[2010] 124 ITD 223 (Delhi)

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IN THE ITAT DELHI BENCH 'H'

Deputy Commissioner of Income-tax, Circle-4(1), New Delhi

v.

JMD Advisors (P.) Ltd.*

VIMAL GANDHI, PRESIDENT AND P.M. JAGTAP, ACCOUNTANT MEMBER
IT APPEAL NO. 1464 (DELHI) OF 2007
[ASSESSMENT YEAR 2003-04]
FEBRUARY 8, 2008

Section 271(1)(c) of the Income-tax Act, 1961 - Penalty - For concealment of income - Assessment year 2003-04 - Whether a mere change of head of income by Assessing Officer in assessment cannot be construed as concealment as envisaged in section 271(1)(c) so as to attract penal provisions contained therein - Held, yes - Whether valuation made by DVO is an estimate which can be a basis for making addition to income of assessee for purpose of assessment, but same alone cannot be basis to construe concealment for purpose of imposing penalty under section 271(1)(c) - Held, yes

FACTS

The assessee-company was incorporated with the main object of carrying on real estate business. It purchased certain land for a total consideration of Rs. 1.62 crores. The construction work of a three-storeyed building was commenced by the assessee on the said land in the previous year relevant to the assessment year 1998-99 and the same was completed in the previous year relevant to the assessment year 2002-03 after incurring a total expenditure of Rs. 2.12 crores on construction. During the relevant assessment year, the assessee had sold the entire property, *i.e.,* land as well as the building constructed thereon for a total consideration of Rs. 1.25 crores and, thus, suffered a loss of Rs. 2.49 crores. The assessee claimed the aforesaid loss as business loss and filed the return of income accordingly. The Assessing Officer having found that the land and building sold by the assessee had been shown in the balance sheet under the head 'Fixed assets' and not as 'stock-in-trade'; and that there was no evidence available on record to show that the assessee had carried out any business activity of real estate either in the year under consideration or even in the earlier years, held that the land and building sold by the assessee was its capital asset and the income arising from sale thereof was chargeable to tax as capital gain and not as business income. He also made a reference under section 55A to the DVO to estimate the market value of the said property as on the date of sale as well as the cost of construction of the building. In his valuation report submitted to the Assessing Officer, the DVO estimated the market value of the said property at Rs. 2.44 crores and the cost of construction of the building at Rs. 62.65 lakhs. The Assessing Officer, therefore, worked out the capital gain arising from the sale of the aforesaid property at a negative figure, *i.e.,* loss of Rs. 64.41 lakhs. Thus, the loss claimed by the assessee on sale of building at Rs. 2.49 crores was reduced by the Assessing Officer to Rs. 64.41 lakhs and the same was brought to tax under the head "Long-term capital gain" in the assessment completed under section 143(3). He also imposed a penalty of Rs. 90 lakhs under section 271(1)(*c*) holding that the assessee-company had furnished inaccurate particulars of its income.

On appeal, the Commissioner (Appeals) cancelled the penalty.

On revenue's appeal :

HELD

The land in question purchased by the assessee-company and the building constructed thereon was treated by the Assessing Officer as its capital asset mainly relying on the balance sheet of the assessee for the year under consideration wherein the said property was shown under the head 'Fixed assets'. He, however, ignored/overlooked the fact that the assessee was admittedly incorporated with the main object of carrying on real estate business and the said property including construction thereon had been shown as 'work-in-progress' by the assessee in its balance sheet relevant to the assessment years 1998-99 to 2002-03. The action of the Assessing Officer to treat the profit/loss arising from sale of the said property as capital gain as against business income as claimed by the assessee was, thus, not well-founded. Even though the said action of the Assessing Officer was not challenged by the assessee in the quantum proceedings due to the fact that the income finally assessed was loss, this by itself could not be sufficient to draw any adverse inference against the assessee during the course of penalty proceedings which were distinct and separate from the assessment proceedings. Moreover, a mere change of head of income by the Assessing Officer in the assessment could not be construed as concealment as envisaged in section 271(1)(c) *so as to attract the penal provisions contained therein. [Para 11]*

Further, in the instant case, there was no material brought on record by the Assessing Officer to show that the sale consideration of the property in question actually received by the assessee was more than what was declared in the relevant agreement and this being the undisputed position, the action of the Assessing Officer in adopting the fair market value on the basis of DVO's report as sale consideration for computing the higher income under the head 'Capital gain' itself was not tenable in law and the addition made on the basis of such action could not be treated as concealed income of the assessee to attract the penalty. [Para 12]

While computing the profit/loss arising from the property in question under the head 'Capital gain' on higher side, the cost of construction claimed by the assessee at Rs. 2.12 crores was also replaced by the Assessing Officer by adopting such cost at Rs. 62.65 lakhs relying on the DVO's report. As pointed out by the assessee, the said construction was carried out by it during a period of five years relevant to the assessment years 1998-99 to 2002-03 and the cost incurred thereon was duly recorded in the books of account regularly maintained. No defect whatsoever was pointed out by the Assessing Officer in the books of account maintained by the assessee for the said years or even for the year under consideration. In the absence of any such defect pointed out by the Assessing Officer or any material brought on record by him to prove that the cost of construction shown in the books of account had been inflated by the assessee, the addition made by substituting the cost of construction as recorded in the books of account with the valuation made by the DVO in his report itself was not justified, much less the imposition of penalty in respect of such addition. Even the benefit of indexation in respect of cost of construction admittedly incurred by the assessee in the earlier years was not allowed by the Assessing Officer while computing the income from capital gain. Moreover, it is well-settled that the valuation made by the DVO is an estimate which can be a basis for making addition to the income of the assessee for the purpose of assessment, but the same alone cannot be the basis to construe concealment for the purpose of imposing penalty under section 271(1)(c)*. [Para 13]*

In view of the aforesaid, the penalty imposed by the Assessing Officer under section 271(1)(c) *was not sustainable and the Commissioner (Appeals) was fully justified in cancelling the same. [Para 14]*

CASES REFERRED TO

CIT v. *Ram Commercial Enterprises Ltd.* [2000] 246 ITR 568/[2002] 122 Taxman 620 (Delhi) (para 6), *CIT* v. *Auric Investment & Securities Ltd.* [2007] 163 Taxman 533 (para 10), *CIT* v. *Apsara Talkies* [1985] 155 ITR 303/[1983] 15 Taxman 384 (Mad.) (para 10), *Dilip N. Shroff* v. *Jt. CIT* [2007] 291 ITR 519/ 161 Taxman 218 (SC) (para 10), *Mamta Mahajan* v. *ITO* [2004] 86 TTJ (Delhi) 120 (para 12) and *K.P. Varghese* v. *ITO* [1981] 131 ITR 597/ 7 Taxman 13 (SC).

Ms. Yogeshwari Kakkar *for the Appellant.* **Salil Aggarwal** *for the Respondent.*

ORDER

Per P.M. Jagtap, Accountant Member. - This appeal is preferred by the revenue against the order of learned CIT(A)-VII, New Delhi dated 11-12-2006 whereby he cancelled the penalty of Rs. 90 lakhs imposed by the Assessing Officer under section 271(1)(*c*).

2. The relevant facts of the case giving rise to this appeal are as follows. The assessee is a company which was incorporated with the main object of carrying on real estate business. It purchased a property at 6, Central Lane, Babar Road, New Delhi *vide* a sale deed dated 26-10-1995 for a total consideration of Rs. 1,62,00,000. The construction work of a three-storeyed building was commenced by it on the said land in the previous year relevant to assessment year 1998-99 and the same was completed in the previous year relevant to assessment year 2002-03 after incurring a total expenditure of Rs. 2,12,18,084 on construction. This entire property *i.e.,* land as well as building constructed thereon was sold by the assessee during the previous year relevant to the assessment year under consideration *i.e.,* assessment year 2003-04 for a total consideration of Rs. 1,25,00,000 *vide* sale deed dated 10-3-2003. The assessee-company thus incurred a loss of Rs. 2,49,63,084 - [Rs. 1,25,00,000 - (Rs. 1,62,00,000 + Rs. 2,12,18,084 + Rs. 45,000)] as a result of the said transaction which was claimed by it as a business loss in the return of income filed for the year under consideration wherein total loss was declared at Rs. 2,51,33,234 including mainly the said loss of Rs. 2,49,63,084 incurred on sale of land and building. During the course of assessment proceedings, the claim of the assessee-company for the said loss was examined by the Assessing Officer. During the course of such examination, he found that the land and building sold by the assessee had been shown in the balance sheet under the head 'Fixed assets' and not as 'stock-in-trade'. According to him, there was no evidence available on record to show that the assessee-company had carried out any business activity of real estate either in the year under consideration or even in the earlier years. He held that even though the main object of the assessee-company was defined in the memorandum and article of association, the same by itself was not sufficient to confirm that it was actually engaged and had carried out such business activity. He, therefore, held that the land and building sold by the assessee was its capital asset and the income arising from sale thereof was chargeable to tax as capital gain and not as business income. He also made a reference under section 55A to the DVO to estimate the market value of the said property as on the date of sale *i.e.,* 10-3-2003 as well as the cost of construction of the building. In his valuation report submitted to the Assessing Officer, the DVO estimated the market value of the said property as on 10-3-2003 at Rs. 2,44,16,000 and the cost of construction of the building at Rs. 62,65,852. Adopting these values estimated by the DVO, capital gain arising from the said property sold by the assessee during the year under consideration was worked out by him at a negative figure *i.e.,* loss of Rs. 64,41,983 as per the working given below :—

Sale consideration	:	Rs. 2,44,16,000
Less : Indexed cost of land - Rs. 2,45,92,131 (Rs. 1,62,00,000 × 463/305)		
Cost of construction - Rs. 62,65,852		

		Rs. 3,08,57,983
Long-term capital loss	:	Rs. 64,41,983

3. Thus, the loss claimed by the assessee on sale of building at Rs. 2,49,63,084 was reduced by the Assessing Officer to Rs. 64,41,983 and the same was brought to tax under the head "long-term capital gain" in the assessment completed under section 143(3). He also initiated penalty proceedings under section 271(1)(*c*) and in reply to the show-cause notice issued during the course of the said proceedings, the following explanation was mainly offered on behalf of the assessee :—

(*i*)The loss arose on depressed market conditions and in the normal course of conduct of real estate business.

(*ii*)The company was formed to carry out real estate business and, therefore, the loss arising from sale of land and building could not be treated as capital loss.

(*iii*)Having regard to all the facts, it was not a fit case to make a reference under section 55A to the DVO.

(*iv*)The requisite satisfaction before initiating the penalty proceedings was not recorded by the Assessing Officer in the assessment order.

(*v*)The income returned by the assessee as well as the income finally assessed by the Assessing Officer being negative *i.e.,* loss, the imposition of penalty was not justified.

4. The above submissions made on behalf of the assessee-company were not found acceptable by the Assessing Officer and rejecting the same, he proceeded to impose a penalty of Rs. 90 lakhs under section 271(1)(*c*) holding that the assessee-company had furnished inaccurate particulars of its income.

5. The aforesaid penalty imposed by the Assessing Officer under section 271(1)(*c*) was challenged by the assessee-company in an appeal filed before the learned CIT(A) and the following submissions were made on its behalf before the learned CIT(A) :—

"1. The cost of construction incurred by the assessee during the assessment years 1998-99 to 2002-03 amounting to Rs. 2,12,18,088 has been estimated by the Assessing Officer at Rs. 62,65,852. There by reducing the cost of construction by Rs. 1,47,52,538.

2. The value of the land has been estimated at Rs. 1.81 crores as against the purchased cost of Rs. 1.62 crores.

3. Since it is a business assets as such no reference can be made under section 55A (reference under section 55A can be made only for ascertaining the FMV of Capital Assets).

4. The Assessing Officer is not clear in his mind whether reference has been made for ascertaining FMV of the assets or for determining the cost of construction incurred by the assessee.

5. The Assessing Officer with a prejudice mind has taken the FMV of the property estimated by the valuation cell as sales consideration while on the other hand has ignored the cost of construction which was incurred by the assessee in the previous year and accepted by the department. There by denying the assessee its legitimate right deducting the actual cost from the sales realization.

6. For the sake of argument even if it is presumed that the matter has been rightly referred to the valuation cell for determining the fair market value then the assessee should have been given the following benefits :—

(*a*)The matter has been referred to the valuation cell for determining the fair market value of the assets sold. In such circumstances only sales consideration declared by the assessee which was Rs. 1.25 crores should be supplemented with the fair market value as estimated by the valuation cell without disturbing the actual cost of construction adjusted to benefit of indexation.

(*b*)The cost of construction as declared by the assessee should be given the benefit of indexation in that case the loss which would have been computed would be much higher than the loss declared by the assessee in its computation of income as per the working given below :—

Sales2,44,16,000

Less :- Indexed cost of land2,45,92,131
(As computed by Assessing Officer)

Indexed cost of construction

241856 (1998-99)	×	$\frac{463}{331}$	=	338306	
1628114 (1999-2000)	×	$\frac{463}{351}$	=	2147626	
13399495 (2000-01)	×	$\frac{463}{389}$	=	15948499	
5762230 (2001-02)	×	$\frac{463}{416}$	=	6571213	
186393 (2002-03)	×	$\frac{463}{426}$	=	202582	25208226

49800357

Long Term Capital Loss
25384357

From the above it is clear that the loss so computed shall be much more than loss declared in the return filed by the assessee there by leaving no ground for levy of penalty under section 271(1)(*c*) by the Assessing Officer."

6. It was also submitted on behalf of the assessee-company before the learned CIT(A) that no proper satisfaction as required in law was recorded by the Assessing Officer in the assessment order and in the absence of such satisfaction, the initiation of penalty proceedings itself was bad in law as held by Hon'ble Delhi High Court, *inter alia,* in the case of *CIT* v. *Ram Commercial Enterprises Ltd.* [2000] 246 ITR 568[1] . It was further contended that both the returned income and assessed income in its case being negative *i.e.,* loss, the imposition of penalty was not justified. The imposition of penalty under section 271(1)(*c*) was also challenged by the assessee relying on the various judicial pronouncements as mentioned by the learned CIT(A) on pages 5 and 6 of his impugned order.

7. After considering the submissions made on behalf of the assessee-company in the light of material available on record as well as the case laws cited in support, the learned CIT(A) disposed of the assessee's appeal by deciding the issue as under :—

> "Rival contentions have carefully been considered. After consid- ering the rival submissions I have come to the conclusion that as far as the issue of the recording of the satisfaction note by the Assessing Officer for initiation penalty proceedings is concerned, the conten- tion of the ld. AR of the appellant stand rejected. The Assessing Officer has in unambiguous terms recorded his satisfaction for initiation of penalty proceedings for furnishing inaccurate particulars of income with regard to treatment of the asset under construction and also with regard to the sale considerations. Accordingly, reliance placed by the ld. AR of the appellant in the decision of Hon'ble Delhi High Court in the case of *Super Metal Re-Rollers (P.) Ltd.* and *Ram Commercial Enterprises Ltd.* are not applicable to the facts of the appellant's case. As far as the another contention of the ld. AR of the appellant that since both returned income and assessed income are losses, penalty proceedings cannot be imposed, same also stand rejected because of amendments brought in the *Explanation 4* to section 271(1)(*c*) and also omission of the sub-clause (*iii*) of section 271(1)(*c*) of the Income-tax Act, 1961. My view has found support from the decision of jurisdictional Delhi High Court in the case of *CIT* v. *Aditya Chemicals Ltd.* However, on the merits of the facts I find that it is not a case of either furnishing inaccurate particulars of income or concealment of its income. It could be true that the assessee had not filed initially an appeal against the quantum additions but same cannot be foundation for levying the penalty under section 271(1)(*c*). Concealment proceedings and assessment proceedings are independent to each other. The consideration for not preferring an appeal against the quantum addition could be totally different because there is no tax liability on the assessed income and also there is no further continuation of the business and, therefore, there was no justification to bear the cost of legal expenses. The principle laid down for imposing the penalty under section 271(1)(*c*) of the Income-tax Act, 1961 by various courts of law including Apex Court is totally different which includes the recording of the satisfaction by the Assessing Officer, non-acceptance of the *Explanation* given by the assessee in respect of its claim although all the material facts have been disclosed and also establishment of the concealment which should not be based purely on the estimation basis or guess work etc. Therefore, the penalty proceedings are being adjudicated as independent to the assessment proceedings although facts remain the same. On the merit of the facts it has been found that the Assessing Officer has treated whole of the transaction as of capital gain transaction. Accordingly, he had referred the valuation of the building to the District Valuation Officer to ascertain the fair market value under section 55A of the Income-tax Act, 1961. The fair market value of the asset was assessed by the Distt. Valuation Officer at Rs. 2,44,16,000 which included the cost of land at Rs. 1,81,50,000 and cost of construction at Rs. 62,65,852. While working out the long-term capital gain, Assessing Officer adopted the fair market value of the building as the sale consideration of the building. The Assessing Officer had also given the indexation at the cost of land and added the cost of construction with the indexed cost of land. It has resulted into the cost of asset at Rs. 3,08,57,983. The long-term capital loss worked out at Rs. 64,41,983 as per the figures given by the District Valuation Officer against the long-term capital loss of Rs. 2,49,63,084 returned by the assessee in its return of income. However, the ld. AR of the appellant has vehemently argued and submitted that even if the findings of the Assessing Officer in treating the whole of the transaction as a capital gain transaction and adopting the figures as per the Valuation Officer are accepted, the long-term capital loss should have been worked out by giving the indexation loss at the cost of construction also in various years which were duly disclosed in its return of income and accepted by the Department. As per the working of the appellant, the long-term capital loss work out at Rs. 2,53,84,357 if the indexation is given on the cost of construction disclosed in its return of income. According to the appellant, the Assessing Officer can adopt fair market value under section 55A but cost of construction cannot be adopted as per the estimate given by the Valuation Officer for the purpose of capital gain as there is no provision in the Income-tax Act. Moreover, in the case of the appellant, the cost of construction has been disclosed by the assessee in its return of income for last many years which was never disputed by the Department. Therefore, the cost of acquisition of the asset should have been adopted by the Assessing Officer by giving the indexation on the cost of land and also on the cost of construction as disclosed in its return of income. Therefore, the working of the Assessing Officer even if it is presumed that the said transaction is a capital gain transaction, working out the long-term capital loss is patently incorrect. Furthermore, appellant has vehemently objected the treatment of the whole of the transaction as a capital gain transaction instead of business transaction because the assessee had consistently been filing its return of income and showing the said transaction as business transaction in last several years. The Assessing Officer had not brought anything on record to prove that the cost of construction has been inflated by the assessee or there has been any suppression in its sale consideration. Therefore, on the merit of the facts itself, the initiation of penalty proceedings and subsequent levying the penalty is totally unjustified. The facts, as stated by the assessee, have found the merits. I agree with the ld. AR of the appellant that Assessing Officer has not brought any facts on the record so as to prove that the cost of the construction has been inflated by the assessee in the past many years. Contrary to that, the value of the cost of construction has been accepted by the Department in the past years. Moreover, the cost of construction, as assessed by the Valuer, cannot be adopted for working out the long-term capital gain or loss because under section 55A, the reference can be made for limited purpose for ascertaining the fair market value of the asset. In the entirety of the circumstances, I agree with the ld. AR of the appellant that working out the long-term capital loss in itself is incorrect because same is contrary to the provisions of the law. Furthermore, if the said transaction is treated as business transaction, the difference be- tween the cost of construction as disclosed by the assessee and the cost of construction as estimated by the Departmental Valuer in the said transaction is not sufficient to take view that there is an involved concealment of income so as to attract section 271(1)(*c*) of the Income-tax Act, 1961. Reliance is placed on the decisions of *CWT* v. *Viswanath SLP* (Civil) Nos. 15761-15762 of (1998) 209 ITR 89 (SC) and *TPK Ramalingham* v. *CIT* [1995] 211 ITR 520, 523 and 524 (Mad.). Considering the entirety of all the facts and circumstances, I

have come to the conclusion that since assessed loss is based on the estimate made by the Departmental Valuer irrespective of whether the said transaction is treated as a capital gain transaction or business transaction but same estimate cannot be sufficient for levying the concealment penalty under section 271(1)(*c*). Therefore, I direct the Assessing Officer to delete the penalty of Rs. 90,00,000 imposed by him under section 271(1)(*c*) of the Income-tax Act, 1961."

8. The learned CIT(A) thus found no merit in the preliminary objection raised by the assessee challenging the validity of initiation of penalty proceedings on the ground of lack of satisfaction observing that the requisite satisfaction was duly recorded by the Assessing Officer in the assessment order. He also rejected the contention of the assessee that the returned as well as assessed income being loss, the penalty under section 271(1)(*c*) was not leviable by relying on *Explanation (4)* to section 271(1)(*c*) inserted in the statute with effect from 1-4-2003. He, however, accepted the contentions raised on behalf of the assessee-company before him challenging the imposition of penalty on merits and cancelled the penalty so imposed by the Assessing Officer under section 271(1)(*c*). Aggrieved by this relief allowed by the learned CIT(A) to the assessee, the revenue has preferred this appeal before the Tribunal.

9. Before us, the learned DR strongly supported the order of the Assessing Officer imposing penalty under section 271(1)(*c*). He submitted that as noted by the Assessing Officer in the assessment order, there was no evidence to show that the assessee-company had been engaged in the business of real estate. He submitted that as further pointed out by the Assessing Officer, the land and building in question was shown by the assessee-company as its fixed asset in the balance sheet and not as stock-in-trade which clearly fortified the fact that the said property was not developed by the assessee-company during the course of its business but the same was acquired and held as a capital asset. He contended that the claim of the assessee for the loss incurred on the sale of the said property as business loss thus was wrong and by making such wrong claim, it had clearly furnished inaccurate particulars of its income. He submitted that even the value of cost of construction as well as sale consideration of the said property was not correctly disclosed by the assessee-company which was duly established on the basis of valuation report submitted by the DVO. He submitted that the valuation done by the DVO in the said report was not challenged by the assessee-company by pointing out any material defect therein during the course of assessment proceedings nor any appeal was filed against the assessment framed by the Assessing Officer adopting the said valuation in the quantum proceedings. He contended that all these material and relevant facts of the case justifying the action of the Assessing Officer in imposing penalty under section 271(1)(*c*), however, were not properly appreciated by the learned CIT(A) and he proceeded to cancel the said penalty accepting the submissions made on behalf of the assessee-company which was not justified.

10. The learned counsel for the assessee, on the other hand, submitted that since it was a loss case and the assessee-company had discontinued its business of real estate, no appeal was filed by it against the assessment made by the Assessing Officer. He contended that such non-filing of appeal, however, cannot be held against the assessee in the penalty proceedings as the penalty proceedings are distinct and separate from the assessment proceedings. He submitted that even if the claim made by the assessee for business loss was not found acceptable by the Assessing Officer, there was nothing brought on record either during the course of assessment proceedings or even during the course of penalty proceedings to establish that the claim so made was false. Referring to the submissions made on behalf of the assessee during the course of assessment proceedings as reproduced by the Assessing Officer on page 2 of the assessment order, he pointed out that the cost incurred by the assessee on the construction of building over the years was shown as work-in-progress in the relevant balance sheets. He contended that the inference drawn by the Assessing Officer that there was no evidence brought on record by the assessee to show that it was in the business of real estate thus is factually incorrect. He submitted that the cost of construction incurred by the assessee on the said building was to the tune of Rs. 2,12,18,084 as recorded in its books of account and the Assessing Officer was not justified in referring the matter of valuation of the said construction to the DVO without pointing out any defect in the books of account of the assessee regularly maintained. He contended that there was also no evidence brought on record by the Assessing Officer to show that any consideration over and above what was shown in the relevant agreement had been actually received by the assessee from the purchaser of the property in question. He submitted that there was no doubt a mistake committed by the assessee-company in showing the said property as fixed assets in its balance sheet for the year under consideration, but the same was not conclusive or even sufficient to change the head under which the resultant loss was claimed from business income to capital gain. He contended that change of such head of income, in any case, cannot be treated as concealment for levy of penalty under section 271(1)(*c*). In support of this contention, he relied on the decision of Hon'ble Delhi High Court in the case of *CIT* v. *Auric Investment & Securities Ltd.* [2007] 163 Taxman 523. He also contended that computation of higher income by substituting the sale price on the basis of DVO's report cannot be a sufficient ground to allege concealment by the assessee and to impose penalty under section 271(1)(*c*) as held in the case of *CIT* v. *Apsara Talkies* [1985] 155 ITR 303[1] (Mad.) and in the case of *Dilip N. Shroff* v. *Jt. CIT* [2007] 291 ITR 519[2] (SC). He further contended that no indexation was allowed by the Assessing Officer in respect of cost of construction while computing the capital gain and as shown in the working filed on behalf of the assessee before the learned CIT(A), if the benefit of such indexation had been allowed, the loss worked out was more than what was shown by the assessee.

11. We have considered the rival submissions and also perused the relevant material on record. It is observed that the property in question purchased by the assessee-company and the building constructed thereon was treated by the Assessing Officer as its capital asset mainly relying on the balance sheet of the assessee-company for the year under consideration wherein the said property was shown under the head "Fixed assets". He, however, ignored/overlooked the fact that the assessee-company was admittedly incorporated with the main object of carrying on real estate business and as pointed out by the learned counsel for the assessee from the submissions made before the Assessing Officer as reproduced on page 2 of the assessment order, the said property including construction thereon was shown as "work-in-progress" by the assessee-company in its balance sheet relevant to assessment years 1998-99 to 2002-03. The action of the Assessing Officer to treat the profit/loss arising from sale of the said property as capital gain as against business income as claimed by the assessee, in our opinion, was thus not well-founded and even though the said action of the Assessing Officer was not challenged by the assessee in the quantum proceedings due to the fact that the income finally assessed was loss as explained by the learned counsel for the assessee, this by itself cannot be sufficient to draw any adverse inference against the assessee during the course of penalty proceedings which are distinct and separate from the assessment proceedings. Moreover, a mere change of head of income by the Assessing Officer in the assessment cannot be construed as concealment as envisaged in section 271(1)(*c*) so as to attract the penal provisions contained therein.

12. It is also observed that while computing the profit/loss arising from the sale of the aforesaid property under the head "capital gain", the fair market value of the said property as on the date of sale as valued by the DVO at Rs. 2,44,16,000 in a report obtained by making a reference under section 55A was adopted by the Assessing Officer as sale consideration in place of the sale consideration of Rs. 1,62,00,000 shown in the relevant agreement. As is evident from the order of the Assessing Officer, there was, however, no material available on record before him to show that something more than what was shown in the agreement as sale consideration had been actually received by the assessee. In the case of *Mamta Mahajan* v. *ITO* [1994] 86 TTJ (Delhi) 120, this Tribunal has held that the Assessing Officer is not competent to make a reference under section 55A to determine fair market value of the asset in order to use the same as a sale consideration unless he brings the material on record to prove that the assessee has received more consideration than what he has declared. Relying, *inter alia,* on the decision of Hon'ble Supreme Court in the case of *K.P. Varghese* v. *ITO* [1981] 131 ITR 597 [1], it was also held by the Tribunal that the fair market value cannot be adopted as sale consideration unless there is material on record to prove that the assessee has received more consideration than what he has declared. In the present case, no such material was brought on record by the Assessing Officer to show that the sale consideration of the property in question actually received by the assessee was more than what was declared in the relevant agreement and this being the undisputed position, we are of the view that the action of the Assessing Officer in adopting the fair market value on the basis of DVO's report as sale consideration for computing the higher income under the head "Capital gain" itself was not tenable in law and the addition made on the basis of such action cannot be treated as concealed income of the assessee to attract the penalty.

13. It is also observed that while computing the profit/loss arising from the property in question under the head "Capital gain" on higher side, the cost of construction claimed by the assessee at Rs. 2,12,18,084 was also replaced by the Assessing Officer by adopting such cost at Rs. 62,65,852 relying on the DVO's report. As pointed out on behalf of the assessee-company before the authorities below as well as before us, the said construction was carried out by it during a period of five years relevant to assessment years 1998-99 to 2002-03 and the cost incurred thereon was duly recorded in the books of account regularly maintained. No defect whatsoever was, however, pointed out by the Assessing Officer in the books of account maintained by the assessee for the said years or even for the year under consideration and as rightly held by the learned CIT(A) in his impugned order, in the absence of any such defect pointed out by the Assessing Officer or any material brought on record by him to prove that the cost of construction shown in the books of account had been inflated by the assessee, the addition made by substituting the cost of construction as recorded in the books of account with the valuation made by the DVO in his report itself was not justified, much less the imposition of penalty in respect of such addition. Even the benefit of indexation in respect of cost of construction admittedly incurred by the assessee in the earlier years was not allowed by the Assessing Officer while computing the income from capital gain and as pointed out on behalf of the assessee before the learned CIT(A) and accepted by the latter *vide* his impugned order, even if such indexation benefit is appropriately allowed in respect of cost of construction, the resultant income would be less than what was shown by the assessee. Moreover, as held by the Hon'ble Madras High Court in the case of *Apsara Talkies* (*supra*) and by the Hon'ble Supreme Court in the case of *Dilip N. Shroff* (*supra*) cited by the learned counsel for the assessee, the valuation made by the DVO is an estimate which can be a basis for making addition to the income of the assessee for the purpose of assessment, but the same alone cannot be the basis to construe concealment for the purpose of imposing penalty under section 271(1)(*c*).

14. As such, having regard to all the facts of the case as discussed above, we are of the view that considered from any angle, the penalty imposed by the Assessing Officer under section 271(1)(*c*) was not sustainable and the learned CIT(A) was fully justified in cancelling the same. The impugned order of the learned CIT(A) is, therefore, upheld dismissing this appeal filed by the revenue.

15. In the result, the appeal of the revenue is dismissed.

26. In the result, the appeal filed by assessee, is dismissed.

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