

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री भागचंद, लेखा सदस्य एवं श्री कुल भारत, न्यायिक सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, AM & SHRI KUL BHARAT, JM

आयकर अपील सं./ITA No. 1061/JP/2016
निर्धारण वर्ष / Assessment Year : 2007-08

Income Tax Officer, Ward 2(1), Jaipur.	बनाम Vs.	Ravi Sancheti, (i) 176, Haldiyan Ka Rasta, Johari Bazar, Jaipur, (ii) C/o- O.P. Agarwal, CA, 13/3147, 1 st Floor, Ajmeri Gate, M.I. Road, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABXPS 3597 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by : Shri Ajay Malik(JCIT)
निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal (CA)

सुनवाई की तारीख / Date of Hearing : 12/05/2017
उदघोषणा की तारीख / Date of Pronouncement : 18/05/2017

आदेश / ORDER

PER: KUL BHARAT, J.M.

This is an appeal filed by the revenue against the order dated 23/09/2016 passed by the Id. CIT(A)-I, Jaipur for the A.Y. 2007-08, wherein the revenue has taken following grounds of appeal:

- "1. Whether on the facts and circumstances of the case and in law, the Id. CIT(A) was justified in cancelling the penalty imposed U/s 271(1)(c) when the assessee filed inaccurate particulars of income by claiming LTCG, whereas the asset had already converted in stock in trade in the March, 2005.

(ii) Alternatively, even the Id. CIT(A) and Hon'ble ITAT held that the assessee was not only liable for LTCG but also STCG, which was not declared by the assessee in his return of income tantamount to furnishing of inaccurate particular of income."

2. Brief facts of the case are that the appellant is proprietor of M/s International Gems and carrying on the business of Gems and stones and filed the return of income for the year under consideration on 10-10-2007 declaring total income at Rs.8,84,110/-. The case was selected for scrutiny and assessment was completed by Ld. Assessing officer vide order dated 31-12-2009 making various additions/disallowances inter alia treating the sale of capital asset as "Adventure in the nature of trade" and thus profit on sale was computed by Ld. AO under two heads:

- (i) Rs.26,86,551/- under the head capital gains on the premise that capital asset acquired in June 2001 was "converted in Stock in trade" in March 2005, after which construction on the plot started.
- (ii) Rs.54,40,175/- as business income ,i.e. on the basis of sale of plots by giving due credit on account of fair market value of plot on the date of conversion and cost of construction incurred during the year under appeal.

The Assessing Officer had also withdrawn the deduction claimed by assessee u/s 54F of the Act. The Assessing Officer initiated penalty proceedings on these additions separately. Subsequently, penalty of Rs. 19,06,221/- was imposed U/s 271(1)(c) of the Act

3. Aggrieved by the order of penalty passed by the Assessing Officer, the assessee preferred appeal before the Id. CIT(A), who after considering the submissions has cancelled the penalty.

4. Now the revenue is in appeal before the ITAT. The Id DR has vehemently supported the order of the Assessing Officer. On the contrary, the Id AR of the assessee has reiterated the submissions as made in the written brief and submitted as under:-

Since the quantum appeal on the basis of which penalty was levied, has been decided in favour of assessee, penalty so imposed does not hold good and deserves to be deleted.

However, so far as merits of the case are concerned, in view of above background, it is submitted that, assessee is regularly showing income from its Gems and stoned business under the head "Business income" and this fact has been admitted by appellant in statements recorded during survey proceedings also and the same remained uncontroverted. Further, Ld. AO himself has accepted in assessment order that the property sold was held by appellant as "Investment" till the year in which construction. However, just because construction and subsequent sale was with profit motive, the same was treated as "Adventure in the nature of trade", which was eventually held to be taxed as "Capital gain" Hon'ble ITAT.

Further, it is crystal clear from above facts that the issue under appeal, i.e. whether profit on sale of flats should be treated as capital gain or business income is a debatable issue. It is an admitted fact that appellant suo moto had disclosed capital gain in respect of sale of flats in the return of income itself and disclosed all the particulars related to such income, which was held to be "Adventure in the nature of trade" by Ld. AO. Matter travelled upto ITAT, and ultimately the nature of income on sale of flats was held to be under "Capital Gain". However, the only modification directed by Hon'ble ITAT was that the capital gain be bifurcated in to two parts, i.e.

- (i) Long term on sale of land as the same was acquire in June 2001

(ii) Short term on sale of building as construction took place from March 2005 onwards.

In this regard, reliance is placed on decision of Hon'ble Rajasthan High court in the case of CIT V/s Harshvardhan Chemicals and Mineral Ltd. reported in 259 ITR 212, wherein affirming the decision of the Appellate Tribunal, it has been held that no penalty was leviable in view of the finding of the Tribunal that when the assessee had claimed deduction of an amount that was debatable it could not be said that the assessee had concealed any income or furnished inaccurate particulars for evasion of tax, and, in view of the finding of the Tribunal, no case was made out for interference.

Your honour would appreciate that since all the details in respect of sale of flats were disclosed in return of income itself, there was no concealment of income on the part of appellant. Hon'ble Apex Court in the case of Reliance Petro Products reported in 323 ITR 158 (SC) has held that " S. 271 (1) (c) applies where the assessee "has concealed the particulars of his income or furnished inaccurate particulars of such income". The present was not a case of concealment of the income. As regards the furnishing of inaccurate particulars, no information given in the Return was found to be incorrect or inaccurate. **The words "inaccurate particulars" mean that the details supplied in the Return are not accurate, not exact or correct, not according to truth or erroneous.** In the absence of a finding by the AO that any details supplied by the assessee in its Return were found to be incorrect or erroneous or false, there would be no question of inviting penalty u/s 271(1)(c).

Further, capital gain was computed in accordance with the provisions of the Act, thus there was no furnishing of inaccurate particulars of income also. Merely because Ld. AO was of the view that the said sale transaction was "adventure in the nature of trade", it cannot be concluded that there is concealment or furnishing of inaccurate particulars of income. Further, the Hon'ble ITAT has eventually held the same as "Capital gain", thus it can be at the most "Difference of Opinion" and it is trite law that no penalty can be levied merely on account of difference of opinion.

In this regard, reliance is place on The Delhi High Court in CIT Vs. Eicher Goodearth Ltd. [2008] 170 Taxman 27 holding that no penalty be levied with reference to disallowance of deductions for excess allowance of depreciation and dividends (u/s 80M) in the absence of any finding of default by the assessee in furnishing material facts or particulars of such income or expenditure. In this case the assessee succeeded even on the point of missing of satisfaction on the basis of decision in CIT Vs. Ram Commercial Enterprises Ltd. [2000] 122 Taxman 620/246 ITR 568 (Delhi). In the similar situation the Delhi High Court in CIT Vs. Mahabaleshwar Gas & Chemical (P) Ltd.

[2008] 170 Taxman 38 held that disallowance of depreciation claim in assessment is a matter of course, of difference of opinion and does not invite penalty action, more so if the assessee has made a bona fide claim for the same in the return of income and has furnished all the particulars in respect of such claim in such return.

120 ITD 151 Ashok Grih Udyog Kendra (P) Ltd. Vs. Asstt. CIT (Luck):

-Assessment year 2000-01 – For relevant assessment year, assessee-company filed its return wherein it claimed deduction of Rs. 2.37 lakhs as LTC paid to an employee – Assessing Officer rejected assessee's claim holding that aforesaid expenditure was not incurred for purpose of business of assessee company – Assessing Officer also imposed penalty on assessee on account of claiming wrong deduction – Commissioner (Appeals) confirmed levy of penalty – On instant appeal, it was seen that revenue had not doubted genuineness of expenditure incurred and it was a mere case of difference of opinion between assessee and department as to whether amount in question had been incurred for purpose of business or not – Furthermore, assessee's explanation in respect of entries in books was found to be bona fide

– Whether, on facts, it could be concluded that it was only a case of assessee's failure to establish its claim in quantum proceedings, but that would not automatically become a case for levy of penalty for concealment of furnishing accurate particulars – Held, yes – Whether, therefore, penalty levied by authorities below was to be cancelled – Held, yes.

Further, penalty proceedings are not automatic rather independent wherein, recording of satisfaction is must. On perusal of page 2 of penalty order itself, it is clear that no such satisfaction was recorded and penalty was imposed merely stating that "since income under the short term capital gain is assessed at Rs.56,19,787/- as against NIL declared by the appellant, the appellant has deliberately and willfully furnished inaccurate particulars of income and tried to conceal income". Hence, penalty u/s 271(1)(c) has been levied merely by borrowing the observations made in the quantum assessment proceedings and no independent satisfaction on the basis of separate inquiries was recorded so as to establish that the income was concealed by assessee or that, inaccurate particulars of income were furnished. It is well established law that the quantum proceedings and penalty proceedings are two distinct and separate proceedings and the observations made in quantum proceedings cannot be borrowed and penalty cannot be imposed merely on the basis of additions made in the quantum proceedings

Thus penalty levied without fulfilling the precondition of recording the satisfaction deserves to be deleted. He relied on the following case laws:

- (i) Eilly Lilly & Company 312 ITR 225.
- (ii) Rajesh C. Gandhi Vs. ITO[ITA No. 3158/Mum./2009, Dated 09.03.2010] (Mum. – ITAT)
- (iii) 176 Taxman 211 CIT Vs. Rampur Engg. Co. Ltd. (Delhi):

5. We have heard the rival contentions of both the parties and perused the material available on the record. The Id. CIT(A) has cancelled the penalty by observing as under:-

“(vii) I have duly considered the submissions of the appellant, penalty order and the material placed on record. It is evident from the above discussion that there were different opinions of the AO, Ld. CIT (A) and the Hon’ble ITAT on the instant issue under consideration. In the first instance, the AO treated the profit from sale transaction as adventure in the nature of trade and did not allow deduction u/s 54F of the Act, whereas the Hon’ble ITAT treated the same as income arising out of capital asset, allowed the deduction u/s 54F of the Act but the amount of capital gains is to be bifurcated between LTCG and STCG. The AO passed the assessment order u/s254/143(3) of the Act determining capital gains at Rs. 52,37,030/- and in the appeal, the Ld. CIT(A) enhanced the capital gains to Rs. 87,68,657/- which was again reduced to the figures as computed by the AO in order passed u/s 254/143(3) by the Hon’ble ITAT vide its order dated 18.03.2016, as referred earlier in this order.

(viii) It may be mentioned that the Hon’ble Rajasthan High court in the case of CIT V/s Harshvardhan Chemicals and Mineral Ltd. reported in 259 ITR 212 held that no penalty was leviable in view of the finding of the Tribunal that when the assessee had claimed deduction of an amount that was debatable, it could not be said that the assessee had

concealed any income or furnished inaccurate particulars for evasion of tax, and, in view of the finding of the Tribunal, no case was made out for interference.

(ix) *Further, capital gain was computed in accordance with the provisions of the Act, thus there was no furnishing of inaccurate particulars of income also. Merely because Ld. AO was of the view that the said sale transaction was “adventure in the nature of trade”, it cannot be concluded that there is concealment or furnishing of inaccurate particulars of income. Further, the Hon’ble ITAT has eventually held the same as “Capital gain”, thus it can be at the most “Difference of Opinion” and it is trite law that no penalty can be levied merely on account of difference of opinion.*

(x) *Further, all the details in respect of sale of capital asset was disclosed in return of income itself, there was no concealment of income on the part of appellant. It may be mentioned that the Hon’ble Apex Court in the case of Reliance Petro Products 323 ITR 158 (SC) has held that “S. 271 (1) (c) applies where the assessee “has concealed the particulars of his income or furnished inaccurate particulars of such income”. The instant case under consideration, is not a case of concealment of the income. As regards the furnishing of inaccurate particulars, no information given in the Return was found to be incorrect or inaccurate. The words “inaccurate particulars” mean that the details supplied in the Return are not accurate, not exact or correct, not according to truth or erroneous. In the absence of a finding by the AO that any details supplied by the appellant in its Return were found to be incorrect or erroneous or false, there would be no question of inviting penalty u/s 271(1) (c). Therefore, in view of the above discussion and looking to the totality of facts and circumstances of the case, it is held that there was no justification for imposition of penalty*

u/s 271 (1) (c) of the Act, hence the same cannot be sustained, thus cancelled.”

From the above, it can be construed that the penalty is levied on the basis that sale of commercial complex was adventure in the nature of trade. However, the assessee claimed it sale of capital asset and computed capital gain. We are in agreement to the observation of Id. CIT(A) that in view of the findings of the Tribunal in quantum proceedings, the penalty cannot be levied. Therefore, we do not see any reason to interfere into the order of the Id. CIT(A). Accordingly, the appeal of the revenue is dismissed.

6. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 18/05/2017.

Sd/-
(भागचंद)
(BHAGCHAND)

लेखा सदस्य / Accountant Member
जयपुर / Jaipur
दिनांक / Dated:- 18th May, 2017

*Ranjan

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

1. अपीलार्थी / The Appellant- The ITO, Ward 2(1), Jaipur.
2. प्रत्यर्थी / The Respondent- Shri Ravi Sancheti, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 1061/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar