

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

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, HON'BLE JUDICIAL MEMBER**

**ITA NOS. 891, 892 & 893/MUM/2020
(A.Ys: 2010-11, 2011-12 & 2012-13)**

M/s. Akshar Developers 225, 2nd Floor Big Splash, Plot No. 78/79 Vashi, Navi Mumbai – 400703 PAN: AAKFA0455B	v.	ACIT –Central Circle – 3 6 th Floor, A-Wing Ashar IT Park Road No. 16Z, Wagle Industrial Estate Thane (E)
(Appellant)		(Respondent)

**ITA NOS. 1698, 1699 & 1700/MUM/2020
(A.Ys: 2010-11, 2011-12 & 2012-13)**

Income Tax Officer – 28(1)(1) 3 rd Floor, Room No. 329 Tower No. 6 Vashi Railway Station Complex Vashi, Navi Mumbai - 400703	v.	M/s. Akshar Developers 7, 8, Plot No. 42 Shreeji Seva, Opp Seawood Rly. Station Nerul (W), Navi Mumbai – 400706 PAN: AAKFA0455B
(Appellant)		(Respondent)

Assessee by	:	Ms. Ritika Agarwal
Department by	:	Ms. Shailja Rai
Date of Hearing	:	11.01.2022
Date of Pronouncement	:	25.02.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. These cross appeals are filed by the assessee and revenue against the common order of the Learned Commissioner of Income Tax (Appeals), Pune - 11 [hereinafter in short "Ld.CIT(A)"] dated 16.01.2020 for the A.Ys. 2010-11, 2011-12 and 2012-13.

2. Since the issues raised in all the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeal Nos. ITA 1698/Mum/2020 and ITA.No. 891/Mum/2020 for A.Y. 2010-11 as a lead appeals.

3. Brief facts of the case are that, assessee is partnership firm engaged in the business of real estate development and constructions. A search and seizure action u/s. 132 of the Income-tax Act, 1961 (in short "Act") was conducted in the case of the assessee along with other entities of Akshar Group on 28.09.2011. The assessment was completed u/s. 153A of the Act after making certain additions. The Assessment Order was subject to appeal before the Ld.CIT(A) and the additions were confirmed by Ld.CIT(A). Subsequently Assessing Officer initiated the penalty

proceedings u/s. 271(1)(c) of the Act. After obtaining the explanation from the assessee why the penalty should not be imposed, the Assessing Officer levied the minimum penalty of ₹.4,04,62,154/- u/s. 271(1)(c) of the Act. The assessee preferred appeal before ITAT against the order passed by Ld.CIT(A) confirming the addition made by the Assessing Officer, the ITAT vide order dated 28.02.2018 allowed part relief to the assessee against the additions made by the Assessing Officer. Subsequently the Assessing Officer passed the revised penalty order u/s. 271(1)(c) of the Act dated 27.03.2018. The Assessing Officer once again passed the revised penalty order giving effect to the order passed by the ITAT u/s.275(1A) r.w.s. 271(1)(c) of the Act dated 28.09.2018. Aggrieved assessee preferred an appeal before the Ld.CIT(A) against the order passed u/s. 271(1)(c) of the Act dated 27.03.2018 and also against order passed u/s. 275(1A) r.w.s. 271(1)(c) of the Act dated 25.09.2018.

4. Ld.CIT(A) adjudicated both the appeals filed before him for the same assessment year i.e. A.Y. 2010-11, on the two revised penalty orders levied by the Assessing Officer vide Appeal Nos. 13 and 100.

5. After considering submissions of the assessee, Ld.CIT(A) deleted the penalty imposed dated 25.09.2018 on technical ground that the order

passed by the Assessing Officer does not indicated if prior approval of the JCIT has been obtained by the Assessing Officer in passing the above said order. Since he deleted the penalty u/s. 275(1A) r.w.s. 271(1)(c) of the Act dated 25.09.2018, he proceeded to adjudicate the penalty order passed by the Assessing Officer u/s. 271(1)(c) of the Act in Appeal No. 13, he directed the Assessing Officer to recompute the quantum of penalty only to the extent of the addition confirmed by the ITAT and dismissed the other grounds raised by the assessee on technical grounds.

6. Aggrieved with the above order both assessee as well as revenue is in appeal raising following grounds in its appeal: -

7. Revenue has raised following grounds in its appeal: -

1. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the A.O to recomputed the quantum of penalty only to the extent of the addition confirmed by the ITAT vide its order dated 28.02.2018 without appreciating the fact that the said order of Hon'ble ITAT is not accepted by the Revenue and the same is challenged before Hon'ble Bombay High Court which is still pending?"

2. "Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was right in holding that the penalty order u/s.275(1A) r.w.s. 271(1)(c) of the Act dated 25.09.2018 does not indicate, if prior approval of JCIT has been obtained by the A.O in passing order u/s.275(1A) and therefore is held to be illegal and void ab initio without appreciating the fact that the A.O has only given effect to ITAT order dated 28.02.2018 and reduced the penalty to Rs.83,63,107/- from Rs.4,404,154/- by passing penalty order u/s.275(1A) r.w.s. 271(1)(c) on 25.09.2018 whereas before passing the penalty order u/s.271(1)(c) of the Act dated 27.03.2018, the A.O has

already taken prior approval of the JCIT vide approval letter no. THN/JCIT/CR/Penalty approval/2017-18/900 dated 27.03.2018?."

3. *"Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was right in holding that the penalty order u/s. 275(1A) r.w.s. 271(1)(c) of the Act dated 25.09.2018 does not indicate, if prior approval of the JCIT has been obtained by the AO in passing order u/s.275(1A) and therefore is held to be illegal and void ab initio without appreciating the fact that the A.O while passing the penalty order u/s.275(1A) r.w.s. 271(1)(c) of the Act dated 25.09.2018 has categorically mentioned that as the appeal in this case is pending before the Hon'ble High Court, hence this penalty order is subject to modification u/s.271(1A) as per the order of the Hon'ble High Court?."*

(4) *The appellant prays that the order of Ld. CIT(A) on the above grounds be reversed and that of the Assessing Officer be restored.*

(5) *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."*

8. Assessee has raised following grounds in its appeal: -

"1. *BECAUSE, the CIT(A) has erred in law and on facts in upholding the validity of order dated 27/03/2018 u/s. 271(1)c) although it stood superseded by order dated 25/09/2018 u/s. 275(1A) r.w.s. 271(1)c).*

2. (i) *BECAUSE, the CIT(A) has erred in law and on facts in directing the AO to recalculate penalty on estimate income of Rs.2,70,65,069/- being 15% of net receipts from RCBs, which is not emanating from the order impugned therein.*

(ii) *BECAUSE, the CIT(A) has erred in law in completely overturning the basis of imposition of penalty as contained in the order impugned before him.*

3. *WITHOUT PREJUDICE, BECAUSE, the CIT(A) has erred in law in failing to understand that there is no concealment of income since the estimated income of Rs.273,87,071/- on account of RCBs, stood already disclosed in the hands of the partners Shri Hari Mujat and Shri Bachubhai Pate! in their respective returns of income for AY 2011-12 in the ratio 50: 50.*

4. *BECAUSE, the CIT(A) has erred in law and on facts in confirming penalty on estimated income of Rs.270,65,069/-, ignoring the fact that estimating income does not tantamount to concealment."*

9. At the time of hearing, Ld. AR submitted a chart indicting chronology of events, for the sake of clarity it is reproduced below: -.

Date	Event	PB Page no.
29/09/2011	Search and seizure action u/s. 132 of the Act carried out on the Appellant firm and its partners Shri Hari Mujat and Shri Bachubhai Patel	--
28/03/2014	Assessment order passed u/s. 143(3) r.w.s. 153A making addition.	92-118
13/01/2017	CIT(A) passed an order confirming additions made by AO.	
27/03/2018	Penalty order passed by AO (impugned order in present appeal)	Attached to Form 36
28/02/2018	ITAT passed order deleting additions.	119-180
04/05/2018	Order giving effect to the order of ITAT passed by AO.	184-185
25/09/2018	Penalty order u/s. 275(1A) r.w.s. 271(l)(c) passed, superseding the impugned penalty order dated 27/03/2018	

10. Ld. AR briefly explained the facts in this case and she specifically brought to our notice Page No. 11 of the Ld.CIT(A) order to submit that when the Assessing Officer passed a revised penalty order u/s. 275(1A) r.w.s. 271(1)(c) of the Act dated 25.09.2018 the earlier order passed by him does not survive i.e. 27.03.2018. She objected to the directions given to Assessing Officer by the Ld.CIT(A) to follow the directions given by him.

11. On the other hand, Ld. DR submitted that Ld.CIT(A) cancelled the second penalty order on the technical grounds that Assessing Officer has not taken prior approval of JCIT before passing this order. She submitted that this is a procedural mistake which is rectifiable, therefore, she prayed that it may be remitted back to the file of the Assessing Officer so that he

can rectify the above mistake. In this regard she relied on the following case laws:

- (i). G. Manoharan *v.* ACIT [2006] 155 Taxman 569 (Kerala)
- (ii). Sardar Harinder Singh *v.* ITAT [1996] 87 Taxman 380 (Allahabad)

12. In the rejoinder Ld. AR prayed that this issue may be remitted back to the file of the Assessing Officer so that assessee can put-forth its argument on merits also before the authorities.

13. Considered the rival submissions and material placed on record, we observe from the record that Assessing Officer has passed a revised penalty order u/s. 271(1)(c) of the Act dated 27.03.2018 after modifying the penalty imposed by him subsequent to the ITAT order against this order assessee also filed appeal before the Ld.CIT(A). Subsequently the Assessing Officer further revised the penalty u/s. 275(1A) r.w.s. 271(1)(c) of the Act dated 25.09.2018. We observe that Ld.CIT(A) cancelled the penalty levied by the Assessing Officer in the second revised penalty order on the basis of technical issue of not obtaining prior approval from JCIT. However, when the Assessing Officer revises the penalty imposed by him, whatever order passed prior to that becomes infructuous, the concept of merger applies. Whatever the recent order passed alone will survive. Since Ld.CIT(A) has cancelled the second revised penalty order the

question is whether the first revised penalty order will survive. The situation is Catch-22.

14. After considering the detailed submissions and pondering upon the documents submitted before us, in our considered view Ld.CIT(A) has cancelled the second revised order on procedural aspect of not obtaining prior approval from JCIT. In our considered view, it is rectifiable mistake therefore we remit the second revised penalty order back to the file of the Assessing Officer to obtain proper approval and pass the order. Accordingly, the Ground Nos. 2 and 3 raised by the revenue are allowed for statistical purpose.

15. With regard to Ground No. 1 raised by the revenue it is stated that Ld.CIT(A) has erred in directing the Assessing Officer to recompute the quantum of penalty only to the extent of the addition confirmed by the ITAT without appreciating the fact that the revenue is not accepted the order of the ITAT and same is challenged before Hon'ble High Court which is still pending.

16. In our considered view once the quantum appeal is decided by the ITAT the same is applicable on both Ld.CIT(A) as well as Assessing Officer, therefore the order passed by the Ld.CIT(A) is binding on the

Assessing Officer. Therefore, the ground raised by the revenue is accordingly dismissed.

17. In the result, appeal filed by the Revenue is partly allowed for statistical purpose.

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18. Coming to the appeal filed by the assessee, with regard to Ground No. 1, we are in agreement with the assessee that once the revised penalty order passed by the Assessing Officer dated 25.09.2018 u/s. 275(1A) r.w.s. 271(1)(c) of the Act it certainly supersedes the order passed by the Assessing Officer u/s. 271(1)(c) of the Act dated 27.03.2018. Accordingly, the Ground No. 1 raised by the assessee is allowed.

19. With regard to Ground No. 2, objection raised on the direction of the Ld.CIT(A) since we allowed the Ground No. 1 raised by the assessee that the direction of the Ld.CIT(A) does not survive, accordingly, this grounds of appeal also allowed.

20. With regard to Ground No. 3 and 4 which is on merits which is filed without prejudice basis, as we have remitted the issue raised by the revenue in Ground No. 2 and 3 in order to rectify the second revised penalty order passed by the Assessing Officer, we deem it fit and proper to remit this ground also to the file of the Assessing Officer so that assessee can make proper submission on merits before him. Accordingly, ground raised by the assessee also partly allowed for statistical purpose.

21. Coming to the appeals relating to A.Y. 2011-12 and A.Y. 2012-13, since facts in these cases are mutatis mutandis, therefore the decision taken in A.Y. 2010-11 are applicable to these Assessment Years also. Accordingly, these appeals are partly allowed for statistical purpose.

22. In the result, appeals filed by the Revenue as well as the assessee are partly allowed for statistical purpose.

Order pronounced on 25.02.2022 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER
Mumbai / Dated 25.02.2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT 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