

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES “C”, BANGALORE**

Before Shri George George K, JM & Shri B.R.Baskaran, AM

ITA No.1714/Bang/2017 : Asst.Year 2012-2013

M/s.Oikos Apartments Pvt.Ltd. #132, Embassy Woods, 6A, Cunningham Road Bengaluru – 560 052. PAN : AAAF01562D.	v.	The Commissioner of Income- tax, (Appeals) 5 Bengaluru.
(Appellant)		(Respondent)

Appellant by : Smt.Pratibha R., Advocate

Respondent by : Sri.Pradeep Kumar, CIT-DR

Date of Hearing : 09.12.2020	Date of Pronouncement : 10.12.2020
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ORDER

Per George George K, JM

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 19.06.2017. The relevant assessment year is 2012-2013.

2. The solitary issue raised is whether the CIT(A) is justified in imposing penalty u/s 271(1)(c) of the I.T.Act amounting to Rs.57,29,893.

3. The brief facts of the case are as follow:

The assessee had entered into an agreement dated 06.06.2011 with M/s.Skyline Construction and Housing Private Limited. As per the agreement, permission of right of way through assessee's land was given to M/s.Skyline Construction and Housing Private Limited. The right of way / easement right was granted for perpetuity. As a consideration for the same, the assessee received Rs.1.5 crore in the current assessment year, viz., assessment year 2012-2013 and the

balance Rs.2 crore was received in assessment year 2014-2015. The assessee did not offer to tax for assessment year 2012-2013 the amount received from M/s.Skyline Construction and Housing Private Limited. According to the assessee, the easement right would be effective only on receipt of full consideration of Rs.3.5 crore and therefore Rs.1.5 crore cannot be taxed in the current assessment year. The Assessing Officer, however, rejected the contentions raised by the assessee and tax a sum of Rs.1.5 crore received by the assessee during the relevant assessment year.

4. Aggrieved by the order of assessment, the assessee filed an appeal to the first appellate authority. The CIT(A) was of the view that the agreement dated 06.06.2011 entered between the assessee and M/s.Skyline Construction and Housing Private Limited was a conclusive agreement and the entire sum of Rs.3.5 crore should be brought to tax in the relevant assessment year. The CIT(A) after issuing enhancement notice and after considering the objections of the assessee, vide order dated 31.03.2017, concluded that the entire amount of Rs.3.5 crore is to be brought to tax in assessment year 2012-2013. The view of the CIT(A) was confirmed by the ITAT in ITA No.1384/Bang/2017 (order dated 31.05.2018).

5. In the meanwhile, the CIT(A) issued notice dated 16.05.2017 u/s 274 r.w.s. 271(1)(c) of the I.T.Act directing the assessee to show cause why penalty u/s 271(1)(c) cannot be imposed on enhancement made by him in the quantum assessment. The CIT(A) vide order dated 19.08.2017 imposed

penalty u/s 271(1)(c) of the I.T.Act for the enhancement made by him in the quantum assessment (i.e. penalty was imposed on quantum enhancement of Rs.2 crore). The CIT(A) imposed penalty of Rs.57,29,893 being 100% of tax sought to be evaded. The relevant finding of the CIT(A) in imposing penalty of Rs.57,29,893 reads as follow:-

“9. Now I proceed in levying the penalty on the enhancement of the assessment, but the question will arise now as to whether minimum penalty of 100% of tax sought to be evaded to be levied or maximum penalty of 300% of tax sought to be evaded to be levied. The imposition of penalty is a matter of discretion and is to be exercised judiciously after consideration of all relevant circumstances and that even if a minor penalty, the authority competent will be justified in not imposing the penalty, if circumstances so warranted. The appellant has not declared those receipts in the original return of income filed in the year in which it was received. During the appellate proceedings it was observed that the taxation of the consideration as other income by the Assessing Officer is not correct and should have been taxed in the year under appeal. Further, the Assessing Officer has taxed only the money received during the year under consideration instead of the entire consideration of Rs.3.5 crores as capital gain. Therefore, in order to bring the entire consideration of Rs.3.5 crores for taxation, an enhancement notice dated 21/03/2017 has been issued asking the appellant as to why the entire money should not be taxed as capital gains in A.Y.2012-13 and the assessment was enhanced. The details of the same and the tax sought to be evaded is worked out as under:

Sl. No.	Income	Rupees
1.	Tax on returned income	Nil
2.	Tax on assessed income as per order u/s 143(3) dated 16.03.2015	66,18,780
3.	Tax on enhancement of assessment order after given effect by ITO-W-5(1)(2) vide letter dated 08.05.2017	1,23,48,673
4.	Difference of 3-1 is the tax on income concealed	57,29,893
5.	The minimum penalty @ 100% of the tax evaded.	57,29,893

6.	The maximum penalty @ 300% of the tax evaded	1,71,89,679
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“Thus, the minimum penalty leviable in this case at 100% of the tax sought to be evaded is Rs.57,29,893/- and the maximum penalty leviable being 300% of such tax sought to be evaded is Rs.1,71,89,679/-. In view of the fact and circumstances of the case, taking a liberal view, I hereby consider a minimum penalty is leviable in this case. Accordingly, the minimum penalty of Rs.57,29,893/- is hereby levied.”

6. The assessee being aggrieved by the order of the CIT(A) imposing penalty of Rs.57,29,893, has filed this appeal before the Tribunal, raising the following grounds:-

1. *That on the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) 5 [(CIT (A))] has grossly erred in imposing penalty under section 271 (1)(c) without any findings.*

The penalty imposed may kindly be deleted.

2. *That on the facts and in the circumstances of the case and in law, the learned CIT (A) has grossly erred in not passing a speaking order as has been held by various Courts, including the Hon'ble Supreme Court of India.*

The order imposing penalty may kindly be quashed and the penalty imposed be deleted.

3. *That on the facts and in the circumstances of the case, that learned CIT (A) has not given any findings. In para 9 on page 7 of his order he has straightaway proceeded to levy the penalty. There has to be conclusive and categorical findings under section 271 (1)(c) before any penalty can be levied under that section.*

The order imposing penalty may, therefore, kindly be quashed and the penalty imposed be deleted.

4. *In the order appealed against, the learned CIT (A) has merely repeated his reasons for passing the appellate order in the quantum appeal. On the basis of those reasons, penalty under section 271 (1)(c) cannot be levied.*

The order imposing penalty may, therefore, kindly be quashed and the penalty imposed be deleted.

5. *While passing the order imposing penalty, the learned CIT (A) has not considered the reply to the penalty notice submitted by the Appellant on 26.05.2017 wherein detailed reasons have been given as to why penalty cannot be imposed. This reply finds no mention in the order imposing penalty.*

In fact, on page 5 of the penalty order, the learned CIT (A) has referred to the Appellant's replies dated 21.03.2017 and 24.03.2017 which had been submitted with respect to the main appeal against the assessment order. This only establishes that the learned CIT (A) had pre-decided to levy penalty.

The penalty order passed without even reading the Appellant's reply cannot be considered judicious by any yardstick. A simple reading of the order will reveal that it has been passed without application of mind. Such an order cannot be sustained.

The order imposing penalty may, therefore, kindly be quashed and the penalty imposed be deleted.

6. *The assessee craves leave to add / alter any of the grounds of appeal before or at the time of hearing."*

7. The learned AR has filed a paper book comprising of 96 pages inter alia enclosing notices issued by the CIT(A), the reply to the said notices, the agreement dated 06.06.2011, the assessment orders for assessment years 2012-2013 and 2014-2015, the CIT(A)'s order and the ITAT's order in the quantum assessment. The learned AR submitted as regards the quantum assessment, the assessee had preferred an appeal to the Hon'ble High Court of Karnataka u/s 260A of the I.T.Act against ITAT order dated 31.05.2018. It was further submitted that the Hon'ble High Court had numbered the appeal as ITA No.660/2018. It was stated that on substantial question of law, notice was issued to the Income Tax Department on 28.05.2019 and appeal was admitted on 31.05.2019. Therefore, by relying on the judgment of the Hon'ble

jurisdictional High Court in the case of CIT v. Dr.Harsha N.Biliangady in ITA No.292 of 2014 (judgment dated 10th March, 2015) it was contended that when the High Court had admitted the appeal u/s 260A of the I.T.Act as regards the quantum assessment, the penalty imposed u/s 271(1)(c) of the I.T.Act needs to be quashed because the mere admission of appeal by High Court on substantial question of law would make it apparent that additions made were debatable.

8. The learned Departmental Representative relied on the order of the CIT(A).

9. We have heard the rival submissions and perused the material on record. As regards the quantum assessment, the issue was decided against the assessee by the ITAT in its order dated 31.05.2018 in ITA No.1384/Bang/2017. The assessee had preferred an appeal to the Hon'ble jurisdictional High Court u/s 260A of the I.T.Act against the above order of the ITAT. (appeal was instituted on 17.09.2018). The Hon'ble jurisdictional High Court had admitted the appeal on 31.05.2019. The Hon'ble jurisdictional High Court in the case of CIT v. Dr.Harsha N.Biliangady (supra) had held that when substantial question has been admitted on quantum assessment, penalty u/s 271(1)(c) of the I.T.Act cannot survive since the additions made were apparently debatable / doubtful. The relevant finding of the Hon'ble High Court reads as follow:-

“8. We do not find any reason to hold that the finding given and the conclusion arrived at by the Tribunal as incorrect. We are also of the opinion that where penalty is imposed in respect

of any addition where the High Court has admitted the appeal on substantial question of law, then the sustainability of the addition itself becomes debatable, and in such circumstances penalty cannot be levied under Section 271(1)(c) of the Act. Penalty can only be imposed for concealment of material particulars or furnishing of inaccurate particulars by the assessee. In the facts of the present case, we are of the view that the assessee cannot be held guilty of the concealment of any material particulars of his income or having furnished inaccurate particulars of such income, so as to attract provisions of Section 271(1)(c) of the Act.”

10. In view of the admission of substantial question of law raised on the issue of quantum assessment by the Hon’ble High Court, we are of the view that the penalty imposed u/s 271(1)(c) of the I.T.Act in given facts and circumstances of the case need to be deleted. Accordingly, we delete the penalty u/s 271(1)(c) of the I.T.Act. It is ordered accordingly.

11. In the result, the appeal filed by the assessee is allowed.

Order pronounced on this 10th day of December, 2020.

Sd/-
(B.R.Baskaran)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 10th December, 2020.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-5, Bangalore
4. The Pr.CIT-5, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore