

आयकर अपीलीय अधिकरण] पुणे न्यायपीठ “बी” पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “B”, PUNE

BEFORE MS. SUSHMA CHOWLA, JM AND
SHRI ANIL CHATURVEDI, AM

आयकर अपील स / ITA No.1190/PUN/2017

निर्धारण वर्ष / Assessment year : 2009-10

The Dy.Commissioner of Income Tax,
Circle-8, Pune.

..... अपीलार्थी /
Appellant

बनाम v/s

M/s. Kshitiji Associates,
B-75, Anugraha Co-op Housing,
Dnyaneshwar Nagar,
Pimpiri, Pune.

..... प्रत्यर्थी /
Respondent

PAN : AAIFK1377L.

प्रत्याक्षेप स / CO No.15/PUN/2019

(Arising out of ITA No1190/PUN/2017

निर्धारण वर्ष / Assessment Year : 2009-10

M/s. Kshitiji Associates,
B-75, Anugraha Co-op Housing,
Dnyaneshwar Nagar,
Pimpiri, Pune.

..... Cross-Objector.

PAN : AAIFK1377L.

बनाम v/s

The Dy.Commissioner of Income Tax,
Circle-8, Pune.

..... Appellant in the
appeal.

Assessee by : Shri V.L. Jain

Revenue by : Shri Pankaj Garg.

सुनवाई की तारीख / Date of Hearing : 22.08.2019	घोषणा की तारीख / Date of Pronouncement: 16.10.2019
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आदेश / ORDER**PER ANIL CHATURVEDI, AM :**

1. The present appeal filed by the Revenue and the C.O. filed by the assessee are directed against the order of Commissioner of Income Tax (A) – 6, Pune dated 10.01.2017 for the assessment year 2009-10.

2. The relevant facts as culled out from the material on record are as under :-

Assessee is an individual stated to be engaged in the business as builder and promoter. Assessee electronically filed his return of income for A.Y. 2009-10 on 31.10.2009 declaring total income at Rs.96,28,370/-. The case was selected for scrutiny and thereafter assessment was framed u/s 143(3) of the Act vide order dt.26.12.2011 and the total income was assessed at Rs.3,28,01,300/- inter-alia by making addition of Rs.2,31,72,934/- on account of suppression of sales. On the aforesaid addition, AO vide order dt.18.03.2014 levied penalty of Rs.76,47,068/- u/s 271(1)(c) of the Act. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide order dt.10.01.2017 (in appeal No.PN/CIT(A)-V/DCIT Cir-8/298/2014-15) deleted the penalty levied by the AO. Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us and has raised the following grounds :

“1. Whether on the facts and in the circumstances of the case, the Ld.CIT(A) was justified in deleting the penalty levied of Rs. 76,47,068/- when the appellant's audit report clearly indicates that the sales are recognized on handing over the possession of flats, though the appellant had followed project completion method for recognition of revenue. The sales have been recognized contrary to assessee's own methodology of recognition of revenue.

2. Whether on the facts and circumstances of the case the Ld. CIT(A) erred in appreciating the fact that the even when possession of flat given by assessee; the income was not offered for taxation thereby suppressing its profit by furnishing inaccurate particulars of income to the extent of Rs.2,31,72,934/-

3. *Whether on the facts and circumstances of the case the Ld. CIT(A) failed to appreciate the fact that the quantum addition was upheld by the Ld.CIT(A) vide order dated 09/10/2012 & further the Hon'ble ITAT has also upheld the quantum addition vide order dated 10/03/2014 & also the assessee has not filed further appeal to Hon'ble Bombay High Court on the issue which confirms that the assessee has furnished inaccurate particulars of income.*

4. *Whether on the facts and circumstances of the case the Ld. CIT(A) erred in applying the apex court decision in the case of CIT vs. Reliance Petroproducts 322 ITR 158 & Hon'ble Pune ITAT decision in the case of Kanby Software India Ltd vs DCIT reported in 122 TT J 721 as the assessee's case is different and issue involved is related to deliberate postponement of income by not following the method of accounting mentioned in audit report and not related to any deduction or claim as mentioned in case laws."*

3. On the other hand, assessee vide C.O.No.15/PUN/2019 has filed the following effective ground.

" The learned CIT(A) erred in law and on fact in not appreciating the fact that the initiation of penalty was on a limb different from the one for levy of penalty and as such the levy of penalty of Rs.76,47,068/- was not justified in law."

