

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **{ITA No.1977 OF 2010}**

% *Judgment reserved on 09.12.2010*
Judgment delivered on:14.1.2011

THE COMMISSIONER OF INCOME TAX . . . APPELLANT
Through : Ms.Suruchi Aggarwal, Advocate
VERSUS

SPLENDER CONSTRUCTIONRESPONDENT
Through: Mr. Manu K. Giri, Advocate for the
respondent.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. This appeal was admitted on 9th December, 2010 on the following question of law:-

1. Whether the treatment given by the assessee company to the short terms capital asset as a long term capital asset is not a colorable device used by the assessee company to pay lower rate of tax on the gain accruing from the sale of immovable property under the garb of 'Long Terms Capital Gain' which was actually the short terms capital gain attracting normal rate of tax?

2. Whether AO was justified in imposing penalty under Section 271(1)(c) as the income derived by the assessee was taxable at the normal rate of tax i.e. 35% under short terms capital gain, whereas in the return of income the assessee declared this income as Long Terms Capital Gain, and paid tax at a lower rate i.e. 20% and thus furnished inaccurate particulars of its income?"

2. Since counsel for the parties were ready to argue the matter finally, we heard their arguments as well and reserved the judgment.

3. We now proceed to answer the aforesaid questions of law which has the following factual edifice.

4. The assessee company filed its return on 10th November, 2003 for the assessment years 2003-04 declaring an income of Rs. 1,78,64,668/-. The return was process under Section 143 (1) on 30th March, 2004. Subsequently, the case was selected for scrutiny and notice under Section 143 (2) was issued on 27th November, 2004 which was duly served upon the assessee company.

5. During the course of assessment proceedings, it was noticed that the assessee company had declared long term capital gain on sale of land owned by it. From the details furnished by the assessee during the course of assessment proceedings, it was discovered that the company purchased the land in the financial year 1998-99 and some improvements were made on it. In the Balance Sheet filed in consecutive years the land was shown as 'stock in trade' and its value cost as on 31st March, 2002 was reflected at Rs. 3,46,63,069/-. In the balance sheet as on 31st March, 2003 filed with the return of, no stock in trade was declared. The assessee company claimed that during the financial year under consideration it had converted its stock in trade comprising of the impugned land into 'investment' and sold the same on 12th December, 2002 to another company i.e. M/s Premier Tyers Ltd. for Rs. 6,00,00,000/-. The difference of sale consideration and the cost of purchase which came to Rs. 2,53,36,931/- was declared as long term gains. The income from long term gain was declared at Rs. 1,66,09,750/- after claiming benefit of indexed cost of acquisition. The period of holding the asset was reckoned from the date when it was

converted as 'investment' from 'stock in trade' and since it was less than three years, the gain was treated as short term capital gain and taxed as such by the Assessing Officer. The Assessing Officer also made one more addition, rejecting the claim of the assessee. However, since this appeal concerning the penalty order is admitted only on the aforesaid addition made by the Assessing Officer, we need not spell out the other aspect.

6. While making this addition, along with other addition, the Assessing Officer also initiated penalty proceedings by issuing show cause notice under Section 271 (1)(c) of the Income-Tax Act (hereinafter referred to as the 'Act'). After giving opportunity to the assessee to show cause thereagainst and hearing the assessee, penalty order dated 19th June, 2009 was passed imposing penalty of Rs. 58,70,115/-. This order of the Assessing Officer was confirmed by the CIT (A) but the Tribunal allowed the appeal of the assessee and deleted the penalty.

7. We may point out at this stage that in so far as quantum proceedings are concerned, the order of the Assessing Officer was upheld by the CIT(A) as well as ITAT and has attained finality. The assessee had preferred appeal thereagainst to this Court which was also dismissed.

8. Notwithstanding the same, the Tribunal held that no penalty was leviable on addition on account of capital asset on the ground that whether the asset was a long term capital asset or short term capital asset, was a debatable issue. According to the Tribunal it became debatable issue because of the reason that against the order passed by

the Tribunal in quantum appeal, substantial question of law was admitted by this Court in appeal preferred by the assessee i.e. ITA 662/2009. As the substantial question of law arose it could not be treated as frivolous or mala fide to attract the levy of penalty under Section 271 (1) (c) of the Act.

9. In the facts and circumstances of the present case, we cannot agree with the approach adopted by the Tribunal. We are of the opinion that the Tribunal has side tracked the main issue. It was a case where the land in question was purchased in the financial year 1998-99. Thereafter, it was shown in the balance sheet as 'stock in trade'. However, during the financial year in question when the land was sold, the same have been converted by the assessee from 'stock in trade' to "investment". Obviously, this change in the books of accounts, just before the sale of the property, was made to avoid payment of full taxes by changing the complexion of the earnings made on the sale of the property. The Assessing Officer, however, still allowed the change but then was right in holding that the period of holding the asset was reckoned from the date when it was converted as 'investment' from 'stock in trade' and not from the date when the land was purchased. Therefore, the gain was to be treated as short term capital gain. The assessee, under the garb "long term capital gain" wanted to pay lesser tax. It had thus clearly furnished inaccurate particulars of income.

10. The issue was not debatable, as held by the Tribunal in the impugned order. No doubt, appeal was admitted. However, the Tribunal has glossed over a very important and fundamental fact. In quantum proceedings, appeal filed by the assessee i.e. ITA 662/2009 came up for admission on 16th September, 2009. On the same date, appeal was admitted, arguments heard and orders were dictated in the

Court dismissing the appeal there and then. In this factual backdrop, when order of the Assessing Officer in quantum proceedings was sustained by all successive authorities and this Court also dismissed the appeal at the admission stage, *albeit* after admitting the same, it cannot be said that the issue was debatable.

11. We thus, answer both the questions of law in favour of the Revenue and against the assessee and as a consequence allow this appeal partially and set aside the order of the Tribunal and restore that of the Assessing officer limiting the penalty on the aforesaid ground.

(A.K. SIKRI)
JUDGE

(INDERMEET KAUR)
JUDGE

January 14, 2011
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