

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'B' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President
&
Shri Girish Agrawal, Accountant Member**

**I.T.A. No. 390/KOL/2023
Assessment Year: 2018-2019**

***Sugam Park,.....Appellant
2/5, Sarat Bose Road, Minto Park,
Sukh Sagar, Unit-1F,
Kolkata-700020
[PAN: AABAS3336H]***

-Vs.-

***Deputy Commissioner of Income Tax,.....Respondent
Circle-32, Kolkata,
10, Middleton Row, Kolkata-700016***

Appearances by:

Shri S.S. Gupta, A.R., appeared on behalf of the assessee

Sri Abhijit Kundu, CIT, D.R., appeared on behalf of the Revenue

Date of concluding the hearing : July 19, 2023

Date of pronouncing the order : July 19, 2023

ORDER

Per Shri Rajpal Yadav, Vice-President (KZ):-

The present appeal is directed at the instance of assessee against the order of ld. Principal Commissioner of Income Tax-9, Kolkata dated 28th March, 2023 passed under section 263 of the Income Tax Act for A.Y. 2018-19.

2. Brief facts of the case are that the assessee has filed its return of income electronically on 24.09.2018 declaring total income of Rs.1,53,61,590/-. The case of the assessee was selected for scrutiny assessment and income of the assessee was determined equivalent to the amount declared by the assessee by way of a scrutiny assessment dated 24.03.2021.

3. The ld. Principal Commissioner on perusal of the assessment record formed an opinion that the assessee has debited the following amounts, namely-

- (a) delay payment charges of Rs.60,00,000/-;
- (b) interest on delayed payment of Rs.3,25,000/-.

According to the ld. Pr. CIT, the deduction claimed by the assessee of the above payments ought not to have been allowed to the assessee and, therefore, order of the ld. Assessing Officer is erroneous and prejudicial to the interest of Revenue. The ld. Pr. Commissioner issued a show-cause notice to the assessee under section 263. In response to the show-cause notice, it was contended by the assessee that it has entered into an agreement with Asansol Durgapur Development Authority for construction of residential township on an area of 30.094 acres. As per Clause 9 of the Agreement, if the assessee fails to complete the construction within the time period,

then, the assessee would be liable to pay penalty @ Rs.5,00,000/- per month for each month of delay in completion of the Project beyond the time schedule mentioned in the Agreement and on the delay of the payment, interest would be charged. The Id. Pr. Commissioner was of the view that this amount of Rs.60,00,000/- was penal in nature and, therefore, it would have not been allowed to the assessee as deduction. Hence, he initiated the proceeding under section 263. The Id. Pr. Commissioner ultimately after hearing the assessee set aside the assessment order and relegated the issue to file of Id. Assessing Officer to make inquiry and then, re-determine the income of the assessee.

4. With the assistance of Id. Representatives, we have gone through the record carefully. It is pertinent to note that Sub-Clause 9 of the Agreement reproduced on page 6 of the impugned order and is the foundation of the controversy. Therefore, we deem it appropriate to take note of this sub-clause, which reads as under:-

"The Party of the second Part shall execute the project within a period of four years from the date of receiving necessary sanctions from all concerned authorities. The Party of the second Part shall however file all necessary applications before the appropriate sanctioning authorities within 90 days from the date of receiving possession of the site from the Party of the First Part. In the event of failure on the part of the Party of the Second Part to comply with the time schedule specified in the instant Memorandum of Understanding, Party of Second part shall be liable to pay penalty the rate of Rs.5 lakhs per month for each month of

delay in completion of the project beyond the time schedule mentioned herein above. The penalty of Rs.5 lakhs per month (if applicable) will be adjusted against the Security Deposit of the Party of the second Part. ”

5. As per the ld. Pr. CIT, the amount paid by the assessee towards non-fulfilment of the contract is penal in nature and, therefore, as per Explanation 1 to Section 37, it is not an allowable deduction. The ld. Assessing Officer has committed an error for granting the deduction of this amount and, therefore, his order deserves to be termed as erroneous, which has caused prejudice to the interest of the Revenue. We are of the view that though expression ‘penalty’ has been used in Clause 9 of the Agreement between the assessee and Asansol Durgapur Development Authority, but it is not on account of infringement of any provision of law, rather it is on account of non-fulfilment of contractual obligation. The penal consequences would be, if it is a penalty by any Law Enforcing Agencies for violation of any Rule and Regulation. Explanation 1 to Section 37 prohibits allowance of deduction of those expenditures, which are incurred in violation to any Rules and Regulation. Here the word ‘penalty’ does not connote to any criminal activity or any violation of any law, rather it is compensatory in nature on account of non-fulfilment of contractual obligation. Therefore, ld. Pr. Commissioner erred in construing the facts and circumstances. The assessment order is not erroneous and no action under

section 263 is required to be taken against such an assessment order. We allow this appeal of the assessee and quash the order of Id. Pr. Commissioner passed under section 263 of the Income Tax Act.

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

Order pronounced in the open Court on July 19, 2023.

Sd/-
(Girish Agrawal)
Accountant Member

Sd/-
(Rajpal Yadav)
Vice-President(KZ)

Kolkata, the 19th day of July, 2023

Copies to : (1) Sugam Park,
2/5, Sarat Bose Road, Minto Park,
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(2) Deputy Commissioner of Income Tax,
Circle-32, Kolkata,
10, Middleton Row, Kolkata-700016

(3) Pr. Commissioner of Income Tax-9, Kolkata

(4) Commissioner of Income Tax ,

(5) The Departmental Representative

(6) Guard File

TRUE COPY

By order

Assistant Registrar
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.