IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'A', HYDERABAD

BEFORE SMT. P.MADHAVI DEVI, JUDICIAL MEMBER AND
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.1817/Hyd/2013 : Assessment year 2004-05
ITA No.1818/Hyd/2013 : Assessment Year 2005-06

Shri R.Om Prakash (HUF), Hyderabad **(PAN - AFLPM 8914 P)**	V/s	Income Tax Officer Ward 8(2), Hyderabad
(Appellant)		(Respondent)

Appellant by	***:***	*Shri S.Rama Rao*
Respondent by	*:*	*Shri B.Kurmi Naidu DR*

Date of Hearing	4.5.2016
Date of Pronouncement	01.08.2016

O R D E R

Per P.Madhavi Devi, Judicial Member :

Both are assessee's appeals for assessment years 2003-04 and 2004-05 respectively, against the penalties levied under S.271(1)(c) of the Income Tax Act,1961.

ITA No.1817/Hyd/2013 : Assessment year 2004-05

2. Brief facts of the case are that the assessee is a HUF, whose Karta is Shri R. Omprakash. He is also a partner in M/s. Om R.S. Wines, Miyapur. A search and seizure operation under S.132 of the Income Tax Act,1961 was conducted on 12.4.2005 and details of the bank account maintained by the aforesaid firm with Syndicate Bank, Kukatpally, Hyderabad were obtained. From the seized material, it was noticed that there were deposits to the extent of Rs.21,32,000 in the said account. On enquiry, Shri R.Om Prakash explained the sources as the cash loan amounting toRs.15,75,000 taken from M/s. R.Om Prakash HUF. He also stated that the amount of Rs.15,75,000

was unaccounted and he would pay taxes and file the income-tax return. Subsequently, the Assessing Officer issued notice under S.153A read with S.153C on 15.3.2007. In response to the same, the assessee filed return of income on 28.3.2007 declaring total income of Rs.1,98,687 alongwith a copy of the original return of income filed on 24.5.2005.

3. During the assessment proceedings under S.143(3) read with S.153C of the Act, the Assessing Officer issued various notices and called for various details. After verification of the details furnished by the assessee, the Assessing Officer noticed that the assessee-HUF had purchased 0.20 guntas OF LAND in Survey Nos.72, 73 and 74 at Miyapur, Seri Lingampally in the name of Smt.R.Sai Rani (Karta's wife), along with three other persons. He also observed that the assessee's share in the land is 10% of the total extent of land, and on the date of purchase itself, i.e. 15.12.2003, assessee through Sm.R.Sai Rani along with other co-owners of land entered into a development agreement with M/s. B.R. Constructions, the builder. As per this agreement, the developer has to construct a building on the land and after construction of the complex, the builder has to hand over 33% of the total built up area to the land owners. The builder is entitled to sell the remaining share of 67% of the total area. Later on, the land owners and the builders entered into a supplemental agreement on 8.3.2004 for dividing the share of built up area alongwith the land owners, as per which the assessee has to receive Flat No.301 of 1415 sq. ft. and Flat No.508 of 1000 sq. ft. Thereafter, the Assessing Officer also observed from the computation of total income filed alongwith the return, that the assessee has not admitted capital gains arising on transfer of undivided share of land to the builder in lieu of the built up area received from the builder. The

assessee's explanation was called for. In response, the assessee vide letter dated 29.11.2007 stated that the consideration for 33% of the land was the cost of construction of 67% of the built up area, as held by the Tribunal in the case of Smt.Vasavi Pratap Chand V/s. DCIT (89 ITD 73) and that the consideration of the land being built up area, there is no capital gains. The Authorised Representative also argued that there is no transfer in the transaction and cited various case-laws defining 'transfer'. The Assessing Officer, however, held that there is a transfer of land by virtue of development agreement and the capital gains arose on the assessee receiving the built up area. He also held that the year of taxation is the year in which the built up area was handed over by the builder to the assessee and since in the case of the assessee, the built up area was received on 8.3.2004, he brought the capital gains to tax in the assessment year 2004-05. Accordingly, he also initiated penalty proceedings under S.271(1)(c) of the Act.

4. Meanwhile, the assessee preferred an appeal before the CIT(A), who confirmed the order of the Assessing Officer, and thereafter to the ITAT, which also confirmed the order of the Assessing Officer.

5. During the penalty proceedings, a show cause notice was issued to the assessee. The assessee filed his explanation stating that the additions made to the income returned was only on account of difference of opinion and there is no concealment as such for levy of penalty under S.271(1)(c) of the Act. The Assessing Officer, however, was not convinced with the explanation of the assessee and held that but for the search and seizure operation, the income would not have been offered to tax by the assessee, and therefore, it is a case of concealment of income and that the penalty is leviable.

6. Aggrieved, the assessee preferred an appeal before the CIT(A), taking a ground that the land did not belong to the HUF, but it belonged to Smt. R.Sai Rani and therefore, CIT(A) could not have brought to tax the capital gains in the hands of the assessee. The CIT(A) held that this is a ground to be taken during the quantum proceedings, and not during the penalty proceedings. As regards the levy of penalty, he confirmed the order of the Assessing Officer and the assessee is in second appeal before us.

7. Learned counsel for the assessee, while reiterating the submissions made by the assessee before the authorities below, submitted that the Assessing Officer, though, has held that the capital gains is chargeable to tax in the year in which the built up area was received by the assessee, he has brought capital to tax in the year when the supplemental agreement was entered into. He submitted that the development agreement itself was entered into on 15.12.2003, while the supplemental agreement was dated 8.3.2004, and it is not possible for any builder to have constructed the building within such a short period of three months. Further, he also submitted the reason why the assessee had offered the capital gains in the year of sale of flat and he drew our attention to the computation of income furnished at page 4 of the paper-book filed by the assessee. He submitted that the assessee had clearly reflected the said transactions in the return of income filed for the assessment year 2004-05 filed on 24th May, 2005, wherein at the end of the computation, it has been stated that on 15.12.2003, the HUF had invested Rs.1,20,000 for 10% share in purchase of land in Sy. Nos.72 to 74 admeasuring 20 guntas of land and registration charges paid of Rs.15,000 and the said land is given for development on 15.12.2003 for which the assessee has received Rs.10,000 as advance from BR Constructions. He submitted

that the assessee has not offered the capital gains to tax in the relevant assessment year as the legal position was not clear at that point of time. He submitted that every addition will not automatically attract levy of penalty, and therefore, the penalty levied by the Assessing Officer and the CIT(A) is not sustainable.

8. The Learned Departmental Representative on the other hand, supported the orders of the authorities below.

9. Having regard to the rival contentions and the also the material on record, we find that the assessee has filed the return of income on 24.5.2005, declaring income of Rs.1,98,687, whereas the there was a search and seizure operation in the case of M/s. Om R.S. Wines on 12.4.2005. Even before the issuance of notice under S.153C of the Act, the assessee has declared the said transaction in the computation of income. The assessee has never taken the ground that the said land does not belong to the assessee herein, though it has raised such a ground before the CIT(A) in the first appeal preferred against the penalty order of the Assessing Officer. Thus, it is seen that the land belongs to the assessee and the transaction of development agreement and supplemental agreement was disclosed by the assessee to the Revenue authorities. Therefore, there cannot be a case of concealment of income. As regards furnishing of inaccurate particulars of income, it has been the stand of the assessee that the capital gains is chargeable to tax in the year in which the developer has given the possession of the developed area to the assessee. Though the Assessing Officer has recorded that the assessee has filed a letter stating that the built up area has been handed over to the assessee on 8.3.2004, it is not understandable as to how a building could have been completed within a period of three months of entering

into the development agreement. It appears that the Assessing Officer has taken the supplemental agreement into consideration for presuming that the built up area has been apportioned to the assessee on 8.3.2004, as the supplemental agreement is entered for apportioning the developed area. Supplemental agreement alone cannot be taken as the proof of handing over of the built up area to the assessee. The Assessing Officer has accepted the assessee's contention that the capital gains is chargeable to tax in the year of handing over of possession to the assessee. The Assessing Officer has come to the conclusion that capital gains have arisen in this year without proper verification of facts. Since the assessee has disclosed all the relevant facts to the Revenue authorities in is computation of income, we are of the opinion that there is no furnishing of inaccurate particulars of income or concealment or income. In the result, penalty levied under S.271(1)(c) is not sustainable and the assessee's appeal for assessment year 2004-05 is allowed.

ITA No.1818/Hyd/2013 : Assessment year 2005-06

10. As regards the appeal for assessment year 2005-06, the Assessing Officer has observed that the assessee has advanced a loan of Rs.15,75,000 to M/s. Om R.S.Wines. During the assessment proceedings under S.143(3) read with S.153C of the Act, the assessee was asked to explain the sources for such advancing of loan in the form of cash. The Assessing Officer also observed that during the search proceedings, the statement of Shri R.Om Prakash was recorded under S.132 of the Act, wherein he has stated that the amount of Rs.15,75,0000 was unaccounted and that he would pay taxes and file income tax return immediately. However, on verification of the return of income filed in response to notice under S.153C of the Act, the Assessing Officer observed that the assessee has not offered to tax the

sum of Rs.15,75,000. Therefore, a show cause notice was issued to the assessee.

11. The assessee filed a letter dated 3.12.2007 stating that the assessee, while deposing under S.132 of the Act had he stated that the return of income for the relevant assessment year was not filed and never meant that this amount was undisclosed income. According to him, it was meant that the taxes would be paid on such filing of return and the taxes computed accordingly. The Assessing Officer however was not satisfied with the assessee's contention and held that the deposition made by the assessee under S.132 carries sufficient significance and also evidence for any assessment proceedings. He also proceeded to consider the Receipts and Payments Account for assessment years 2001-02 to 2005-06 and observed that in the relevant financial year, the assessee had opening balance of Rs.19,44,561 receipts from property income of Rs.3,21,000, receipt from Cecon Builders of Rs.1,25,000 and cash loan repayment by Smt.R.Sai Rani of Rs.4,00,000, which was utiiised for advancing the cash loan amounting to Rs.15,75,000 to the firm, M/s. Om R.S. Wines. The Assessing Officer however observed that the Receipts & Payments Account is not prepared date-wise and only the gross receipts and gross payments are shown and therefore, the authenticity of the statement cannot be verified and ascertained. He thereafter proceeded to examine the creditworthiness of Smt.R.Sai Rani and also availability of funds with the assessee over a period of time. He observed that Smt.Sai Rani is not maintaining any books of account nor has the assessee filed any Receipts and Payments Account of her, and therefore, the same cannot be treated as explained. As regards the availability of cash with the HUF, he observed that the savings of the HUF in earlier years is only Rs.57,000 per year which could be

presumed to be the source to accumulate Rs.15,75,000 only, if the assessee is believed have saved the entire income approximately for four years. He also observed that the household expenses shown by the assessee are very low and therefore, the availability of funds with the assessee is not acceptable. He further observed that the assessee has purchased a Fiat Car worth Rs.3,25,000 from M/s. Satya Kalyan Constructions Pvt. Ltd., and therefore, the individual also does not have the capacity to advance such fund. He therefore, brought to tax the entire amount of Rs.15,75,000, treating the same as unexplained. The said addition was confirmed by ITAT in appeal.

12. Meanwhile, the Assessing Officer initiated penalty proceedings under S.271(1)(c) of the Act, and after considering the assessee's contentions at length, levied minimum penalty, computed at 100% of the tax sought to be evaded. Aggrieved, assessee preferred an appeal before the CIT(A), who confirmed the penalty order passed by the Assessing Officer, and hence, the assessee is in second appeal before us.

13. The learned counsel for the assessee, while reiterating the submissions made before the authorities below, has drawn our attention to the return of income filed by the assessee for the relevant assessment year on 24th May, 2005, wherein the assessee has disclosed the loan of Rs.15,75,000 to M/s. Om R.S.Wines. He also has drawn our attention to the Receipts and Payments Account for the year ending on 31.3.2001 to show that the assessee has sold some flats in the said year and the assessee had cash balance of Rs.18,75,722 was a sufficient source for the loan to M/s. Om R.S.Wines of Rs.15,75,000 on 31.3.2005. Therefore, according to him, the assessee had sufficient funds to explain the source for the loan

advanced to M/s. Om R.S. Wines, though at the time of search, the assessee was confused and had accordingly offered the same as undisclosed income. He submitted that though the addition has been confirmed by ITAT, the penalty proceedings being independent proceedings, the evidence filed by the assessee has to be considered independently and valid explanation has to be accepted for deletion of penalty.

14. The Learned Departmental Representative, supported the orders of the authorities below and submitted that the assessee could not explain the availability of funds for the advancing of loans either during the assessment proceedings or during the penalty proceedings, and therefore, Explanation 1(b) under S.271(1)(c) of the Act is attracted.

15. Having regard to the rival contentions and the material on record, we find that the assessee has disclosed the fact of advancing of loan to M/s. Om R.S. Wines in his return of income filed prior to issuance of notice under S.153C of the Act. Further, the assessee has also explained the availability of funds of Rs.18,75,022 for assessment year ending on 31.3.2003 which fact has been considered by the Assessing Officer. The Assessing Officer has only presumed the property income to be Rs.57,000 per year without taking into consideration the other sources of income. Since the assessee has disclosed the loan in the computation of income for the relevant assessment year, it is clear that there is no concealment of income or furnishing of inaccurate particulars of income. There are catina of decisions rendered by Hon'ble High Courts and Supreme Court, including in the case of CIT V/s. Reliance Petro-products Pvt. Ltd. (322 ITR 158), wherein it has been held that every addition made in

assessment cannot automatically attract the levy of penalty. Since it has not been proved that the assessee has either furnished inaccurate particulars of income or concealed his income, the impugned penalty imposed by the Assessing Officer is not sustainable. It is accordingly cancelled, allowing assessee's appeal for assessment year 2005-06.

16. To sum up, both the appeals of the assessee are allowed.

Order pronounced in the Court on 01st August, 2016.

Sd/-/-	**Sd/-**
(S.Rifaur Rahman)	**(P.Madhavi Devi)**
Accountant Member.	**Judicial Member**

Dt/- 01st August, 2016

Copy forwarded to:

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2. Income Tax Officer Ward 8(2), Hyderabad
3. Commissioner of Income-tax(Appeals) III Hyderabad
4. Commissioner of Income-tax II, Hyderabad
5. Departmental Representative ITAT, Hyderabad

B.V.S.