आयकर अपीलीय अधिकरण, मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B" MUMBAI

सर्वश्री बी.आर.मित्तल, न्या.स / **एवं** श्री राजेन्द्र, ले.स.

BEFORE SHRI B.R. MITTAL, JUDICIAL MEMBER /AND
SHRI RAJENDRA, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 301/Mum/2011
निर्धारण वर्ष /Assessment Year 2005-06

आयकर अपील सं. / ITA No. 7454/Mum/2011
निर्धारण वर्ष /Assessment Year 2006-07

M/s. Money Care Securities & Financial Services Ltd., 1/17, Ground Floor, Sumer Nagar, Near Kora Kendra Flyover, S.V. Road, Borivali (W), MUMBAI – 400 092.	Vs.	I.T.O. – 4(3)(3), MUMBAI.
PAN: AAACM 4056 H		
(अपीलार्थी /Appellant)		(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by : Shri Kirit Sanghvi
प्रत्यर्थी की ओर से/Respondent by : Shri Mohit Jain

सुनवाई की तारीख / Date of Hearing : 15-04-2013
घोषणा की तारीख / Date of Pronouncement : 15-04-2013

आदेश / O R D E R

PER RAJENDRA, A.M.

Assessee-company has filed appeals against the orders dt. 29-11-2010 & 26-09-2011 of the CIT(A)-11 & 9, Mumbai respectively for the AYs. 2005-06 & 2006-07. Grounds of Appeal filed by the assessee read as under:

Grounds of Appeal for the AY. 2005-06

> *1. The learned CIT(A) erred on facts and in law in confirming the order of penalty passed u/s. 271(1)(c) of the Act levying a penalty of Rs. 4,15,000/-.*
>
> *2. The learned CIT(A) erred on facts and in law in not giving a finding of fact, based on a copy of Hon'ble ITAT's order for the AY. 2002-03 passed in the case of the same appellant on similar facts and kept on his record that the Revenue's appeal on the same issue had been dismissed by Hon'ble ITAT.*

3. The learned CIT(A) erred on facts and in law in not following the Hon'ble ITAT's order passed on similar facts in the case of the same assessee for AY. 2002-03.

Grounds of Appeal for the AY. 2006-07

1. The learned CIT(A) erred on facts and in law in confirming the order dt. 26-09-2011 passed u/s. 271(1)(c) of the I.T. Act, 1961.

2.1 The learned CIT(A) erred on facts and in law in not appreciating that the Revenue's appeal on identical facts in the case of the appellant against ht eorder passed u/s. 271(1)(c) of the I.T. Act, 1961 for AY. 2002-03 was dismissed by both, Hon'ble ITAT, Mumbai and Hon'ble Bombay High Court.

2.2 The learned CIT(A) erred on facts in omitting in the order passed u/s. 271(1)(c) of the I.T. Act, 1961, the mention to the fact, especially when the fact was brought to the notice of learned CIT(A) by keeping relevant orders on record, that the Revenue's appeal against a similar order for AY. 2002-03 was dismissed by both, the Hon'ble ITAT, Mumbai and Hon'ble Bombay High Court.

2.3 The learned CIT(A) erred on facts and in law and in judicial discipline in not following order dt. 7th July 2011, passed by Hon'ble Bombay High Court on identical facts in the appellant's own case for AY. 2002-03 a copy of which was kept on the records of learned CIT(A).

The appellant craves leave to add to alter, amend or modify the grounds of appeal.

2. Assessee-company, a Member of National Stock Exchange, is engaged in the business of buying and selling of shares and securities. The issues involved in for both the years are common, so appeals are being adjudicated by a common order. Details of dates of filing of Return of Income, Returned Incomes, Dates of Assessment Orders, Assessed Income, Date of order of CIT(A) are as under:

ITA No. & AY	Date of filing of Return of Income	Returned Income	Date of Assessment Order	Income Assessed (Rs.)	Dt. of order of CIT(A)
301/M/11 2005-06	31-10-2005	NIL	28-12-2007	55,86,000	29-11-2010
7454/M/11 2006-07	28-11-2006	NIL	29-12-2008	64,40,750	26-09-2011

ITA No. 301/Mum/2011 AY. 2005-06

3. During the assessment proceedings, AO found that assessee had declared loss of Rs. 11.27 Lakhs on sale of shares and had adjusted the same against the brokerage and other income earned by it. AO was of the opinion that it was a Speculation Loss. He asked the assessee as why the explanation to Section 73 should not be invoked in the case under consideration and why the loss on purchase and sale of shares should not be treated as Speculation Loss. After considering the submissions of the assessee-company, AO treated the loss as Speculation Loss and did not allow the set-off of this loss against the Business Income of the company.

4. Assessee preferred an appeal before the First Appellate Authority (FAA). After considering the submissions of the assessee and the assessment order, FAA confirmed the order of the AO. Meanwhile, the AO initiated penalty proceedings u/s. 271(1)(c) of the Act and after giving opportunity of hearing to the appellant-company, he imposed a penalty of Rs. 4,12,653/- u/s. 271(1)(c) of the Act for furnishing inaccurate particulars of income and concealing the income. Assessee preferred an appeal before the FAA against the Penalty Order passed by the AO. FAA held that provisions contained in explanation to Section 73 were fairly clear, that trading in shares by the company resulted in Speculation Loss/Speculation Profits, that the assessee was expected not to set-off Speculation Loss against the Business Income of the company in accordance with the provisions of the Law, that it is not a case of bonafide mistake/oversight, that under no circumstances, Speculation Loss can be adjusted against the Business Income of the Capital Gain. Relying upon the order of the Hon'ble High Court of Delhi in the case of Zoom Communication Pvt. Ltd., [191 Taxman 179], he upheld the concealment penalty imposed by the AO.

5. Before us, Authorised Representative (AR) submitted that the same issue arose before the ITAT for the first time in the AY. 1997-98 and later on in the AY. 1998-99, that penalty imposed by the AO was deleted by the Tribunal vide its order dt. 26-02-2007 (ITA Nos. 5855/Mum/2000 AY. 1997-98; 5388/Mum/2002 AY. 1998-99), that the issue was debatable and hence penalty u/s. 271(1)(c) could not be imposed by the AO, that penalty u/s. 271(1)(c) for the AY. 2002-03 was deleted by the Tribunal vide its order dt. 23-04-2009 (ITA No. 129/Mum/08 AY. 2002-03), that department had challenged the order of the Tribunal before the Hon'ble Jurisdictional High Court, that appeal filed by the department was dismissed on 07-07-2011. Departmental Representative (DR) supported the order of the AO and FAA.

6. We have heard the rival submissions and perused the material put before us. We find that issue of levying of penalty for setting-off of loss against the business income has been decided by the Hon'ble Bombay High Court in favour of the assessee vide its order dt. 07-07-2011 (ITA No. 4032/2010). While deciding the issue Hon'ble Court has framed the following question. Whether ITAT was justified in deleting penalty levied u/s. 271(1)(c) of the Act. Hon'ble High Court decided the issue as under:

> *"The Tribunal has deleted the penalty on the ground that the issue was debatable and merely because the assessee has made a long claim, it is dis-allowed by the AO, levy of penalty u/s. 271(1)(c) of the Act is not justified. We see no infirmity in the order passed by the ITAT. Accordingly, appeal is dismissed".*

Respectfully following the order of the Jurisdictional High Court, we allow the appeal filed by the assessee.

ITA No. 7454/Mum/2011 AY. 2006-07

7. The facts of the case for the AY. 2006-07 are identical of the last AY except for the amount of penalty levied by the AO. For the AY under consideration, AO had levied penalty of Rs. 5,87,133/- u/s. 271(1)(c) of the Act for the same reasons which were there for the last AY. Following the order of the Hon'ble Bombay High Court, we decide the issue in favour of the assessee reversing the order of the FAA for both the years.

As a result, Appeals filed by the assessee-company stand Allowed.

Order pronounced in the open court on 15th April, 2013
आदेश की घोषणा खुले न्यायालय में दिनांक 15 अप्रैल,2013 को की गई ।

Sd/-	Sd/-
(बी.आर.मित्तल / **B.R. MITTAL**)	(राजेन्द्र / **RAJENDRA**)
न्यायिक सदस्य / **JUDICIAL MEMBER**	लेखा सदस्य / **ACCOUNTANT MEMBER**

मुंबई/Mumbai, दिनांक/Date: 15th April, 2013

TNMM

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. Appellant
2. Respondent
3. The concerned CIT (A)
4. The concerned CIT
5. DR "B" Bench, ITAT, Mumbai
6. Guard File

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai