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आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी' मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, MUMBAI

श्री डी. करुणाकर राव, लेखा सदस्य, एवं श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष

BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER AND

SHRI AMIT SHUKLA, JUDICIAL MEMBER

आयकर अपील सं. / ITA no. 2770/Mum./2012

(निर्धारण वर्ष / Assessment Year : 2007-08)

Asstt. Commiissioner of Income Tax
Circle-21(1), Pratyakshakar Bhavan
Bandra Kurla Complex, Bandra (E)
Mumbai 400 051

..... अपीलार्थी /
Appellant

बनाम v/s

Crescent Property Developers
B-11, Meenakshi Apartments
S.V. Road, Vile Parle (W)
Mumbai 400 056

..... प्रत्यर्थी /
Respondent

स्थायी लेखा सं./Permanent Account Number – AADFC4262B

राजस्व की ओर से / Revenue by : Mr. Morya Pratap

निर्धारिती की ओर से / Assessee by : Dr. K. Shivaram, Sr. Counsel a/w
Mr. Rahul K. Hakani

सुनवाई की तारीख /
Date of Hearing – 12.06.2014

आदेश घोषणा की तारीख /
Date of Order – 19.06.2014

आदेश / ORDER

**अमित शुक्ला, न्यायिक सदस्य के द्वारा /
PER AMIT SHUKLA, J.M.**

The present appeal has been preferred by the Revenue,
challenging the impugned order dated 23rd February 2012, passed by

the learned Commissioner (Appeals)-XXXII, Mumbai, in the matter of penalty of ₹ 33,66,000, levied by the Assessing Officer under section 271(1)(c) and confirmed by the learned Commissioner (Appeals), for the assessment year 2007-08. Following grounds have been raised:-

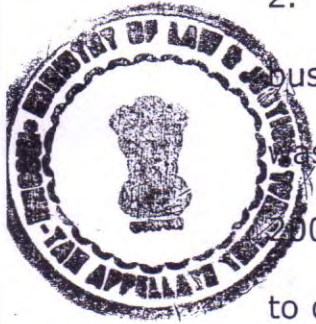
"On the facts and in the circumstances of the case and in law the learned CIT(A) failed to appreciate that the assessee has himself admitted in his statement on oath, that there are discrepancies and errors and omissions in the accounts and the A.O. has recorded satisfactorily in the assessment order that the undisclosed income / concealment would not have been detected if the case was not surveyed."

2. Facts in brief:- The assessee is a partnership firm engaged in the business of developing projects. A survey action under section 133A, was carried out at the business premises of the assessee on 29th March 2007, during the course of which, partner of the assessee firm, in reply to question no.8 of his statement, made a disclosure of ₹ 1 crore in the following manner:-

"I am offering a sum of ₹ 1 crore on account of the above discrepancies and any other errors & omissions in my accounts in respect of my partnership firm M/s. Crescent Property Developers for the financial year 2006-07 relevant to assessment year 2007-08.

i)	Discrepancies in cash	08.54 lakhs
ii)	Sale of debris & material not reflected in the books	78.87 lakhs
iii)	On account of brokerage	12.45 lakhs
iv)	Any other omissions & errors	0.14 lakhs

		1.00 crore

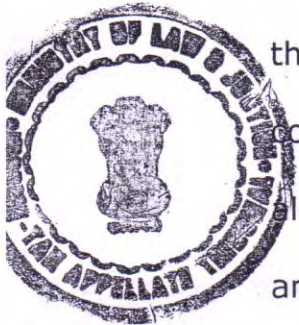


3. In pursuance thereof, the assessee, in its return of income filed on 26th October 2007, under section 139(1), declared total income of ₹ 99,86,070. The said return of income was accepted and the assessment was completed on the returned income vide order dated 11th November 2009, passed under section 143(3). However, in the assessment order, the Assessing Officer mentioned that if the survey would not have been carried out, then the undisclosed income would not have been detected. On this ground alone, he initiated penalty proceedings under section 271(1)(c) on the amount of returned income. During the course of penalty proceedings, it appears that the assessee had sought adjournment. However, the Assessing Officer levied penalty on the ground that the matter is going to be barred by limitation on 31st May 2010, and consequently, he levied minimum penalty @ 100% at ₹ 33,66,000 on the amount of income declared during the course of survey.

4. Before the learned Commissioner (Appeals), the assessee, besides objecting to the penalty order on the ground of not been given proper opportunity by the Assessing Officer before passing of the penalty order, also made detail submissions on merits. It was submitted that the assessee has slum rehabilitation project under SRA Scheme in the financial year 1999-2000 as approved by the



Government of Maharashtra, according to which, the assessee was required to provide rehabilitation to tenants by constructing and giving 165 flats and one community hall free of cost. Thus, there was no income to be received by the assessee in construction of rehab portion. The income to the assessee was to be generated only when the salable portion to the 3rd party was to be constructed and sold after reducing the cost of rehabilitation from the salable portion. The work of rehab portion commenced in the financial year 2005-06 and was completed in the financial year 2006-07 and was handed over to the respective tenants free of cost as per the scheme of the SRA project. The work on the salable portion on which the assessee had to generate income commenced only in the financial year 2009-10. However, that work also, after reaching the plinth level, come to stand still due to recession and financial problem with the assessee and till date the said project could not be started. In any case, the assessee was following project completion method of accounting and the profit was to be offered in the year of completion of project and hence, there was no profit or income which could have been determined before the completion of project. The survey was conducted on 29th March 2007, and at that time only the rehabilitation portion was constructed and was given free of cost as per the scheme of the Government to the tenants of slum and, therefore, there was no question of any income or profit under any



method of accounting. The declaration of ₹ 1 crore was made only to buy peace of mind and on that date, the return of income for the assessment year 2007-08 was not even due. Hence, there was no question of concealment of income as on 29th March 2007. The assessee has filed its return of income under section 139(1) on 26th October 2007, showing income of ₹ 99,86,070, as per the audited books of account which included the income offered during the survey. The said return of income has also been accepted under section 143(3). Thus, there cannot be a case of any concealment of income especially when there is no evidence or material on record to prove that the assessee has concealed any particulars of income in the return of income filed on 26th October 2007.



5. The learned Commissioner (Appeals), duly accepted the assessee's explanation and deleted the penalty after detail discussion and reasoning. He held that while accepting the return of income, the Assessing Officer has not discussed or given details of any incriminating documents found during the course of survey and the assessee's audited account had neither been doubted nor the same have been rejected under section 145. Even the method of accounting has been accepted. The assessee could not have earned any income or profit from the construction of rehabilitation portion and the construction of the salable portion had not yet commenced on the date of survey.

Therefore, there was no question of any income which can be said to be suppressed from SRA project, even if no survey was carried out in assessee's case. Further, no proceedings were initiated against the assessee either for the earlier years or for the subsequent assessment years on the basis of any incriminating material found during the survey. The items, which has been disclosed by the assessee only pertains to the salvage value of debris, brokerage and misc. income, etc. No evidence of any sale receipts or inflation of any expenditure has been found. Thus, the assessee's surrender was without any incriminating material and on bonafide reasons to buy peace. He also referred to the CBDT circular dated 10th March 2003, that the addition based merely on the statement made during the survey, without any corroborative evidence cannot be taken to be conclusive. He also referred and relied upon several decisions including that of the Hon'ble Delhi High Court in CIT v/s Dhingra Metal Works, [2010] 328 ITR 384 (Del.) and decision of Hon'ble Madras High Court in CIT v/s S. Khader Khan Son, [2008] 300 ITR 157 (Mad.). He thus, held that on these facts and circumstances, the penalty cannot be levied.

6. Before us, the learned Departmental Representative submitted that the assessee's undisclosed income has been shown in the return of income only in the background of the survey action and if there had been no survey, the assessee would not have come forward for



declaring any income in the return of income, therefore, the conduct of the assessee itself goes to show that the assessee is guilty of concealment of income under section 271(1)(c) and, therefore, the penalty has been rightly levied by the Assessing Officer.

7. On the other hand, the learned Sr. Counsel, Dr. K. Shivaram, on behalf of the assessee, submitted that, first of all, at the time of survey, the due date of filing of the return of income for the assessment year 2007-08 under section 139(1) was not due. The due date of filing of the return of income was 31st October 2007. The amount which was surrendered during the course of survey was duly shown in the audited books of account and was disclosed in the return of income filed on 26th October 2007. Thus, there is no case of concealment of income or furnishing of inaccurate particulars of income at the time of filing of return of income. On these facts, he strongly relied upon the decision of the Hon'ble Delhi High Court in CIT v/s SAS Pharmaceuticals, [2011] 335 ITR 0259 (Del.)

8. We have heard the rival contentions. On a perusal of the assessment order passed under section 140(c) and the penalty order, it is evident that there is no reference to any incriminating material found during the course of survey consequent upon which the assessee was cornered to surrender sum of ₹ 1 crores. Mere admission by the



assessee in the statement given during the course of survey itself cannot be a conclusive piece of evidence, unless, such a surrender is corroborated by any evidence or materials discovered during the course of such survey proceedings or by any enquiry thereafter. The amount which was surrendered during the course of such survey has already been reconciled and disclosed in the regular books of account which has been subjected to audit. These audited statement of accounts were filed along with the return of income under section 139(1). It is an undisputed fact that at the time of survey, which was conducted on 29th March 2007, the return of income for the assessment year 2007-08, was not due, as the due date for filing of the return of income under section 139(1) for the assessment year 2007-08, was 31st October 2007. The assessee had duly disclosed all the particulars of its income in the return of income, which was filed before the Assessing Officer, without any defect either in the audited statement of account or in the books of account produced before him. On these facts, the Hon'ble Delhi High Court in SAS Pharmaceuticals (supra), after analyzing the legal provisions, has held as under:-

"Clause (c) of section 271(1) authorizes imposition of penalty when the Assessing Officer is satisfied that the assessee had either concealed particulars of his income or furnished inaccurate particulars of such income. It was not a case of furnishing inaccurate particulars of income, as in the income-tax return, particulars of income had been duly furnished and the surrendered amount was duly reflected in the return. The question whether the

particulars of income were concealed by the assessee or not would depend upon whether this concealment had reference to the return filed by the assessee. **The words "in the course of any proceedings under this Act" were prefaced by the satisfaction of the Assessing Officer or the Commissioner (Appeals). When the survey was conducted the question of satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Commissioner did not arise.** It was the Assessing Officer who initiated the penalty proceedings and directed the payment of penalty. He had not recorded any satisfaction during the course of survey. The decision to initiate penalty proceedings was taken while making the assessment order. Thus, the expression "in the course of any proceedings under this Act" could not have the reference to survey proceedings, in this case. The concealment of particulars of income or furnishing of inaccurate particulars of income by the assessee had to be in the return filed by it. No penalty could be imposed unless the conditions stipulated in the provisions were duly and unambiguously satisfied. Since the assessee was exposed during the survey, may be, it would have not disclosed the income but for the survey. However, there could not be any penalty only on surmises, conjectures and possibilities. Section 271(1)(c) of the Act had to be construed strictly. Unless it was found that there was actually concealment or non-disclosure of the particulars of income, penalty could not be imposed. There was no such concealment or non-disclosure as the assessee had made a complete disclosure in the return and offered the surrendered amount for the purposes of tax."



9. The aforesaid reasoning and the conclusion drawn by the Hon'ble High Court clearly clinches the issue in the present case. That apart, the reasoning and the findings given by the learned Commissioner (Appeals) on the facts of the assessee's case is not only factually correct but also based on proper appreciation of law. Thus, we do not find any reason to deviate from such a conclusion drawn by the learned Commissioner (Appeals) for deleting the penalty and, hence, the grounds raised by the Revenue stand dismissed.

10. परिणामतः राजस्व की खारिज अपील की जाती है।

10. In the result, Revenue's appeal is dismissed.

आदेश की घोषणा खुले न्यायालय में दिनांक: 19th June 2014 की गई।
Order pronounced in the open Court on 19th June 2014

Sd/-

डी. करुणाकर राव

लेखा सदस्य

D. KARUNAKARA RAO
ACCOUNTANT MEMBER

Sd/-

अमित शुक्ला

न्यायिक सदस्य

AMIT SHUKLA
JUDICIAL MEMBER

मुंबई MUMBAI, दिनांक DATED: 19th June 2014

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

- (1) निर्धारिती / The Assessee;
- (2) राजस्व / The Revenue;
- (3) आयकर आयुक्त(अपील) / The CIT(A);
- (4) आयकर आयुक्त / The CIT, Mumbai City concerned;
- (5) विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / The DR, ITAT, Mumbai;
- (6) गार्ड फाईल / Guard file.

सत्यापित प्रति / True Copy

आदेशानुसार / By Order

प्रदीप जे. चौधरी / Pradeep J. Chowdhury

वरिष्ठ निजी सचिव / Sr. Private Secretary

उप / सहायक पंजीकार / (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai