आयकर अपीलीय अधिकरण "जी" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCH "G", MUMBAI

श्री अमित शुक्ला, न्यायिक सदस्य एवं

श्री आशवानी तनेजा, लेखा सदस्य के समक्ष ।

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND SHRI ASHWANI TANEJA, ACCOUNTANT MEMBER

ITA No. : 1965/Mum/2014

(Assessment year: 2009-10)

Goldfilled Mercantile Company, 13/15, Damodar Mansion, 2nd Floor, Amrut Keshav Nayak Marg Fort, Mumbai -400 001 स्थयी लेखा सं.:PAN: **AAAFG 2959 G**	**Vs**	DCIT Circle 12(1), Aayakar Bhavan, M K Road, Mumbai -400 020
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Chetan Karia
Respondent by	:	Shri Rajesh Ranjan Prasad

सुनवाई की तारीख /Date of Hearing : 10-09-2015

घोषणा की तारीख /Date of Pronouncement : 16-09-2015

आदेश
ORDER

श्री अमित शुक्ला, न्या स:

PER AMIT SHUKLA, JM:

The aforesaid appeal has been filed by the assessee against the impugned order dated 04.12.2013, passed by CIT(A)-23, Mumbai in relation to the penalty proceedings u/s 271(1)(c) for the assessment year 2009-10. The assessee is mainly aggrieved by levy of penalty of Rs. 4,02,03,900/- u/s 271(1)(c).

2. Brief facts are that, the assessee is a partnership firm which has shown income from capital gain on sale of assets, income from interest and dividend. Return of income was filed on a total income of Rs. 26,80,99,047/- for the assessment year 2009-10 on 31.03.2010. The said return was processed u/s 143(1), but later on was selected for scrutiny by issuance of notice u/s 143(2) dated 18.08.2010. Thereafter, the assessee's revised its return of income on 02.08.2011 declaring total income of Rs. 27,03,01,900/- in the

computation of long-term-capital-gain. The relevant facts *qua* the levy of penalty are that the assessee firm is a partnership came into existence in the year 1975. Prior to that it was proprietary concern of Shri Pyarali Dholakia which was converted into a partnership firm by admission of his daughter Natasha Almas and son, Mateen Dholakia as partners. Later on, there was change in the partners and his son Mateen and wife, Mrs. Pravin Dholakia were taken as partners in 1983. An immovable property situated at Chakala, Andheri (East), Mumbai was owned by Shri Pyarali Dholakia in his proprietorship concern, later on, the said property was converted into property of partnership firm in year 1975. A part of the property was owned by Mrs. Pravin Dholakia, who entered into a Memorandum of Understanding with the assessee firm granting of her share of property to the partnership in 2003, for a consideration of Rs. 35,05,000/-. This consideration was neither paid nor transferred to Mrs. Pravin Dholakia during her lifetime (she passed away on 26th November, 2006). On 8th May, 2006 the partnership firm entered into joint venture agreement for the development of the property and introduced the Development Rights to the property into joint venture with M/s Prestige Properties (Developer). Thus immovable property was introduced/entered into on AOP consisting of the assessee firm and the Prestige Properties for the purpose of development. Since the transaction had taken place during the previous year 2006-07, the assessee firm has treated the said transactions as transfer of asset and long-term-capital-gain was computed by adopting gross sale consideration of Rs. 17 crores. The Assessing Officer in the assessment order for the impugned assessment year, that is, 2009-10 has taken note of this fact and has also given credit to sum of Rs. 17 crores, already considered for taxation. After the death of Mrs. Pravin Dholakia on 20.11.2006, daughter Meenaz was appointed as Executrix of her Will and her Estate by which she has bequeathed her property to her Husband (Shri Pyarali Dholakia).

Later on, Mr. Pyarali Dholakia also expired on 19.09.2007 and again daughter Meenaz was appointed as Executrix of his Will and Estate. As per his Will, it was mentioned that, in the event of development of the property by the firm, each of his three daughters would be entitled to 10% of the sale proceeds and the balance after the payment of taxes, will belong to his son Mateen. Thereafter, the assessee firm started negotiation for retirement from the joint venture by which the land would go to the developers. On 21.05.2008, the partners retired from Joint venture and received consideration of Rs. 70 crores from the said Joint Venture in lieu of the transfer of the land. By the Deed of Retirement, the assessee firm exited from the 'Joint Venture' and continuing Members i.e. M/s Prestige Properties paid consideration to the assessee firm. All the legal heirs were also confirmatory party to the deed of retirement. Out of the consideration received on retirement from the joint venture, the assessee firm paid following sums to the three legal heirs (Daughters) as per the "will" aggregating to Rs. 17,74,22,070/- :-

Name of the Legal Heir	**Gross Amount paid**	**Tax thereon by grossing up**
Mrs. Meenaz Kassam	4,50,00,000	1,31,40,690
Mrs. Tanveer Coelho	4,50,00,000	1,31,40,690
Mrs. Natasha Simpson	4,50,00,000	1,31,40,690

In this manner, the assessee firm has calculated the tax by grossing-up the whole amount and also paid the tax in the government treasury from its own account. In the return of income, while computing the long-term-capital-gain, the assessee claimed the deduction of Rs. 17,74,22,070/- on the ground that the transfer of price in the land to legal heirs on retirement from Joint Venture, was due to testament of the "will" of the father and family arrangement, hence it amounts to diversion by overriding title to the three legal heirs of Mr. Pyarali Dholakia.

3. However, the Assessing Officer held that, payment made to the legal heirs of the partner, Shri Pyarali Dholakia & Mrs. Pravin Dholakia cannot be allowed to be reduced from the gross consideration received, as the same belongs to the partnership and

the entire amount should have been shown in the hands of the firm. The reason given by him has been elaborately discussed from pages 10 to 13 of the assessment order. The relevant observation and the finding of the Assessing Officer are as under :-

> *"On the basis of the facts highlighted above and in view of the show cause and its response dated 26.12.2011 and 28.12.2011 by the assessee, it can be seen that the assessee is primarily relying on the fact that the family members are legal heirs of the partners and are therefore entitled for their share in the GMC property. At this state, the following issues are to be considered while deciding the taxability of income arising out of long term capital gain on sale of shares mentioned above :*
>
> *i. The assessee firm M/s Goldfilled Mercantile Co. is having absolute rights in the title of the property mentioned at 'a' above.*
>
> *ii. None of the family members have any rights in the property at 'a' and only the Assessee firm M/s GMC have rights in the JV and/or the property.*
>
> *iii. M/s Goldfilled Mercantile Co. is the owner of the piece of land 'a' for last more than 50 years. Since the title of the land is in the name of firm itself, the taxability at the time of transferring the capital asset would be in the hands of the firm only.*
>
> *iv. At the time of entering into Joint Venture agreement in May, 2006, none of these family members had any role to play and in fact Joint Venture deed was only signed by Shri Mateen Dholakia on behalf of assessee firm M/s Gold filled Mercantile Co.*
>
> *v. None of the family members have staked any claim for any share in the property when the property ('a' & 'b') was transferred vide agreement dated 08/05/2006.*

vi. The only obligation for the Assessee firm was that to pay the mutually agreed compensation for land 'b'. This is due to the fact that the Assessee firm was having only the selective rights on land 'b' and the title was not in the name of the firm but in the name of Mrs. Pravin Pyarali Dholakia.

vii. Similarly at the time of deed of retirement executed on 21/05/2008, Shri Mateen Dholakia only signed on behalf of M/s Goldfilled Mercantile Co.

viii. None of the partners were signatory to the above deed of retirement even when their relatives who were partners of the firm have died.

ix. Now, at the time of retirement, an amount of Rs. 17,74,22,070/- cannot be considered as a deduction while computing net sales consideration as none of the family members have any rights either in the AOP/JV or in the Goldfilled property. If these three persons were having such right in the JV and/or in property, the same should have been reflected in the agreement dated 08/05/2006 and resultant computation of capital gain during AY 2007-08.

x. Since, the rights in the title and development rights of property were only vested in the Assessee firm; the taxability of the long term capital gain would only be in the hands of the firm.

xi. Payment to family members is only an application of income and cannot be considered as an allowable expense/deduction prior to computing the consideration for capital gain computation in the hands of the firm".

"In view of the above, it is established that the capital asset which was transferred was owned by the firm and not by the legal heirs of the partners. Thus, the long term capital gain arising out of transfer of such capital asset would only be

taxable in the hands of the assessee firm and not in the hands of legal heirs of the partners. Any payment out of gross consideration received/receivable to the legal heirs of the partners can be best be considered as application of income but such payment cannot be reduced from the gross consideration while computing the long term capital gains. As the absolute rights in the capital assets were only vested in the firm; the long term capital gain arising out of transfer of such capital asset would only and entirely accrue in the hands of the assessee firm M/s Goldfilled Mercantile Co".

Accordingly, the entire gross sale consideration dated 21st May, 2008, of Rs. 70 crore was taken as sale consideration and whatever amount was shown in the AY 2007-08 was reduced and long-term-capital-gain was computed at Rs. 41,62,25,278/-. Thereafter, the assessee moved an application u/s 154, praying that, in case the deduction of Rs. 17,74,22,070/- is not given, then adjustment of tax paid by the firm in the name of the legal heir should be adjusted. The Department fairly agreed with such a prayer and allowed the credit of taxes, paid by the assessee though on behalf of the legal heirs. This adjustment in fact, resulted into refund of Rs. 13,29,566/- which is evident from the copy of the order passed by the Assessing Officer u/s 154.

4. Now, penalty has been levied on this claim of deduction of Rs. 17,74,22,070/-. In the penalty proceedings, the assessee's explanation has been summarized by the Assessing Officer in Penalty order in para 5.2, which for the sake of ready reference is reproduced hereunder

"i. They acknowledge that the property belongs to the firm and the share of the legal heirs was paid to them under mutual agreement, however, tax on the amount paid to the legal heirs were erroneously deposited in the names of the heirs instead of the firm. Also since the payments

were made by the assessee itself, credit for taxes paid can be given in its name and PAN.

ii. *The assessee had claimed the deduction of the amount paid to the legal heirs on the belief that the legal heirs had the preferential rights over the property and that this is a diversion by overriding title in favour of the estate of the partners of the assessee firm.*

iii. *The way in which the income from capital gains was shown in the return of income was due to a particular view point taken at the time of filing of return of income which is based on the agreement entered into between the developer and the assessee firm and that there was no mala fide intention.*

iv. *Various case laws are cited in support of their contention that penalty u/s 271(1)(c) should not be imposed".*

However, the Assessing Officer rejected the assessee's explanation and after detailed discussion, and citing various judicial authorities, levied the penalty of Rs. 4,02,03,900/- as per the discussion appearing at pages 7 to 13 of the penalty order.

5. The Ld. CIT(A), too has confirmed the penalty after discussing the entire facts and submissions of the assessee and held that the assessee's explanation cannot be held to be reasonable explanation, because at the threshold, legal heir do not have the right on sale consideration, which can be said to have been diverted by overriding title. He also noted the fact that the amount paid to the legal heirs were out of the amounts standing in the credit of father and mother which to be paid as part of the family settlement amongst the legal heirs and this had no connection whatsoever with the taxability on the sale of the assets on which the capital-gains had accrued to the assessee. Under no

circumstances, the amount paid to the legal heirs could have been claimed by the assessee as deductible u/s 48. Regarding assessee's plea that taxes has already been paid by the legal heirs at the same rate, therefore, there was no *mala fide* intention to evade taxes is not tenable, because as per the law, the taxes are required to be paid by the person to whom income has accrued. The assessee has claimed wrong deduction to which it was not eligible at all. Thus, he rejected the assessee's contention on all counts. Besides this, he has also discussed various case laws, including that of Supreme Court decisions in the case of Dharmendra Textiles Processors Reliance Petroproducts (P.) Ltd. and Delhi High Court in the case of Zoom Communications.

6. Before us the Ld. Counsel, Shri Chetan Karia, after explaining the entire facts, first of all, drew our attention to relevant documents, like joint venture agreement entered into between the assessee firm and the developer; family arrangement between father and his four children and family business of M/s Goldfilled Mercantile Company; a copy of "Will" executed by Shri Pyarali Dholakia; second family agreement dated 9th May, 2008 and Retirement deed. From these documents, placed in the paper book, he submitted that firstly, by virtue of these documents and reading of the relevant clauses therein, the assessee was under genuine and *bona fide* belief that amount of sale consideration received should be paid to the three daughters as per partner as per his 'will' and who were his legal heirs and, therefore, the payment was made to them after calculating the on grossing-up the amount, that is, the gross amount paid and the taxes thereon. Thus, the assessee had paid more taxes on or behalf of the legal heirs. Secondly, the overall conduct of the assessee is required to be seen/gauged that there was no intention even remotely for evading the tax, because the assessee had paid more taxes on behalf of the legal heirs and if such an amount would have been included in the income of the assessee and taxes would have been

calculated on such income then the assessee would have paid less taxes. In fact, the assessee is now entitled for refund of Rs. 13,97,526/- which is evident from the copy of the order passed u/s 154. The decision of Hon'ble Supreme Court in the case of ITO vs. Ch. Atchaiah, reported in 218 ITR 239 (SC) has heavily relied upon by the Assessing Officer for the proposition that the taxes has to be paid and levied under the correct assessee, he submitted that the said judgment is not applicable in the case of the assessee, because there the Assessing Officer has option to assess either the AOP or its member which fact is not applicable here in the case of the impugned assessee firm. The assessee had paid the amount to the legal heirs and genuinely believed that there was a diversion by overriding title by virtue of family arrangement, Retirement Deed and the Will. He also distinguished the decision of Hon'ble Delhi High Court in the case of CIT vs. Zoom Communication (P.) Ltd. [2010], reported in 327 ITR 510 (Del) and placed reliance upon the decision of Hon'ble Bombay High Court in the case of CIT vs Dychem, in Income-tax Appeal No.1346 of 2013, order dated 06.07.2015 wherein, Hon'ble High Court has taken note of Zoom Communications. Thus, he submitted that penalty levied in the case of the assessee should be deleted.

7. On the other hand, Ld. DR, after referring to the relevant observation and finding given in the penalty order as well as the impugned order of the CIT(A), submitted that there was never an dispute about, who will pay the taxes and whose liability it is. Assessee had filed the computation of long-term-capital-gain and thereby had claimed huge deduction of Rs. 17 crores from such computation by reducing the sale consideration. It is only when the matter was taken-up during the scrutiny proceedings, the assessee was forced to withdraw the claim of deduction and showed the correct income in the hands of the assessee. Thus, it was assessee who was liable to pay tax on its own account, because it is purely application of an income. Even the assessee's

explanation kept on changing. Before the Assessing Officer, it was submitted that the assessee's claimed was based on the opinion of the Chartered Accountant and then it was submitted that there was a clerical mistake. There cannot be two views in the case of the assessee that it was assessee who was liable to show the income and there is no debatable issue at all or assessee had any *bona fide* belief. Thus, he strongly relied upon the order of the CIT(A).

8. We have heard the rival contentions, perused the relevant finding given in the impugned orders and also the material referred to before us. There is no dispute with regard to the facts discussed in the foregoing paragraphs. However, for the sake of brevity, the crucial facts, which are relevant for deciding the levy of penalty are hereby reiterated again. One, Shri Pyarali Dholakia owned an immovable property at Chakala, Andheri (East), Mumbai along with his wife. Earlier, he was carrying out his business in his proprietorship concern. Later on, in the year 1975, the proprietorship concern was converted into a partnership firm whereby his daughters and his son were taken as partners. In 1983, his wife Mrs. Pravin Dholakia and his son became the partners along with Shri Pyarali himself. The immovable property, which was partly owned by proprietary concern became part of the partnership firm on conversion in the year 1975 itself. A part of the said property which was owned by Mrs. Pravin Dholakia had entered into MOU for the grant of development rights of this property to the partnership firm in the year 2003 for a consideration of Rs. 35,05,000/-. However, this consideration was never paid to her. On 8th May -2006, partnership firm entered into joint venture agreement for the development of the property with one 'M/s Prestige Properties'. In the mean time, Mrs. Pravin Dholakia passed away on 20.11.2006 and as per her 'Will', her share of property went to her husband, Shri Pyarali Dholakia. Thus, through her Will, she had given her property to her husband. Shri Pyarali Dholakia also executed a 'Will', wherein he

made a *testament* that, in case his property held through partnership was developed then 70% of the consideration would go to his son, Mateen Dholakia and balance 10% each to his three daughters. Shri Pyarali Dholakia died on 19th September, 2007. Thereafter, a family agreement was entered into wherein, it was agreed that Rs. 4.50 crores was to be paid to each of the three daughters from the funds available from the firm from the sale of the property including the amount that the firm may receive on the retirement from the Joint Venture of the Developer. Thereafter, Retirement Deed was signed on 21.05.2008, whereby, a joint venture was ended and the Developer agreed to pay sum of 70 lakhs to the other Members of the AOP i.e. the partnership firm in view of the surrender of rights and interest in the land. Not only that, a Deed of the confirmation of the same date was also entered by legal heirs so that there is no legal claim by the legal heirs. Post this event, the partnership firm paid the amount to the three legal heirs (daughters) sum of Rs. 4.50 crores each and over and above, tax amount of Rs. 1,31,40,690/- each was paid by the assessee. Given as per the details incorporated above. Thus, the taxes were paid by the assessee-firm though on account of / on behalf of the legal heirs. Thereafter, the assessee in the return of income, declared the long-term-capital-gain received from the Developer under the Retirement Deed and claimed deduction of Rs. 17,74,22,707/- paid to legal heirs. In the course of the assessment proceedings, the Assessing Officer held that in view of the decision of the Hon'ble Supreme Court in the case of ITO vs Ch. Atchaiah (*supra*), the assessee should have shown the income under the right head and therefore, the claim of deduction is not allowable as the assessee should have shown the entire capital gain in its own hand. This disallowance of tax at Rs. 17,74,22,707/- is the subject matter of penalty. The assessee's case has been that, by virtue of 'Will' of the father of the legal heirs and by family arrangement, there was diversion by overriding title in favour of the legal heirs to

get share in the sale proceeds of the land and, therefore, there was a *bona fide* belief that the amount paid to the legal heirs is not be included in the sale consideration of the capital gain shown by the assessee firm. Once, the Assessing Officer had taxed the whole amount in the hands of the assessee, the assessee agreed to this proposition and made an application before the Assessing Officer that the taxes paid by the firm on behalf of legal heirs should be given credit to the assessee, which in fact was duly accepted and was given by the Assessing Officer under the order passed u/s 154 dated 07.06.2012. Thus, there was no revenue effect or any tax was payable by the assessee. In fact, there was a refund only.

10. Now, whether the assessee's explanation can be said to be *bona fide* or not or whether the penalty can be said to be leviable on the facts of the assessee's case. It is a trite law that the findings given in the assessment proceedings are certainly relevant and have probative value. But such a finding and material alone may not justify imposition of penalty in a given case, because consideration that arise in the penalty proceedings are separate and distinct then the assessment proceedings, because the assessee may adduce some fresh evidence or may rely on same material to show that he was not guilty of furnishing of inaccurate particulars of income or for concealment of income. The explanation given by the assessee, in the course of the penalty proceedings is a crucial and determinative factor, which needs to be scrutinized as to whether the penalty can be levied in the case of the assessee. The degree of proof under Explanation 1 to section 271(1)(c) is like a civil suit, that is 'preponderance of probabilities'. In other words, whether there was probable explanation and such an explanation has not been found to be false. The assessee may give an explanation and substantiate with his *bona fide* belief that the claim made at the time of filing of return of income was based on materials and factors favourable to the assessee at that time.

The explanation merely raises a rebuttal presumption, which could be discharged in a given case by pointing out the factors and materials in favor of the assessee. It is from this stage the burden shifts upon the revenue. Here in this case, as discussed above, the assessee had no intention even remotely to evade the taxes by claiming the deduction of the amount given to the legal heirs which is evident from the fact that assessee firm acted bonafidely that the amount was to be paid to the legal heirs of the partners and the assessee has paid more taxes though on behalf legal heirs which should have been paid through its own account. The main surviving partner, Mr. Mateen Dholakia (Son of late Mr. Pyarali & Mrs Pravin Dholakia), had tried to discharge his obligation as per the 'Will' of his parents and also by the family arrangement that out of the sale proceeds from the land originally belonging to his father, (later on converted into property of partnership firm) had to be given to his sisters. Instead of receiving the whole amount in the hands of the partnership firm and including it as its income and paying taxes thereon, and then paying to the legal heirs which would have been the correct manner, he chose to give the amount directly to the legal heirs after paying the taxes. Thus, there was no *mala fide* intention for evading the tax or not showing the income, because so far as assessee is concerned there is no tax impact even otherwise also, what has to be seen is, whether the assessee's explanation that there was diversion by overriding title by virtue of obligation cast upon due to 'Will'. Family arrangement and the other documents. Though such an award should have included as income and then such an income should have been applied as per the will of the partner, but therefore the purpose of penalty, it cannot be held that assessee is guilty of concealment of income. Once assessee has complied with the terms of the Will and the family arrangement then, it cannot be held that at the time of filing of the return the assessee lacked genuine and *bona fide* belief or acted *mala fidely* to divert the income for evading the taxes. The

concealment of income or furnishing of inaccurate particulars, as contemplated in clause (c) of section 271 has to be seen with reference to amount of tax sought to be evaded. Here, in case there is no tax which has been sought to be evaded, because as pointed out earlier, the assessee had paid more taxes as it has to pay taxes on the gross amount paid to the legal heirs. Thus, under the present facts and circumstances, we hold that penalty levied by the Assessing Officer and confirmed by CIT(A) is unsustainable. Accordingly, the ground raised by the assessee is allowed.

9. In the result, appeal of the assessee stands allowed.

Order pronounced in the open court on 16th September, 2015.

Sd/-	**Sd/-**
(आशवानी तनेजा)	(अमित शुक्ला)
लेखा सदस्य	**न्यायिक सदस्य**
(ASHWANI TANEJA)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 16th September, 2015

प्रति/Copy to:-

1) अपीलार्थी /The Appellant.
2) प्रत्यर्थी /The Respondent.
3) The CIT(A) –23, Mumbai.
4) The CIT– 12, Mumbai.
5) विभागीय प्रतिनिधि "जी", आयकर अपीलीय अधिकरण, मुंबई/
   The D.R. "G" Bench, Mumbai.
6) गार्ड फाईल \
   Copy to Guard File.

आदेशानुसार/By Order

/ / True Copy / /

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, मुंबई
Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हान व.नि.स
*Chavan, Sr.PS