

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "E" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
AND  
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

I.T.A. No.2144/DEL/2017  
Assessment Year: 2011-12

M/s. Onkareshwar Properties P. Ltd., Flat No. B-14/C, First Floor, Freedom Fighters Enclave, Neb Sarai, New Delhi.	vs.	Dy.CIT, Circle-19(1), New Delhi.
TAN/PAN: AAACO7076M		
(Appellant)		(Respondent)

Appellant by:	Shri Neelesh Kumar Jain, CA		
Respondent by:	Smt. Paramila M. Biswas, CIT-DR		
Date of hearing:	1	10	2019
Date of pronouncement:	16	12	2019

**ORDER**

**PER AMIT SHUKLA, JM**

The aforesaid appeal has been filed by the assessee against the impugned order dated 03.12.2017, passed by Commissioner of Income Tax (Appeals)-VII, New Delhi, in relation to penalty proceedings initiated u/s. 271B for the Assessment Year 2011-12. The assessee is mainly aggrieved by levy of penalty at Rs.1,50,000/- u/s.271B.

2. The facts in brief are that the assessee company has shown Long Term Capital Gain of Rs. 117,67,97,883/- in its return of income. The assessee had purchased land way back in the year 2006 and had treated the said land as investments/fixed assets in

the books of account. Upon the sale of the said investment assessee had offered the gains to be taxed under the head 'income from Long Term Capital Gain'. The Assessing Officer after detailed discussion had held that the sale of land is income from business or profession. He further held that, since assessee has not obtained tax audit report u/s.44AB despite its receipts exceeded benchmark limit of 60 lacs, therefore, penalty proceedings u/s.271B is to be levied. In the penalty proceedings, in response to the show cause notice, the assessee submitted that the provision of Section 44AB are not applicable to the facts of the case, because assessee has derived its income from capital gains which has been declared in the income tax return not in this year but also in the earlier years. However, the ld. Assessing Officer levied the penalty of Rs.1,50,000/- being  $\frac{1}{2}$  of the total sales/gross receipts. The penalty order levied by the Assessing Officer is confirmed by the Ld. CIT (A), despite the fact that the ITAT in the Assessment Year 2009-10 has held that income arising from sale of land is to be assessed as Long Term Capital Gain and not business income.

3. Before us, ld. counsel submitted that the Tribunal for the same Assessment Year 2011-12 vide order dated 21.01.2019 passed in ITA No.1823/Del/2015 has held that the sale of land held as investment/fixed asset is taxable under the head 'capital gain' and it cannot be treated as business income, therefore, there was no question of obtaining the audit report u/ 44AB.

4. Ld. DR on the other hand strongly relied upon the order of the Ld. CIT (A).

5. After considering the material placed on record and the relevant findings given in the impugned order, we find that in the

case of the assessee, the Tribunal has given a categorical finding that assessee company all throughout has been showing land as an investment right from the Assessment Year 2006-07 till this year, i.e., 2011-12. The land in question which was purchased in Assessment Year 2006-07 was shown as fixed assets in the books of account. In the Assessment Year 2009-10, on similar set of facts, the Tribunal has held that the sale of land in the case of the assessee which has been held as capital asset is taxable under the head 'Long Term Capital Gain' and this decision of the Tribunal have also been upheld by the Hon'ble Delhi High Court. The relevant observation and the finding of the Tribunal and Hon'ble High Court have been incorporated in the Tribunal order in the quantum proceedings. The relevant conclusion in this regard reads as under:

*“10. Thus, when same issue on similar set of facts and reasoning has been decided in favour of the assessee by the Tribunal which has also been upheld by the Hon'ble Delhi High Court, then this issue becomes a binding judicial precedent and no contrary view can be taken in this year. Moreover when in all the years, the assessee has been showing the land which is in dispute as a part of fixed assets which stood accepted year after year as an investment / fixed assets, then sale of such land will only give rise to capital gain chargeable u/s 45(2). Thus, the order of the AO and Ld. CIT (A) in treating it as a business income is reversed and the assessee's claim for taxability of such gain on sale of land under the head capital gain is affirmed. In the result, grounds raised by the assessee on this score is allowed.”*

6. Since in the quantum proceedings it has been held that assessee is not deriving any business income from sale of land, and therefore, provision of Section 44AB are not applicable.

Consequently, the penalty levied u/s. 271B on failure of the assessee to get its books of account audited u/s. 44AB cannot be levied. Accordingly, the penalty levied u/s.271B of Rs.1,50,000/- is directed to be deleted.

7. In the result, the appeal of the assessee is allowed.

**Order pronounced in the open Court on 16<sup>th</sup> December, 2019.**

Sd/-  
**[ANADEE NATH MISSHRA]**  
**[ACCOUNTANT MEMBER]**

DATED: 16<sup>th</sup> December, 2019

PKK:

Sd/-  
**[AMIT SHUKLA]**  
**JUDICIAL MEMBER**