2009-TIOL-282-ITAT-MUM

IN THE INCOME TAX APPELLATE TRIBUNAL
I-BENCH, MUMBAI

ITA	No.	5391/Mum/2004	-	A.Y.	:	1980-90
ITA	No.	5392/Mum/2004	-	A.Y.	:	1990-91
ITA	No.	5393/Mum/2004	-	A.Y.	:	1991-92
ITA	No.	3423/Mum/2006	-	A.Y.	:	1989-90
ITA	No.	3424/Mum/2006	-	A.Y.	:	1990-91

ITA No. 3425/Mum/2006 - A.Y. : 1991-92

LOKPRIYA HOUSING DEVELOPMENT PVT LTD

GROUND FLOOR, GAUTAM NIWAS, 548, Dr BA ROAD

MATUNGA (E), MUMBAI-19

PAN: AAACL7971N

Vs

ITO,
6(3)(2)

Shri J Sudhakar Reddy, AM & Shri R S Padvekar, JM

Dated: February 11, 2009

Appellant Rep by: Shri M Subramanian

Respondent Rep by: Shri S K Mahaptra

Income Tax - Section-147 and penalty u/s 271(1)(c) - Assessee engaged in the business of Real Estate development - follows project completion method of accounting - declares nil income - AO reopens assessment beyond the statutory time limit – CIT (A) confirms the order and also confirms the penalty u/s 271(1)(c) - Held, , for the A.Y 1990-91 and 1991-92 the reopening is bad in law because the revenue could not produce the exact reasons for reopening despite repeated opportunity given by the bench and has ultimately come out with a letter stating that the records for AY. 1989-90 are not traceable, for the A.Y 1990-91 and 1991-92 the reasons recorded are not available on record. No permission as required is stated to have been obtained by the AO prior to issue of notice u/s. 148 for

the A.Y 1990-91 and 1991-92 in terms of section 151 and the addition itself is made on protective basis, so the question of coming to conclusion that income escaped assessment does not arise, for permitting reopening .For assessment year 1989-90, The AO cannot frame an opinion that the income chargeable to tax has escaped assessment as he had not information of the return filed by the assessee It is well settled that there should be reasonable belief and it should be based on record, for coming to a conclusion that income has escaped assessment when the reason cannot be produced, there is no other alternative but to draw adverse inference and agree with the contention of the assessee. Assessments of all the A.Y under appeals is bad in law .Contention of the assessee upheld. The penalties levied based on those assessments have no leg to stand. Assessee Appeal allowed.

ORDER

Per : Bench :

All these appeals are filed by the assessee. ITA Nos.5391 to 5393/Mum/2004 are directed against independent orders passed by the CIT(A)-XXVI Mumbai all dated 31.3.2004 confirming the order passed by the assessing officer under section 143(3) r.w.s. 147 of the Act whereas ITA Nos. 3423 to 3425/Mum/2006 are directed against the order of the CIT (A) –XXVI, Mumbai confirming the penalty imposed by the assessing officer under section 271(1)(c) for the assessment years 1989-90, 1990-91 and 1991-92. AO all the appeals pertain to one assessee and as common issues are involved, for the sake of convenience, these appeal were heard together and are disposed of by way of this common order.

Quantum appeals

2. In the quantum appeals, the assessee has raised the following summarized common grounds of appeal.

“1. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in upholding the action of the assessing officer for estimating the income at 10% of the earnest money deposit.

2. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in upholding the action of the assessing officer in not allowing expenditure except depreciation."

3. The assessee also sought to file the following additional grounds of appeal:

“1. On the facts and in the circumstances of the case and in law, the proceedings initiated by issuance of Notice u/s 148 of the IT Act is invalid and bad in law.

2. On the facts and in the circumstances of the case and in law, the Assessment order passed u/s 143(3) r.w.s. 147 of the I.T.Act is invalid and bad in law.

3. On the facts and in the circumstances of the case and in law, the interest charged u/s 234-A & 234-B of the I.T.Act is invalid and bad in law.”

4. The learned counsel for the assessee, Shri M Subramanian argued that the additional grounds of appeal taken for the first time before the Tribunal are legal grounds and have to be admitted as all the facts are on record. He placed reliance on the judgment of the Hon'ble Supreme Court in the case of *NTPC CIT Vs 229 ITR 383 (SC) = (2002-TIOL-279-SC-IT).* He submitted that these legal grounds would go into the root of the matter and it was inadvertently omitted to be taken earlier. The learned departmental representative, Shri S K Mahaptra, on the other hand, strongly opposed the admission of this legal grounds and submitted that these grounds were neither taken before the assessing officer nor before the first Appellate authority. He further submitted that the assessee has not sought reasons for reopening earlier and thus, it cannot demand the reasons of reopening at this stage.

5. After hearing rival contentions, we are of the considered opinion that the issue as to whether the reopening of assessments is valid or not, is a legal issue and as the facts are on record the same may be admitted, by applying the decision of the Hon'ble Supreme Court in the case of NTPC Vs CIT (supra). Accordingly the additional grounds are admitted.

6. Facts in brief: The assessee is a company and is in the business of development of real estate. The assessee claims to be following project completion method of accounting since its inception on 17.12.1966. As per the order of the Assessing Officer, it could be gathered that the assessee had filed its return of income for the assessment year 1989-90 on 27.12.1989 declaring total income at Nil. This return was processed u/s 143(1)(a). Subsequently notice u/s 148 was issued on 30.3.2000 and the assessment was reopened u/s 147 of the Act. Similarly, for assessment year 1990-91 and 1991-92 notice u/s 148 was issued on 08.04.1997 consequent to which the assessee filed returns of the income on 05.1.2000 declaring Nil income for both the assessment years. The assessee challenging the reopening of assessments of these assessments on the

ground that - (a) no reasons have been recorded before issuing notice u/s 148; (b) as the reopening is made beyond the statutory time limit previous approval from the higher authority u/s 151 had to be mandatorily obtained and such approval was not obtained.

7. The case was being adjourned from time to time with the direction to the revenue to furnish the reasons recorded for reopening the assessment to the assessee. Finally the revenue has furnished a letter dated 18.11.2008 at the time of hearing, which stated as under.

“Kindly refer to your letter N/Sr. A.R./ITA/I-BENCH/2008-09 dt. 11.11.2008 addressed to the Addl. Commissioner of Income Tax, Range 6(3), Mumbai and copy endorsed to the undersigned on the captioned subject.

As per the letter, it is desired that the reason for re-opening the assessment be provided to the assessee before 25.11.2008. In this regard, it may kindly be noted that the reasons for re-opening for the above assessment years are not available no recorded for A.Y. 1990-91 and 1991-92 and the case records for AY. 1989-90 is not traceable. However, the reasons for re-opening the assessment for AY. 1989-90 are mentioned in concluding part of the assessment orders for the A.Y. 1990-91 and 1991-92 and also as per the reopened assessment order for AY. 1989-90 it is seen that the same has been reopened after obtaining approval of the CIT City V Mumbai. Since the assessee had to mandatory follow mercantile system of accounting from A.Y. 1989-90 onwards, income of the assessee, being 10% of the sale proceeds, was to be taxed substantially in AY. 1989-90 for which the assessment was re-opened.

From the deta is available on record, it is seen that the for AY 1990-91 and, 1991-92 no regular return was filed by the assessee and since a percentage of the sale proceeds was to be taxed as income accrued during the year as per mercantile system of accounting, the assessment for the said years was reopened u/s 147.

6.1 Going by this letter, we tried to ascertain the reasons for re-opening from the assessment order passed for assessment year 1991-91. At paragraph 3 on the last but one page of the assessment order dated 30.3.2000, the assessing officer recorded as follows;

"..... The assessee claims that it is following a hybrid system of accounting. However, from AY. 88-89 i.e. AY. 89-90, all companies have to mandatorily follow mercantile system of accounting. Therefore, what ever amounts were receivable in the F.Y. 88-89, have to be offered as income

and are taxable in the AY. 1989-90, but, prior to F.Y. 88-89 i.e. AY. 1989-90 the assessee had a choice of following a hybrid system of accounting.

Therefore, to the extent legally permissible, the past assessment years will be reopened and income brought to tax. From the official records, it is observed no records prior to A.Y. 1990-91 are available. Thus, it is not clear whether the assessee has filed any return for the period prior to the A.Y. 1990-91 in this charge are not. The assessee also mentioned that its method of accounting was accepted before the department. This however, cannot be verified as no return of income is filed for the periods prior to the assessment years under consideration. In the given situation, in the interest of the revenue, additions will have to be made protectively, for those incomes which in the opinion of the AO will have to be taxed substantially in the assessment years prior to A.Y. 1990-91."

7. In our considered opinion, on the facts extracted above, for the assessment year 1990-91 and 1991-92 the reopening is bad in law for more than one reason. (1) The revenue could not produce the exact reasons for reopening despite repeated opportunity given by the bench of has ultimately come out with a letter stating that the records for AY. 1989-90 are not traced. (2) For the assessment years 1990-91 and 1991-92 the reasons recorded are not available on record. Thus, the reopening is bad in law, (3) No permission as required is stated to have been obtained by the assessing officer prior to issue of notice u/s. 148 for the assessment years 1990-91 and 1991-92 in terms of section 151 of the I.T. Act (4) for the addition itself is made on protective basis, so the question of coming to conclusion that income escaped assessment does not arise, for permitting reopening.

8. Coming to assessment year 1989-90, the assessee had already filed its return of income and has, admittedly, disclosed full particulars therein. In the last but one page of the assessment order for the assessment year 1990-91, it is just mentioned that to the extent legally permissible, the past assessments will be reopened and income brought to tax. The assessing officer did not know whether the assessee had filed its return for the assessment year 1989-90 or not. The assessing officer had not verified his records before come to a conclusion. On this factual matrix, it cannot be said that the assessing officer has correctly come to a conclusion, that it could be reasonably believed, that the assessee's income has escaped assessment, especially when the fact is that the assessee had, in fact, filed its return of income for the assessment year 1989-90 on 27.12.1989 itself. The assessing Officer cannot frame an opinion that the income chargeable to tax has escaped assessment as he had not information of the return filed by the assessee on 27.12.1980 for the assessment year, 1989-90.

Such action and belief of the AO is not only arbitrary but also not based on facts. Such reasons, if any, will be untenable in law. It is well settled that there should be reasonable belief and it should be based on record, for coming to a conclusion that income has escaped assessment when the reason cannot be produced, we have no other alternative but to draw adverse inference and agree with the contention of the assessee. Thus, based on the above factual matrix, we uphold the contention of the assessee that reopening is bad in law.

9. In view of the above reasons, we hold that the reopening of assessments of all the assessment years under appeals is bad in law. Therefore, we cancel the reopening of assessments and the consequent assessment orders framed u/s 143(3) r.w.s 147 of the Act for all the three years under appeals.

10. As the assessment itself have been cancelled, the penalties levied based on those assessments have no leg to stand. Thus, these appeals are allowed.

11. In the result, the appeals filed by the assessee are allowed.

12. Order pronounced on this 11.2.2009.

(Paras are numbered as per the original text: Editor).