4. With respect to Cross Objections, assessee submitted that C.O of the assessee is supporting the order of Ld.CIT(A) and if the appeal of the Revenue is dismissed then the C.O. of assessee would be rendered academic.

5. First we proceed with Revenue's appeal in ITA No.1190/PUN/2017 for A.Y. 2009-10.

6. Before us, Ld. D.R. submitted that though the Revenue has raised various grounds but all the grounds are inter-connected and the sole controversy is with respect to levy of penalty u/s 271(1)(c) of the Act.

7. Ld.D.R. supported the order of AO and submitted that Ld.CIT(A) has erred in deleting the penalty levied by the AO. On the issue of levy of penalty, Ld.A.R. submitted that while passing the assessment order and

while recording satisfaction, AO was not clear as to whether the assessee had furnished inaccurate particulars of income or concealment of income. In support of his contention he pointed to para 3.4 of the assessment order. Thereafter, he submitted that in the penalty order, AO had levied the penalty for furnishing inaccurate particulars of income. He therefore, relying on the decision of Hon'ble Bombay High Court in the case of CIT Vs. Samson Perinchery reported in (2017) 392 ITR 4 (Bom) submitted that in the absence of proper show cause notice to assessee, penalty u/s 271(1)(c) cannot be levied. He also supported the order of Ld.CIT(A) on merits of deletion of penalty. He thus supported the order of Ld.CIT(A).

8. We have heard the rival submissions and perused the material on record. The issue in the present case is with respect to levy of penalty u/s 271(1)(c) of the Act. Penalty of Rs.76,47,068/- u/s 271(1)(c) of the Act has been levied on amount of Rs.2,31,72,934/- being the addition made on account of suppression of sales. The perusal of assessment order passed u/s 143(3) of the Act reveals that in the assessment order AO had not recorded clear satisfaction as to whether assessee had furnished inaccurate particulars of income or has concealed particulars of income. Thereafter, in the penalty order passed u/s 271(1)(c) of the Act, AO had levied penalty for furnishing inaccurate particulars of income. It is a settled law that while levying penalty, the AO has to record clear satisfaction and thereafter come to a finding in respect of one of the limbs, which is specified under section 271(1)(c) of the Act. The first step is to record satisfaction while completing the assessment as to whether the assessee had furnished inaccurate particulars of income or concealed his income. Thereafter, notice u/s 274 read with Section 271(1)(c) of the Act is to be issued to the assessee. The Assessing Officer

thereafter has to levy penalty under Section 271(1)(c) of the Act for non-satisfaction of either of the limbs. While completing the assessment, the Assessing Officer has to come to a finding as to whether the assessee has concealed his income or furnished inaccurate particulars of income. The Hon'ble Bombay High Court in CIT Vs. Shri Samson Perinchery (supra) held that where initiation of penalty is one limb and the levy of penalty is on other limb, then in the absence of proper show cause notice to the assessee, there is no merit in levy of penalty.

9. Considering the facts of the present case in the light of the decision of Hon'ble Bombay High Court in the case of Samson Perinchery (supra), we are of the view that in the present case, the basic condition for levy of penalty has not been fulfilled and that the penalty order suffers from non-exercising of jurisdiction power and therefore penalty order cannot be upheld. We accordingly uphold the set aside the penalty order passed by AO. We further find that Ld.CIT(A) on merits has also deleted the penalty. Before us, no fallacy in the findings of Ld.CIT(A) has been pointed by Ld. D.R. We therefore find no reason to interfere with the order of Ld.CIT(A). **Thus, the grounds of Revenue are dismissed.**

10. **In the result, the appeal of the Revenue is dismissed.**

11. Now we will take up the C.O of assessee in C.O.No.15/PUN/2019 for A.Y. 2009-10.

11.1. As far as C.O.No.15/PUN/2019 of assessee is concerned, in view of Ld.A.R.'s submission noted hereinabove and since we have herein above dismissed the appeal of Revenue, we find no reason to adjudicate the grounds raised by the assessee in the C.O. **Thus, the C.O. of the assessee is dismissed.**

12. **In the result, the appeal of Revenue and Cross-Objections of assessee are dismissed.**

Order pronounced on 16th day of October, 2019.

Sd/-	Sd/-
(SUSHMA CHOWLA)	(ANIL CHATURVEDI)
न्यायिक सदस्य / JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 16th October, 2019.

Yamini

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A)-6, Pune.
4. Pr. CIT – 5, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “बी” / DR,
ITAT, “B” Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.