आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ “ए” , चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH “A”, CHANDIGARH

श्री सुधांशु श्रीवास्तव, न्यायिक सदस्य, एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SHRI. SUDHANSHU SRIVASTAVA, JM & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA NOS. 1231 to 1236 /Chd/ 2019
निर्धारण वर्ष / Assessment Years : 2007-08 to 2012-13

Shri Karnail Singh C/o Khanna Kapoor & Co. Advocates, 63, Police Lines Road, Near Maqbool Road, Amritsar, Punjab-143001	बनाम	Joint Commissioner of Income Tax (OSD), International Taxation. Circle-Chandigarh
स्थायी लेखा सं./PAN NO: CMZPS3965B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Sanat Kapoor
राजस्व की ओर से/ Revenue by : Smt. Priyanka Dhar, Sr. DR

सुनवाई की तारीख/Date of Hearing : 28/09/2022
उदघोषणा की तारीख/Date of Pronouncement : 18/11/2022

आदेश/Order

PER SUDHANSHU SRIVASTAVA, J.M. :

All these appeals have been filed by the assessee against the consolidated order passed by the Ld. Commissioner of Income Tax(Appeals)-43, New Delhi [hereinafter referred to as ‘CIT(A)’] dated 25/06/2019 pertaining to A.Y. 2007-08 to A.Y. 2012-13. Since the issues involved in all the appeals relates to levy of penalty u/s 271(1)(C) of the Act, they were heard together and are being disposed off by this common and consolidated order for the purpose of convenience.

2. With the consent of both the parties, the case of the Assessee in ITA No. 1231/Chd/2019 in the case of Karnail Singh Vs. JCIT(OSD) Intl. Taxation, Circle is taken as the lead case wherein the grounds of appeal read as under:

"1. That the notice issued under section 274 read with section 271(l)(c) of the Act initiating penalty proceedings against the appellant is vague, illegal and bad in law.

2. That, in view of the facts and circumstances of the case and in law, no valid satisfaction has been recorded by the Assessing Officer while completing the assessment proceedings, hence the order passed u/s 274 r.w.s271(l)(c) of the Act are illegal, bad in law and without jurisdiction. Moreover, no satisfaction has been recorded in the penalty order also.

3. That the penalty was initiated on a different charge and levied on a different charge. This action of the AO is illegal and the penalty order passed is without jurisdiction.

4. That the additions made in the Assessment Order are not made on the basis of any incriminating seized material and hence, no penalty u/s. 271(l)(c) should be levied in this case.

5. The CIT(A) has grossly erred on facts and in law in upholding penally of Rs 16,670/- on addition/disallowances upheld by the CIT(A) in quantum proceedings.

6. That the lower authorities have failed to appreciate that this is a simple case of disallowances made in the assessment due to differences of opinion between the AO and assessee. Hence no penalty should be levied in this case.

7. That on the facts and circumstances of the case and in law, the CIT(A) and AO erred in not considering that the Appellant had neither concealed particulars of income nor filed inaccurate particulars of income and therefore, the initiation of penalty and subsequent levy of penalty was not warranted.

8. That the levy of Penalty vide the penalty order u/s 271(l)(c) is against the well-established norms, case laws and jurisprudence of penalty under the Income Tax Act and against various judicial pronouncements.

9. That the lower authorities have failed to appreciate that this is a simple case where the assessee declared the income under the head Income From House Property but the revenue has assessed the income under the head Income From Other Sources. Hence the penalty should be deleted."

3. Briefly the facts of the case are that the assessee is a non-resident and during the financial year relevant to the impugned Assessment Year, the assessee has booked certain units in M/s Omaxe Ltd. Novelty Mall, Amritsar. The assessee has made payment of 95% of the basic sale price at the time of booking the said units and has been provisionally allotted these units and in lieu of 95% payment of the basis sale price, M/s Omaxe Ltd. was to pay monthly

assured return to the assessee till the time of possession of these units were handed over to the assessee. In the return of income filed for the impugned assessment year, the assessee has shown the amount received from M/s Omaxe ltd. as income under the Head “Income from House property” and has claimed statutory deduction under section 24 of the Act. Further the assessee has claimed credit of TDS deducted by M/s Omaxe Ltd. @ 15% as per Article-12 of India and U.K DTAA r/w Section 90 of the Act.

3.1 As per the AO, the income received by the assessee from M/s Omaxe Ltd. cannot be stated to be income from house property as there is no construction/ complete property and the question of letting out the same to third party and earning rental income thereof does not arise. It was held by the AO that assured return being given to the assessee by M/s Omaxe Limited therefore does not fall under the head “income from house property”. Thereafter, the AO analyze the provisions of Article 12 of Indo-UK DTAA as well as definition of interest as per Section 2(28A) of the Act and has held that the money paid by the assessee to M/s Omaxe Ltd. is a capital investment for purchase of the property, the assessee will get back the capital asset and not the money. There is no money borrowed by M/s Omaxe Ltd. which is returnable within a specified time period. There was no debt or deposit taken by the Omaxe Ltd. from the tax payer and it does not have any character of debt or payment of interest. It was accordingly held by the AO that the assured return paid to the assessee is not covered under the definition of interest as per Article-12 of Indo-UK DTAA as well as Section 2(28A) of the Act. Further referring to the allotment letter, the AO held that the agreement does not intend to treat assured return as interest as nowhere in the allotment letter, it has been stated that M/s Omaxe Ltd. shall pay any interest to the assessee otherwise it would have been worded as interest which is absent in the instant case. It was accordingly held by the AO that assured return received by the assessee can only be classified under the head “income from other source” under section 56(1) of the Act and the same was

accordingly brought to tax in the hands of the assessee and as against the returned income, the assessed income was determined at Rs 2,58,090/- and penalty proceedings u/s 271(1)(C) were separately initiated.

4. Being aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A). The submissions made before the AO were reiterated. It was submitted that the AO has failed to appreciate the nature of income received by way of assured return before allotment of the property. It was submitted that under Article-12 of the Indo-UK DTAA, the term "interest" means income from debt claims of every kind. It was submitted that the amount given by the assessee to M/s Omaxe Ltd. was in the nature of debt claim till the possession of the property was actually handed over to the assessee and in this regard reference was drawn to the contents of the allotment letter dt. 12/06/2007.

4.1 The Ld. CIT(A) considered the submissions of the assessee however the same were not found acceptable. As per the Ld. CIT(A), the payments are in the nature of return on investment as held by the Hon'ble Delhi High Court in case of M/s Omaxe Ltd. Vs. Vikas Malhotra and others vide order dt. 28/07/2014 in ITA FAO(OS) 191/2014. It was further held by the Ld. CIT(A) that payment from M/s Omaxe Ltd. are not in the nature of damages for late delivery of the asset. The payments were merely assured returns of a fixed amount per month. The word "interest" has not been used in the agreement. It was accordingly held that the payments are not interest and Article -12 of India-UK DTAA as well as provision of Section 2(28A) of the Act are not applicable in the instant case.

5. Being aggrieved with the order of the Ld. CIT(A) the assessee moved in appeal before the Tribunal and recently, we have decided this matter along with other connected matters in ITA Nos. 469 to 474/Chd/2016 in case of Karnail Singh Vs. The Asst. DIT wherein we have held that the amount received by the assessee is in the nature of interest taxable @ 15% under Article 12 of India-UK

DTAA and the relevant findings are contained at para 8 & 9 of our order dated 07/11/2022 which reads as under:

> *"8. We have heard the rival contentions and purused the material available on record. We find that under the identical set of facts and circumstances of the case, the matter has been decided by the Coordinate Chandigarh Benches in case of Shri Mohinder Singh Sanghera Vs. Astt. DIT (Supra) and the relevant findings of the Coordinate Bench are contained at para 9 to 13 of its order which read as under:*
>
> > *"9. Now, coming to the merits of the case, the Assessing officer while making the impugned additions has relied upon the definition of 'interest' as provided under article 12 of the India –U.K. DTAA, which read as under:-*
> >
> > *"The term interest as used in Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtors profits, and in particular, income from Government Securities and income from bonds and debentures, including premiums and prizes attaching to such securities, bonds or debentures but, subject to the provisions of paragraph 9 of this Article, shall not include any item which is treated as a distribution under the provisions of Article 11 (Dividends) of this convention."*
> >
> > *10. The Assessing officer has also referred to the clause 23 of the allotment letter issued by the Omaxe Ltd to the assessee, which reads as under-*
> >
> > *"23. Unless a conveyance deed is executed and registered, the company shall continue to have full authority over the said Unit and all amounts paid by the Allottee (s) under this allotment shall merely be a token payment for purchase of the allotted unit and shall not give him any lien or interest in the said Unit until he has complied with all the terms and conditions of this Allotment and Conveyance of the said Unit has been executed and registered in his favour."*
> >
> > *A perusal of the above clause 23 of the Allotment letter reveals that as per the terms and conditions of the allotment letter, unless and until the Conveyance deed is executed and registered, the company i.e. Omaxe Ltd will continue to have full authority over the proposed Unit and all the amounts paid by the allottee shall merely be a token payment and shall not give any lien or interest in the said unit to the allottee. Hence, as per the above clause (23), even after payment of 95% of the sale consideration, in advance, the assessee did not get any lien or interest in the proposed unit to be constructed by Omaxe Ltd. However, in lieu of the 95% of the total sale consideration settled, the Omaxe Ltd. agreed to pay a certain fixed monthly amount to the assessee in the name of assured return. Now the question arises what is the nature of the advance payment made by the assessee to the Omaxe Ltd and what is the nature of the amount received by the assessee as assured return. The facts and circumstances on the file reveal that the property for which the assessee had paid the money was not in existence at the time of making payment and even subsequently was not capable of yielding any income in the shape of rent, lease money and even otherwise was not capable to be commercially exploited.*
> >
> > *11. Under the circumstances, it cannot be said that the assured return was any return from the property in respect of which the assessee had paid the amount. Even as per the clause 23 of the allotment letter as discussed above, even for making the investment, the payment of the advance money at the rate of 95% of the agreed price, the assessee did not get right of lien in the proposed property. The assessee, under the circumstances, had a claim of debt against the Omaxe Ltd, which means the assessee had advanced money to the Omaxe Ltd. which*

was nothing but a debt claim till the proposed property is constructed, possession handed over to the assessee and the conveyance deed executed and registered. In our view, it was a financial transaction and the assured money return received by the assessee was nothing else than the interest received by the assessee on the finances made by the assessee to the Omaxe Ltd to be used for the construction of the property. Therefore, the Omaxe Ltd had rightly deducted the tax @ 15% of the interest / assured return paid to the assessee. Even the assessee on being asked to file the return has also treated the said receipts as interest income. However, subsequently, the assessee changed his stand and come with a plea that the assured return is only in the nature of capital receipt. The assessee in this respect has placed reliance on several decisions of the High Courts and Supreme Court. Without referring to each of the decision, we may point out that the decisions referred to by the assessee are not applicable to the facts and circumstances of the case e.g. in the case of 'CIT Vs. Saurashtra Cement Ltd (2010) 325 ITR 042 (SC) : 192 taxman 300 (SC), the assessee in that case had received liquidated damages for delay in supply of plant and machinery. The Hon'ble Supreme Court held that the damages were directly and intrinsically linked with the procurement of the capital assets i.e. cement plant.

12. Similarly in the other case laws relied upon by the Ld. Counsel for the assessee, it was held that if any expenditure is incurred such as interest paid for acquiring assets, the same will be added to the cost of the assets. However, none of the case laws relied upon by the assessee as discussed above, are applicable to the facts and circumstances of this case. Neither any damages were paid by the Omaxe Ltd. to the assessee for late delivery of the possession of the commercial floors in question nor any advance money was paid by the assessee to get the commercial floors at some concessional rate or on an early date rather as discussed above, as per the clause of the agreement, even after payment of 95% of the price, the assessee did not get right or lien in the property and as discussed above, this was a financial transaction between the assessee and Omaxe Ltd. In view of this, we hold that the assured return received by the assessee was in the nature of interest and the assessee has rightly returned / offered the same as interest income.

13. In view of this, we do not find any justification on the part of the lower authorities in treating the receipts of the assessee as 'income from other sources'. We, accordingly, set aside the impugned order and direct that the assessee in this case has rightly paid the taxes as India – U.K. DTAA. No further addition is warranted. However, the claim of the assessee that it is a capital receipt not liable for taxation is rejected. The appeal of the assessee is, therefore, treated as allowed."

9. Nothing has been brought on record to the effect that the aforesaid decision of the Coordinate Bench has either been stayed or reversed by the Higher Courts. Further, no contrary decision of any Higher authority has been brought to our notice. Therefore, we see no reason to deviate from the view already taken by the Coordinate Benches and following the same, the amount received by the assessee is in the nature of interest taxable @ 15% under Article 12 of India-UK DTAA. In the result, ground no. 9 of the assessee's appeal is allowed in favour of the assessee and against the Revenue."

6. Against the order of penalty u/s 271(1)(C), the assessee moved in appeal before the ld CIT(A) and who vide his impugned order dated 25/06/2019 has

confirmed the levy of penalty and against the said order and findings of the ld CIT(A), the assessee is in appeal before us.

7. During the course of hearing, the ld AR reiterated the submissions made before the Ld. CIT(A). It was submitted that the notice under section 271 read with 274 does not specify the charge against the assessee on which the penalty is sought to be levied and even no charge has been specified in the penalty order which has been passed under section 271(1)(c) of the Act. It was submitted that in the return of income, the assessee has declared property income as rental income and claimed statutory deduction under section 24 of the Act whereas the AO has assessed the same as income from other sources and deduction so claimed has been disallowed. It was submitted that non acceptance of the taxable amount does not means that the assessee has concealed particulars of his income or furnished inaccurate particulars of his income. It was submitted that during the course of assessment proceedings, all details as directed by the AO were filed reflecting the true nature and character of income and there is no allegation in the assessment or in the penalty order that the assessee has concealed or hidden anything from the AO. It was accordingly submitted that it is simple case of difference of opinion between the assessee and the AO that the income should be assessed under what head of income. It was submitted that there are various decisions wherein it has been held that the no penalty can be levied on debatable issue and also where there is a difference of opinion in terms of the head of income under which the income can be assessed.

7.1 Regarding to the findings of the Ld. CIT(A), it was submitted that the Ld. CIT(A) has held that it is a case of deemed concealment of income as the assessee has not filed the return of income voluntarily even after the time allowed under section 153(1) has lapsed and the return of income has been filed only after issuing of notice under section 153A of the Act and Explanation 3 to Section 271(1)(c) have been invoked. In this regard, it was submitted that

there was reasonable cause on the part of the assessee in not filing the return of income. It was submitted that the assessee was an NRI and permanent resident of U.K. and was running textile business in Derby, England. He has invested in properties in India and has earned income from assured returns from his investment and on which the tax has been deducted at source @ 15% by M/s Omaxe Limited. It was accordingly submitted that the assessee was under the belief that his Indian taxes have been deducted at source and there were no further obligation on his part to pay any further taxes and report by way of filing the return of income.

7.2 It was further submitted that even without prejudice to the said contention even where it is held that Explanation 3 is applicable in the instant case, as per Explanation 4, the tax sought to be evaded in cases where Explanation 3 applied means tax on the total income assessed as reduced by tax deducted at source. It was submitted that it is an admitted position that in the instant case, M/s Omaxe Ltd. has deducted tax @ 15% as per Article 12 of the India-UK DTAA and our reference was drawn to the para 5 of the assessment order which reads as under;

> " *As per information available and return filed by the assessee, the total assured return received by Sh. Karnail Singh and TDS deducted during the assessment year under consideration are as under:*

Financial Year	Total assured return	TDS deducted
2006-07	2,58,092/-	39,488/-

7.3 It was submitted that similar position exists in other assessment years and in this regard, our reference was drawing to the following table and the contents thereof which read as under:

Assessment Year	Income Received from Omaxe	TDS @ 15%

2007-08	Rs. 2,58,092/-	Rs. 39,488/-
2008-09	Rs. 61,93,345/-	Rs. 1,052,882/-
2009-10	Rs. 64,73,424/-	Rs. 11,00,496/-
2010-11	Rs. 62,72,020/-	Rs. 10,66,256/-
2011-12	Rs. 54,66,404/-	Rs. 8,68,083/-
2012-13	Rs. 53,65,700/-	Rs. 8,29,003/-

7.4 It was submitted that in view of the same, where the income of the assessee is held as assessable under Article 12 of India-UK DTAA as so contended in the quantum proceedings and the tax has also been deducted thereon as per Article 12 of India-UK DTAA, as per explanation 4 to section 271(1)(C), there is no tax which is sought to be evaded by the assessee and thus, there is no basis for levy of penalty in all these case. It was accordingly submitted that penalty so levied and sustained by the Ld. CIT(A) be directed to be deleted.

8. Per contra, the Ld. DR relied on the order of the lower authorities and our reference was drawn to the findings of the Ld. CIT(A) which reads as under:

> *"4.2 The submissions of the appellant and the arguments of the AO have been examined. It is clear that the appellant had not filed his return voluntarily even after the time allowed under sec. 153(1) had lapsed. The appellant filed a return only after issue of notice u/s 153A. In the absence of such notice, the aforesaid income would have clearly been concealed and the tax on the same evaded. The arguments are not relevant as the entire income per se was sought to be concealed by the appellant by not filing the return. It is only the notice u/s 153A which resulted in the filing of return. The nature of addition or disallowance of deduction or the treatment of income leading to penalty is absolutely irrelevant in the present case. It is further seen that though the AO has not referred to Explanation 3 to sec.271(l)(c), the aforesaid explanation is clearly applicable to the appellant. The explanation lays out a deemed concealment for cases where returns have not been filed within the period specified u/s 153(1) i.e. twenty one months from the end of the A Y 2010-11.*
>
> *Explanation 3 to section 271(1) provides as under*
>
> *"Explanation 3.—Where any person fails, without reasonable cause, to furnish within the period specified in sub-section (1) o f section 153 a return of his income which he is required to furnish under section in respect of any assessment year commencing on or after the 1st day of April, 1989, and until the expiry of the*

period aforesaid, no notice has been issued to him under clause (i) of sub-section (1) of section 142 or section 148 and the Assessing Officer or the Commissioner (Appeals) is satisfied that in respect of such assessment year such person has taxable income, then, such person shall, for the purposes of clause (c) of this sub-section, be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under section 148."

4.2.1 The import of the aforesaid provision is that if a person, does not file a return of income for an assessment year voluntarily within the normal period of limitation (under section 139 or section 153(1)) and no notice under sections 142(1) or 148 is issued to him till the expiry of the said period, he will be treated to have concealed his income and penalty will be leviable on him accordingly if he is later found to have had taxable income in that year. Thus, for the purpose of falling within the purview of Explanation 3, firstly, a person should have failed without to furnish return of income for any assessment year within eighteen months from the end of the assessment year; and that no notice should have been issued to him under section 142(1) or section 148 of the Act till the expiry of the eighteen month, period; and lastly, the concerned officer is satisfied that in respect of such assessment year, such person had taxable income. In such cases, Explanation 3 provides that such person shall be deemed to have concealed the particulars of his income within the meaning of clause (c) of section 271(1) of the Act for such assessment year. In such an eventuality, even if the person concerned files a return after the expiry of the said period of two years in pursuance of a notice under section 148 of the Act, the deeming provision of Explanation 3 shall still have application and income would be deemed to be concealed. In the appellants case the conditions laid down in the Explanation are satisfied as no return of income was filed before issue of notice under *section 153A and therefore income is deemed to be concealed.*

4.2.2 The receipt of income from Omaxe has not been held to be of the nature of house property income. This view has already been upheld in appeal on the assessment order. The appellant was aware of the nature of the receipt. Therefore there could not be any reasonable cause for not filing the return. The appellant cannot be granted any immunity from the fact that the position of filing the return was not known to the appellant. In the absence of the reasonable cause the last limb of Explanation 3 is also satisfied. Explanation 3 is clear in stating that there is a default in the nature of not filing of any return. The assessee shall be deemed to have concealed particulars of income. In this context, therefore, the principal argument of the appellant and his reliance on the judgements that it was only a change of head of income and therefore no penalty lies is also not correct. Explanation 3 refers to deemed concealment which has been established in the appellants case.

4.2.3 In view of the aforesaid position, the penalty imposed by the AO is clearly in order. The appellant has concealed particulars of income by not filing return and is therefore liable to penalty u/s 271(l)(c). It is further seen that the quantum of penalty is to be determined in accordance with the provisions of explanation 4 to sec. 271(l)(c). The AO has not correctly computed the tax sought to be evaded in accordance with the said explanation. The relevant extract of the explanation is as under:

Explanation 4.—For the purposes of clause (iii) of this sub-section, the expression "the amount of tax sought to be evaded",—

(a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, means the tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income;

(b) in any case to which Explanation 3 applies, means the tax on the total income assessed [as reduced by the amount of advance tax, tax deducted at source, tax collected at source and self-assessment tax paid before the issue of notice under section 148];

(c) in any other case, means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished.

4.2.4 The Explanation 4(c) is clearly applicable to the appellant's case. In this context therefore, the tax sought to be evaded would be the tax on the assessed income as reduced by the total tax deducted at source before issue of notice u/s 153A. The AO is directed to correct the quantum of penalty in accordance with Explanation 4."

9. We have heard the rival contentions and purused the material available on record. In the quantum proceedings, we have held that the amount received by the assessee is in the nature of interest taxable @ 15% under Article 12 of India-UK DTAA. It is also an admitted and undisputed position that M/s Omaxe Limited has deducted tax @ 15% as per Article 12 of India-UK DTAA while remitting the payment to the assessee. Therefore, we find that even as per the findings of the ld CIT(A), where the provisions of Explanation 3 read with Explanation 4(b) to Section 271(1)(C) are applicable and invoked in the instant case, the tax finally assessed would be equal to tax deducted at source and there is no quantum of tax which is sought to be evaded by the assessee and therefore, in light of same, there is no basis for levy of penalty u/s 271(1)(C) of the Act. In light of the same, the penalty so levied and sustained by the Ld. CIT(A) u/s 271(1)(C) is hereby directed to be deleted and the matter is decided in favour of the assessee.

10. In ITA No. 1232/Chd/2019, ITA No. 1233/Chd/2019, ITA No. 1234/Chd/2019, ITA No. 1235/Chd/2019, ITA No. 1236/Chd/2019, both the parties fairly submitted that the facts and circumstances of the case are exactly identical except for the difference in the amount involved. Therefore, our findings and directions contained in ITA No. 1231/Chd/2019 shall apply *mutatis mutandis* to these appeals and the same are decided in favour of the assessee.

11. In the result, all the appeals of the assessee stands allowed.

(Order pronounced in the open Court on 18th November 2022.))

Sd/-	Sd/-
विक्रम सिंह यादव	**सुधांशु श्रीवास्तव**
(VIKRAM SINGH YADAV)	**(SUDHANSHU SRIVASTAVA)**
लेखा सदस्य/ ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

AG
Date: 18/11/2022

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar

SAG INFOTECH