

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHES "A", PUNE**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER
AND SHRI R.S. PADVEKAR, JUDICIAL MEMBER**

**ITA No.1167/PN/2012
(Assessment Year: 2006-07)**

Asstt. Commissioner of Income Tax
Panvel Circle, Panvel, Dist –Raigad. Appellant

Vs.

Shri Ratanshi Dahya Patel
Krishna Niwas,
Near Vishveshwara Temple,
Mahad, Dist - Raigad

PAN : AATPP5581C Respondent

Department by	:	Mr. Y. K. Bhaskar
Assessee by	:	Mr. S. N. Doshi
Date of hearing	:	12-09-2013
Date of pronouncement	:	19-09-2013

ORDER

PER G. S. PANNU, AM

This appeal by the Revenue is directed against an order of the Commissioner of Income Tax (Appeals)-I, Thane dated 29.02.2012 which, in turn, has arisen from an order dated 29.07.2010 passed by the Assessing Officer, under Section 271(1)(c) of the Income-tax Act, 1961 (in short "the Act"), pertaining to the assessment year 2006-07.

2. In this appeal, the solitary issue relates to the penalty imposed by the Assessing Officer under Section 271(1)(c) of the Act amounting to Rs.28,48,775/-, which has since been deleted by the CIT(A).

3. In brief, the facts are that assessee, an individual, filed a return of income declaring total income of Rs.11,92,680/-, which was subjected to a scrutiny assessment under Section 144 of the Act dated 23.12.2008, whereby the total income was determined at Rs.1,11,23,060/-. The said income was

scaled down to Rs.96,56,060/- consequent to the order of the Commissioner of Income Tax (Appeals)-I, Thane wherein certain relief was allowed. Subsequently, the Assessing Officer passed an order on 29.07.2010 treating the assessee guilty of concealing the income and/or for furnishing inaccurate particulars of income within the meaning of Section 271(1)(c) of the Act and levied penalty equivalent to 100% of tax sought to be evaded on such income and accordingly, the penalty was determined at Rs.28,48,775/-. Such determination of penalty by the Assessing Officer is the subject-matter of the present appeal filed by the Revenue before us, as the CIT(A) has deleted the levy of penalty on an appeal filed by the assessee.

4. The income subjected to the levy of penalty can be understood as follows. In the return of income, assessee had declared long term capital gain on purchase and sale of shares of Rs.84,51,484/- which was claimed as exempt as per Section 10(38) of the Act. However, while framing the assessment, Assessing Officer held that income earned by the assessee on account of sale of shares was a 'business income' and not 'Capital gains' and thus the exemption claimed by the assessee under Section 10(38) of the Act was denied and the amount of Rs.84,51,484/- was brought to tax as 'business income'. Secondly, out of the total interest expenditure, a sum of Rs.11,901/- was disallowed holding the same to be relatable to the exempted income, namely, dividends. For both the above additions made to the returned income, Assessing Officer has held the assessee guilty of concealing the income and/or for furnishing inaccurate particulars of income within the meaning of Section 271(1)(c) of the Act, and accordingly, penalty of Rs.28,48,775/- was imposed.

5. In appeal, the CIT(A) deleted the levy of penalty regarding the profit on sale of shares on the ground that assessability of such profit as 'capital gain' or 'business income' was merely a difference of opinion between the assessee

and the Revenue for which no penalty under Section 271(1)(c) of the Act could be levied. Secondly, with respect to the disallowance of proportionate interest of Rs.11,901/-, the CIT(A) has deleted the same on the ground that in the assessment order no penalty under Section 271(1)(c) of the Act was initiated on the said score. Accordingly, the entire penalty imposed of Rs.28,48,775/- by the Assessing Officer was deleted by the CIT(A). Against the aforesaid decision of the CIT(A), Revenue is in appeal before us.

6. The learned Departmental Representative contended that penalty has been deleted by the CIT(A) on wrong considerations. The learned Departmental Representative submitted that by declaring the profit on sale of shares as long term capital gain, assessee made a wrongful claim of exemption under Section 10(38) of the Act. The learned Departmental Representative pointed out that profit on sale of shares was indeed assessable as 'business income' in the present case as discussed by the Assessing Officer in the assessment order, which has since been upheld by the CIT(A); and, therefore the concealment of income and/or furnishing of inaccurate particulars of such income stood established.

7. On the other hand, the learned counsel for the assessee has pointed out that the CIT(A) made no mistake in deleting the levy of penalty. According to him, the assessee had disclosed all the relevant particulars in the return of income and the only point of difference with the Assessing Officer was as to whether the profit on sale of shares was assessable as a 'long term capital gain' or 'business income', which is a debatable issue. It has been pointed out that assessee had made a bonafide claim in the return of income inasmuch as long term as well as short term capital gains on sale of shares were disclosed by the assessee in earlier years also. It was pointed out that the shares in question were held for more than a period of 18 months prior to sale and the gain on sale of such shares was clearly a long term capital gain. Merely

because the Assessing Officer has not accepted the same, and has taxed it as 'business income' cannot lead to an inference of concealment of income and/or furnishing of inaccurate particulars of income. It is further pointed out that at no stage assessee has concealed any income or furnished inaccurate particulars of income and it is a case where a claim made by the assessee in the return of income has not been accepted by the Assessing Officer. Accordingly, the order of the CIT(A) is sought to be defended.

8. We have carefully considered the rival submissions. The factual matrix of the present case clearly brings out that there is no dispute that the assessee duly disclosed the transaction on purchase and sale of shares which resulted in the impugned profit of Rs.84,51,484/-. It is also not in dispute that the date of purchase, the date of sale and the period of holding etc. of the shares relating to such transactions were duly disclosed and no discrepancy in such particulars have been found by the Assessing Officer. In other words, in so far as the disclosure of the income and particulars thereof is concerned, the same were duly made and no falsity or inaccuracy in the same were found by the Assessing Officer. The only point of difference is as to whether such profit is assessable as a 'long term capital gain' so as to be exempt under Section 10(38) of the Act or the same is assessable as a 'business income' resulting in denial of exemption under Section 10(38) of the Act. The assessee claimed in the return of income that such profit is a 'long term capital gain' which was exempt under Section 10(38) of the Act. On the contrary, as per the Revenue, the same was to be assessed as a 'business income', thereby resulting in denial of exemption under Section 10(38) of the Act and accordingly, the amount of Rs.84,51,484/- has been brought to tax as 'business income'.

9. In our considered opinion, whether a particular transaction is assessable under the head 'capital gain' or under the head 'business income' is an issue which involves a mixed question of law and facts. There is a

plethora of judicial pronouncements also on the said subject. Presently, we are dealing with the levy of penalty under Section 271(1)(c) of the Act and not on the merits of the respective claims regarding the assessability of impugned transaction of purchase and sale of shares. Nevertheless, it is important to examine the bonafides of assessee's claim made in the return of income that the impugned gain on purchase and sale of shares is assessable as 'Capital Gains'. For the said purpose, the following features of the case are notable i.e. the impugned shares were held for a period exceeding 18 months prior to sale; assessee's assertions that such shares have been acquired out of own funds; that the assessee has been declaring capital gain on sale of shares in earlier years also; that there is no bar on an assessee to deal in shares as a trading activity as well as an investment activity; that the shares in question were purchased and sold on delivery basis. Moreover, it is noticed that the primary reason which prevailed with the Assessing Officer to treat the impugned profits as a 'business income' is the fact that assessee was not maintaining any separate Demat account for the two activities of Investment in shares, and Trading in shares. Considering the aforesaid factors, in our view, the stand of the assessee in the return of income to the effect that the profit on sale of shares was assessable as long term capital gain by treating such sale of shares as an investment activity was on bonafide considerations, though it may not have been ultimately accepted by the Assessing Officer. Notably, it is also factually emerging that none of the particulars of such income have been found to be inaccurate or false. Therefore, it would be appropriate to infer in the present case that the claim made by the assessee in the return of income was bonafide and the particulars of such income were duly disclosed. Merely because there is a difference of opinion as to the relevant head of income under which such transaction is assessable, it cannot *ipso facto* lead to a conclusion of concealment or furnishing of inaccurate particulars of such income within the meaning of Section 271(1)(c) of the Act.

10. In the above background, in our view, the CIT(A) made no mistake in observing that following the ratio of the judgement of the Hon'ble Supreme Court in the case of CIT vs. Reliance Petroproducts (P) Ltd. (2010) 322 ITR 158 (SC), there was no furnishing of inaccurate particulars in the present case within the meaning of Section 271(1)(c) of the Act. The CIT(A) has further relied upon the judgement of the Hon'ble Supreme Court in the case of Reliance Petroproducts (P) Ltd. (supra) to hold that merely making of an incorrect claim in law would also not tantamount to furnishing inaccurate particulars of income. The aforesaid conclusion of the CIT(A), in our view, is fair and proper and is hereby affirmed. Similarly, the CIT(A) has relied upon the judgement of the Hon'ble Delhi High Court in the case of CIT vs. Vamchampong & Agro Produce, 284 ITR 408 to justify the deletion of penalty in the present case. In the case before the Hon'ble Delhi High Court, assessee had sold debentures and the resultant profit was declared as 'capital gain' and claimed as exempt. The said claim was denied by the Revenue and consequently penalty under Section 271(1)(c) of the Act was imposed. The Revenue treated the profit on sale of debentures as 'business income' and not 'capital gain' as claimed by the assessee. The CIT(A) and the Tribunal in the said case deleted the penalty on the ground that assessee was under a bonafide belief that the profit arising on sale of debentures was taxable as 'capital gain' and not as 'business income'. The aforesaid view was affirmed by the Hon'ble Delhi High Court. Following the aforesaid parity of reasoning, in our view, in the present case also, penalty under Section 271(1)(c) of the Act has been rightly deleted by the CIT(A), which we hereby affirm.

11. In so far as the levy of penalty with regard to the disallowance of proportionate interest of Rs.11,901/- was concerned we find no reasons to interfere with the assertion of the CIT(A) that in the assessment order no penalty under Section 271(1)(c) of the Act has been initiated on this aspect.

The aforesaid assertion of the CIT(A) has not been controverted by the Revenue before us and accordingly, the same is hereby affirmed.

12. In the result, the order of the CIT(A) in deleting the levy of penalty under Section 271(1)(c) of the Act amounting to Rs.28,48,775/- is hereby affirmed.

13. As a result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 19th September, 2013.

Sd/-

(R.S. PADVEKAR)
JUDICIAL MEMBER

Sd/-

(G.S. PANNU)
ACCOUNTANT MEMBER

Pune, Dated: 19th September, 2013

Sujeet

Copy of the order is forwarded to: -

- 1) The Assessee;
- 2) The Department;
- 3) The CIT(A)-I, Thane;
- 4) The CIT-I, Thane;
- 5) The DR, "A" Bench, I.T.A.T., Pune;
- 6) Guard File.

By Order

//True Copy//

Sr. Private Secretary
I.T.A.T., Pune