

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI**

BEFORE SHRI J. SUDHAKAR REDDY, A.M. AND SHRI V. DURGA RAO, J.M.

ITA No. 2316/Mum/2011
Assessment Year : 2007-08

Harding Loevner Funds Inc.,
C/o, S.R.Batliboi & Co.,
18th Floor, Express Tower,
Nariman Point, Mumbai – 400 021.
(PAN – AABCH 4746C)

... Appellant

Vs.

Asstt. Director of Income Tax,
(International Taxation) – 3(1),
Scindia House,
Mumbai – 400 038.

...Respondent

Appellant by : Mr. R.R. vora
Respondent by : Mr. CGL Nair

Date of Hearing : 11/01/12 & 19/03/2012
Date of Pronouncement : 28/03/2012

ORDER

PER V. DURGA RAO, J.M.:

This appeal filed by the assessee is directed against the order of CIT(A)- 10, Mumbai, passed on 25/01/2011 for the assessment year 2007-08.

2. The ground raised by the assessee in this appeal is in respect of levy of penalty u/s 271(1)(c) of the Act.

3. Briefly the facts of the case are that the assessee is a foreign company incorporated in USA. The assessee has registered with SEBI as Foreign Institutional Institution (FII). The assessee had filed its

return of income on 30/10/2007 declaring total taxable income at Rs. 47,67,16,502/- and claimed refund of Rs. 32,64,578/-. The assessee's case was selected for scrutiny u/s 143(2) of the Act, and a notice u/s 142(1) was issued to the assessee. After receiving the said notice, the assessee intimated to the AO that the net short term capital gain of Rs. 97,31,044/- was inadvertently missed out while filing the return of income. The AO completed the assessment by adding the said net short term capital gain of Rs. 97,31,044/- as income of the assessee. Subsequently, the AO initiated penalty proceedings u/s 271(1)(c) of the Act, on the ground that the assessee had filed inaccurate particulars of its income. During the penalty proceedings, the AR of the assessee submitted that the tax liability of Rs. 10,17,380/- on the said short term capital gain of Rs. 97,31,044/- was duly discharged by the assessee by way of advance tax and as a result of the suo-moto disclosure by assessee the amount of refund due to assessee was reduced from Rs. 32,64,578/- to Rs. 22,47,197/-. The AR of the assessee pointed out that the AO computed the revised income of assessee based on the above disclosure. After considering the submissions of the assessee, the AO concluded that during the course of assessment proceedings, it is noticed that the assessee was not offered the short term capital gain of Rs. 97,31,044/-, this fact was admitted by the assessee during the course of assessment proceedings vide letter dated 18/12/2009. This is clearly proved that the assessee concealed its income and, therefore, the provisions of section 271(1)(c) were attracted. The AO further observed that the assessee is not able to substantiate its explanation before him and invoked Explanation 1 to section 271(1)(c) of the Act and imposed penalty accordingly.

4. Before the CIT(A), the AR of the assessee contended that during the hearing, no details of short term capital gain were called for by the AO but the assessee himself offered the same to tax once the

mistake was discovered by the assessee. It was submitted that the short term capital gains on sale of shares underlying GDRs inadvertently remained to be offered in return of income, which was suo-moto and without any notice issued by the AO disclosed by the assessee. It was further submitted that the assessee had already discharged the tax liability of Rs. 10,17,380/- on the amount of short term capital gain by way of advance tax on 12th July, 2006, therefore, the assessee did not have any malafide intention to conceal the income. The AR of the assessee relied upon various case laws including the decision of the Hon'ble Supreme Court in the case of CIT Vs. Reliance Petroproducts Pvt. Ltd., 322 ITR 158 (SC). After considering the submissions of the assessee, the learned CIT(A) held as under:-

"3.4. I have considered the facts and perused the material on record. I have also gone through the assessment order dated 25-11-2009 as against which no appeal was preferred before the CIT (A). It is seen that the case was selected under scrutiny and notice under section 143(2) of the Act was issued on 11-8-2008. Subsequently a notice u/s 142(1) & questionnaire was also issued on 03/09/2009. I also find from the penalty order that the AO has concluded that the appellant has not offered the amount of short term capital gains of Rs.97, 31,044 pertaining to capital gains on sale of shares of underlying GDRs voluntarily as the same was disclosed in response to notice issued u/s.142 (1) of the Act wherein the assessee was specifically asked to furnish the details capital gains and long term capital gains separately). The hearing was fixed for 14-9-2009, but no detail was furnished on that date as no one attended on that date neither sought any adjournment After a long time on 28-10-2009, SM Amit Gouri from S.R. Bafilbol & Co. attended and filed detail vide letter dated 26-10-2009. However the details filed by the assessee were not complete and therefore the AR was required to file complete details vide order sheet notings dated 28-10-2009, and the assessee was asked to file complete detail of capital gains statement In response to which the assessee filed details vide letter dated 29-10-2009, however, again same were not still found to be incomplete and sufficient and therefore the assessee was asked to file details regarding computation of long term capital gains/long term capital loss/short term capital gains and short term capital loss. In response to which the AR of assessee stated vide letter dated 9-11-2009 that net short term capital gains of Rs. 97,31,044 was inadvertently not reported under the capital gains. This fact shows that the assessee has not offered the capital gains voluntarily as it was filed after receipts of so many notices issued by the Assessing Officer and hearing conducted. Therefore, the details

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filed after long drawn process and hearings in the case is such that it cannot be said to be voluntarily and suo-moto compliance by the assessee to offer the short term capital gains of such a substantial quantum. Therefore, the appellant has concealed its income and furnished inaccurate particulars of income. In such circumstances, it would be appropriate to refer to the provisions of section 271 (1)(c) which reads as under:

*“(1) If the (Assessing) Officer or the r**j [Commissioner (Appeals)] (or the Commissioner) in the course of any proceedings under the Act, is satisfied that any person —*

(a)

(B)

(c) has concealed the particulars of his income or(J furnished inaccurate particulars of income),

He may direct that such person shall pay by way penalty —

(i)

(ii) the cases referred to in clause fin addition to tax, if any, payable] by him (a sum of ten thousand rupees) for each such failure]

(iii) In the case referred to in clause (c) [or clause (ci)] [addition to tax if any, payable) by him, a sum which shall not be less than, but which shall not exceed (three times], the amount of tax sought to be evaded by reason of the concealment of particulars of his income [or fringe benefits) or the furnishing of inaccurate particulars of such income (or fringe benefits).

Explanation I — Where in respect of any acts materials to the computation of total income of any person under this Act—

(A) such person fails to offer an explanation or offers an explanation which is found by the (Assessing) Officer or the (Commissioner (Appeals)) (or the Commissioner) to be false, or

(B) such person offers an explanation which he is not able to substantiate (fails to prove that such explanation is bonafide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him)’

3.4.1 A perusal of the above provision would show that the Explanation (1) to section 271(1) (c) provides that the penalty would duly attract wherein either no explanation is offered or explanation offered is found to be false. In this case, the appellant has offered the explanation that it inadvertently not disclosed the short term capital gains on underlying shares of GDRS in the return. However it is seen that short term capital gains was disclosed after issue of notice under section 142(1) and after hearing taken place on 28-10-09 and on 29-10-09. It may be noted that the appellant failed to attend the hearing taken Scheduled for 14-9-09. Therefore, the explanation offered by the appellant is not found to be correct and it is contrary to the facts observed during the course of assessment proceedings. Therefore, the explanation offered by the appellant is found to be false and accordingly its case is covered by clause (A) of Explanation-I. Clause LB) of Explanation I provides that where the assessee is not able to

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substantiate its explanation and fails to prove that such explanation is bona-fide and that all the facts relating to the same have been disclosed, penalty is leviable. The amount of Rs.97,31,044/- was added as the same amounted to Income of the assessee earned during the year under appeal. I found that the details of such capital gains were only filed after issue of notice on 3-9-2009 and after recording notings vide order sheet entry dated 28-10-09. i.e. after two years of the filing of the return of income and therefore the same cannot be treated as filed suo-moto. If the intention of the assessee was to offer the short term capital gains, it should have done it prior to receipt notice under section 142(1) of the Act. Its case was selected under scrutiny and the notice u/s.143 (2) of the I.T. Act was issued on 11-8-2008 whereas such capital gains was offered only in the month of November,2009 i.e. one year after selection of case under scrutiny. Further the appellant has not disclosed short term capital gains even after immediately on receipts of notice u/s 142(1) dated 3-9-2009 for which hearing was fixed on 14-9-2009. The appellant has also not filed any revised return. I am, therefore, of the considered view that the appellant has not been able to substantiate its explanation. Therefore, the conditions as envisaged under clause (B) of Explanation-I are further satisfied. Further, this explanation cannot be considered as substantiated particularly when the appellant is a nonresident is being assisted in filing of return by reputed International Counsels/C.As. Even, if, there had been such mistake, the appellant could have brought to the notice of the A.O before the scrutiny of assessment or immediately after the selection of case for scrutiny of assessment but no such attempt has been made which, leads to infer that the capital gains offered by the appellant is not bonafide. The appellant has claimed that it had paid advance tax of Rs. 10,17,380 on 13-7-2006 on earning of such short term capital gains, hence, there was no malafide intention is also cannot be accepted as correct, Rather the payment of advance tax means that the appellant was well aware that it has earned short term capital gains of underlying shares of GDRs, therefore , there is no reason as to why they said income was not disclosed particularly when the appellant has duly claimed such refund on payment of advance tax while filing the return of income. This is contrary sustained that one side it pays the advance tax and other side it claim s refund on such advance tax with offering the income corresponding to the said income. Thus it crystal clear that the explanation offered by the appellant has not been backed up by bonafide belief and genuineness of reasons and well founded intention. Therefore, I hold that the AO has rightly levied penalty in this case.

3.4.2 Earlier there was some dispute as to whether penalty proceedings under section 271(1) (c) of the Income tax Act are quasi criminal in nature or not. This controversy has been brought to an end by recent judgment of three member bench of Supreme Court in the case of M/s. Dharmendra Textile Processors and others 166 TAXMAN 65 wherein Hon'ble Supreme Court has said thality imposed under section 271(1) (c) is pU1Iy a civil liability and there is no requirement to establish mens rea' before levying penalty. It is useful to reproduce

the observation of the Supreme Court in para 24 and para 25 of the order:

“24. It of significance to note that the conceptual and contextual difference between Sections 271(1) (c) and Section 276C of the I. T. Act was lost sight of in Dilip Shroffs case (supra)

25. The Explanations appended to Section 271(1) (c) of the I. T. Act entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in Dilip N. Shroff’s case (supra) has not considered the effect and relevance of Section 276C of the I. T. Act. Object behind enactment of Section 271(1) (c) read with Explanations indicate that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Willful concealment is not an essential Ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the I. T. Act.’

3.4.3 Since as per this judgment of Supreme Court, liability imposed under section 271(1) (c) is civil liability, it is not more necessary for the Assessing Officer to establish whether the appellant has consciously furnished inaccurate particulars of income or concealed particulars of income. Therefore penalty is leviable if the claim for deduction made is not bonafide claim. Question whether in a particular case penalty u/s. 271(1) (c) of the Act is imposable or not is to be decided after taking into consideration all the facts and circumstances of each case.

3.4.4 There cannot be any precedent on facts. Precedent can be only on the point of law. Every decision has to be understood in the light of the facts of that particular case. As rightly said by the Supreme Court in Willie (William) Sianey v. State of M. P., MR 1956 SC 116; [1955] 2 SCR 1140, ‘there is no such thing as a judicial precedent on facts that counsel and even judges, are sometimes, prone to argue and to act as if they were’. A decision is available as precedent only if it decides a question of law. In other words, the principles laid down for arriving at a decision alone will bind as a precedent. Therefore it is not necessary to refer to all judgments relied upon by the AR of the appellant in the written submission filed.

3.4.5 It is further seen that the appellant has not filed any appeal against the addition. Therefore penalty would be leviable in light of Supreme Court decision In the case of K. P. Madhusudhan v CIT (2001) 251 ITR 99(SC) wherein, it was held that penalty is leviable even if the assessee has offered any amount to buy peace of mind. In the light of above facts, I am of the view that the AO has rightly imposed the penalty on the appellant.

3.4.6 It is further seen penalty is imposable even if additional income shown in revised return pursuant to questionnaire as held in following cases-in the case of Shiv Ratan R. Kapadia v ACIT (2007) 115 ITR 15

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(Pune) where income surrendered and revised return filed after investigation, penalty leviable as no plausible explanation offered Deepak Construction Co. v CIT (2007) 293 ITR 285(GuJ) it was held that where the AC detected concealment of income much before filing of revised return, penalty leviable In the case of Ravi & Co. v ACIT (2004) 271 ITR 286 (MAD) it was held that the Tribunal had come to a conclusion that much before the revised returns were filed by the assessee, the questionnaire had been issued by the Assessing Officer calling for certain details and the assessee filed the revised returns only when it was cornered. In other words, the Tribunal found that the revised returns had not been filed voluntarily in a bona fide manner, but with a view to escape from the consequences of not filing a proper return. [Para 5]

Having considered the materials on record, nothing substantial in nature was found to come to a different conclusion. As a matter of fact, in the reply to the notice under section 271(1) (c), the assessee did not offer any credible explanation indicating the reasons for which the amount had not been disclosed in the original returns. [Para 6]

in the result, it was to be held that the Tribunal was justified in concluding that the returns were not filed voluntarily and, hence, there was concealment of the amounts offered by the assessee in the revised returns.

3.4.7 In the case of Sajjanraj Nahar Vs CIT (2006) 155 Taxman 536 (Mad) it was held that Where if the assessee has disclosed income subsequent to completion of original assessment, assessee filed revised return declaring Income and the A.O. accepted revised return and made indication of initiating penalty proceedings u/s 271(1)(c). The AO accordingly called for explanation from assessee. As no explanation was offered by the assessee, A.O. levied penalty. Held on facts, the A.O. was justified in levying penalty. In view of ratio laid down by this decision the penalty is leviable in the case of the appellant.

3.4.8 In the light of above facts, I am of the view that the AO has rightly Imposed the penalty on the appellant. Accordingly the action of the AO is upheld and ground no 1 to 3 of the appeal are treated as dismissed."

Aggrieved by the order of the CIT(A), the assessee is in appeal before us.

5. Before us, the learned counsel for the assessee submitted that the assessee is a USA based FII company. During the year under consideration, it had completed more than 500 transactions and

advance tax was paid on each and every transaction, for which the certificate from CA also obtained. He further submitted that total sale transactions amounting to Rs. 5,411,763,293/-, out of which one transaction amounting to Rs. 97,31,044/- was missed. The learned counsel for the assessee pointed out from page 34 of the paper book of the assessee, which is a notice u/s 142(1) issued by the AO on 03/09/09 wherein at Sl.No. 10, the AO asked the assessee to furnish details of capital gains both short term and long term, if any, subjected to security transaction tax, and submitted that whatever the AO asked, those details were filed and it is not the case of the AO that he asked complete details of short term and long term capital gains. He has also referred page 53 of the paper book, which is a letter addressed to AO dated 09/11/09 intimating that for AY 2007-08 the net short-term capital gain amounting to Rs. 97,31,044/- was inadvertently not reported under the head 'capital gains' in the return of income filed by the assessee. It is submitted that in response to the notice issued by the AO, the assessee had filed various details vide letter dated 26/10/09, particularly, all the details of capital gains for AY 2007-08 were filed. It is further submitted that the assessee has disclosed the amount of Rs. 97,31,044/- voluntarily prior to the detection by the AO. The learned counsel for the assessee contended that the AO without investigating or examining the details filed by the assessee, found that the assessee concealed its income. He pointed out that if the details are not filed by the assessee, the AO is not able to detect the non-disclosure of the short term capital gain of Rs. 97,31,044/-. The learned counsel for the assessee contended that the CIT(A) wrongly followed the case of Dharmendra Textiles Ltd., which is not applicable to the case of the assessee. The learned counsel for the assessee submitted that no penalty can be levied on voluntary disclosure during the assessment proceedings, wherein no

specific question raised by the AO on impugned disclosure. For this proposition, he relied upon the following case laws:-

1. Om Prakash Tandon dated 15/07/2011 (ITA No. 3313/Del/2010(Delhi))
2. Hans Christian Gass dated 22/06/11 (ITA No. 2209 of 2010(Bom.))
3. Hans Christian Gass (ITA No. 1583 and 505 to 509/PN/09 (Pune) dated 26 May 2010.
4. Alexander Reuss dated 30 September 2010 (ITA No. 662/PN/2010 (Pune))
5. Babitaben Rameshbhai Patel [116 TTJ 421 (Ahm)]
6. Bhanwar Lal Mahendra Kumar Soni 138 TTJ 381 (Jd)
7. Niton Valve Industries (P) Ltd., 30 SOT 236 (Mum.)
8. K Deedar Ahmed 97 ITD 240 (Hyd)

6. The learned counsel for the assessee submitted that not showing the short term capital gain of Rs. 97,31,044/- in the return of income was a bonafide mistake and the same was withdrawn on being pointed out by the AO during the assessment proceedings, therefore, no penalty can be levied u/s 271(1)(c) of the Act. For this proposition, he relied upon the following case laws:-

1. A.H. Wheelers & Co. Pvt. Ltd., [142 TTJ 112 (All)]
2. Shahabad Co-op Sugar Mill, 129 TTJ 92 (Chd.)
3. Lino Alberto Marques dated 30th April 2008 (ITA No. 497/Pune/08 (Pune))

7. The learned counsel for the assessee submitted that no penalty should be levied on the bona-fide mistake of the assessee in not showing the short term capital gain in the return of income. For this proposition, he relied upon the following case laws:-

1. Precision Electrical Wiring dated 19 January 2011 (ITO No. 2349/Mum/2009 (Mum)).
2. NTN Manufacturing India (P) Ltd. [140 TTJ 33 (Del.)]
3. Hans Christian Gass dated 22/06/11 (ITA No. 2209 of 2010(Bom.))
4. Hans Christian Gass (ITA No. 1583 and 505 to 509/PN/09 (Pune) dated 26 May 2010.
5. Alexander Reuss dated 30 September 2010 (ITA No. 662/PN/2010 (Pune))

8. On the other hand, the learned DR besides relying upon the orders of the authorities below submitted that the assessee has not disclosed the capital gains voluntarily. He pointed out by referring page no. 37 of the paper book that the AO repeatedly asked the assessee to submit the details with regard to short term capital gains, then the assessee, subsequently, filed a letter before the AO stating that it has only having few details and the remaining details are available with custodian. The learned DR, therefore, contended that the explanation offered by the assessee is itself a contradictory and not a bona-fide explanation for the simple reason that if the assessee does not have all the details he is supposed to have explained to the AO that he does not have full information with regard to short term capital gain. The learned DR, therefore, submitted that the assessee had filed inaccurate particulars of income, which resulted into concealment of income, therefore, the AO has rightly invoked the provisions of section 271(1)(c) of the Act, and levied penalty accordingly.

9. We have considered the rival submissions, perused the record and gone through the orders of the authorities below as well as the precedents cited. It is observed that the assessee is a US based investment company filed return of income showing capital gains of Rs. 47,67,16,502/- claiming refund of Rs. 32,64,578/-. When the return was selected for scrutiny u/s 143(2), notice u/s 142(1) was issued and, in response to which, the assessee has offered additional income of short term capital gain amounting to Rs. 97,31,044/- explaining that the said gain was inadvertently not shown in the return of income for the year under consideration under the head 'capital gains'. The AO completed the assessment taxing the said capital gains offered by the assessee in the hands of the assessee. Subsequently, the AO initiated penalty proceedings u/s 271(1)(c) of

the Act, on the ground that assessee concealed income by furnishing inaccurate particulars and issued notice dated 31/12/09, which was duly served on the assessee to show cause as to why penalty u/s 274 read with section 271(1)(c) of the Act should not be levied against him. When the assessee has not filed its reply against the said notice, the AO issued another notice on 19/06/10 fixing the hearing on 24/06/10. In response to the said notice, that the assessee submitted before the AO that tax liability of Rs. 10,17,380/- on the above amount of short term capital gain of Rs. 97,31,044/- was duly discharged by the assessee by way of advance tax. He further submitted that as a result of suo-moto disclosure by the Assessee, the amount of refund due to the assessee was reduced from 32,64,578/- to Rs. 22,47,197/-. It was stated before the AO that the AO computed the revised income of assessee based on the disclosure of the details by the assessee. It was further stated that the assessee did not have any mala-fide intention to furnish inaccurate particulars of its income or concealing its income. After considering the submissions of the assessee, the AO held that the assessee had disclosed the short term capital gains of Rs. 97,31,044/- only after asking repeatedly by him, therefore, the assessee furnished inaccurate particulars of its income, which led to attract the provisions of section 271(1)(c) of the Act, and accordingly, imposed penalty on the income sought to be evaded by the assessee.

10. Before the CIT(A), it was submitted that once the mistake came to the notice of the assessee, the assessee himself offered the short term capital gains for taxation and the assessee discharged its tax liability of Rs. 10,17,380/- by paying advance tax on 12/08/06. He, therefore, submitted that the assessee did not have any mala-fide intention or mens-rea to conceal the income. He pointed out that penalty proceedings being quasi-criminal in nature, mere rejection of

the claim of the assessee does not, automatically, lead to levy of penalty u/s 271(1)(c) of the Act. It was stated that when such claim is not based on a deliberate attempt to evade tax, the same may be treated as bona-fide mistake. After considering the submissions of the assessee, the CIT(A) gave specific finding that when the case was selected for scrutiny u/s 143(2) and notice u/s 142(1) was issued on 11/08/09 and questionnaire was also issued on 3rd September, 09 fixing the case for hearing on 14/09/09. However, no details were filed by the assessee nor appeared before the AO or adjournment was sought. On 28/10/09 Shri Amit Gowri appeared on behalf of the assessee and filed the details vide letter dated 26/10/09. However, the details filed by the assessee were not complete and the AO asked the AR, who appeared on behalf of the assessee directed him to file complete details of capital gains statement vide order sheet noting dated 28/10/09. In response to the said notice, the assessee filed details vide letter dated 29/10/09. However, after examining the details, the AO found that the details were incomplete and insufficient and, therefore, asked the assessee to file the details regarding computation of long term and short term capital gains and the assessee filed the details vide letter dated 09/11/09 stating that the short term capital gains of Rs. 97,31,044/- was inadvertently not reported under the capita gains in the return of income.

11. The CIT(A), therefore, noted that this fact shows that the assessee has not offered the said capital gains voluntarily as it was filed after repeatedly requested by the AO. The CIT(A), thus, held that the amount of Rs. 97,31,044/- offered by the assessee is not voluntary offer and the same was offered after repeated requests made by the AO to file the details. In this connection, we refer to page 34 of the paper book, which is the notice issued by the AO u/s 142(1) on 03/09/09, wherein at Sl.No. 10, the AO asked the Assessee as under:-

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“10. Please furnish the details of capital gain (short term & Long term separately), if any, subject to security transaction.”

The assessee filed its reply on 26/10/09, which is placed at page No. 37 at Sl.No. 11, which is extracted below:-

“We have enclosed as Annexure 10, the details of capital gains computation for AY 2007-08. Further, we have attached the details of Securities Transaction tax paid as Annexure 11.”

From the above, it is clear that the AO asked the assessee to submit the details of capital gains and, in response, the assessee submitted all the details. At the time of hearing, the learned counsel for the assessee has pointed out that the AO has not asked all the details of short term and long capital gains, but, only asked short term and capital gains subjected to security transaction tax accordingly filed. We do not agree with the said submission of the learned counsel for the assessee for the simple reason that the AO has specifically asked the details of short term and long term capitals, then, the assessee in reply submitted that all the details are filed. When the AO asked the assessee that the details filed are not sufficient, the assessee again vide letter dated 29/10/09 submitted the details stating therein as under:-

“We wish to submit that in respect of the information requested by you in the notice issued u/s 142(1) of the Act, we were liaising with the local custodian of HLFIs for provision of the same. The custodian took more than anticipated time in providing the information and that we received only part information by end of September 2009 which was the deadline for filing tax returns for the AY 2009-10. As soon as we received the balance information, we collated the same and filed the submission with all the information requested by you.”

12. From the above, it is clear that when the AO asked the assessee to file all the details pertaining to capital gains vide letter dated 03/09/09, the assessee filed details vide letter dated 26/10/09. It is to be noted here that the assessee must be aware that it does not

have full details of short term and long term capital gains, therefore, submitted some details before the AO to take a chance that if the AO satisfies, further information need not be disclosed. It appears that the assessee wanted to take a chance to file some information though it has got full details. Therefore, it cannot be said that the assessee is voluntarily surrendered the short term capital gain of Rs.97,31,044/-, which was deliberately not shown in the return of income, but, when the AO suspected the same, the assessee submitted that the said capital gain was inadvertently missed in the revised return of income, which, in our view, under compelling circumstances only the assessee offered the short term capital gain for taxation by saying that advance tax has already been paid and it is suo-moto offered for taxation. From the above, the conduct of the assessee shows that the assessee does not want to disclose the amount in the original return of income, but, after suspected by the AO, under compelling circumstances, the assessee offered the same for taxation. We, therefore, do not find any infirmity in the order of the CIT(A), in so far as this aspect, is concerned.

13. The learned CIT(A) further noted that the assessee has claimed that it had paid advance tax of Rs. 10,17,380/- on earning of such short term capital gain, hence, there was no malafide intention is also cannot be accepted as correct, rather the payment of advance tax means that the assessee was well aware that it has earned short term capital gains of underlying shares of GDRs, therefore, there is no reason as to why the said income was not disclosed particularly when the assessee has duly claimed such refund on payment of advance tax while filing the return of income. From the above finding of the CIT(A), it is very clear that while filing the return of income refund of advance tax, which the assessee was paid was claimed, why the short term capital gain has not offered for taxation, for which there is no proper

explanation from the assessee. Therefore, we are of the view that the CIT(A) has rightly confirmed the penalty levied by the AO u/s 271(1)(c) of the Act. The learned CIT(A) referred the judgment of the Hon'ble Supreme Court in the case of M/s Dharmendra Textile Processors and others, 166 Taxman 65 wherein the Apex Court held that liability imposed u/s 271(1)(c) is purely a civil liability and there is no requirement to establish 'mens-rea before levying penalty. In this connection, the learned counsel for the assessee submitted that the CIT(A) wrongly followed the decision of the Dharmendra Textile (supra) as this decision was subsequently was explained by the Hon'ble Supreme Court in the case of CIT Vs. Reliance Petroproducts Pvt. Ltd., 322 ITR 158 (SC). He, therefore, contended that the action of the CIT(A) in following the decision of Dharmendra Textile (supra) is bad in law. We have considered the decisions of the Hon'ble Supreme court in the case of Reliance Petroproducts and Dharmendra Textiles (supra). In the case of Dharmendra Textiles, the Hon'ble Supreme Court has explained that mens-rea is not the requisite condition in case of levying penalty u/s 271(1)(c) of the Act. In the case of Reliance Petroproducts, the Apex Court has observed that the application of mens-rea is not an issue before us and the Hon'ble Supreme Court has explained the difference between 271(1)(c) and 276C. In view of the decision of the Hon'ble Supreme Court, we made it clear that to initiate penalty proceedings u/s 271(1)(c) mens-rea is not a prerequisite condition, what is necessary is either 'concealed particulars of income' or 'furnishing inaccurate particulars of income'. If either of the conditions are satisfied penalty proceedings can be initiated. During the course of penalty proceedings, if the assessee is in a position to establish by filing cogent material before the AO to prove the bonafides, and if the AO is satisfied with the explanation offered by the assessee is bona-fide one, no penalty can be levied. In the present case, the learned CIT(A) following the decision of the

Hon'ble Supreme Court in the case of Dharmendra Textile Processors (supra) for the reason that the assessee has explained before him that the assessee is not having any malafide intention to evade tax. Therefore, the contention of the assessee is that the CIT(A) wrongly followed the decision of the Dharmendra Textiles Processors(supra) is not correct. In the present case, when the case of the assessee was selected for scrutiny, the AO noticed that the assessee has not shown the short term capital gains in the return of income filed by the assessee. He, therefore, issued notice u/s 142(1) to the assessee to file all the details of short term capital gains, and the assessee filed all the details with regard to short term capital gains (vide page 7 of paper book). However, the AO noticed that the details filed by the assessee were incomplete, hence, on 26/10/09 again asked the assessee to file some more details vide order sheet note dated 28/10/09. In response, the assessee filed some details on 29/10/09 and according to the AO, even these details were not complete and again asked the assessee to file some more details. The assessee filed details vide letter dated 09/11/09 stating that all the details are not available with the assessee and most of the details are with the custodian of the assessee. From the above, we are of the view that if the assessee is not having all the details, when the AO asked to submit the details in the first instance on 26/10/09, the assessee ought to have explained before the AO that full details are not available with it as other details are available with the custodian of the assessee. The conduct of the assessee, therefore, shows that the assessee wanted to take a chance with the AO that if the AO is satisfied with the details filed by the assessee, the assessee does not want to disclose the remaining details, wherein, the details include non-disclosure of short term capital gains amounting to Rs. 97,31,044/-. From the above, it can safely be concluded that the disclosure made by the assessee is not voluntary disclosure as the

details about short term capital gain of Rs. 97,31,044/- were disclosed against the repeated demands/requests made by the AO only. In so far as the explanation offered by the assessee that the short term capital gains of Rs. 97,31,044/- was missed out inadvertently in the return of income and the details for the same were available with the custodian, in our considered view, is not a bonafide explanation for the reason that the assessee wanted to take chance with the AO by filing some details thinking that the same are enough for the AO to complete the assessment proceedings. Therefore, the assessee deliberately wanted to hide some particulars to evade tax in as much as the assessee filed the full particulars pertaining to the short term capital gain of Rs. 97,31,044/- after repeated demands/requested by the AO.

14. As regards the submission of the assessee that the assessee missing out the short term capital gain of Rs. 97,31,044/- in the original return of income is a bona-fide mistake, it is observed that whether the mistake is a bona-fide or not, it has to be decided taking into consideration the facts and circumstances of each case. In the present case, when the AO took up the return filed by the assessee for scrutiny and notice was issued u/s 1432(1) to the assessee to file all the details in respect of short term capital gains, the assessee is expected to submit the full details before the AO in respect of the short term capital gains of Rs. 97,31,044/- having paid the advance tax and claimed the refund of the same in the return of income, but, the assessee after demanding/requesting to file the details by the AO on number of occasions, finally filed the details by stating that the assessee is having only few details and the other details are available with the custodian and offered the short term capital gains of Rs. 97,31,044/-, which was stated to have been missed in the return of income. From the above, we find that it is not a bonafide mistake for

the simple reason that the assessee has tried to take chance before the AO that if the AO is not demanded further details, he could have consciously concealed the particulars in respect of short term capital gain of Rs. 97,31,044/-.

15. Now we examine the case laws relied upon by the assessee as under:-

The learned counsel for the assessee submitted that no penalty can be levied on voluntary disclosure during the assessment proceedings, wherein no specific question raised by the AO on impugned disclosure. For this proposition, he relied upon the following case laws:-

1. Om Prakash Tandon dated 15/07/2011 (ITA No. 3313/Del/2010(Delhi))

In this case, the assessee came forward to disclose the income as soon as he came to know that the income of Rs. 8,89,457/- was omitted to offer in the hands of the assessee. The assessee not filed the revised return because time was already expired, therefore, by way of a letter he offered the missed out income for taxation. In the present case, the assessee disclosed the particulars only after repeated demands/requests made by the AO. Therefore, this case law is not applicable to the facts of the case under consideration.

2. Hans Christian Gass dated 22/06/11 (ITA No. 2209 of 2010(Bom.))

In this case, during the course of assessment proceedings, the AO asked the assessee to inform as if there was any source of income excluding the income shown in the return of income and whether income arise in consequence of the services rendered in India to the employer and any other company. In response, the assessee accepted that the tax prerequisite should

be included in the total income of the assessee and accordingly the assessee paid the taxes on the same. In this case, the assessee has not made repeated demands to file more details, therefore, this case is not applicable to the facts of the case under consideration.

3. Alexander Reuss dated 30 September 2010 (ITA No. 662/PN/2010 (Pune))

In this case, the Tribunal gave a finding that we are not inclined to interfere with the penalty deleted by the CIT(A) because the assessee has filed revised computation of income of income prior to any reassessment proceedings initiated by the assessee. In the present case, even after the case of the assessee was selected for scrutiny and notice was issued u/s 142(1), the assessee was not ready to offer the missed out item in the return of income. Therefore, this case has no application to the case of the assessee.

4. Babitaben Rameshbhai Patel [116 TTJ 421 (Ahm)]

In this case also, revised return of income filed voluntarily by the assessee without pointing out anything by the AO, therefore, this case has no application to the case of the assessee.

5. Bhanwar Lal Mahendra Kumar Soni 138 TTJ 381 (Jd)

In this case, surrender of income was made during the course of survey and the assessee has explained each and every item and the explanation offered by the assessee has not been found to be false by the AO. Since facts are entirely different in this case, this case has no application to the case of the assessee under consideration.

6. K Deedar Ahmed 97 ITD 240 (Hyd)

In this case, the assessee disclosed additional income in revised return. The tribunal held that revised return filed by the assessee after detection by the department and the fact that income was assessed on protective basis that shows that the AO has not detected any concealment of income by the assessee. Since the facts are different in this case, this case is not applicable to the case under consideration.

16. The learned counsel for the assessee submitted that not showing the short term capital gain of Rs. 97,31,044 in the return of income was a bona-fide mistake, for which he relied upon the following case laws:-

1. A.H. Wheelers & Co. Pvt. Ltd., (supra) – in this case, capital loss shown as wrong figure and the mistake occurred on the part of the tax consultant, who filed IT return on the basis of audit report u/s 44AB. On being pointed out the mistake, the same was rectified before finalising the assessment. No penalty was levied in this case. Therefore, this case has no application to the case under consideration.

2. Precision Electrical Wiring (supra) – In this case assessee claimed deduction u/s 80IB. The Tribunal gave a finding that the claim is a bona-fide as the assessee withdrew the excess claim and paid tax immediately on being pointed out by the AO. We are, therefore, of the opinion that there is neither furnishing of inaccurate particulars of income nor concealing the income, as done by the assessee in the case under consideration. Hence, this case is not applicable to the case under consideration.

3. NTN Manufacturing India (P) Ltd. (supra) – In this case, assessee company having declared loss in its return for the relevant year which is the first year after its incorporation

when there was no business activity and later surrendered the said claim during the assessment proceedings, it can be accepted that the claim made in the return was a bonafide mistake committed on account of inadvertent clerical error and there was no deliberate attempt on the part of the assessee to submit inaccurate particulars of income and therefore, mere rejection of the claim of deduction of expenditure cannot justify levy of penalty u/s 271(1)(c) of the Act. Since the facts are different, this case also is not applicable to the facts of the case under consideration.

4. Kanbay Software India (P) Ltd. Vs. DCIT (supra) – In the present case, there was no concealment as the assessee has made a claim, and that too by revised return which virtually ensured that the fact of assessee having made this claim cannot remain unnoticed by the AO, and has given specific justification and all the supporting details for the same. In the case under consideration, the assessee disclosed the particulars of income only after repeated demands made by the AO. Therefore, this case is also not of any help to the case of the assessee under consideration.

17. In view of the above discussion and also taking into the facts and circumstances of the case under consideration, we find no infirmity in the order of the CIT(A) in confirming the penalty levied by the AO u/s 271(1)(c) of the Act, and the same is hereby upheld.

18. In the result, appeal of the assessee is dismissed.

**Pronounced in the open court on this 28th day of March,
2012.**

**Sd/-
(J. SUDHAKAR REDDY)
ACCOUNTANT MEMBER**

**Sd/-
(V. DURGA RAO)
JUDICIAL MEMBER**

Mumbai, Dated: 28th March, 2012

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Copy to:-

- 1) *The Appellant.*
- 2) *The Respondent.*
- 3) *The CIT (A) concerned.*
- 4) *The CIT concerned.*
- 5) *The Departmental Representative, "H" Bench, I.T.A.T.,
Mumbai.*

By Order

//true copy//

*Asst. Registrar,
I.T.A.T., Mumbai.*