IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH 'A', PUNE

BEFORE SHRI I.C. SUDHIR AND
SHRI D. KARUNAKARA RAO

ITA No. 417/PN/09 (Asstt. Year 2003-04)

Dhananjay Vilas Jadhav **304, Moti Villa,** **Fatimanagar,** **Pune- 411013** **PAN No. ADSPJ8070A**	**....**	**Appellant**
Vs.		
ITO, **Ward 1(3),** **Pune**	**....**	**Respondent**

Appellant by : Shri Pramod Shingte
Respondent by : Shri Hareshwar Sharma

ORDER

Per D. Karunakara Rao AM

This is an appeal filed by the assessee against the order of the CIT(A)-I, Pune dated 05-01-2009 for the A.Y 2003-04 and the only issue raised in this appeal is as under:-

> *"The Commissioner of Income Tax Appeals-I has erred in law & on facts in confirming the levy of Penalty u/s 271(1)(c) of the Income Tax Act, 1961."*

2. During the proceedings before us, Ld. Counsel brought to our notice that it is a case of earning of long term capital gain out of sale of ***penny*** stocks. Further, he narrated stating that, on hearing the market news that such earnings have to be offered by many others in the market as short term capital gains to avoid the litigation with the revenue, the assessee filed the revised return which happened to be belated return disclosing the correct particulars in the said return. Relevant paras 3, 4 and 4.1 of CIT(A) are as under:-

> "3. The facts of the case as per records are that the assessee has filed his original return consisting of income from long term capital gain of Rs.

8,86,540/- on account of sales of shares. Assessee subsequently filed revised return wherein the long term capital gain original shown was revised as short term capital gain. Subsequently, proceedings u/s. 148 were initiated in case of the assessee, reopening the case. In the reassessment proceedings, on the basis of enquiries conducted by the investigation Wing of the Department and enquiries conducted by the Assessing Officer, it was held that no purchase / sale transaction of shares in respect of which capital gain was shown by the assessee actually took place and the documentary evidence produced in this regard were held to be fabricated. Since no capital gains arose out of transfer of capital asset within the meaning of section 2(14) of the Income Tax Act, 1961 as assessee in the instant case did not hold any shares in reality, the claim of receipt of capital gains was rejected and short term capital gains shown by the assessee was assessed as income from other sources and penalty proceedings u/s. 271(1)(c) were initiated.

4. During the penalty proceedings, it was contended by the assessee before the Assessing Officer that he had voluntarily filed the revised return, offering the long term capital gains as originally claimed as short term capital gain and paid taxes at the normal rate. It was contended that since the gain arising out of the transaction in shares were duly reflected in the return, there was no element of concealment or furnishing of inaccurate particulars in his case.

4.1 However, the contentions of the assessee were not accepted by the Assessing Officer on the ground that the revised return filed by the assessee was not voluntary but as a result of the investigation carried out by the Investigation Wing of the Department. Further, it was also observed that the revised return filed by the assessee was not valid within the meaning of section 139(5) of the Income Tax Act, 1961. It was observed that in case of assessee, the transactions in share were found to be non-genuine and the documents produced in support of such transaction were fabricated for which the capital gains shown by the assessee were treated as income from other sources. It was also stated that the assessee did not furnish any new evidence in the penalty proceedings to substantiate the different interpretation of capital gains claimed. It was thus, concluded that the assessee has deliberately concealed the particulars of his real income of Rs.8,02,545/- giving it a colour of long capital gains. Accordingly, penalty of Rs. 1,72,547/- at minimum rate was levied u/s. 271(1)(c)."

Subsequently, the A.O issued the notice u/s 148 of the Act to regularize the impugned belated revised return of income and assessed the said short term capital gain as ***income from other sources***. Penalty proceeding u/s 271(1)© of the Act was also initiated and levied the penalty as narrated in the above para 4 of the impugned order.

3. During the proceedings before us, Ld. Counsel mentioned considering the fact of effecting of the impugned transactions through banking channels and delivering based transactions of the penny shares, the Pune Bench of the Tribunal held in number of cases that such gains have to be taxed as ***short term*** capital gains only and not as income from other sources. Taking the argument further, Ld.

Counsel stated that there is dispute on a taxability of such gains on a particular head of income. Therefore, considering the debatable nature of the issue and furnishing or disclosure of relevant information in the belated revised return of income, this case should not be a fit case for invoking the provisions of sec. 271(1)(c) Act.

4. On the other hand, Ld. Dr for the Revenue argued stating that this is a case of penny stocks and the assessee admittedly entered into the bogus and paper transactions and it was the way of converting his unaccounted money into accounted transaction by payment to meager tax. Assessee is benefited by offering the same under the head ***capital gains*** and not under the head ***income from other sources***. He also highlighted furnishing of belated revised return which must not be taken into cognizance as it is invalid one in the sight of the law. As per the Revenue only the original return of income exists and the particulars furnished in the said valid return must only be reckoned. Further, Ld. DR relied on the citations reported in 186 ITR 571 and 222 ITR 496 and 299 ITR 179.

5. During the time of rebuttal, Ld. Counsel mentioned that the act of filing the revised return was belatedly showed the voluntary nature of the assessee in coming clean before the revenue. As such, the AO did nothing to generate or garner any incriminating evidences against the assessee. Relying on the **Pune** Bench decisions in the cases of Santosh Narain Kapoor 115 TTJ (Lucknow) 402 and Prem Chand Garg (Del) (TM) 123 TTJ 433, Ld. Counsel mentioned that, assessee's case is not fit case over levy of penalty.

6. We have heard above mentioned facts and the arguments forwarded by both the parties. We have also perused the ratio of the judgement relied upon by the Counsel, the conclusion part of both the decisions are as follows:-

> **Santosh Narain Kapoor 115 TTJ (Lucknow) 402-**
>
> "**Conclusion:** There being no material with AO at the time when income was voluntarily surrendered by assessee by assessee to established that such income was concealed income of assessee or in respect of which assessee had furnished inaccurate particulars of income, penalty under s. 271 (1)(c) could not be imposed."
>
> **Prem Chand Garg (Del) (TM) 123 TTJ 433-**
>
> "**Conclusion:** Voluntary offer of income in order to buy peace and avoid litigation before taking up assessment by the A.O de hors any material with the A.O cannot amount to concealment; assessee having surrendered the amount of NRI gift on a general query raised by AO on the condition of not initiating penalty proceedings before assessment was taken up, AO could not

have imposed penalty under s. 271(1)(c) when there was no material with the AO to arrive at satisfaction about concealment."

7. Considering the fact that assessee came forward to undo the claim made in the original return by filing the belated return of income, the offer of the impugned gains under the head ***short term capital gain*** which is held by this Bench of the Tribunal as proper, we are of the opinion that the assessee's case is covered by the above referred decisions of the Tribunal of both Lucknow and Delhi Benches. In any case, this is the case where assessee came forward to undo the claim made in the original return and in this decision of the Tribunal, we find there is an element of voluntary act on part of the assessee, though it is done belatedly. In any case, the department has not brought out any incriminating material to demonstrate the impugned penny stocks in question were purchased for converting the unaccounted money into accounted money. Accordingly, we are of the opinion this is not fit case for levy of penalty.

8. Accordingly, appeal of the assessee is allowed.

9. In the result appeal of the assessee is **allowed**.

Order pronounced on 08th December, 2010.

Sd/-	**Sd/-**
(I.C. SUDHIR)	**(D.KARUNAKARA RAO)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Pune dated the 08th December, 2010
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Copy of the order is forwarded to :

1. Assessee
2. ITO, Ward 1(3), Pune
3. CIT(A)-I, Pune
4. CIT-I, Pune
5. D.R. ITAT 'A' Bench

By order

Assistant Registrar
I.T.A.T Pune