). Therefore, even as the asessee has not furnished any explanation during the penalty proceedings, nor indeed in the appellate proceedings, there is no 'tax sought to be evaded', in terms of *Explanation 4* to section 271(1)(c), on which penalty could be levied. The assessee, accordingly, succeeds.

3.5 I decide accordingly.

4. In the result, the assessee's appeal is (in ITA No. 561/Asr/2018) is dismissed and its appeal (in ITA No. 284/Asr/2017) is allowed.

Order pronounced in the open court on May 21, 2019

Sd/-

(Sanjay Arora)
Accountant Member

Date: 21.05.2019

/GP/Sr. Ps.

Copy of the order forwarded to:

(1) The Appellant: Embrocia Farms Pvt. Ltd., Village Kotli, P.O. Jakolari, Tehsil & Distt. Pathankot
(2) The Respondent: Dy. CIT, Circle 6, Pathankot
(3) The CIT(Appeals)-2, Amritsar
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T

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By Order