

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

**BEFORE SHRI ANIKESH BANERJEE, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 1006/Mum/2024 (A.Y.2008-09)**

Om Developers,

Office No. 14, Mahavir Centre,
Sector-17, Vashi, Navi Mumbai
Maharashtra-400 703
PAN: AAAFO9862A

..... Appellant

Vs.

CIT (A)/NFAC/ITO-27(2)

I.T. Office, Vashi Railway Station,
Navi Mumbai- 400 705

..... Respondent

Appellant by : Shri Nikhil Natekar, Ld. AR
Respondent by : Shri H. M. Bhatt, Ld. DR
Date of hearing : 10/06/2024
Date of pronouncement : 14/08/2024

ORDER

PER GAGAN GOYAL, A.M.:

This appeal by assessee is directed against the order of National Faceless Appeal Centre (for short "NFAC") dated 17.01.2024 passed u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2008-09. The assessee has raised the following grounds of appeal:-

1. The penalty order passed by the learned CIT appeal is not sustainable as the re-opening of the assessment under section 147 is quashed by Hon'ble Mumbai Tribunal. The

Quantum assessment itself being invalid, consequent levy of penalty and levy of penalty lacks jurisdiction.

2. The penalty order passed by the learned CIT appeal is liable to be quashed as all additions in quantum additions have been deleted.

It is prayed that addition made may be deleted.

The applicant craves the right to adduce, add, amend, alter delete any of the grounds of appeal before or at the time of hearing of this appeal.

2. The brief facts of the case are that the assessee is a partnership firm filed a return of income on 26.09.2008 declaring total income at Rs. 63,16,295/-. The assessment was completed u/s 143(3) of the Act at a figure of Rs. 71,06,560/-. The case of the assessee was reopened on 25.03.2015 u/s. 148 and re-assessment u/s. 143(3) r.w.s. 147 of the Act was completed at a figure of Rs. 6,65,06,560/-. In consequence to this order, the AO initiated penalty u/s. 271(1)(c) of the Act and passed the order also on 17.01.2024 levying penalty of Rs. 1,83,54,600/-.

3. The assessee aggrieved with the order of the AO passed u/s. 147 r.w.s. 143(3) of the Act preferred an appeal before the Ld. CIT (A), who in turn confirmed the assessment order passed by the AO. The assessee being further aggrieved preferred an appeal before the Coordinate Bench of ITAT wherein the Coordinate Bench vide paras 21 to 26 allowed the appeal of the assessee. Relevant extract of the findings are as under:-

“021. Further there is no mention of name of the assessee or any of the partners in the seized documents for receipt of impugned sum.

022. Even otherwise, intimation from ITO ward 3 New Panvel categorically stated that addition is made in the hands of society, but tax could not be recovered. For this reason, the sum cannot be taxed in the hands of the assessee, without any material against the assessee.

023. In view of the above facts, applying the principles laid down by the honourable Bombay High Court in the above judicial precedents, we find that the reasons recorded for reopening of the assessment, in absence of any allegation on the part of the assessee to fully and truly disclosed material facts in the reasons recorded, are not sustainable.

024. Statement u/s 131 of Mr. Manohar Desai also does not state that cash is received by assessee. Letter of ITO ward 3 panel says that he has only stated PAN and Jurisdictional AO of the Assessee. This is evident in last para of the letter dated 23/02/2015.

025. Even otherwise on the merits the coordinate bench in case of the cooperative society has categorically held that income is chargeable to tax in the hands of the members of the society, therefore, we are not in a position to give any other finding with respect to the receipt of above sum and its addition in the hands of the assessee on the merits also.

026. Accordingly, reopening of the assessment in case of the assessee is quashed.”

4. In addition to the above, assessee preferred an appeal before the Ld. CIT (A) against the order levying penalty u/s. 271(1) (c) of the Act vide dated 30.03.2019. It is pertinent to mention here that before conclusion of hearing by the Ld. CIT (A), the Coordinate Bench allowed the appeal of the assessee on quantum and quashed the assessment order passed u/s. 143(3) r.w.s. 147 of the Act. In view of this i.e. when the quantum appeal is quashed, levy of penalty cannot be sustained. Here the chronology of the events are also relevant to be discussed. The Coordinate Bench passed the order on 18.09.2023 whereas the order of Ld. CIT (A) with reference to penalty was passed on 17.01.2024 i.e. without taking cognizance of the quantum appeal decided by Coordinate Bench in favour of the assessee. Although, before the Ld. CIT (A) there was no effective representation was made and also not brought on record the order of the Coordinate Bench. Consequently, the Ld. CIT (A) passed the order on ex-parte basis.

5. In view of the above facts, matter should have been restored to the file of Ld. CIT (A) for fresh adjudication after giving a proper opportunity of being heard to the assessee, but as it is placed on record before us that the quantum appeal is no more sustaining, hence we deem it fit to decide the matter in favour of the assessee by allowing the present appeal of penalty. To substantiate our view, we relied on the following judicial pronouncements by the Coordinate Benches and various Hon'ble High Courts as under:-

The coordinate benches and Hon'ble High Courts has deleted penalty fully in similar case.

Hon'ble Punjab & Haryana High Court in the case of Harigopal Singh v. CIT [258 ITR85].

Sushil Chhatrabhuj Raheja Vs ACIT (ITA No 1375/Mum/2017).

Late Shri. Upendra G. Sheth-ITA No. 3365/Mum. /2017 dated 07-09-2017.

Tans Conduct (India) v/s ACIT Circle 21(1), Mumbai - ITA No. 3198/Mum/2016.

CIT vs. Manjunath Cotton & Ginning Factory [2013] (Karnataka)

Pankaj B Tike V/s PCIT-31, ITA No 3391/3392/Mum/2017359 ITR 565

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

Order pronounced in the open court on 14th day of August, 2024.

Sd/-

(ANIKESH BANERJEE)

JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 14/08/2024

Dhananjay, Sr. PS

Sd/-

(GAGAN GOYAL)

ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

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BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai