

| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI

SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
BEFORE ANIKESH BANERJEE, HON'BLE JUDICIAL MEMBER

I.T.A. No. 3746/Mum/2024
Assessment Years: 2009-10

Mr. Abhijit K. Avarrsekar 1252, Pushpanjali Old Prabhadevi Road Mumbai - 400025 [PAN: AAAPA5573E]	Vs	CIT(A)-50, Mumbai, JAO - Circle 6(1)(1), Mumbai
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

Assessee by :	Shri Apurv Gandhi, A/R
Revenue by :	Shri Ram Krishn Kedia, Sr. D/R

सुनवाई की तारीख/Date of Hearing : 10/12/2024
घोषणा की तारीख /Date of Pronouncement: 12/12/2024

आदेश/ORDER

PER NARENDRA KUMAR BILLAIYA, AM:

This appeal by the assessee is preferred against the order of the ld. CIT(A) - 50, Mumbai, dated 28/06/2024, pertaining to AY 2009-10.

2. The solitary grievance of the assessee is that the ld. CIT(A) erred in confirming the penalty levied by the AO u/s 271(1)(c) of the Act.

3. Representatives were heard at length. Case records carefully perused and the relevant judicial decision brought to our notice duly considered.

4. The roots for the levy of penalty lie in the assessment order dated 31/03/2014 framed u/s 153A r.w.s. 143(3) of the Act.

5. Briefly stated, the facts of the case are that a search and seizure action u/s 132 of the Act was carried out on 10/02/2012 at the office premises of Unity Infraprojects Ltd. The assessee being one of the director of the company was also searched at his residence. Statutory notices were accordingly issued and served upon the assessee. Pursuant

to the notice, the assessee filed return of income u/s 153A of the Act in which the assessee included the cash receipts on sale of flats while computing the capital gain on sale of property along with his spouse. The cause for this action was triggered from the search assessment proceedings u/s 132 of the Act carried out at the residential premises of Shri Madhav Nadkarni, CFO of M/s. Unity Infraprojects, at Flat No. 102, Plot No. 125, Kalpatru CHS, Seth Motisha Cross Lane, Byculla, Mumbai on 10/02/2012, wherein as per the seized loose paper no. 213 of Annexure-A1, it was revealed that on sale of plot at Matunga, which was jointly owned by the assessee along with his spouse, they are in receipt of cash of Rs.2,65,00,000/- in addition to the agreed sale consideration of the plot of Rs.2,77,00,000/-.

5.1. In respect of the assessee's share of Rs.1,42,06,679/-, penalty proceedings were initiated u/s 271(1)(c) of the Act.

6. Thereafter, the assessee furnished another return u/s 153A of the Act on 06/01/2014, wherein the assessee had shown long term capital gain on the sale of property at Matunga of Rs.1,13,39,956/- as against short term capital gains of Rs.1,35,66,593/-, offered in the original return filed u/s 153A of the Act. The reduction in the short term capital gains was explained as under:-

Asset	Plot at Matunga			Amount(Rs.)
Date of Transfer			25.3.2009	2,90,56,579
Acquisition Details		Financial year	Cost	Indexed Cost
Purchase	10522501*582/497	2005-06	1,05,22,501	1,23,22,124

Cost				
Improvement Details				
Interest Cost	593103*582/519	2006-07	5,93,103	6,65,098
BMC Fees	2473045*582/519	2006-07	24,73,045	27,73,241
Interest Cost	581261*582/551	2007-08	5,81,261	6,13,964
BMC Fees	391394*582/551	2007-08	3,91,394	4,13,414
Interest Cost	928782*582/582	2008-09	9,28,782	9,28,782
Indexed Cost of Improvement				53,94,499
Capital Gains				1,13,39,956

6.1. It can be seen from the above that the assessee had claimed interest cost of Rs. 5,93,103/- and BMC fees of Rs.24,73,045/- which was indexed for the recomputation of capital gains. These expenses claimed by the assessee were disallowed and since no appeal has been filed by the assessee, the disallowance became final. Penalty proceedings initiated for furnishing inaccurate particulars/concealment of income.

7. The penalty proceedings were separately initiated and vide order dated 31/03/2017, the AO levied penalty of Rs.1,17,60,708/- on the amount offered as cash receipts of Rs.1,42,06,679/- and cost of improvement of Rs.53,94,499/-.

8. The assessee carried the matter before the Id. CIT(A) without any success.

9. Before us, the Id. Counsel for the assessee vehemently stated that, insofar as the sale receipts in cash is concerned, the assessee has himself offered it for taxation in the return filed u/s 153A of the Act, therefore, no penalty is leviable on this amount. Strong reliance was placed on the decision of the Hon'ble Delhi High Court in the case of *PCIT vs. Neeraj Jindal* reported in [2017] 393 ITR 1 (Delhi).

9.1. Insofar as the addition on account of disallowance of cost of improvement is concerned, the ld. Counsel for the assessee stated that the assessee did not furnish any inaccurate particular of income nor concealed any income. Inadvertently, the interest cost and the BMC fees could not be claimed as cost of improvement in the return filed pursuant to the notice u/s 153A of the Act. Therefore, no penalty should be levied on the amount also.

9.2. Per contra, the ld. D/R strongly supported the findings of the AO. It is the say of the ld. D/R that the income returned and thereafter revised was pursuant to the search action and had there been no search action, the assessee would not have offered the additional income.

10. We have given a thoughtful consideration to the order of the authorities below and have carefully perused the decisions of the Hon'ble Delhi High Court (*supra*).

11. The undisputed fact is that during the course of search assessment proceedings at the residential premises of Shri Madhav Nadkarni, CFO of M/s. Unity Infraprojects, some loose sheets were found and seized which revealed that the assessee had received cash of Rs.2,65,00,000/-, over and above the sale consideration of Rs. 2,77,00,000/- on sale of flat at Matunga. The assessee's share was Rs. 1,42,06,679/-. It is only because of this search that the assessee included the cash receipts in his return of income filed u/s 153A of the Act which means that the offer was only after the detection of concealment by the revenue and there was live link between the notings in the pieces of paper and the offer made by the assessee. The decision relied upon by the assessee (*supra*), is totally on different set of facts and incidentally the decision supports the levy of penalty rather than deletion of penalty inasmuch as in that

case, no material was recovered during the course of search and the assessee added Rs.21.65 Lakhs in the return filed pursuant to notice u/s 153A of the Act, *suo moto* and this amount was not relatable to any sum recovered or article seized. Therefore, the question of adding or not adding amounts after the search and falling within the mischief of Explanation (5) to Section 271(1)(c) of the Act, could not arise in the facts and circumstances of the case. Therefore, deletion of penalty was justified. Facts are clearly distinguishable and the decision of the Hon'ble Delhi High Court supports the action of the revenue authorities.

12. The levy of penalty cannot be denied for the reasons that the assessee cannot be given benefit of Explanation (5) to Section 271(1)(c) of the Act as Clause (ii) of Explanation (5) to Section 271(1)(c) of the Act, exempts only that part of the income from the penal provisions which is covered by statement u/s 132(4) of the Act where the assets have been acquired by the assessee out of his income which is not disclosed in the return of income to be furnished before the expiry of the time prescribed u/s 139(1) of the Act and the assessee specifies in the statement, the manner in which such income has been derived. The penalty was levied because the assessee had not communicated in the return, the income which was sought to be brought to taxation as a result of the search. The disclosure in the return after the search did not, in any way, diminish its responsibility to do so.

12.1. Moreover, the penalty has not been levied for returning higher income but on the amount returned, found only during the search proceedings and, therefore, it cannot be said that the excess income has

no co-relation with any incriminating material/assets/investment found.

13. It would be pertinent to refer to the observations of the Hon'ble High Court in the case *Neeraj Jindal (supra)* in relation to the invocation of Explanation (5), which reads as under:-

"Now for the revenue to invoke Explanation 5, it would have to prove that its requirements are clearly fulfilled in the present case. In order for Explanation 5 to apply, it is necessary that there must be certain assets (such as money, bullion etc.) found in the possession of the assessee during the search, and that the assessee must claim that such assets have been acquired by him by utilising (wholly or in part) his income. Moreover, such income must be in relation to a particular previous year that has either ended before the date of the search or is to end on or after the date of the search and such income is declared subsequently in the return of income filed after the search. Therefore, it is only when assets are found during the search which the assessee claims to have been acquired by him by utilizing his income for any particular previous year, and then declared such income in a subsequent return filed after the date of search, would it be deemed that the assessee had concealed his income. In other words, the assets seized during the search must relate to the income of the particular assessment year whose return is filed after the date of the search. Such a conclusion is only logical, considering that assessment under the Act is with respect to a particular assessment year and the penalty imposed under section 271(1)(c) would also be for concealing income in that particular assessment year, which concealment was revealed by the discovery of certain assets in the assessee's possession during the search conducted under section 132."

14. Facts on record clearly show that on the search assessment proceedings, the unaccounted cash consideration was unearthed which permitted the assessee to offer his share of Rs.1,42,06,679/- as additional capital gains. This act of the assessee and the underlying facts go on to show that the decision of the Hon'ble High Court in the case of *Neeraj Jindal (supra)*, would go against the assessee and in favour of the revenue. To this extent, there is no error or infirmity in the levy of penalty u/s 271(1)(c) of the Act.

15. Now, coming to the levy of penalty on the additions made on account of cost of improvement and BMC fees charges. It clearly

emerges from the record that the assessee first increased the capital gains by adding the sale consideration of Rs. 1,42,06,679/- and once the assessee has increased the sale consideration, he thought it prudent to reduce it by showing some cost of improvement and payment of BMC fees. No evidence of any cost of improvement in the said plot of land was brought on record, therefore, when the amount was disallowed by the AO, the assessee did not file any appeal. Same with the BMC fees. Nothing has been brought on record to show that the BMC fees has been paid by the assessee on the said plot of land sold at Matunga. Considering the underlying facts in totality, the levy of penalty on this count is also justified.

16. In light of the facts discussed hereinabove *vis-à-vis* the decision of the Hon'ble Delhi High Court, no interference is called for.

17. In the result, appeal of the assessee dismissed.

Order pronounced in the Court on 12th December, 2024 at Mumbai.

Sd/-

(ANIKESH BANERJEE)
JUDICIAL MEMBER

Sd/-

(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Mumbai, Dated 12/12/2024

SC S.P.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, मुंबई /DR,ITAT, Mumbai,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai