Omprakash T. Mehta ITA Nos. 1742 of 2011 Bombay high Court

Issues discussed and addressed:

Penalty u/s 271(1)(c)

Facts of the Case with respect to Issue No 1:

Appellant is an assessee under the Act. Appellant along with 4 others executed an agreement for sale dated 7-12-2004 in respect of a plot of land at Vasai. The total consideration stated in the agreement was Rs. 2,60,00,000.00 and conveyance was to be executed only upon receipt of the entire consideration. The appellant's share in the sale consideration of the said plot of land was 49.2%. During the financial year 2004-15, a sum of Rs. 1,05,01,111.00 was received out of the total consideration of Rs. 2,60,00,000.00. Hence during the said financial year conveyance was not executed and possession was not handed over of the said plot. In the return of income filed by the appellant for the Assessment Year 2005-06, appellant offered to tax his share in the consideration received during the previous year i.e. Rs. 51,66,548.00. Thus in F Y 2005-06 and in F Y 2006-07, the amounts so received towards instalments were offered as income in A Y 2006-07 and A Y 2007-08 respectively.

The final outstanding balance amount of consideration i.e. Rs. 9,98,889.00 (Rs.2,60,00,000- Rs. 2,50,01,111) was not received and therefore conveyance was not executed between the parties. However, during Assessment Year 2006-07 physical possession of the said plot of land was forcibly taken over by the purchaser.

Respondent raised an objection with the manner in which capital gains arising from the sale agreement with respect to the said plot was offered to tax by the appellant on receipt basis. After following the procedure, respondent issued notice dated 21-4-2008 under the provisions of Section 148 of the Act seeking to reopen the assessment for the Assessment Year 2005- 06 under section 147 of the Act.

Appellant revised his income tax returns for the Assessment Years 2005-06 to 2007-08 withdrawing the amount of capital gains and offering to tax capital gains on the entire sale consideration of Rs. 2,60,00,000.00 for the financial year relevant to Assessment Year 2006-07. Thus, the appellant filed revised returns of income for the Assessment Years 2005-06, 2006-07 and 2007-08 on the above basis respectively.

Respondent completed the reassessment for the Assessment Year 2005-06 on 26-11-2008 and taxed the appellant's share of capital gains arising on the entire sale consideration of Rs. 2,60,00,000.00 for the said Assessment Year 2005-06. However, while completing the above assessment respondent also initiated

penalty proceedings against the appellant for furnishing inaccurate particulars of income as a result of deferring the charge on capital gains arising pursuant to execution of the sale agreement with respect to the said plot of land.

The assessments for the Assessment Years 2006-07 and 2007-08 were completed keeping in mind the reassessment completed for the Assessment Year 2005-06.

Held by the Authorities with respect to Issue No 1:

It is quite evident that assessee had declared the full facts and the sale agreement at the first instance; the full factual matrix or facts were before the Assessing Officer while passing the assessment order. It is clear from the facts that the appellant had never suppressed any material fact from the respondent. Hence we are inclined to accept the submissions of the appellant. It is another matter that the claim based on such facts was found to be inadmissible. This is not the same thing as furnishing inaccurate particulars of income as contemplated under section 271(1) (c) of the Act.

Thus, on a careful examination of the entire matter, we answer the substantial question of law in favour of the appellant/assessee. Therefore, on an overall consideration, the appeal would stand allowed and the order of penalty as affirmed by the two lower appellate authorities would consequently stand interfered with.

Narang International Hotels (P.) Ltd IT(SS) A No . 94 (Mum) of 2008 T.C.A.NO.766 OF 2017 Mumbai ITAT

Issues discussed and addressed:

Validity of Search

Facts of the Case:

A search and seizure action under section 132 of the Act was carried out on the residential and business premises of the Narang Group of cases. The assessee before us narrated that a search was conducted on 7-11-2000 under section 132 of the Act vide authorization issued dated 4-11-2000. The search proceedings were closed on 8-11-2000 at 8:45a.m. The search continued again on 8-11- 2000 from 12:15p.m. and was concluded at 11:55 a.m. The investigation agency seized files, books and cash. In the 8-11-2000 panchnama it is specifically stated that the search is "finally concluded" by striking off "temporarily concluded".

On 10-11-2000, i.e. after 2 days, the investigation agency revisited the premises of the Appellant for conducting search at 8:30 p.m. under a fresh authorisation dated 10-11-2000 and the search action

continued upto 11:40 p.m.(pgs 2-3).A statement u/s132(4)was also recorded on that day and prohibitory order was passed.

On 24-11-2000, i.e. after 14 days from above, the investigation team again visited the premises of the Appellant under the same authorisation dated 10-11-2000 and the search commenced from 1:30 p.m. and continued upto 6:15p.m.

On 4-12-2000, i.e. after 10 days from above, the investigation team again visited the premises for conducting search under the same old authorisation dated 10-11-2000 and passed prohibitory order u/s132(3) and the items were inventorised as detailed from pgs 10-28.

On 7-11-2001, i.e. almost after a period of close to one year, the investigation team visited the premises of the Appellant under the same old authorisation dated 10-11-2000 and stated that the search is finally concluded. On this day the prohibitory order passed on 4-12-2000 was converted into deemed seizure u/s 132(1)(iii). There was nothing searched on this day except the passing of conversion order from section 132(3) to 132(1)(iii) of the Act.

The assessee also filed a chart of Panchnama issued by the Investigation Wing of the Department on various dates along with copies of Panchnama.

In view of the above the learned Counsel stated that limitation period under section 158BE of the Act read with explanation 2 starts from 7-11-2000 , being the last date of drawing panchanama in respect of conclusion of the search in lieu of original authorization issued vide dated 4-11-2000. The learned Counsel further stated that in case the above date cannot be considered for limitation purpose, in any case, limitation expired for framing of block assessment from 4-12-2000 and since period of 2 years from the end of month will expire on 31-12-2002, whereas the bock assessment in this case was framed vide order dated 28-11-2003.

Held by the Authorities:

We have heard rival contentions and gone through the facts and circumstances of the case. We noted that the case of the Revenue is that the limitation will start from 7-11-2001 by virtue of Explanation 2 read with section 158BE of the Act and hence the last date for passing the block assessment order would expire on 30-11-2003 and since the assessment order is passed on 28-11-2003, same is within the limitation period. The assessee objected to the commencement of limitation period by stating that panchnama dated 7-11-2001 cannot be the starting point of limitation for the purposes of section 158BE of the Act. The provision for

"authorisation" is to be found in section 132(1) of the Act which provides for officers specified therein to obtain "authorisation" from higher authorities to enter and search any premises, etc. on a particular day. This is also fortified by Form No. 45 which prescribes the form of authorisation. Therefore, the authorisation is executed the moment the investigating agency enters the premises and searches the same for any undisclosed income. The said authorisation is followed by drawing up of the panchnama before leaving the premises. The moment the search party leaves, the search comes to an end unless it is temporarily suspended to be continued immediately after a short break due to various reasons like search extending into the night, voluminous documents that cannot be examined in 24 hours, etc. Every fresh entry after a gap of many days would require a fresh authorisation so as to enable the search party to enter the premises for conducting search. Search based on one authorisation issued one year back, the department cannot conduct search after one year and draw a panchnama stating conclusion of search and thereby contend that limitation under section 158BE of the Act r/w Explanation 2 thereto should begin from such last drawn panchnama.

Judgments Relied upon by the Authorities:

C. Ramaiah Reddy [2012] 20 taxmann.com 781 (Karnataka) & Deepak Aggarwal [2009] 308 ITR 116 (Delhi)

Cornerstone Property Investment (P.) Ltd ITA Nos. 1082 and 1083 (Bang) of 2019 Bangalore ITAT

Issues discussed and addressed:

Interest on land which is treated as Inventory

Facts of the Case:

As per the AO, the borrowed funds were used for acquisition of land which is inventory in the present case. The AO has referred to AS - 2 and AS - 16 issued by The Institute of Chartered Accountants of India (ICAI) and concluded that interest cost is not allowable and it should be added with cost of inventory. On the factual aspect that borrowed funds were used for inventory, there is no dispute.

Held by the Authorities:

In the present case, the AO has also referred to AS 2 in addition to AS 16 and in our considered opinion, when the provisions of the Act are in contradiction of Accounting Standard whether AS 16 or AS 2 or any other AS, the provisions of Act will apply and not the provisions of AS. The tribunal considered in that case the provisions of section 36 (1) (iii) and its proviso and held that this proviso is the only restriction if conditions of section 36 (1) (iii) are satisfied and the proviso is applicable only when the borrowing is made

in respect of acquisition of a capital asset for the period up to user of the asset and inventory is not a capital asset and therefore, interest on borrowing used for inventory is allowable u/s 36 (1) (iii).

Judgments Relied upon by the Authorities:

DLF Limited v. Addl. CIT as reported in TS 5387 ITAT 2016 (Delhi)

Rajendra Shringi I.T.A. Nos. 718 to 720/Ind/2018 Indore ITAT

Issues discussed and addressed:

Penalty for Failure to get the Books Audited

Facts of the Case:

The assessee is a partnership firm engaged in the civil construction business was subjected to search and seizure operation under section 132 of the Act on 28-2-2014. During the course of assessment proceedings carried out under section 143(3) read with section 153C of the Act. Learned assessing officer on observing that the turnover of the assessee for assessment years 2010-11 to 2012-13 is above the prescribed limit for audit as per provisions of section 44AB of the Act but the assessee had not get the books of accounts audited under section 44AB of the Act and thus held the assessee liable to pay penalty of Rs. 1,50,000 under section 271B of the Act for assessment years 2010-11 to 2012-13.

Held by the Authorities:

We observe that the assessee is engaged in real estate business acquired land and started construction of commercial building in the name of Balaji Tower from assessment year 2005-06 onwards. The construction was completed during the Financial Year 2012-13 relevant to assessment year 2013-14. Assessee firm adopted 'project completion' method and the amount received as advance from the customers were shown as liability and expenses incurred during the period of construction was shown in the trading account as work in progress. In the return of income for assessment year 2010-11 to 2012-13 assessee has not disclosed any turnover. However for assessment year 2013-14 during which the project was completed the assessee has shown turnover of Rs. 10,61,12,633 and after claiming the incidental expenses including construction cost and opening work in progress declared net profit at Rs. 59,99,505. In the computation of income, taxable income of Rs. 60,02,565 has been shown and offered to tax accordingly.

There is a reasonable cause on the part of the assessee in not getting the books of accounts audited since it adopted the percentage completion method and that the advance received from customers is not part of turnover but in the shape of liability which can be crystallized to the sale turnover only when the project is

completed and the possession is handed over along with registered sale deed to the customer. Therefore in our view the assessee succeeds on two counts firstly that it was not required to get books of accounts audited and if for sake of discussion if the alleged advance received from customers is presumed to be turnover then also the assessee will succeed on account of section 273B of the Act which provides for "penalty not to be imposed in certain cases" where the assessee proves that there was a reasonable cause for the said failure and thus covers the situation of the assessee too.

Judgments Relied upon by the Authorities:

1. Esque Finmark (P) Ltd. v. ACIT (2014) 40 CCH 810 (Mum)

Aricent Technologies Holdings Ltd. ITA No. 5708/Del/2019 Delhi ITAt

Issues discussed and addressed:

Reimbursement of ESOP Expense

Facts of the Case:

The assessee had claimed sum of Rs. 6.58 crores as deduction on account of reimbursement of ESOP expenses to the parent company. The assessee was asked to provide the details of tax deducted at source and proof of deposit of the same. The assessee in reply pointed out that the said amount was paid towards ESOP, on which no tax was deducted. The assessing officer show-caused the assessee to explain why the deduction on account of salary may not be disallowed, since it was not an allowable expenditure.

Held by the Authorities:

The issue which arises in the present appeal is with regard to claim of the expenses on account of reimbursement paid to the parent company towards ESOP for granting stock auctions to the assessee's employees. Share incentive plan for the employees of Aricent Group was floated and under the scheme, as part of the employee compensation measure, an option to purchase the shares after the completion of the vesting period was granted to the employees of the company at a discounted price to the fair market value of the share. The difference between the fair market value of the shares and the amount paid by the employee on actual exercise of option represented employee compensation expenses. Since the option was granted to the employees during the relevant assessment year and assessee reimbursed the said amount to the group company, as the liability had accrued/crystallized and the same was recognized in the year itself as the assessee was following mercantile system of accounting. The aforesaid expense was claimed as deduction under section 37(1) of the Act. It may be pointed out herein itself that the aforesaid payment to the Aricent Cayman has been accepted by the TPO to be at arms length.

We hold that the aforesaid payment under the ESOP scheme wherein the reimbursement was paid to the parent company, towards ESOP for granting stock options to assessee's employees is in the nature of employees compensation and is deductible as the expenditure incurred was wholly and exclusively for the purposes of business.

Now coming to the second aspect of the case that whether aforesaid payment requires tax deduction or not. The requirement to deduct tax would arise when the employee exercises the option granted under ESOP and it would be treated as perquisite in the hands of the employee on actual allocation/transfer of such shares, which is provided under section 17(2)(vi) of the Act. Further, even the provision of section 192 of the Act mandate the deduction of tax at source on actual payment which is allotment of shares in the case of ESOP and not prior to that. Hence, there was no requirement to deduct tax at source by the assessee while reimbursing the amount to its AE during the year under consideration. Accordingly, we direct the assessing officer to allow the said expense totaling to Rs. 6.58 crores.

Judgments Relied upon by the Authorities:

1. CIT v. M/s PVP Ventures Ltd. (2014) 211 Taxman 554 (Mad);
2. (CIT v. Lemon Tree Hotels Ltd. (2019) 104 taxmann.com 26 (Del); and
3. Biocon Ltd. v. DCIT (2013) 155 TTJ 649 (Bang) (SB).

Ashwin. S. Bhalekar ITA No. 6822/Mum/2016 Mumbai ITAT

Issues discussed and addressed:

Exemption u/s 54

Facts of the Case:

The assessee is an Advocate by profession. The assessee was allotted Flat No. 1703/1704/1705 admeasuring 4200 sq. ft. in the B-Wing on the 17th floor of the proposed Building known as "Shubh Residency" vide Allotment letter dated 20-6-2008. The assessee had paid advance amounting to Rs. 50,00,000 on the allotment of said flat. By virtue of the said allotment the assessee has acquired right to the proposed flats. The construction of the building was yet to commence on the date of allotment. Due to various delay in regulatory approvals, the builder could not obtain permission to construct the building upto 17th floor. Under such circumstances, the assessee surrendered the right to receive the flats and the builder cancelled the allotment of the above flats and agreed to pay the compensation for an amount of Rs. 1,10,00,000 on account of surrender of such flats.

In addition to the above, builder has transferred the initial advance of Rs. 50,00,000 to new flat in the same project which the assessee agreed to buy. The assessee then invested the said money to acquire Flat No. 301/305 in the same project at 3 floor in the 8-Wing of Shubh Residency admeasuring 1500 sq. ft. @ 10200/sq. ft. at Rs. 1,53,03,800 vide agreement dated 28-2-2012 registered on 29-2-2012. The above facts result in extinguishment of assessee's right in Flat No. 1703/1704/1705. As per Sec 2(47) of the Act, extinguishment of any right in relation to capital asset falls in the definition of transfer and hence will result in the Capital Gain chargeable to tax under section 45 of the Act. Since the above right was held for more than 3 years the assessee has treated the gain on extinguishment of right as long term.

The assessing officer has not accepted the claim of the assessee and treated the compensation on surrender of flats amounting to Rs. 1.10 crores as income of the assessee under the head of income from other sources.

Held by the Authorities:

We have heard rival contentions and gone through the facts and circumstances of the case. We have noted that the above narrated facts are undisputed. The facts clearly show that the extinguishment of assessee's right in Flat No. 1703, 1704 and 1705 proposed building known as "shubh Residency" allotted vide allotment letter dated 20-6-2008 is actually extinguishment of any right in relation to capital asset in view of the provisions of section 47 of the Act and falls in the definition of transfer and hence, result in capital gain chargeable under section 45 of the Act. It is a fact that assessee held this right for more than 3 years for a reason that this flats were subject to allotment vide allotment letter dated 20-6-2008 and assessee received compensation of Rs. 1.10 crores and in lieu of that acquired flat No. 301 and 305 in the same project vide agreement dated 28-2-2012, which period is more than three years. The assessee has made payment of Rs. 1.10 crores on various dates and this is eligible for the claim of deduction under section 54 of the Act also