IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI RAHUL CHAUDHARY, JM

ITA No. 650/Mum/2023
(Assessment Year: 2014-15)

Gunwant Sohanlal Kherodiya 504, A3, Swami Devprakash Garden, Sai Section Ambernath-421501	Vs.	Dy. Commissioner of Income Tax, Circle 2, Kalyan Plot No.30, Office No.101, Jeevandeep Apartment, Opp Sibu Palace, Ambarnath, Thane 421501
(Appellant)		**(Respondent)**

PAN No. AGEPK2846E

Assessee by	:	Ms. Ajitha Thampan, AR
Revenue by	:	Shri Ajudiya Manish, DR

Date of hearing: 04.12.2023
Date of pronouncement : 08.12.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the assessee / appellant against the appellate order passed by the Commissioner of Income-tax (Appeals)-11, Pune, [the d CIT (A)] for A.Y. 2014-15 dated 19th December, 2022, wherein the penalty order passed under Section 271(1)(c) of the Income-tax Act, 1961 (the Act) dated 4th May, 2018, by the Dy. Commissioner of Income Tax, Circle-2, Kalyan (the

learned Assessing Officer) levying the penalty of ₹6,52,990/-, was confirmed.

02. Assessee is in appeal before us, raising following grounds:-

"On being aggrieved by the order of the learned Commissioner of Income-tax (Appeal)-3, Thane ['CIT(A)'] passed under section 250 read with section 251 of the Income tax Act, 1961 ('the Act') dated 19 December 2022 (received on 16 January 2022) the present appeal is being preferred on the following grounds amongst others which, it is prayed, may be considered without prejudice to one another.

Ground 1: Passing an Ex-Parte order by not following the natural justice or an opportunity for hearing.

1.1 Based on the facts and circumstances of the case and in law, the learned CIT(A) has erred in passing an ex-parte order, without giving an opportunity of hearing working against the principle of natural justice

1.2 On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in passing the ex-parte judgment. The appellant prays that the appeal should be taken up for hearing.

1.3 That the non reply was due to the medical exigency and other issues which was not being heard by the Learned CIT (A)

Ground 2: Levy of Penalty u/s 271(1)(c) of the Income-tax Act, 1961 ('the Act')

2.1 On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in not deciding the issue on merits and levying the Penalty under section 271(1)(c) of the Income tax Act, 1961, without hearing the appellant's case 2.2 On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in not deciding the issue on merits and levying the Penalty under section 271(1)(c) of the Income tax Act. 1961, as the income was declared by the appellant fully and correctly, as there was no concealment or furnishing of inaccurate particulars during the assessment proceedings, nor the Learned Assessing Officer came out with any supporting for the contention

2.3 On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in not deciding the issue on merits and levying the Penalty under section 271(1)(c) of the Income tax Act 1961, on account of the addition made under deemed provision that is Section 50(C) of the income tax act 1961 in the erstwhile assessment order

The Appellant craves leave to add, alter, amend and/or withdraw any of the above grounds of appeal and to submit such statements, documents and papers as may be considered necessary either at or before the hearing of this appeal as per law."

03. Brief facts of the case shows that assessee is an individual resident deriving salary and other income, filed its return of income on 30th March, 2015, at a total income of ₹83,21,656/- including agricultural income of

₹10,25,625/-. In the return of income, assessee has shown short-term capital gain of ₹49,33,600/-.

04. In case of assessment proceedings of Mr. Sunil Choudhary, it was found that Mr Sunil choundhary had sold immovable property jointly owned by the assessee as per agreement dated 19th June, 2013, at ₹35 lacs. The market value of the property as per Stamp Duty Authority is ₹109,25,000/-. This resulted into reopening of the assessment of the assessee for the impugned assessment year. The matter was referred to valuation officer, who valued the property at ₹82,66,000/-. On the basis of the report of DVO, the addition of ₹21,13,000/- was made under Section 50C of the Act. Consequently, the assessment order under Section 143(3) read with section 147 of the Act was passed on 23rd November, 2017, assessing the total income of the assessee at ₹94,09,031/-. Regarding difference of ₹21,13,000/-, penalty proceedings were initiated for filing inaccurate particulars of income to that extent.

05. The assessee was asked to show cause that why the penalty should not be levied for furnishing of inaccurate particulars of income of ₹21,13,000/-. Assessee submitted his reply on 2nd May, 2018, stating that the addition is made on account of deeming provision under Section 50C of the Act. On such addition penalty cannot be levied. Assessee relied on several judicial precedents of the co-ordinate Benches.

06. The learned Assessing Officer held that assessee has deliberately not shown this income at the time of filing of the return of income. On reopening of the assessment, it

has come to the knowledge of the learned Assessing Officer about the above difference and therefore, assessee has filed inaccurate particulars of income to that extent. Accordingly, the penalty of ₹6,52,919/- was levied for furnishing inaccurate particulars of income as per order under Section 271(1)(c) of the Act dated 4th May, 2018.

07. Assessee approached the learned CIT (A), wherein the assessee was given 11 opportunities but nothing was submitted and therefore, the learned CIT (A) was left to decide the issue ex-parte as per information available. Accordingly, on the merits, he confirmed the penalty and dismissed the appeal.

08. Assessee filed the appeal against the order of the ld CIT (A)

09. Ld AR submits that addition is made based on DVO report u/s 50 C of the Act. It is a deeming provision; there is no dispute about actual consideration. On deeming provision addition, penalty could not be levied.

010. Ld DR vehemently contended that Section 50C of the Act makes a mandatory provision. The assessee ought to have offered capital gain tax based on valuation adopted by the Stamp Valuation authorities. He submitted that merely because Section 50C refers to deeming income, it does not mean that penalty under Section 271 [1](c) cannot be imposed, since the penalty is to be levied for tax sought to be evaded

011. We have heard the rival contentions and perused the orders of the lower authorities. Solitary issue in this

appeal is levy of penalty u/s 271(1)C) of the Act on reinstatement of deemed sales consideration u/s 50 C of the act for commutation of capital gain holding it to be furnishing of inaccurate particulars of income.

012. In this case assessee has jointly with other person has sold an immovable property for an agreed consideration as per agreement dated 19/6/2023 four ₹ 35 lakhs. The market value was considered at ₹ 10,925,000/– by the stamp valuation authorities. The reference was made to the learned departmental valuer by the learned assessing officer on 29/8/2016. The departmental valuation officer is submitted his report on 27/12/2016 determination the valuation of the immovable property at ₹ 8,266,000/–. On that basis the deemed sale consideration was substituted in accordance with section 50 C of the act was computed and resultant plea the addition of ₹ 2,113,000/– was made to the computation of total income under the head short-term capital gain. On this addition penalty under section 271 (1) (C) of the act was levied of ₹ 652,919/–. The penalty was challenged before the learned CIT – A in despite 11 opportunities given to the assessee, no representation was made. Generally, when assessee did not appear before the learned CIT – A, the matter should have been remanded back to CIT – F for fresh adjudication. However, We find that this issue has been decided by honourable high courts holding that where the deemed sales consideration is substituted against actual sales consideration by invoking provision of section 50 C of the Act for computation of capital gain , on such addition penalty u/s 271 (1) (c) cannot be levied.

013. In Fortune Hotels & Estate Private Limited 52 taxmann.com 330 [Bom] Honourable jurisdictional High Court on identical facts has held as under:-

> **"2.** Upon perusal of the order passed by the Tribunal in its entirety and noting the peculiar facts pertaining to the Assessee we are of the view that the question as posed before us and the contentions advanced need not be gone into in any further details. The admitted factual position and which the Tribunal noted is prevailing throughout. The Assessee was the owner of the office premises at Nariman Point, Mumbai and he sold the same during the year previous to the Assessment Year 2004-2005 and sale consideration was Rs.2 crores. The Assessing Officer noted that the market value adopted by the Registrar of Assurances for levy of stamp duty was Rs.3,72,42,000/-. In view thereof by taking recourse to Section 52C(2) the Assessing Officer called upon the Assessee to show cause as to why the full value of consideration received on transfer should not be adopted as per the stamp valuation. The Assessee insisted that the question of valuation of the property should be referred to the Departmental Valuation Officer. That was so referred and the report was submitted by the Valuation Officer dated 27.12.2006 determining the market value of the property at Rs.2,70,03,920/-. The Assessee maintained that the value of Rs.2 crores is actual sale consideration received by it. However, this was not accepted and the difference between the consideration received and

determination of the Valuation Officer was declared as tax liability.

