

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
BENCH "G", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI M. BALAGANESH, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 5104/MUM/2017 (A.Y: 2009-10)

DCIT, Central Circle – 8(1) Room No. 656, 6 th Floor Aayakar Bhavan, M.K. Road Mumbai – 400 020	v.	Shri Suresh G. Wadhwa 429, Arneja Corner Sector – 17, Vashi Navi Mumbai - 400705 PAN: AAAPW0812A
(Appellant)		(Respondent)

Assessee by	:	Shri S.C. Tiwari
Department by	:	Shri Vijay Kumar Subramanian
Date of Hearing	:	12.02.2021
Date of Pronouncement	:	05.03.2021

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the revenue against order of the Learned Commissioner of Income Tax (Appeals) – 26, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 01.05.2017 for the Assessment Year 2009-10 in deleting the penalty levied u/s. 271(1)(c) of the Act made by the Assessing Officer.

2. At the outset, Learned Counsel for the assessee submitted that, assessee, an individual, has been carrying on since 1987 business of developing real estate and constructing multi-story buildings and selling flats in such buildings. Because construction of a multi-story building and sale of flats spans over quite a few years the income or loss from the project is known only when the construction of whole building is completed and all the flats are sold and selling price is collected. But, unlike many others, the assessee has not followed the practice of declaring income of a project in the final year only and he has been declaring certain income on estimated basis in the years prior to the final year and balance income is declared in the final year on actual working of receipt and expenditure. For showing income in the intermediate years the assessee has been following percentage of incremental work-in-progress method. This method of accounting has been accepted in all earlier years since A.Y.1996-97.

3. Assessee filed return of income for A.Y. 2009-10 on 29.09.2009 declaring total income of ₹.2,62,64,870/-. Assessing Officer completed the assessment u/s. 143(3) of the Act on 26.12.2011 determining total income at ₹.9,19,00,780/-. The difference between the returned income and assessed income had mainly arisen due to the Assessing Officer

estimating the assessee's profit from building project "SAI STHAAN" and made an addition of ₹.6,31,61,224/- whereas a larger amount of ₹.6,45,83,979/- has been shown by the assessee for A.Y. 2011-12 which according to the assessee is the final year of the project SAI STHAAN.

4. Learned Counsel for the assessee submitted that for A.Y. 2009-10 under consideration the assessee has offered intermediate profit of ₹.47,90,899/- based on percentage of accretion to work in progress. In all assessment years up to A.Y. 2008-09 the method of working of income in intermediate years from various projects including this project has been accepted by the Assessing Officer. But for A.Y.2009-10 the Assessing Officer did not accept the assessee's treatment to the project "SAI STHAAN" and held that this project should be assessed on final basis because occupation certificate had been issued in the A.Y. 2009-10. It is submitted that Assessing Officer stated that in most of the cases possession of flats had been given during financial year 2008-09 and ignored that in many cases possession of flats was given beyond A.Y. 2009-10. It is submitted that merely based on the possession being given to the customers it cannot be said that project is complete unless all costs are incurred, and entire sale price is received. It is submitted that in the return of income for assessment year under consideration, the assessee

declared profit from another project SAI SWAR at ₹.64,12,084/-. On the same logic the Assessing Officer held that income from another project SAI SWAR should have been offered for assessment on final basis in the A.Y.2008-09. Assessing Officer however did not exclude the income from project "Sai Swar" as declared by the assessee in the computation of income for assessment year under consideration. It is submitted that in this manner learned Assessing Officer proposed double assessment of the same income.

5. Learned Counsel for the assessee submitted that the assessee filed appeal before CIT(Appeals)-33, Mumbai and thereafter before Income Tax Appellate Tribunal Mumbai. Hon'ble ITAT has agreed that the year of Occupancy Certificate did not signify completion of project and deleted the addition as made by the Assessing Officer. However, they worked out intermediate income for the A.Y. 2009-10 before them at a higher amount for the reason that the project having already been completed in A.Y.2010-11 the final picture was before them. Accordingly, ITAT made certain addition to the income offered by the assessee on an altogether different reasoning, on average basis but they directed that the amount of addition should be reduced from the income declared by the assessee for AY 2010-11.

6. Learned Counsel for the assessee submitted that Assessing Officer has made the order of penalty u/s 271(1)(C) of the Act on 25.03.2014 more than seven months after ITAT order against the assessment order. It is submitted that Assessing Officer was aware of ITAT order as could be seen from his observations in Para No. 3 of the penalty order. It is submitted that Assessing Officer summarily refers to ITAT order and does not mention that the basis of huge addition made in the assessment order that A.Y. 2009-10 should be taken as the final year for assessment has been disapproved by ITAT and the addition made as such in the assessment order has been knocked down by ITAT. It is submitted that the Assessing Officer proceeds as if the income assessed by the Assessing Officer is final notwithstanding the ITAT order.

7. Ld. Counsel for the assessee submits that the Assessing Officer had only moved the assessee's income as disclosed in subsequent assessment year to assessment year under consideration. Otherwise learned Assessing Officer has not found any discrepancy and disputed neither expenditure nor receipt as declared by the assessee. In fact, the assessee has worked out final profit from the project at higher amount than that worked out by learned Assessing Officer. The Ld. Counsel for the assessee further submits that Assessing Officer failed to appreciate that unlike

many assesseees in this line of business the assessee has been recognizing revenue from the project and offering to tax income on annual basis. The assessee could have chosen if he had so desired, to follow completion of project method, and refrained from recognizing any income from the project until the year of completion of project i.e. A.Y.2010-11. Therefore, it is submitted that the assessee has declared income from the project from A.Y. 2006-07 and the assessment year under consideration is fourth year of the assessment of income from the project "SAI STHAAN". It is submitted that the case of the assessee is on higher pedestal for having offered substantial income in this year and earlier years instead of Nil income and therefore there cannot be any penalty levied.

8. Ld. Counsel for the assessee further submits that having regard to the nature of construction projects undertaken by the assessee it is not possible for the assessee to commence and complete the entire project in a single year. For the same reason, the entire profit and income from the project cannot be realized and offered for assessment in a single year. As the assessee wished to work out income annually, it called for a method of accounting for recognition of income of the project in the intermediate years. It is submitted that under the provisions of section 145 of the Income Tax Act, 1961 in the absence of any method notified by the

government the choice of method of accounting is at the option of the assessee provided that such method of accounting is regularly employed by the assessee. The Assessing Officer can interfere with the method of revenue recognition followed by the assessee only in one of the following two circumstances:-

- a) The assessee has not followed the accounting standards notified by Central Government in the Official Gazette or
- b) The Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee.

9. Learned Counsel for the assessee submitted that applying this statutory provision to the facts of the case of the assessee for assessment year under consideration it would be seen that there was no notified accounting standard (NAS) in relation to the real estate developers. As regards correctness and completeness of the accounts of the assessee there is not even a whisper in the assessment order or penalty order. It would be seen that it is not the case of the Assessing Officer that any receipt of the assessee from any project has been suppressed or deduction of any expenditure not actually incurred by the assessee has been claimed. The assessment order and the penalty order have been made on a wrongful assumption that the year in which occupation certificate is obtained would be the final year of assessment of the income from the project and this assumption has been rejected by the Tribunal.

Learned Counsel for the assessee submitted that while Tribunal has computed higher income for assessment in this year but that has been done without interfering in the receipts and expenditure as disclosed by the assessee.

10. Ld. Counsel for the assessee further submits that Assessing Officer has entirely based the penalty levied by him on the assessment order after altogether ignoring ITAT order. It is therefore not necessary for the assessee to make any submissions in relation to the addition worked out by the Tribunal for AY 2009-10 under consideration. However, Learned Counsel for the assessee submitted that it may be appreciated that whatever addition has been computed by Hon'ble ITAT A.Y. 2009-10 results into corresponding reduction from the income declared by the assessee himself in its return of income for Assessment Year.

11. Learned Counsel for the assessee submitted that once it is found that the assessee stated primary facts of the case truly and fully, it cannot be said that there is concealment of income or furnishing of inaccurate particulars of income for the reason that there is difference of opinion as respects allocation of income of the project amongst different years. If all primary facts are correctly stated, the penalty cannot be levied. In

support of his contention Ld. Counsel for the assessee relied on the decision of the Hon'ble Supreme Court in the case of CIT v. Reliance Petroproducts (P)Ltd. 322 ITR 158 (SC).

12. Ld. DR vehemently supported the orders of the Assessing Officer. Ld. DR relied on the order of the Champion Construction Company v. ITO (1983) 5 ITD 495 (Bom).

13. In reply Learned Counsel for the assessee submitted that Ld.DR sought support from the decision of ITAT in the case of Champion Construction Company v. ITO (1983) 5 ITD 495 (Bom) without realising that the reasoning of the Assessing Officer based on occupation certificate has not been accepted by this Tribunal . Even otherwise the decision in the case of Champion Construction has been rendered in relation to the assessee following Project completion method deliberately delaying recognition of income whereas the assessee has already been declaring and assessed for income from the project in each year of assessment and prayed that there is no basis for seeking interference in the impugned order of Ld.CIT(A).

14. We have heard the rival submissions, perused the orders of the authorities below. On a perusal of the order of the Ld.CIT(A), we find that Ld.CIT(A) considered all the aspects of the matter elaborately with reference to the submissions of the assessee and the averments in the Assessment Order and taking note of the Tribunal order in quantum proceedings, deleted the penalty levied u/s. 271(1)(c) of the Act observing as under: -

"6.6. In the present case, during the relevant AY 2009-2010, the appellant is an individual who carries on the business under the name & style of "Concrete Builders. The appellant filed return of income declaring a total income of Rs.2,62,64,870/-. The said income comprises of income from house property, income from business from proprietary concerns as well as income from other sources. During the scrutiny assessment proceedings, the AO made addition on following counts (i) Income on completion of the project (para 5.1 of assessment order) Rs.6,31,61,224/-, (ii) Interest expenses Rs.22,18,124/-) Para 5.2 of the assessment order) and (iii) Expenses of personal nature Rs.2,56,562/- (para 5.3 of the assessment order). The AO initiated penalty proceedings for filing inaccurate particulars of income on disallowance of income on completion of project Rs.6,31,61,224 within the meaning of section 271(1)(c) of the Income Tax Act, 1961. Further he initiated penalty proceedings for concealing taxable income by furnishing inaccurate particulars of income on disallowance of interest expenses Rs.22,18,124/- within the meaning of section 271 (1)(c) of the Income Tax Act, 1961.

6.7. Aggrieved by the above said additions, the appellant preferred appeal before the Ld.CIT(A). The CIT(A) vide his order dated 09-08-2012 confirmed the addition made on account of income on completion of project of Rs.6,31,61,224/- and reduced the disallowance of personal expenses to 10% as against 20% added by the AO. The Ld.CIT(A) had allowed the appeal of the appellant in respect of interest expenses of Rs.22,1 8,124/-.

6.8. The ITAT Mumbai vide its order dated 02-08-2013 had partly allowed the appeal of the appellant in respect of addition made on account of income on completion of project of Rs.6,31,61,224/-, by directing as follows:

" The AO is directed to verify the ratio of 40,22% as worked out by the assessee and apply the said percentage i.e., 40%, assuming the same as correct, to the incremental MP for the current year. The incremental WIP shall include, irrespective of the year of incurring, the proportion of basis cost, as referred to above, attributable to the current year. We may hasten to add that by directing so, we are not in any manner advocating or endorsing the said method for consistent application, but only providing for a reasonable basis for allocation of income on the project 'Sai Sthaan' for the current year in the given facts and circumstances of the case. Needless to add, the income as finally assessed on this project shall be given due credit of while determining the profit on the project for the terminal year....."

The Hon'ble ITAT further clarified that "it would be noted that our order is in fact consistent with the decision in the case of Champion Construction Co. (supra), referred to during hearing; we having directed application of the rate of profit (vis-à-vis the cost) for the only project for which adjustment has been made by the A O by adopting the same ratio as reflected per the assessee's accounts, consistent with the method being followed by him."

6.9. Considering the above said directions and clarification of the Hon'ble ITAT, the AO levied penalty on amount Rs.6,31,61,224/- on account of income on completion of project, wherein, after considering the appellant's submission the AO submitted that since the appellant follows project completion method and the occupancy certificate for the project was received on 12.09.2008, he ought to have offered the income in the current year and not taken an ambiguous stand of offering profits in the subsequent year. The fact remains that if the appellant is allowed to show completion of each unit at his whims and fancies, then there would be a huge loss to revenue. In this case, there was a deferment of tax liability since profits offered did not commensurate with the stage of completion of the project since the project was completed. Further, possession given to a customer is not a criteria for recognizing income by builder as stated above. The builders risk is over when the project is complete and most of the payment are received. The customer may or may not take possession as he may be an investor who will resell the flat and may not occupy. The appellant had booked sales in FY 2008-09 (the year under consideration) in respect of many flats. During the course of penalty proceedings the appellant did not adduce any evidence in respect of why the additional income should not be added to the returned income for the year under consideration. It is clear from the above facts that the appellant has

not disclosed or offered the income voluntarily. The word 'voluntarily' means out of free will without any compulsion. In this case, income on completion of project and cash deposits could be identified only on account of the scrutiny assessment proceedings in the case of the appellant, which would have otherwise have gone undetected. This is consequent to the efforts of the Assessing Officer to examine the correctness of claim made by the appellant. The appellant has not shown these details only with a view to reduce the tax liability for the year under consideration. Even in the penalty proceedings, the appellant has not adduced any evidence to show that these incomes were not liable for taxation. In view of the above facts, AO concludes that it is very clear that the attempt of reducing of tax liability being intentional, and that the appellant has concealed the income and furnished inaccurate particular of income and levied penalty amounting to Rs.2,15,12,104/-.

6.10. On careful perusal of the written submission of the appellant, penalty order, the CIT(A) order and the Order passed by the Hon'ble ITAT, it appears that AO is heavily relying on Occupancy Certificate (OC). The ITAT has observed in the order that OC signifies completion of the project or not is largely irrelevant to the question before the bench, inasmuch as transfer has already taken place, so that the fact that income has to be recognised to the proportionate extent is not in dispute. The question before the bench was of profit determination. The appellant has been disclosing profit on the project 'Sai Sathan' since AY 2006-07, hence nothing turns on the OC, though without doubt it would show that the project is almost complete, and not only the civil construction. The fact that possession has been given in most of the cases reinforces and confirms the fact of substantial completion of the project and inhabitable status of the residential units. In the light of this understanding, the ITAT has decided and directed the AO to verify the ratio of 40.22% as worked out by the appellant and apply the said percentage i.e., 40%, assuming the same as correct, to the incremental WIP for the current year. The incremental WIP shall include, irrespective of the year of incurring, the proportion of basis cost, as referred to above, attributable to the current. They further clarified that by directing so, they are not in any manner advocating or endorsing the said method for consistent application, but only providing for a reasonable basis for allocation of income on the project 'Sai Sathan' for the current year in the given facts and circumstances of the case. Needless to add, the income as finally assessed on this project shall be given due credit of while determining the profit on the project for the terminal year. The Hon'ble ITAT further clarified that it would be noted that its order is in fact consistent with the decision in the case of Champion Construction Co. The ITAT directed application of the rate of profit

(vis-à-vis the cost) for the only project for which adjustment has been made by the AO by adopting the same ratio reflected as per the appellant's accounts, consistent with the method being followed by him.

6.11. It is observed that difference between the returned income and assessed income has mainly arisen due to the assessing officer estimating the appellant's profit from building project 'Sai Sthaan' on final basis and making an addition of Rs.6,31,61,224/- whereas more or less the same amount (Rs.6,45,83,979/-) has been shown by the appellant for Assessment Year 2011-12 which according to the appellant is the final year of the project 'Sai Sthaan'. For assessment year 2009-10 under consideration, the appellant has offered intermediate profit of Rs.47,90,899/- on the basis of percentage of accretion to work in progress. The Hon'ble ITAT, has agreed that the year of Occupancy Certificate did not has much significance. However, they worked out intermediate income for the assessment year 2009-10 before them at a higher amount for the reason that the project having already been completed in assessment year 2010-11 as the final picture was before them. Accordingly, ITAT sustained in part the addition made by the Assessing Officer, though on an altogether different reasoning, on average basis. The appellant could have chosen if he had so desired not to offer any income from the project until the project was substantially completed and sold. The AO has not noticed any discrepancy in the accounts as maintained by the appellant. There is no allegation from the AO that any entry made in the books of accounts does not truly or correctly reflect the transactions of the appellant. It is not the case of the Assessing Officer that any receipt of the appellant from any project has been suppressed or deduction of any expenditure not actually incurred by the appellant has been claimed. The entire dispute relates to the method of working of income from the project for assessment during an intermediary year until the first outcome of the project is known in the year of completion. It is to be noted that the main plank of the Assessing Officer in the assessment order that income from project 'Sai Sthaan' should be assessed on final basis for Assessment Year 2009-10 has not been accepted by Hon'ble ITAT. It cannot be said that there is concealment of income or furnishing of inaccurate particulars of income for the reason only that there is difference of opinion in respect of allocation of income of the project amongst different years. Hence, two views are possible in the appellant's case as addition made by the AO is debatable in nature. As long as all primary facts are correctly stated by the appellant the penalty cannot be levied as decided in the judgement of Hon'ble Supreme Court in the case of CIT vs. Reliance Petroproducts (P) Ltd. 322 ITR 158 (SC). In view of these facts and circumstances, penalty cannot be sustained."

15. On a careful perusal of the order of the Ld.CIT(A) and the reasons given therein, we do not find any infirmity in the order passed by the Ld.CIT(A) in deleting the penalty levied u/s. 271(1)(c) of the Act for the assessment year under consideration. Grounds raised by the revenue are dismissed.

Order pronounced on 05.03.2021 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER
Mumbai / Dated 05/03/2021
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum