IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'E' MUMBAI

ITA No.3064/Mum/2008
Assessment Year: 2006-2007

M/s EARTH CASTLE
101, AKRUTI ADITYA TOWER
36, NOSHIR BHARUCHA MARG
MUMBAI-400007
PAN NO:AABFE3880F

Vs

DEPUTY COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE-32, AAYAKAR BHAVAN
MUMBAI

R S Padvekar, JM and Rajendra Singh, AM

Dated: June 17, 2011

ORDER

Per: Rajendra Singh:

This appeal by the assessee is directed against the order dated 29.2.2008 of the CIT(A) for the Assessment Year 2006-07. The only dispute raised in this appeal is regarding levy of penalty under section 271(1)(c) for concealment of income.

2. Briefly stated facts of the case are that the assessee firm is a builder and developer which belongs to "Earth Group". A search has been conducted under section 132 in case of "Earth Group" on 1.9.2005 which also covered the assessee. During the course of search two diaries marked as A-11 and A-12 were found and seized. The partner Shri Bhupesh P. Jain stated on 3.9.2005 that the diary A-11 contained all payments received by the assessee by cheque whereas all cash sale receipts were recorded in the diary A-12. It was admitted that cash receipts recorded in the diary A-12 were in the nature of on money receipts and payments which were not reflected in the regular books. As regards diary A-11, it was submitted that the transactions were fully recorded in the books. The receipts mentioned in the diary A-12 were declared as undisclosed income in the name of various concerns of "Earth Group".

3. During the assessment proceedings, the Assessing Officer noted that in seven cases the amount disclosed in the diary A-11 were more than the amount disclosed in the books of account. The difference was added by the Assessing Officer to the total income. Details regarding these seven transactions were as under :-

S.No.	Flat No.	Sale value as per seized	Sale value as per book of	Sale Value considered by	Addition

		diary A-11	account	Assessing Officer	
1.	1001	4000000	3475000	4000000	525000
2.	802	950000	-	950000	950000
3.	1203	4200000	3250000	4200000	950000
4.	1302	5451111	5411111	5451111	40000
5.	1401	4000000	3800000	4000000	200000
6.	1402 & 1403	8700000	8100000	8700000	600000
7.	1503	4788000	4011000	4788000	777000

Similarly the Assessing Officer also noted that there was discrepancy with respect to diary A-12 and in four cases the amount recorded in the diary were more than the amount offered by the assessee in the return of income. The details of transactions were as under :-

S.No.	Flat No.	Sale value as per seized diary A-12	Sale value as per books of accounts	Sale value considered by Assessing Officer	Addition
8.	501	2115100	1764350	2115100	350750
9.	1501	5450000	Nil	5450000	5450000
10.	1801/1802	10000000	100000	10000000	9900000
11.	Shop-19	1310000	Nil	1310000	1310000

The total amounts not accounted by the assessee as per details mentioned above came to Rs.2,42,07,888/-. Since the assessee had completed only 83% of the project, the Assessing Officer treated 83% of the excess sale mentioned above i.e. Rs.2,00,92,546/- as undisclosed sales and added to the total income. The Assessing Officer had also initiated penalty proceedings for concealment of income and levied penalty @ 100% of tax sought to be evaded which came to Rs.67,63,150/-.

4. In appeal, the CIT(A) in relation to the addition made on the basis of diary A-11 observed that there were no disputes that all the payments were by cheque and therefore, it could not be said that the assessee had not intended to disclose the transactions in the books of account. The assessee had filed explanation which was supported by documentary facts. The CIT(A) therefore, deleted the penalty in relation to addition made based on diary A- 11. The CIT(A) however, confirmed the penalty in relation to additions made based on diary A-12. Revenue is not in appeal against relief allowed by CIT(A). We have therefore to deal with only the penalty in relation to addition made based on diary A-12.

5. During the penalty proceedings, the assessee submitted before the Assessing Officer that penalty proceedings were different from assessment proceedings and that mere addition in assessment could not automatically lead to concealment. The assessee was entitled to adduce evidence in support of contention that there was no concealment. In relation to flat No.501, it was submitted that in the seized diary, the

left side showed the amount given back/returned back. The sum of Rs.3,50,750/- was recorded on the left side which represented the amount returned and therefore no addition was required. The Assessing Officer however did not accept the explanation. It was observed by him that sales recorded in diary were Rs.21,15,100/- but in the regular books, the amount recorded was Rs.17,64,350/-. The assessee had also not objected to the addition made by the Assessing Officer as no appeal had been filed before the CIT(A). He therefore, rejected the explanation. In relation to flat 1501, the assessee submitted that the flat had been booked by the purchaser in June 2004 and he had paid a sum of Rs.54,50,000/- in cash up to February 2005 and Rs.1.00 lacs in cheque in January, 2005. Due to loss in business, he was unable to pay balance amount and cancelled the deal and the amounts were returned both in cash and in cheque and the flat was vacant till date. Similar explanation was given in relation to flat No.1801 and 1802 that the booking had been cancelled and the amounts had been cancelled and the amounts had been returned. It was also submitted that the assessee had offered income of Rs.1.00 lacs in the return of income to buy peace of mind. It was pointed out that flat No.1801 was still vacant and flat 1802 had been given to a re-habilitated tenant free of cost. In regard to shop No.19, it was submitted that the purchaser had requested the assessee for some interior work. The assessee had therefore given instruction on behalf of the purchaser to labour contractor for interior work. The amount written in the diary was received by the assessee from the purchaser and given directly to the labour contractor. The Assessing Officer however did not accept the explanation and argued that the assessee had himself claimed that the transactions were not recorded. There was also no evidence to substantiate the claim. He therefore, levied penalty @ 100% of tax sought to be evaded. In appeal CIT(A) agreed with the Assessing Officer and observed that the explanation given by assessee was not supported by documentary evidence. Assessee had not filed confirmation regarding cancellation of booking and return of amounts. The entries have clearly recorded in the seized diary. The assessee also could not produce evidence to show that the amount received for interior decoration was given to the contractor. CIT(A) thus agreed with the Assessing Officer that assessee had concealed the income and penalty was leviable. He therefore, confirmed the penalty to the tune of Rs.47,52,29/-. Aggrieved by the said decision, the assessee is in appeal before the Tribunal.

6. We have heard both the parties. The ld. AR for the assessee submitted that merely because there is an addition in the assessment and the assessee had not filed an appeal cannot automatically lead to concealment and the assessee was free to produce evidence in the penalty proceedings to prove that there was no concealment of income. It was submitted that addition of Rs.3,50,050/- made on the basis of entry on the left side of page-50 of the document A-12 was not justified as the amount had been returned. There was another amount of Rs.2.90 lacs written on the left side which had been deducted but no deduction had been allowed in respect of Rs.3,50,050/- which was not correct. In regard to flat No.1501 it was submitted that the deal had not materialized and the amount had been returned on 19.12.2005 which was clear from the ledger copy placed at page-5 of the paper book showing return for Rs.1.00 lacs by cheque to Reena Arvind Goyal in relation to flat No.1501. Similarly it was further submitted that deal in addition to flat No.1801 and 1802 had also been cancelled. As regards flat No.1802, it was further submitted that the same had been allotted to a rehabilitated tenant free of cost. The ld. AR for the assessee further argued that the assessee has evidence to support the claim that the flat No.1501 and 1801 had been shown in the stock in the subsequent years and were

sold later to other parties. It was requested that the additional evidence filed in the paper book-2 which contains the following documents should be admitted.

i) Statement of flats held as on 31.3.2007 as given before Assessing Officer in Assessment Year 2007-08.

ii) Copy of sale agreement dated 25.3.2009 regarding sale of flat No.1501 to Shri C. T. Bhansali and Smt. P.C. Bhansali for a consideration of Rs.1,08,00,000/- placed at page 12 to 14 of the paper book-2.

