

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 1st DAY OF APRIL 2016

PRESENT

THE HON'BLE MR. JUSTICE JAYANT PATEL

AND

THE HON'BLE MRS. JUSTICE B.V.NAGARATHNA

ITA. No.714/2015

BETWEEN:

1. PR. COMMISSIONER OF
INCOME TAX-4,
C.R.BUILDINGS,
QUEENS ROAD,
BENGALURU-560001.
2. DEPUTY COMMISSIONER
OF INCOME TAX,
CIRCLE-12(1), BENGALURU.

... APELLANTS

(BY SRI.E.I.SANMATHI, ADV.)

AND:

M/S.MINITECHS
AEROTOOLS PVT. LTD.,
RATHNA COMPLEX, IV FLOOR,
NO.143, RATHNA AVENUE,
RICHMOND ROAD,
BENGALURU-560 025,
PAN: AABCM 1317J.

... RESPONDENT

THIS ITA IS FILED UNDER SECTION 260-A OF INCOME
TAX ACT 1961, ARISING OUT OF ORDER DATED:26/05/2015
PASSED IN ITA NO.1228/BANG/2013, FOR THE ASSESSMENT
YEARS 2007-08, PRAYING TO DICIDE THE FOREGOING

QUESTION OF LAW AND / OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT AND SET ASIDE THE APPELLATE ORDER DATED 26.05.2015 PASSED BY THE ITAT, 'A' BENCH, BENGALURU, IN APPEAL PROCEEDINGS IN ITA NO.11228/BANG/2013 FOR ASSESSMENT YEAR 2007-08, AS SOUGHT FOR IN THIS APPEAL; AND TO GRANT SUCH OTHER RELIEF AS DEEMED FIT, IN THE INTEREST OF JUSTICE.

THIS APPEAL COMING ON FOR ADMISSION THIS DAY, **JAYANT PATEL J.** DELIVERED THE FOLLOWING:

J U D G M E N T

The appellant-revenue has preferred the present appeal raising following substantial questions of law:-

“Whether on the facts and in the circumstances of the case, the Tribunal is justified in holding that the explanation offered by the assessee for not offering the capital gain in the original return on income was bonafide explain, when the fact and circumstances revealed that the assessee has declared the concealed income only on the detection of the same during the course of survey in the premises of developer?”

2. We have heard Mr. E.I. Sanmathi, learned counsel appearing for the appellant-revenue.

3. The discussion in the order of the Tribunal are from paras 11 to 17, which reads as under:-

11. We have considered the rival submissions. We have given a very careful consideration to the rival submissions. The assessee received built up area of the flats of 10,931 sq.ft. during the previous year relevant to A.Y. 2007-08 i.e., on 1.11.2006. The share of property which the assessee received from the builder was let out by the assessee and income from such letting was offered to tax by the assessee under the head 'income from house property'. The return of income was filed by the assessee for A.Y.2007-08 on 24.10.07 declaring total income of Rs.36,04,060 comprising of income from property of Rs.33,88,276 and income from business of Rs.2, 15, 779. The return was processed u/s.143(1) of the Act on 31.10.2008. There was a survey u/s.133A of the Act conducted in the case of M/s. VBDPL, the entity which developed the property. In the course of such

survey, the Revenue came to know about the joint development agreement between the assessee and VBDPL and the fact that capital gain on transfer of the property by the assessee had not been offered to tax in the return of income filed by the assessee for A.Y. 2007-08. Immediately the assessee filed a working of long term capital gain arising from transfer of the property, even without any proceedings having been initiated against the Assessee. The assessee filed only a computation of long term capital gain computing the same at Rs.2,14,42,340, but did not file a revised return of income because the time limit for filing revised return of income had also expired by that time. The above circumstances explained by the Assessee cannot be ignored and was rightly treated by the CIT(A) to be circumstance which go to show the bonafides of the Assessee.

12. The Assessee's explanation that owing to wrong professional advise to the effect that in a Joint Development Agreement there was only a barter and no capital gain arises is also a plausible explanation. Though no material has been brought on record in this regard by the Assessee, it is

widely acknowledged that incidence of capital gain tax in a Joint Development Agreement and the year of chargeability of capital gain tax in a Joint Development Agreement is not free from doubt and is always controversial.

13. *The subsequent conduct of the Assessee in not raising any legal issue with regard to the year of taxability of capital gain and validity of initiation of reassessment proceedings was also rightly treated as a circumstance showing the bonafides of the assessee by the CIT(A). It was open to the Assessee to have taken a stand that in view of the decision of the Hon'ble Karnataka High Court case of Dr.T.K.Dayalu (supra), capital gain in the case of transfer of capital assets under Joint Development agreement will be only the year in which the Joint Development Agreement is entered into and possession given to the developer for developer.*

14. *The Assessee paid taxes much before the issue of the notice u/s 148 and had also duly filed the revised computation of income. The AO's view is that "when the rental income was already offered to tax, it was in the knowledge of the*

assessee that the capital gains are also attracted on taking possession of the built up area". As already stated, the issue was debatable and the belief entertained by the Assessee in this regard cannot be said to be unreasonable. The levy of penalty with regard to computation of long term capital gain by disallowing part of cost of acquisition, in our view, cannot lead to concealment and it, at best, could be an error in computation. The primary facts with regard to the computation of capital gain filed by the Assessee are true and there was no concealment or furnishing of inaccurate particulars therein. Even with regard to disallowance of labour charges of Rs.1759087/- against the business receipts the disallowance was made owing to mismatch between two submissions. The accountant had made a mistake by submitting a provisional ledger extract at one point of time which resulted into certain mismatches in the amounts. The mismatch in the submissions would not result into total expenditure to be bogus. The labour component is major expenditure of the Assessee. The CIT(A) has examined the labour payments of Rs.17,59,087 made to various parties and the mode of payment

and has found that labour charges for Rs.1759087/- have been discharged through bank barring a small expenditure of Rs.3224/- by cash. It appears to us that the Assessee in order to avoid any litigation with the department has accepted the addition and did not file any appeal on the addition made though the entire expenditure is backed up with clear documentary proof.

15. the Hon'ble Supreme Court in the case of MAK Data (P) Ltd v. CIT (2013) 358 ITR 593 (SC) has discussed the approach to be adopted in cases such as that of the Assessee. The assessee-company filed its return of income for the assessment year 2004-05 on 27th October, 2004 declaring income of Rs.16.17 lakh along with tax audit report. The case was selected for scrutiny. At the time of assessment, it came to light that a survey under section 133A was conducted on the assessee on 16.12.2003. During the course of survey, certain documents comprising share application forms, bank statements, memorandum of association of certain companies, affidavits, copies of income-tax return and blank share transfer deeds were impounded. The Assessing

Officer sought specific information pertaining to blank share transfer deeds by means of show cause notice. The assessee-company surrendered a sum of Rs.40.74 lakhs as additional income with a reply in the following manner: "The offer of surrender is by way of voluntary disclosure of income without admitting any concealment whatsoever or with any intention to conceal and subject to non-initiation of penalty proceedings and prosecution". The Assessing Officer completed the assessment by adding Rs.40.74 lakhs as income from other sources and the assessment was completed on 29.12.2006. Further, the Assessing Officer initiated proceedings for levy of penalty towards concealment of income. The Hon'ble Delhi High Court applied clause (A) of Explanation 1 and held that the assessee has not offered any explanation and therefore upheld the levy of penalty. On appeal by the Assessee, the Hon'ble Supreme Court held that Explanation to section 271(1) raises a presumption of concealment, when a difference is noticed by the Assessing Officer between the returned income and assessed income. The burden then is on the assessee to show otherwise, by giving cogent and reliable evidence.

When the initial onus is discharged by the assessee, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise. The Apex Court held that surrender of income with a view to avoid litigation, buy peace and to channelise the energy and resources towards productive work and to make amicable settlement with the Income-tax Department are not recognized type of defence under Explanation 1 to section 271(1)(c) of the Act. It held that the law does not absolve the assessee from concealment penalty merely because a voluntary disclosure of concealed income is made.

16. *The Hon'ble Supreme Court held that the surrender of income in this case is not voluntary and the surrender was in view of the detection made by Assessing Officer. It is not surrender of income on voluntary basis. The survey was conducted 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure, it could have filed the return declaring the amount which was factually surrendered only during the course of assessment proceedings and not in the return filed.*

It is a clear case of the assessee not having intention to declare its true income.

17. *In the present case, as we have already seen, the original return of income was filed by the Assessee in which the income from the property which the Assessee received under the Joint Development Agreement was offered to tax. After survey in the case of the Property Developer, the Assessee file a revised computation of total income offering capital gain to tax and also paid taxes due thereon. We have already found that the explanation offered by the Assessee for not offering the capital gain in the original return of income as bonafide explanation. In the circumstances, we are of the view that the CIT(A) was fully justified in coming to the conclusion that the case is not a fit case for imposing penalty u/s.271(1)(c) of the Act. We concur with the view of the CIT(A) and find no merit in this appeal by the Revenue.”*

4. The aforesaid shows that two authorities one CIT(Appeals) and another, Tribunal, after undertaking the fact finding exercise as to whether the explanation

submitted is bonafide or not, has found that the appellant has acted in a bonafide manner and the explanation is accepted. As such, the aforesaid finding of fact should rest with the conclusion of the Tribunal since the judicial scrutiny by this Court is limited to only substantial questions of law.

5. However, Mr. Sanmathi, learned counsel appearing for the appellant-revenue attempted to contend that the requisite documentary evidence with regard to any opinion by a lawyer had not come on record and therefore, it can be said that the finding recorded by the Tribunal for the bonafide explanation by the assessee is without their being any proper material on record. He has also submitted that the Tribunal has not properly appreciated the documents and the material on record before recording the finding that it is a bonafide explanation and hence, the finding appears

to be perverse and therefore becomes a substantial question of law.

6. We are not at all impressed by the submission for two fold reasons. One, is that appreciation of evidence is once again a question of fact and not a question of law. The second, is that it is not a matter where the Tribunal has not considered the entire facts and circumstances of the case under which the income was offered by the assessee as the income from house property by submission of revised returns and payment of tax even before the proceedings were initiated by the department after survey.

7. Apart from the above, the additional aspect is that the view of the Tribunal on acquiring property under barter system could not be totally ruled out even if the contention of the assessee was to be considered as to be bonafide or not. Under these circumstances, it cannot be said that the Tribunal has recorded a factual

finding without their being any material. The moment one says that the material is not sufficient or the evidence on record was not properly appreciated it would result in upsetting the fact finding by the Tribunal, which is beyond the scope of judicial scrutiny.

8. In view of the above, no substantial question of law would arise for consideration, as canvassed. Hence, the appeal is meritless and therefore, dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

*alb/-.