

IN THE INCOME TAX APPELLATE TRIBUNAL
PANAJI BENCH : PANAJI
BEFORE SHRI C.M. GARG, JUDICIAL MEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.361/PAN/2018
Assessment Year: 2006-07

ITO, Ward 1(1), Panaji, Goa.	Vs.	Shri Lalji Purshottam Dabhoyya Patel, Hill View, Althinho, Panaji, Goa- 403 001. PAN: ABAPD1169Q
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ITA No.339/PAN/2018
Assessment Year: 2006-07

Shri Lalji Purshottam Dabhoyya Patel, Hill View, Althinho, Panaji, Goa- 403 001. PAN: ABAPD1169Q	Vs.	ACIT, Circle -1(1), Panaji, Goa.
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(Appellant)

(Respondent)

Assessee by	:	Shri Jitendra Jain, Advocate
Revenue by	:	Shri Mayur Kamble, Sr. DR
Date of Hearing	:	15.06.2022
Date of Pronouncement	:	17.08.2022

ORDER

PER C.M. GARG, JM:

ITA No.339/PAN/2018

This appeal has been filed by the assessee against the order of the CIT(A),
Panaji-1, dated 31.05.2018 for assessment year 2007-08.

2. Facts of the case, in brief, are that the assessee is a civil contractor carrying on the business at Panaji, Goa. The assessee filed his return of income declaring the total income at Rs.9,02,333/-. The AO completed the assessment u/s 143(3) of the Act by making the following additions:-

- | | |
|--------------------------------|-------------------|
| i) Unexplained Cash Credit | - Rs.27,33,000.00 |
| ii) Unconfirmed creditors | - Rs. 6,30,000.00 |
| iii) Depreciation disallowance | - Rs. 1,03,697.00 |

3. The AO also initiated penalty proceedings u/s 271(1)(c) of the Act and a penalty of Rs.9,90,009/- was imposed. In appeal, the learned CIT(A), Panaji, sustained the additions made as well as the penalty imposed by the AO.

4. The learned counsel for the assessee, placing reliance on various decisions including the decision of the Hon'ble Karnataka High in the case of CIT vs. Manjunath Cotton & Ginning Factor (2013) 359 ITR 565 (Kar), submitted that the penalty has wrongly been imposed by the Assessing Officer and sustained by the CIT(A). Further, in the notice issued u/s 274 r.w.s. 271(1)(c) dated 29.12.2016, it has not been specifically mentioned whether the penalty was being imposed for concealment of income or furnishing of inaccurate particulars of income.

5. The learned Departmental Representatives heavily relied on the orders of the authorities below. However, he could not controvert the arguments made by the learned counsel for the assessee.

6. Having considered the rival arguments and perused the material available on record, we find the issue is squarely covered by the decision of the Hon'ble Karnataka High in the case of CIT vs. Manjunath Cotton & Ginning Factor (2013) 359 ITR 565 (Kar). Further, in the notice issued u/s 274 r.w.s. 271 of the IT Act, the irrelevant part has not been struck off and it has not been made clear whether the penalty was being imposed for concealment of income or furnishing of inaccurate particulars of income, which is a mandatory requirement under the law. The said notice is reproduced below for ready reference:-

I.T.N.S.29

NOTICE UNDER SECTION 274 READ WITH SECTION 271(1)(c) OF THE INCOME TAX ACT, 1961.

No.271(1)(c)/TFO/W-1(4)/2005-10

Office of the
Income Tax Officer, Ward 1 (),
111 Floor, Aayakar Bhavan,
Patto, Panaji, Goa.
Date: 29/12/2009.

To
Lalji Patel
Hill view, Altinho,
Panaji - Goa.

Whereas in the course of proceedings before me for the assessment year ~~2007~~2008 it appears to me that you:-

*have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under Section 22(1)/22(2)/34, of the Indian Income Tax Act, 1922 or by a notice given under Section 139(1)/148 of the Income Tax Act, 1961, No..... dated..... or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said Section 139(1) or by such notice.


*have without reasonable cause failed to comply with notice under section 22(1)/23(2) of the Indian Income Tax Act 1922 or under Section 142(1)/143(2) of the Income Tax Act, 1961.

No..... dated.....

*have concealed the particulars of your income or furnished inaccurate particulars of such income.

You are requested hereby to appear before me at _____ on _____ at the aforementioned address and show cause why an order imposing a penalty on you should not be made under section 271(1)(c) of the Income Tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative, you may show cause in writing on or before the said date which will be considered before any such order is made under Section 271(1)(c).

Seal



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P. K. RAGHAVENDRA RAO
INCOME TAX OFFICER W-1(4)
PANAJI

7. In view of the above arguments advanced by the learned counsel for the assessee which have not been controverted by the learned Departmental Representative, we are of the considered opinion that the penalty in the instant case has wrongly been imposed and sustained by the Assessing Officer and the learned CIT(A) respectively. Therefore, the Assessing Officer is directed to cancel the impugned penalty u/s 271(1)(c) of the Act imposed on the assessee.

8. In the result, the appeal filed by the assessee is allowed.

ITA No.361/PAN/2018

This appeal has been filed by the Revenue against the order of the CIT(A), Panaji—1, dated 31.05.2018 for Assessment Year 2006-07.

9. The grounds of appeal taken by the Revenue read as under:-

“1. The Order of the Ld. CIT(Appeals) is opposed to law and facts of the case.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty levied u/s. 271(1)(c) of Rs. 85,77,932/-. On the assessment made on the basis of admitted undisclosed income during the course of survey u/s. 133A of the IT Act which proved concealment of income.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in concluding that the assessment made accepting revised income filed consequent to survey grants immunity from penalty u/s. 271(l)(c) of the Income Tax Act, 1961.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to note that the assessee himself in the statement recorded under oath admitted the undisclosed income of Rs. 67,50,000/- however, arrived at the undisclosed income to the tune of

Rs. 2,53,89,129/- and accordingly declared the income of Rs.2,57,40,889/- in the Revised Return of Income. The Ld. CIT(A) failed to note that the admitted additional income was due to the investigations carried out by the Department u/s. 133A of the Income Tax Act, 1961 and it is not a voluntary offer.

5. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) that the Amendment of Section 45(5A) was introduced vide Finance Act, 2017, effective from A.Y. 2018-19, prescribing the taxability of area-sharing arrangement under a Joint Development Agreement in the hands of land owner, in the year in which the capital assets i.e. construction area is received by it against the transfer of land under the Joint Development Agreement. However, the Amendment of sec. 45(5A) of the Income Tax Act, 1961 cannot be applied retrospectively for Joint Development Agreement with area-sharing arrangement entered prior to AY 2018-19, the amendment status is effective from the said Asst. Year.

6. The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.”

10. We have heard the arguments of both the sides and carefully perused the relevant material available on record.

11. The Id. CIT-DR strongly supported the first appellate order and submitted that the penalty imposed u/s 271(1)(c) of the Act may kindly be confirmed, whereas the Id. Counsel for the assessee drew our attention towards the relevant operative paras of the first appellate order and submitted that the AO failed to bring out the nature of concealment by the appellant either in the assessment order or in the penalty order, therefore, the Id.CIT(A) was right in deleting the penalty by following the judgment of the Hon'ble Supreme Court in the case of CIT vs. Balbir Singh Maini (2017) 86 taxman.com 94 (SC).

12. On careful consideration of the above submissions, we observe that the ld.CIT(A) has granted relief to the assessee by observing as follows:-

“On Merits:

15. The original return of income for the AY 2006-07 was filed on 08/03/2007 declaring income of Rs.3,51,760. During the course of survey, a statement u/s 131 of Shri Lalji Daboyya Patel was recorded on 26/03/2012 where he agreed to declare income amounting to Rs.67,50,000 for AY 2006-07. The assessee filed his return of income on 13/03/2014, declaring income of Rs.2,57,40,889. The assessment u/s 143(3) has been completed on 26/03/2014 by accepting returned income of Rs.2,57,40,889/-.

16. Shri R.K. Pikale, the AR of the appellant has also requested to take into consideration the death of the appellant's 18 years old son and condition of his wife who is mentally disturbed, seriously ill and undergoing treatment in Mumbai.

17. The AO has stated that the assessee would not have declared his additional income, but due to concealment detected during the course of survey operation u/s 133A, the assessee has declared the income of Rs.2,57,40,889/-. I find that neither in the assessment order nor in the penalty order the AO has brought out the nature of concealment by the appellant.

18. The appellant on the other hand has submitted that the consideration from the joint development project was to be received in kind to the extent of 12.5% of the built up area equivalent to 22 flats admeasuring 2620.52 sq.mts.

19. The appellant has also argued that the income will be liable to tax only in the year of completion of the project since it is joint development project. Further, it is argued by the appellant that the issue is debatable in view of the amendment of the Sub Section (5A) to Section 45 the joint development agreement the tax payable on the sale consideration which is received in kind to be offered for taxation in the year of completion of the construction. The detailed submission is already extracted in para 4 supra.

20. It is also submitted by the appellant that the project got delayed due to delay in approvals and objection from local people

and the appellant could neither sell the flats nor the developer could complete the construction till today (16.5.2018 i.e. till dt. of the submission before me). Therefore it is claimed by the appellant that there are two opinions possible as per the method of accounting. So, it is claimed that the short term gain declared cannot be considered as concealed income and the penalty is requested to be deleted.

21. I find that in the facts and circumstance of the case the decision of the Hon. Supreme Court of India in the case of Commissioner of Income-tax v. Balbir Singh Maini [2017] 86 taxmann.com 94 (SC) is applicable. It is held by Hon. Supreme Court of India that where for want of permissions, entire transaction of development of land envisaged in Joint Development Agreement (JDA) fell through, there would be no profit or gain which arose from transfer of a capital asset, which could be brought to tax under section 45, read with section 48.

22. I hold that the AO has failed to bring out the nature of concealment by the appellant either in the assessment order or in the penalty order. Further, in the facts and circumstance of the case the decision of the Hon. Supreme Court of India in the case of Commissioner of Income-tax v. Balbir Singh Maini [2017] 86 taxmann.com 94 (SC) is applicable and the penalty is hereby deleted.

23. In the result, the appeal is allowed.”

13. In view of the above, we are compelled to hold that the ld.CIT(A) has discussed the issue threadbare and after considering the facts and circumstances of the case, rightly held that the AO has failed to bring out the nature of concealment by the appellant either in the assessment order or in the penalty order. Therefore, the issue is totally covered in favour of the assessee by the order of the Hon'ble Supreme Court in the case of CIT vs. Balbir Singh Maini (supra) and, thus, no penalty was imposable on the assessee. We are unable to

see any ambiguity, perversity or any other valid reason to interfere with the findings given by the Id.CIT(A). Therefore, we uphold the same.

14. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court under Rule 34(4) of the IT(AT) Rules, 1963 on 17.08.2022 .

Sd/-

(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

Dated: 17th August, 2022.

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Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-

(C.M. GARG)
JUDICIAL MEMBER

Asstt. Registrar, ITAT, New Delhi