IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "E", MUMBAI

BEFORE SHRI I.P.BANSAL,JUDICIAL MEMBER &
SHRI SANJAY ARORA, ACCOUNTANT MEMBER

ITA NO.8521/MUM/2011(A.Y. 2008-09)

Shri Subramani Ramachandran, 1102, Glen Heights, Hiranandani Gardens, Powai, Mumbai - 400 076. PAN:ABTPM 6917C (Appellant)	Vs.	The ACIT 10(1), Aaykar Bhavan, MK Road, Mumbai - 20. (Respondent)

Appellant by	:	Shri P.R.Toprani
Respondent by	:	Shri V.Krishnamoorthy
Date of hearing	:	06/12/2012
Date of pronouncement	:	19/12/2012

ORDER

PER I.P.BANSAL, J.M

This is an appeal filed by the assessee. It is directed against the order passed by Ld. CIT(A)-21, Mumbai dated 23/9/2011 for the assessment year 2008-09. The grounds of appeal raised by the assessee read as under:

> *"1. The Ld. CIT (A) erred in law and on facts in upholding the order of the Assessing Officer in levying penalty at Rs.2,69,591/- under Section 271(1)(c) of the Act.*
>
> *2. The Ld. CIT(A) erred in law and on facts in ignoring the fact that the Appellant himself agreed for the disallowance of Rs.7,93,15O/ in respect of Long Term Capital Gains made on FT Dynamic FOF which was erroneously considered by the Appellant as exempt like other Long Term Capital Gains in the computation of income.*
>
> *3. The Ld. CIT(A) ought to have considered the fact that even though the Appellant himself agreed for the disallowance, the A.O wrongly held that the Appellant has filed inaccurate particulars of income for levying penalty under Section 271(1)(c) of the Act.*

4. The Ld. CIT(A) ought to have appreciated the decision relied upon by the Appellant of the Apex Court in the case of Reliance Petro Products P.Ltd (322 ITR 158) holding that making an incorrect claim does not amount to concealment of particulars of income and penalty under Section 271(1) (c) is not leviable in respect of the same".

2. The assessee in the present appeal is aggrieved with the levy of concealment penalty amounting to Rs.2,69,591/-, which has been sustained by the Ld. CIT(A). The assessee is an individual and is a director in a company namely M/s. Technova Imaging Systems Pvt. Ltd. and main income returned by the assessee was remuneration from the said company. Apart from that an income of Rs.2,23,191/- was shown as income from other sources. During the course of assessment proceedings, going through the details regarding long term capital gain claimed by the assessee to be exempted, the AO noticed that a sum of Rs.7,93,150/- earned as long term capital gain by the assessee on FT Dynamic FOF was not eligible for exemption. The same was added to the income of the assessee. To more elaborate, the assessee had purchased certain units of mutual funds which were sold and on which Security Transactions Tax(STT) was paid. The details of such transactions as given by the assessee are as under:

Name of the Fund	Amount Rs. Invested	Dated Invested	Amount Rs. Redeemed	Date Redeemed	Long Term Capital Gains STT deducted by fund hou
DSP BR Balanced Fund	293,044	3-May-04	471391	24-Jul-07	178,347
FT Bluechip Fund	280,000	6-Oct-03	915111	11-May-07	635,111
FT Bluechip Fund	120,000	6-Oct-03	539887	7-Feb-08	419,887
FT Dynamic FOF	210,000	31-Oct-03	495852	20-Apr-07	285,852
FT Dynamic FOF	100,000	31-Oct-03	388482	11-Oct-07	288,482
FT Dynamic FOF	90,000	31-Oct-03	308816	7-Feb-08	218,816
FT Prima Fund	200,000	30-May-05	272493	7-Feb-08	72,493
FT Flexicap Fund	200,000	2-Mar-05	215109	13-Jun-07	15,109
Fidelity Special situations fund	100,000	22-May-06	124792	20-Apr-07	24,792
HDFC Capital builder	150,000	27-Oct-04	323340	20-Apr-07	173,340
HDFC Capital Builder	150,000	27-Oct-04	466958	14-Feb-08	316,958
HDFC Equity Fund	410,000	18-Mar-06	903555	20-Apr-07	493,555
HDFC Equity Fund	400,000	19-Sep-06	996320	10-Oct-07	596,320
HDFC Longterm growth	500,000	10-Feb-06	789000	7-Jan-08	289,000
HDFC Prudence fund	600,000	4-Mar-06	774325	24-Jul-07	174,325
HDFC Top200 growth	100,000	13-Aug-03	446688	11-May-07	346,688
HDFC Top200 growth	100,000	13-Aug-03	510224	14-Feb-08	410,224

fund					
ICICI Prudiscovery Fund	220,000	5-Apr-05	317329	18-Sep-07	97,329
ICICI Prudiscovery Fund	300,000	19-Sept-06	414948	21-Sep-07	114,948
ICICI EDF wealth optimizer fund	400,000	30-DEc-06	451833	14-Feb-08	51,833
ICICI Pru regular growth fund	130,000	5-Aug-03	488550	19-Jun-07	358,550
ICICI Pru regular growth fund	100,000	29-Aug-03	369810	10-Oc-07	269,810
ICICI Pru power growth fund	100,000	5-Aug-03	438250	19-Jun-07	338,250
ICICI Pru Power growth fund	100,000	29-Sep-03	517800	10-Oct-07	417,800
FT Equity income fund	400,000	19-Jun-06	557863	7-Feb-08	157,863
HDFC Equity Fund	110,000	2001-02	536141	13-Jun-07	426,141
Reliance vision fund	115,000	17-Jun-03	755353	13-Jun-07	640,353
Total Long Term Capital Gain					7812176

2.1 It can be seen from the above list that total long term capital gain earned by the assessee on mutual funds was a sum of Rs.78,12,176/-, out of which gain arising to the assessee in respect of FT Dynamic FOF was a sum of Rs.7,93,150/- On query by the AO the assessee submitted that the same may be added to the income and he is ready to pay the tax for the same. The assessee also did not agitate this addition in any further appeal.

3. On these facts it is the case of the Ld. AR that the claim of the assessee was on bona-fide belief that the items on which Security Transaction Tax paid are exempted from the long term capital gain and when AO asked him that on these funds assessee will not be entitled to claim exemption, the assessee immediately surrender the said amount and expressed his consent to bear the tax for that amount. To support such contention Ld. AR relied upon the provisions of section 10(38) of the Act, wherein it has been stated that any income arising to an assessee from transfer of long term capital gain, being an equity share in the company or a unit of equity oriented fund value will not be liable for tax, if such transaction is chargeable to STT. Ld. AR submitted that where the assessee has acted bonafidely , the penalty cannot be levied in view of the decision of Hon'ble Supreme Court in the case of Reliance Petro Products P. Ltd. (322 ITR 158).

4. On the other hand, it is the case of Ld. D.R that assessee deliberately to avoid the incidence of taxation did not disclose the transaction which were liable to tax. He submitted that assessee even did not dispute the levy of tax thereon but that does not exonerate the assessee from levy of penalty which has rightly been upheld by Ld. CIT(A) and order of Ld. CIT(A) should be upheld.

5. We have carefully considered the rival submissions in the light of the material placed before us. According to the facts of the case, we find that a bona-fide belief could be formed by the assessee on the ground that transactions liable for STT are exempt from levy of long term capital gain tax. Immediately when the assessee came to know that such transactions are liable for tax, the assessee has submitted to AO that tax may be charged on these transactions and assessee did not carry this issue in appeal. The assessee is a director of company mainly deriving its income as remuneration from the company. He may not be well conversant with the technicalities of law according to which such transactions are liable for long term capital gain tax. The case law relied upon by the Ld. AR supports the case of the assessee as facts and circumstances of each case have to be taken into consideration while deciding the issue relating to levy of concealment penalty. Keeping in view the facts of the present case, we are of the opinion that it is not a fit case where levy of penalty can be held to be justified. Therefore, we delete the penalty and allow the appeal filed by the assessee.

6. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on the 19th day of Dec. 2012

Sd/-	Sd/-
(SANJAY ARORA)	(I.P.BANSAL)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated 19th Dec. 2012

Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned
4. The CIT(A)- concerned 5. The D.R "E" Bench.

(True copy) By Order

Asst. Registrar, ITAT, Mumbai Benches

MUMBAI.

Vm.