IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.640 OF 2014

The Commissioner of Income Tax, Central-1... Appellant
Versus
M/s Acme Associates ... Respondent

.....

Mr. P.C. Chhotaray for the Appellant.
Mr. Jitendra Jain a/w Mr. Hiten Chande a/w Ms. Jas Sanghavi i/b PDS Legal for the Respondent.

.....

CORAM : M.S. SANKLECHA &
S.C.GUPTE, JJ

DATE : 17 OCTOBER 2016

<u>P.C.</u> :

. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 13 September 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2005-06.

2 The Revenue urges the following question of law for our consideration :-

> "Whether on the facts and in the circumstances of the case and in law, the Income Tax Appellate Tribunal was justified in deleting the penalty imposed under Section 271(1)(c) of the Act ?"

3 The Respondent-assessee is in the business of Real Estate Development. For the Assessment Year 2005-06, the Respondent-assessee on 31 October 2005 filed its return of income, declaring a income of Rs.2.04 crores claiming 100% deduction under Section 80IB(10) of the Income-tax Act, 1961 ("Act"). During the course of the assessment proceedings, the Assessing Officer noticed that two buyers, viz. Ms. Sulbha M. Waghle and Mr. Mangesh G. Waghle had entered into joint agreement for purchase of flats which in the aggregate exceeded 1,000 sq.ft (built up area). Consequently, by Assessment Order dated 28 December 2007, he disallowed the deduction claimed under Section 801B(10) of the Act while initiating penalty proceedings under Section 271(1)(c) of the Act on the aforesaid ground for furnishing inaccurate information/concealing of income.

4 The Respondent-assessee carried issue in appeal to the Commissioner of Income Tax (Appeals) (CIT(A)). During pendency of the appeal, before the first Appellate Authority, the Officers of the Revenue initiated a search action under Section 132 of the Act on the Respondent-assessee group. Consequent to which, notices under Section 153A of the Act were issued to the Respondent-assessee including one for the subject Assessment Year 2005-06. In the above circumstances, the Respondent-assessee withdrew its appeal from Assessment order dated 28 December 2007 pending before Commissioner of Income Tax (Appeals).

5 Thereafter by order dated 30 March 2010, the Assessing Officer imposed penalty upon the Respondent-assessee under Section 271(1)(c) of the Act. This on the very ground on which the Assessing Officer had

initiated penalty proceedings viz. selling of flats to two members of the family which in the aggregate was in excess of 1000 sq.ft. of built up area. Therefore concluding that the Respondent-Assessee has furnished incorrect particulars of income/concealed particulars of income. Consequently, a penalty of Rs.74,85,091/- was imposed.

6 Being aggrieved the Respondent-assessee carried the order of the Assessing Officer imposing penalty under Section 271(1)(c) of the Act to Commissioner of Income Tax (Appeal) (CIT(A)). By order dated 9 December 2010 the CIT (A) confirmed the penalty imposed by the Assessing Officer. However, the confirmation was on a completely new and different ground viz. that during search proceedings, the Respondent-assessee had made disclosure that the project in respect of which Section 801B(10) of the Act was being claimed was not completed before the due date i.e. 31 March 2008. Thus confirming the order dated 30 March 2010. It is to be noted that CIT(A) in its order did not deal with the issue on which the Assessing Officer had initiated and confirmed the penalty upon the Respondent-assessee.

7 Being aggrieved the Respondent-assessee filed a further appeal to the Tribunal. By the impugned order the Tribunal held that the initiation and confirmation of penalty by the Assessing Officer under Section 271(1)(c) of the Act, was not on the ground that the project was not completed by the due date, on which the CIT (A) confirmed the penalty. Thus the Tribunal held that this could not be done by the CIT(A) as the penalty proceedings were initiated on account of selling flats of an area in excess of 1000 sq.ft. i.e. a ground different from the ground on which the

Commissioner of Income Tax (Appeal) confirmed the penalty. In any event, the impugned order also noted the fact that at the time when the return of income was filed on 31 October 2005, it was not possible to predict whether the project would be completed on or before the specified date 31 March 2008. Further the impugned order also examined the issue on which the Assessing Officer had imposed penalty, namely, selling of two flats to the members of same family, the area of which in the aggregate exceeded 1000 sq.ft. built up and held that no material was brought on record that the Respondent-assessee had constructed a flat of more than 1000 sq.ft. built up area or that the Respondent-assessee had sold any unit of more than 1000 sq.ft. It renders a finding of fact that after units had been sold the buyers had joined two flats resulting in a flat in excess of 1000 sq.ft. In the aforesaid view, the impugned order of the Tribunal holds that there is no furnishing of inaccurate particulars and/ or concealing of income warranting the imposition of penalty under Section 271(1)(c) of the Act.

8 Mr. Chhotaray, learned Counsel appearing for the Revenue urges that the very fact that the Respondent-assessee has withdrawn an appeal filed before the Commissioner of Income Tax (Appeal) in quantum proceeding on the ground it is not entitled to the benefit of Section 80IB(10) of the Act, penalty must follow. Therefore, CIT(A) was justified in imposing the penalty on a new ground as the powers of the CIT(A) are co-terminus with that of the Assessing Officer, therefore, he could do all that the Assessing Officer could have done.

9 It is undisputed position before us that initiation of penalty under Section 271(1)(c) of the Act by the Assessing Officer is on the ground of area of flat being sold in excess of 1000 sq.ft. being concealed. It was this ground that the Respondent-assess is required to offer explanation during penalty proceedings to establish that the claim as made in the return of income was not on account of furnishing of inaccurate particulars of income or concealment of income vis-a-vis of selling flat having area 1000 sq.ft. The Assessing Officer under the Act also considered the Respondent-assessee's explanation in the context in which the penalty proceedings were initiated and did not rightly place any reliance upon the subsequent events. In an appeal from the order of the Assessing Officer, the CIT(A) could not have imposed penalty on a new ground which was not the basis for initiation of penalty. The appeal before the CIT(A) was with regard to issue of penalty under Section 271(1)(c) of the Act only on the ground on which the penalty proceedings were initiated in the assessment order.

10 Although the powers of CIT(A) are co-terminus with that of the Assessing Officer, the imposition of penalty could be only the ground on which it was initiated. This is not the case, where the CIT(A) had independently initiated penalty proceedings on a new ground in an order in quantum proceedings in appeal from the Assessment Order. This alone could lead to the imposition of penalty under Section 271(1)(c) of the Act on the new ground. The ground on which the penalty was initiated and penalty imposed by the Assessing Officer, namely, that the flat had been sold in the project which was in excess of 1000 sq.ft., the Tribunal has recorded a finding of fact that the flats were sold individually by two separate agreements individually to the purchasers in joint names.

However, two flats were subsequently joined by the purchasers aggregating the size of two flats to 1000 sq.ft. built up purchased from the Respondent-assessee. This is finding of fact which has not been shown to be perverse or arbitrary.

11 In the above view, question as proposed does not give rise to any substantial question of law. Thus not entertained.

12 Appeal dismissed. No order as to costs.

(S.C. GUPTE, J.) **(M.S. SANKLECHA, J.)**