iii) Copy of the agreement of sale dated 25.3.2009 in relation to flat No.1801 sold to Mrs. Savita Mahendra Jain and Shri Mahindra D. Jain for a consideration of Rs.1,34,40,000/- placed at pages 15 to 17 of the paper book-2.

iv) Copy of assessment order dated 29.10.2010 for Assessment Year 2008-09.

v) Details of plot sold submitted to Assessing Officer in Assessment Year 2008-09 placed at page 27 and 28 of the paper book.

vi) Details of sundry debtors as on 31.3.2008 showing amount receivable in respect of flat Nos. 1501 and 1801 at page 34 to 35 of the paper book.

vii) Copy of agreement dated 25.2.2008 regarding flat No.1802 given to rehabilitated tenant at page 40 to 44 of the paper book.

6.1. It was requested by the ld. AR that the additional evidence should be accepted which will support the bonafide of the claim of the assessee that the flats had not been sold in the relevant Assessment Year. It was argued that the bonafide of the explanation should be tested by probability of the explanation given and in case there was equal possibility of accepting or rejecting the explanation the benefit of doubt should be given to the assessee. Reliance was placed on the judgment of Hon'ble High Court of Gujarat in case of *National Textiles Limited vs. CIT (249 ITR 145)* and the decision of Delhi Bench of the Tribunal in case of *Smt. Shanta Kumari vs. ITO (38 ITD 175)*. It was also submitted that penalty was not automatic and should be levied only when statutory conditions for levy are satisfied as held by Hon'ble Supreme Court in the case of *CIT vs. Atul Mohan Bindal (317 ITR 1)*. Accordingly it was urged that the penalty levied should be deleted.

7. The ld. DR on the other hand strongly supported the orders of the authorities below. It was argued that the assessee had itself admitted that the transaction recorded in the diary A-12 were cash transactions not recorded in the books and the assessee had itself declared undisclosed income on this account. Further addition had been made by the Assessing Officer on the basis of some discrepancies and these additions were also accepted by the assessee as the assessee did not file appeal against the additions. It was improbable that the flat having been not sold during the year, the assessee would agree to substantial additions and would not file appeal. The ld. DR also opposed the admission of additional evidence on the ground that the assessee could have easily filed evidence regarding cancellation of the sale agreement and return of the money before Assessing Officer which had not been done. Accordingly it was requested that the additional evidence should not be admitted.

8. We have perused the records and considered the rival contentions carefully. The dispute is regarding levy of penalty under section 271(1)(c). The penalty has been levied in respect of additions made by the Assessing Officer based on the material found during the search. During the search, a diary namely A-12 was seized which showed unaccounted cash transactions in relation to dealings in properties. The assessee at the time of search admitted that these cash transactions represented unaccounted income not disclosed in the books of account. Based on these transactions the undisclosed income had been declared in the name of different members of the group including the assessee. However, the Assessing Officer at the time of assessment found that income in respect of five properties as mentioned in the table in para-3 earlier, had not been fully disclosed. The assessee could not give any satisfactory explanation and Assessing Officer made an addition of Rs.2,00,92,546/- on this account and also initiated penalty proceedings and levied penalty for concealment of income under section 271(1)(c).

8.1. It has been argued on behalf of the assessee that a sum of Rs.3,50,750/- added by the Assessing Officer on account of flat -501 was the money refunded by the assessee as mentioned in the diary itself. Therefore, addition was not justified in relation to flat No.501. In relation to flats 1801/1802 it has been submitted that the bookings had been cancelled and the amount had been returned subsequently. It has also been submitted that flat 1802 had subsequently been given to a re-habilitated tenant free of cost. Regarding shop No.19 it was submitted that the amount represented money received from the purchaser for some interior work which had been given to the contractor and was not income of the assessee. It was also submitted that merely because the assessee did not dispute the addition it could not be a ground for levy of penalty and that the assessee was free to adduce further material and raise further plea at the time penalty proceedings. The assessee at the time of hearing of the appeal before us, also furnished some additional evidence such as agreements dated 25.3.2009 in respect of sale of flats 1501 and 1801 to different persons in Financial Year 2008-09 and other evidence as mentioned on para-6 earlier to substantiate the plea that the bookings in respect of the flats had been cancelled and the flats remained with the assessee. We admit these additional evidences as these came to the possession of the assessee subsequently in the interest of justice and will deal with them at appropriate place later.

8.2. It is a settled legal position as held by Hon'ble Supreme Court in the case of *Dharmendra Textile Processors and Others (306 ITR 277)* that penalty under section 271(1)(c) is only a civil liability and is remedy for loss of revenue. Mens rea or will full concealment is not required to be proved by the revenue. However, we agree with the ld. AR that each and every addition made in the assessment can not automatically lead to penalty. Similarly non-filing of the appeal by the assessee against addition made in the assessment can also not be the ground to conclude that assessee accepted concealment. The penalty proceedings are different from assessment proceedings. It is a settled legal position as held by the Hon'ble Supreme Court in case of *Anantharam Veerasingaiah & Co. (123 ITR 457)* that though the addition made in the assessment constitutes good evidence but the same is not conclusive in the penalty proceeding in which the assessee is free to place further material to substantiate the claim that there was no concealment. The assessee in the present case filed copy of ledger dated 19.12.2005 before the Assessing Officer to show that a sum of Rs.1.00 lacs received by cheque on 29.1.2005 from Reena Arvind Goyal for booking of flat 1501 had been returned by cheque on 19.12.2005. This was filed at the time of penalty proceedings. Subsequently as mentioned earlier the assessee has also filed additional evidences before us to substantiate the claim

that booking in respect of flat 1501 and 1801/1802 had been cancelled and flats remained with the assessee. We have now to evaluate the case of penalty considering the facts and circumstances of the case under the provisions of Explanation 271(1)(c) which provides that in relation to any addition in the assessment in case the assessee is not able to substantiate an explanation and is also not able to prove that the explanation is bonafide, it would amount to deemed concealment of income.

8.3. We now take up the individual items of additions. In relation to flat No.501, the explanation of the assessee is that a sum of Rs.3,50,060/- written on the left side of the diary was the amount which had been returned and therefore, it was wrongly added. We have perused the said page of the diary. We find that the total of the transactions worked out by the assessee is Rs.24,05,000/-. On the left side there is one noting of Rs.2,90,000/- against which date is also mentioned which the assessee deducted from the gross amount and the net amount of Rs.21,15,000/- was mentioned at the top of the page itself. The other amount was Rs.3,50,060/- mentioned on the left side is not dated and the assessee did not deduct the same which shows that this amount had not been refunded. Moreover the assessee had itself worked out the net amount which had been taken by the Assessing Officer and therefore, we see no error in the working made by the Assessing Officer. The explanation of the assessee that the sum of Rs.3,50,060/- had been refunded is neither substantiated with any evidence nor on the facts of the case the explanation is considered bonafide. Therefore, in our view penalty is leviable.

8.4. As regards flat No.1501 total cash of Rs.54,50,000/- had been received during the period 26.6.2004 to 26.2.2005 and is recorded in the diary and payment of Rs.1.00 lacs by cheque on 29.1.2005. In relation to flat No.1801 and 1802, total cash receipt of Rs.1.00 crores is recorded in the diary in the relevant year. The assessee at the time of penalty proceedings submitted ledger copy showing that a sum of Rs.1.00 lacs was returned to Reena Arvind Goyal by cheque on 19.12.2005. In addition to flat No.1801, there is no such evidence given. The assessee has also filed agreements dated 19.3.2009 to show that the said flat had been sold by the assessee to some other buyer and therefore, the earlier booking in 2005 had been cancelled. It may be noted that the ledger copy dated 19.12.2005 is only after search in the next year and therefore, such evidence is not reliable and can be easily created. Further there is no confirmation from the buyer to substantiate the claim that the booking had been cancelled. Therefore, only by issue of cheque of Rs.1.00 lacs and that too subsequent to search the assessee cannot show that the flat had been returned. As regards the additional evidences produced before us such as agreements dated 19.3.2009 we find that the assessee has given only three pages i.e., pages 1,8, and 58 of the agreements placed at pages 12 to 14 and pages 11 to 17 of the paper book –II and these pages do not give the description of the property and therefore, it is not possible to conclude that the agreements relate to flat Nos.1501 and 1801. Secondly it is also noted that the amounts receivable in respect of the so called sale of flat No.1501 and 1801 has been shown in the list of sundry debtors as receivable on 31.3.2008 at pages 34- 35 of the paper book-II. In case, the flats were sold by agreement dated 25.3.2009, it is not clear as to how sale proceedings would appear in the balance sheet as on 31.3.2008. The assessee has also submitted copy of assessment orders for 2007-08 and 2008-09, but we find that there is no finding by the Assessing Officer regarding sale of these flats. Further even if it is accepted for the sake of argument that the flats remained with the assessee in subsequent years, such evidence can easily be created in collusion with the buyer because it suites both the parties as the assessee as well as buyer both are hit by

the material found during the search. The assessee is liable for unaccounted income on account of cash received whereas the buyer has to explain the cash transactions. Therefore, both can easily collude and assessee can buy the flat subsequently from the same buyer at the same price and explain that the booking had been cancelled and the amount refunded and the flat remained with the assessee. Such evidences therefore do not disprove the fact that the flats had been sold in the relevant year. In case the assessee sells the flat in a particular year and subsequently in the next year buys back the same flats at the same price, these are two different transactions. The assessee has to show income in respect of flats sold in the earlier year though there will be no income in relation to the subsequent transaction being on the same price. In relation to the shop, no arguments were advanced by the ld. AR.

8.5. Thus the evidence filed by the assessee are not only not reliable, these also do not establish that the assessee had not sold the flats in the relevant year. By bringing back the flats in its books in the subsequent year after the search, through a collusive transaction which helps both the parties, the assessee cannot deny the sale transactions in the earlier year which is duly supported by cash receipts recorded in the diary which the assessee itself admitted as its unaccounted income. It may also be noted that substantial addition of Rs.2,00,92,546/- made in the assessment has been accepted by the assessee . No assessee would accept such huge additions running into crores in case no sale had taken place and there was no income. It is not a case of addition of few thousands which the assessee may not pursue in appeal as it may not be cost effective but not disputing additions running into crores which the assessee thinks that there was no income at all, does not conform to normal human conduct. Considering the entirety of the facts and circumstances and applying the test of human probability, we have to conclude that the explanation of the assessee that the sales had not materialized which is not supported by any reliable evidence cannot be considered as bonafide. The ld. AR for the assessee argued that when there is equal probability for accepting or rejecting the explanation, the assessee has to be given the benefit of doubt, but as mentioned earlier, in this case there is all the probability of rejecting the explanation as being not bonafide. The ld. AR has also relied on certain judgments which in our view are distinguishable and not applicable to the facts of the case. In the case of National Textiles Limited (supra), the addition had been made on account of loans taken which could not be explained satisfactorily. The loans had been taken through the accountant who had left the firm and the assessee could not produce him due to strained relations and therefore, addition had been made. The Hon'ble High Court deleted the penalty on the ground that there was no material to draw conclusion that the credits represented the income of the assessee and that there was no conscious concealment. The said judgment may not be relevant now after the judgment of the Hon'ble Supreme Court in the case of Dharmendra Textile Processors (supra) in which it has been held that conscious concealment is not required to be proved by the revenue and that penalty is only a civil liability. The decision of the Tribunal in case of Smt. Shanta Kumar (supra), is also distinguishable. In that case the Assessing Officer had added part of the loan but in appeal the ld. AAC added the entire amount. It was held that penalty in respect of the entire loan was not justified. The facts are obviously different and the said decision cannot be applied to the facts of the present case. In view of the foregoing discussion and for the reasons given earlier we are of the view that the case of the assessee is covered by the provisions of Explanation 1 to section 271(1)(c) and the penalty has been rightly levied. We accordingly confirm the order of the CIT(A).

9. In the result, appeal of the assessee is dismissed.

(Order pronounced in the open court on 17.6.2011.)