IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'A' MUMBAI

ITA No.5224 & 5225/Mum/2009
Assessment Years: 2007-08 & 2008-2009

M/s LOK HOUSING AND CONSTRUCTIONS LTD
LOK BHAVAN, LOK BHARATI COMPLEX
MAROL MAROSHI ROAD, ANDHERI (E)
MUMBAI-400059
PAN NO:AAACL1881B

Vs

ADDLL COMMISSIONER OF INCOME TAX
RANGE-8(2), AAYAKAR BHAVAN, M K ROAD
MUMBAI-400020

R S Syal, AM and R S Padvekar, JM

Dated: March 11, 2011

Appellant Rep by: Shri M P Mehwala
Respondent Rep by: Shri R S Srivastava

ORDER

Per: R S Padvekar:

Both these appeals are filed by the assessee challenging the impugned order of the Ld. CIT (A)-8 Mumbai dated 11.6.2009 for the A.Y. 2007-08 and 2008-09. Both these appeals are arising out of the penalty levied by the A.O. u/s.221(1) of the Income-tax Act for the non-payment of the due tax by treating the assessee in default. The assessee has taken the identical grounds in both the appeals and the facts are also identical. Hence, both these appeals are disposed off by this common order for the sake of convenience.

2. The A.O. levied the penalty u/s.221(1) of the I.T. Act of Rs 2.82 crores for the A.Y. 2007-08 and Rs 1.98 crores for the A.Y. 2008-09. The facts which revealed from the record are as under. The assesseecompany is engaged in the business of reality and civil construction. So far as assessment year 2007-08 is concerned, the due date of filing of the return was 30.11.2007. The assessee did not pay any advance tax for the A.Y. 2007-08. The survey action u/s.133A was conducted in the business premises of the assessee-company. In the course of the survey action, audited accounts of the company for the financial year ending 31.3.2007 were found in which the profit before the tax was shown at Rs 142.45 crores. So far as A.Y. 2008-09 is concerned, as noted by the A.O. the assessee did not pay any advance tax. It appears that the statement of the Managing Director of the assessee-company Shri Lalit Gandhi was recorded u/s.131 of the I.T. Act. In the said statement he promised to make the payment of the tax dues for both the assessment years which, according to the A.O. was to the extent of Rs 43 crores and Rs 42 crores respectively

and also to file the returns of income for both the yeas on or before 30.9.2008. The A.O. issued the notice u/s.142(1) requiring the assessee to file the return of income. The assessee filed the return of income for the A.Y. 2007-08 on 23.09.2008 in which the total income was shown at Rs 135.47 crores and due tax payable on the said income was shown at Rs 43.92 crores. The assessee also filed the return of income for the A.Y. 2008-09 on the same date and the total income was declared at Rs 116.49 crores and due tax was shown payable at Rs 39.55 crores. However, the assessee did not pay any self-assessment tax for both the assessment years. The A.O., therefore, passed the order u/s.140A(3) dated 20.10.2008 and treated the assessee in default under the Act. The return of income for the A.Y. 2007-08 was processed u/s.143(1) and demand of Rs 58.61 crores for the A.Y. 2007-08 was raised. The A.O. proceeded to levy the penalty u/s.221(1) of the Act r.w.s.140A(3) as the assessee failed to pay the due tax on the returned income treating the assessee in default in payment of the taxes and interest in respect of both the assessment years. The assessee contended that due to acute shortage of funds it could not pay the tax and offered to pay the same by installment by 31st March 2009. The A.O. rejected the plea of the assessee. It was noticed by the A.O. that the assessee has made substantial sales in the A.Ys. 2007-08 and 2008-09 to the extent of Rs 268.94 crores and Rs 223.25 crores respectively. The A.O. was also not impressed with the contention of the assessee that due to financial crunch the assessee was unable to pay due tax on the return of income. The assessee also took the stand that due to provisional attachment order issued u/s.281B and hence it become very difficult for the assessee to liquidate the assets like stock-in-trade for payment of the taxes. It appears that the assessee approached to the Ld. CIT (A)-VIII Mumbai for lifting or canceling the order passed u/s.281B but the same was also rejected and the Ld. CIT (A) informed the assessee that if any proposal of the sale of the flats is filed then the said proposal would be cleared immediately. Finally, the A.O. levied the penalty at 5% u/s.221(1) of the Act of the total tax due as per original returns filed. The challenged penalty orders before the Ld. CIT(A). The assessee relied on the decision of Hon'ble Supreme Court in the case of *D.M. Malani 174 Taxman 263* and submitted that though the assessee is having the huge assets but the assessee is not in a position to liquidate the same. At the first instance, for the reason that the reality Estate was in crisis and substantial money of the flat booking was refunded to the buyers there was mass cancellations of booking and secondly, as the Department has issued the Prohibitory Order u/s.281B that also created the problem as prospective buyers kept distance from the assessee-company for buying the flats in it's projects. Hence, it would not be possible for the assessee to liquidate the assets and to make the payment. The assessee, therefore, contended that the financial crunches is a good and reasonable cause for non-payment of the taxes and hence, there was no reason to levy penalty u/s.221(1) of the Act. The assessee could not get any relief from the Ld. CIT(A) and all contentions of the assesses were rejected. Now, the assessee is in appeal before us.

3. We have heard the rival submissions of the parties and perused the records. The survey action u/s.133A was carried out in the business premises of the assessee on 11th & 12 September, 2008. There is no dispute about the fact that the assessee has not paid any advance tax nor had filed the return for the A.Y. 2007-08 till the date of survey, though the same was due on 30.11.2007. So far as assessment year 2008-09 is concerned, on the date of survey, due date for filing of the return was not expired. The assessee filed the returns of income for the A.Ys. 2007-08 and 2008-09 on 23.9.2008 but without payment of the tax. The A.O. proceeded to levy the penalty u/s.221(1) of the Act treating the 'assessee in default'. It appears that the A.O. also passed the order u/s.281B of the Act on 17.10.2008 provisionally attaching

all the immovable property of the assessee. The Ld. Counsel vehemently argued that due to very bad financial economic scenario, there was a serious setback to the reality industry. Though the assessee was showing good sales, there was a serious crunch in the liquidity as the payments were not coming. It is argued that the assessee is sincere tax payer. Nowhere there was any deliberate attempt on the part of the assessee to avoid the legitimate due tax. He further submits that the assessee filed the revised return of income for the A.Y. 2007-08 and in the revised return the tax liability for the A.Y. 2007-08 was reduced to Rs 15.30 lacs. He further submits that once the revised return is filed then the original return becomes non-est and the A.O. has to take the cognizance of the revised return. He further submits that assessee has paid tax to the extent of income declared in revised return. He further argues that in the case of D.M. Malani (supra) the Hon'ble Supreme Court has waived the interest levied u/s.220 for non-payment of the tax by the assessee due to severe cash crunch and non-availability of the funds for non-payment of the tax itself treated as a reasonable cause. He further submits that there is a discretion to the A.O. u/s.221(1) for invoking the harsh provision of sec. 221(1) and same is to be invoked in only rare case. It is argued that sufficient safeguards are provided in the Act to compensate the revenue by way of the payment of the interest, in case, the assessee fails to make the payment on the due dates. He further submits that penalty proceedings are qusi-judicial proceedings and A.O. has to establish the deliberate Act on the part of the assessee. He pleaded for canceling the penalty. Per contra, the Ld. D.R. supported the orders of the authorities below.

4. Section 221 reads as under:-

(1) "When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of, be liable, by way of penalty, to pay such amount as the Assessing Officer may direct, and in the case of a continuing default, such further amount or amounts as the Assessing Officer may, from time to time, direct, so, however, that the total amount of penalty does not exceed the amount of tax in arrears :

***Provided** that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard :*

***Provided further** that where the assessee proves to the satisfaction of the [Assessing] Officer that the default was for good and sufficient reasons, no penalty shall be levied under this section.]*

[Explanation.-For the removal of doubt, it is hereby declared that an assessee shall not cease to be liable to any penalty under this subsection merely by reason of the fact that before the levy of such penalty he has paid the tax.]

(2) Where as a result of any final order the amount of tax, with respect to the default in the payment of which the penalty was levied, has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded."

5. As per the Scheme of the said section, it is discretion of the A.O. to levy the penalty, if the assessee is treated as a defaulter in the payment of the taxes. There is no dispute about the fact that the assessee has not paid any advance tax in both the assessment years and also did not pay self assessment tax as per provisions of

sec.140A of the Act. During the course of the Survey action, audited statement of accounts were found for the A.Y. 2007-08 in which the assessee has declared substantial profit. In the original return filed by the assessee for the A.Y. 2007-08, the same profit was declared, but subsequently the assessee filed the revised return. We do not want to go into the legality and sanctity of the revised return filed by the assessee. The contention of the assessee is that there was financial crunch due to lack of liquidity as reality market was badly affected in that period. The question before us is whether the defence of the assessee that due to the financial crunch it was not possible for the assessee to make the payment of taxes is good and reasonable cause. It is true that the assessee has shown substantial sales in both the assessment years.

6. In the case of B.M. Mulani (supra) the assessee was carrying on the money lending business and trading in shares and securities. The raid was conducted u/s.132. The assessee filed declaration u/s.132(4) to pay the taxes from out of the seized shares and securities stating that the shares expeditiously disposed off and sale proceeds be appropriated towards the taxes. The Appellant-assessee filed an application for waiver of interest, but the same was rejected by the Commissioner. When the matter reached before the Hon'ble Supreme Court, the assessee took the plea that if the interest is not waived then the assessee would suffer genuine hardship. The Hon'ble Supreme Court explained the term 'genuine' and set aside the matter with certain directions to the CIT (A) for afresh adjudication. In our opinion, facts in the case of B.M. Mulani (supra) are in the different context.

7. The assessee has filed the paper book which is placed on record. The plea of the assessee is that the A.O. has passed the order u/s.281B of the Act making the provisional attachment that affected the liquidity. Copy of the order is placed at page no.49 and 50 of the compilation. It is seen that the order is passed on 17.10.2008 i.e. after the survey action and it was not passed in the finance year 2006-07 or 2007-08. Hence, this defence of the assessee is not helpful to support the contention that due to provisional attachment order, there was liquidity crunch in F. Yrs. 2006-07 & 07-08. The A.O. passed the order u/s.140A(3) treating the assessee in default in respect of the tax and interest remaining unpaid on the income declared in the returns for the A.Ys. 2007-08 and 2008-09. As per the copy of the Balance-sheet filed on record for the year ending 31.3.2007, the cash in hand as on 31.3.2007 was declared at Rs 1,60,71,286/- in addition to the balances in the bank plus F. Ds at Rs 2,44,55,643/- and Rs 3,06,47,176/- respectively. Hence, so far the financial year 2006-07 relevant to the A.Y. 2007-08 is concerned, in our opinion, the assessee has sufficient liquidity to pay the tax. So far as financial year 2007-08, as per the copy of the Balance-sheet as on 31.3.2008 relevant to the A.Y. 2008-09 the assessee has shown the cash in hand at Rs 2,36,48,223/- and balance with the Bank as well as fixed deposits are to the extent of Rs 1,34,76,101/- and Rs 4,05,37,644/- respectively. This shows that the assessee has sufficient cash liquidity in the financial year 2006-07 (A.Y. 2007-08) as well as in F. Y. 2007-08 (A.Y. 2008-09). As per evidences on record it is seen that assessee had sufficient cash in hand and also bank balances and hence, it can not be said that assessee was having financial crunch to pay some tax. We therefore reject said contention.

8. The assessee has alternatively contended that revised returns are filed for both the assessment years and at the most penalty should be restricted and computed on the income declared in the revised returns for both the assessment years. It appears that the assessee has revised the total income. We do not want to express anything

on the fate of the revised returns filed by the assessee but at the same time, in our opinion, this matter has to go back to the A.O. for fresh determination of the quantum of the penalty in the light of the fact that the assessee has filed the revised returns. The A.O. is, therefore, directed the re-compute the penalty payable u/s.221(1), as self assessment tax under sec. 140A is to be worked out on the income declared in the revised returns if said returns have been acted upon by the A.O. If however said revised returns are not taken into consideration by the A.O. and are treated as invalid returns, in that case penalty should be computed as per provisions of law but it should not be more that 5% of tax due but not paid under sec. 140A of the Act. Needless to say that the A.O. should give reasonable opportunity of being heard to the assessee.

9. In the result, both the appeals are allowed for statistical purpose.

(Order pronounced in the open court on this day of 11.3.2011.)