3. To this extent there is no dispute and what later on followed was the imposition of penalty. The Tribunal held that this cannot be taken as a case of furnishing inaccurate particulars of income inasmuch as there was a registered sale deed and there was consideration mentioned therein. That ground was raised and therefore, the document was forwarded to the Valuer and for determination of the value, by itself would not mean that the Assessee had furnished inaccurate particulars of income or has concealed the income. In these peculiar circumstances the imposition of penalty was not justified, is the conclusion drawn. The larger question posed for our consideration by Mr.Vimal Gupta really does not arise in the peculiar facts of the case. We leave that question and contentions based thereon open for being canvassed in an appropriate case. The Tribunal's order even if containing any reference to some deeming provision will not preclude or prevent the Revenue from raising such contentions. With this clarification and finding that the Tribunal's order does not raise any substantial question of law that we proceed to dismiss the Appeal. It is, accordingly, dismissed. No costs."

014. Further honourable Gujarat High Court in Sun on Peak Hotel 95 taxmann.com 320 [Guj] has held on identical facts that

> **"11.** As is well settled, capital gain can be levied on actual sale consideration and not on fair market value. Sub-section [1] of Section 50C of the Act makes a deviation in this principle and introduces a concept of deemed consideration for the purpose of Section 48 of the Act. There is thus a clear distinction between sale consideration actually received and deemed to have been received in terms of sub-section [1] of Section 50C of the Act. Application of sub-section [1] of Section 50C therefore cannot automatically give rise to penalty proceedings.
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> **12.** Counsel for the Revenue strongly argued that the assessee was required to declare the valuation adopted by the Stamp Valuation authority and offer capital gain on the basis of such valuation which he failed to do, and therefore, the assessee was guilty of providing inaccurate particulars of income. To examine this contention, we must refer to sub-section [2] of Section 50C which starts with an expression, "*without prejudice to the provisions of sub-section [1]* ". As per sub-section [2], where the assessee claims before any Assessing Officer that the value adopted or assessed by the stamp valuation authority under sub-section [1] of Section 50C has not been disputed in any appeal or revision, or no reference has been made before any

other authority or the Court, the Assessing Officer may refer the valuation of the capital asset to a Valuation officer.

13. Under sub-section [2] of Section 50C thus, the assessee has an opportunity to dispute the stamp duty valuation of a property in question before the Assessing Officer upon which the Assessing Officer would refer the question of valuation to the Valuation Officer. Application of sub-section [1] of Section 50C is not automatic and is subject to an opportunity to the assessee to question such valuation during the assessment proceedings also.

14. In the present case, the assessee had in fact at one stage disputed such valuation by pointing out *inter alia* that the property was facing certain restrictions from the forest department, and that therefore, the valuation prescribed by the stamp valuation authority could not be automatically adopted.

15. In the facts of the case, we do not find any reason to interfere with judgment of the Tribunal. This is so since the assessee had, as noted above, initially disputed the stamp valuation. However, once the assessee gave up the challenge, revised the return and offered additional deemed income to tax. The judgment of Orissa High Court in the case of *Ganpatrai Gajanand* [*supra*] was rendered in the background of Section 68 of the Act which contains vastly different provisions; as compared to Section 50C of the Act.

015. Further in Madan Theatres 42 Taxmann.com 26 [Cal] it has been held that :-

> **"4.** Mr. Niaumuddin, learned Advocate appearing for the Revenue, contended that the assessee had a choice to dispute the valuation on the basis of the deemed value, but the assessee did not take that opportunity. The assessee had a choice or he could have litigated. The fact remains that the actual amount received was offered for taxation. It is only based on the deemed consideration that the proceedings under Section 271(C) started. The revenue has failed to produce any iota of evidence that the assessee actually received one paise more than the amount shown to have been received by him."

016. In view of the above judicial precedents including of Honourable Jurisdcitional high court we do not find that any useful purpose would serve by remitting issue back to ld CIT [A]. Therefore, respectfully following the above judicial precedents, we allow the appeal of the assessee and direct ld AO to delete penalty levied u/s 271 (1) (c) of the Act.

017. Appeal of assessee is allowed.

Order pronounced in the open court on 08.12.2023.

Sd/-	Sd/-
(RAHUL CHAUDHARY)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 08.12.2023

Dragon / Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai