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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 780/2019

NIRALA HOUSING PVT. LTD. ..... Appellant

Through: Mr. Salil Kapoor, Mr. Sumit Lalchandani, Ms. Ananya Kapoor, Mr. Tarun Chanana and Mr. Shivam Yadav, Advs.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX-5 & ANR. ..... Respondents

Through: Mr. Kunal Sharma, Sr. Standing Counsel along with Ms. Zehra Khan, Jr. Standing Counsel and Mr. Shubendu Bhattacharyya, Adv.

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\+ ITA 782/2019

NIRALA HOUSING PVT. LTD. ..... Appellant

Through: Mr. Salil Kapoor, Mr. Sumit Lalchandani, Ms. Ananya Kapoor, Mr. Tarun Chanana and Mr. Shivam Yadav, Advs.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX-5 & ANR. ..... Respondents

Through: Mr. Kunal Sharma, Sr. Standing Counsel along with Ms. Zehra Khan, Jr. Standing Counsel and Mr. Shubendu Bhattacharyya, Adv.

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\+ ITA 781/2019

NIRALA HOUSING PVT. LTD. ..... Appellant

Through: Mr. Salil Kapoor, Mr. Sumit Lalchandani, Ms. Ananya Kapoor, Mr. Tarun Chanana and Mr. Shivam Yadav, Advs.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX-5 & ANR. ..... Respondents

Through: Mr. Kunal Sharma, Sr. Standing Counsel along with Ms. Zehra Khan, Jr. Standing Counsel and Mr. Shubendu Bhattacharyya, Adv.

**CORAM:**
**HON'BLE MR. JUSTICE YASHWANT VARMA**
**HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV**

**ORDER**

% **19.02.2024**

1. These appeals have been preferred in respect of the orders passed by the Income Tax Appellate Tribunal ["**ITAT**"] dated 16 November 2018 for the Assessment Year ["**AY**"] 2011-2012 [ITA 780 of 2019], AY 2012-2013 [ITA 782 of 2019] and AY 2012-2013 [ITA 781 of 2019]. We note that the issues which survive were succinctly noticed by us in our order of 31 July 2023 which is extracted hereinbelow:-

> "1. These appeals concern Assessment Years (AYs) 2011-12 [ITA 780/2019] and 2012-13 [ITAs 781/2019 and 782/2019]
>
> 2. *Via* these appeals, the appellant/assessee seeks to assail the order dated 16.11.2018 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].
>
> 3. The Tribunal *via* the order dated 16.11.2018 disposed of five

appeals. Out of five appeals, one appeal was preferred by the revenue (ITA 3531/Del/2015), while the remaining four appeals concerned two assesses i.e., Nirala Developers Pvt. Ltd. and Nirala Housing Pvt. Ltd.

3.1 The appeal which concerns Nirala Developers Pvt. Ltd. was numbered as ITA 3155/Del/2015, while the remaining three appeals which related to Nirala Housing Pvt. Ltd. are numbered ITA 3135/Del/2015, ITA 3136/Del/2015 and ITA 3137/Del/2015.

4. The appeals centred around levy of penalty on the assessees. Insofar as Nirala Developers Pvt. Ltd. was concerned, penalty amounting to Rs.19,54,700/- was imposed under Section 271AAA of the Income Tax Act, 1961 [in short, "the Act"].

4.1. Insofar as the other assessee, which is Nirala Housing Pvt. Ltd. is concerned, two sets of penalties were levied; Rs.20,15,300/- was levied under Section 271AAA, while penalty amounting to Rs.66,94,323/- was levied under Section 271(1)(c) of the Act.

4.2. In addition thereto, a penalty amounting to Rs.2,00,000/- was imposed under Section 271AAA of the Act and penalty was also imposed under Section 271(1)(c) of the Act on an addition amounting to Rs.63,00,000/-.

5. Mr Salil Kapoor, learned counsel, who appears on behalf of both appellant/assessee, says that insofar as the instant appeals are concerned they relate only to Nirala Housing Pvt. Ltd.

6. It is Mr Kapoor's contention that the record would show that, in a search carried out, one, Mr Suresh Garg had surrendered Rs.10,00,00,000/- on behalf of the group companies, which was added on a protective basis in the instant AYs.

7. In this context, our attention is drawn to the assessment order dated 28.03.2014 passed concerning AY 2011-12. In particular, the following part of the assessment order is brought to the fore:

> *"The version of the assessee has been considered and is found to be without merit. It has to be appreciated that the assessee has offered the cash received outside the books of account as its income for the relevant period though the tax liability in respect thereof has been deferred on the pretext of the method of accounting being applied for recognition of revenue. The assertion of the assessee that the income offered will be taxed in succeeding years cannot be verified at this stage.* ***In order to protect the interest of the revenue, the impugned cash received outside the books of account and treated as advances from customers by the assessee, addition on protective basis is hereby made of Rs. Rs.2,01,53,000/-/- for the relevant assessment year. This order will be linked to the succeeding assessment years and***

***after verification of the fact that cash received as advances from customers has been included as income for such succeeding years, to such extent the protective addition in this year will stand deleted, else the protective addition of this year will become substantive****. Penalty proceedings u/s 271(l)(c) of the I.T. Act is initiated separately for furnishing inaccurate particulars of income."*

[Emphasis is ours]

7.1 A perusal of the aforesaid extract would reveal that out of Rs.10,00,00,000/-, Rs.2,01,53,000/- was added on protective basis. The order indicated that the addition would be linked to the AYs that would follow and that after verification of the fact that cash received as advances from customers had been included in succeeding years, the protective addition made would stand deleted.

8. In this context Mr Kapoor has placed before us hard copies of two separate orders dated 05.10.2021 passed in AY 2011-12 and AY 2012-13. These orders suggest that advances received from customers have been included in AYs 2017-18, 2018-19 and 2019-20.

8.1. Resultantly, the return filed in AYs 2011-12 and 2012-13 have been accepted and the total taxable income, according to the Assessing Officer (AO), is "nil". Given this position, Mr Kapoor says that the penalty orders cannot survive.

9. Mr Shubhendu Bhattacharya, learned standing counsel, who appears on behalf of the respondents/revenue, says that he will obtain instructions in the matter.

10. Accordingly, list the appeals on 11.08.2023, for directions.

11. We may note that Mr Bhattacharya has been furnished the copies of orders dated 05.10.2021 passed under Section 143(3) read with Section 153A of the Act."

2. The above position on facts is not disputed by Mr. Sharma, learned counsel appearing for the respondents, who fairly concedes to the conclusion of the assessment proceedings with the income liability having been quantified 'NIL' and the protective addition being deemed to be deleted consequent to the advances having been offered to tax in AYs' 2017-18, 2018-19 and 2019-20 as well as of the income itself having been subjected to tax in the subsequent years.

3. In view of the aforesaid, we are of the considered opinion that

the penalty orders would not sustain.

4. Accordingly, we allow the instant appeals and set aside the order of the ITAT dated 16 November 2018 insofar as it had negated the challenge of the appellants to the penalty proceedings.

**YASHWANT VARMA, J.**

**PURUSHAINDRA KUMAR KAURAV, J.**

**FEBRUARY 19, 2024/** RW