

**IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI
BEFORE SRI MAHAVIR SINGH, JM AND SRI RAMIT KOCHAR, AM**

**ITA No.6195 & 1686/Mum/2006
(A.Y.:2004-05 & 2005-06)**

| | | |
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| Ms. Ambika Chauhan, Kanila, Swami Vivekananda Road, Vile Parle West, Mumbai 400 056 | Vs. | The Income Tax Officer, Ward- 15 (2) (2), Mumbai |
| PAN: AFIPC0966 J | | |
| Appellant | .. | Respondent |

| | | |
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| Appellant by | | Shri Girish Dave Ms. Kadambari Dave, ARs |
| Respondent by | | Shri S. C. Tiwari, DR |

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|------------------------------|--|-------------------|
| Date of hearing | | 13-06-2016 |
| Date of pronouncement | | 17-06-2016 |

ORDER

PER MAHAVIR SINGH, JM:

Out of these two appeals by assessee, ITA No.6195/Mum/2011 is arising out of the order of CIT (A)-26, Mumbai in appeal No.CIT(A)-26/IT-112/15(2)(2)/08-09 dated 09-06-2011. Assessment was framed by the ITO, Ward-15(2) (2), Mumbai for assessment year 2004-05 vide his order dated 28-11-2006 u/s 143 (3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”). Penalty under dispute was levied by ITO, Ward-15(2) (2), Mumbai u/s 271 (1) (c) of the Act vide order dated 28-01-2009.

2. The other appeal of the assessee in ITA No.1686/Mum/2011 is arising out of the order of the learned CIT (A)-26, Mumbai passed in appeal No.CIT (A)-26/IT-113/15(2) (2)/08-09 dated 16-12-2010. In this

case, assessment was framed by the ITO, Ward-15(2) (2), Mumbai for assessment year 2005-06 vide his order dated 17-09-2007 u/s 143 (3) of the Act. Penalty under dispute was levied by the ITO, Ward-15(2) (2), Mumbai u/s 271 (1) (c) of the Act vide order dated 12-02-2009.

3. The only issue in the assessee's appeal in ITA No.6195/Mum/2011 for assessment year 2004-05 is against the order of the CIT (A) confirming the action of the AO in levying penalty u/s 271 (1) (c) of the Act. For this, the assessee has raised the following ground:-

"1. The learned CIT (A) erred in confirming the action of the assessing officer in levying penalty of Rs.2,00,488 in respect of set off of brought forward long term and short term capital loss which was disallowed on the basis that the long term and short term capital loss relate to the assessment years in which the income of the appellant was clubbed with the income of the father".

4. Briefly stated, the facts of the case are that the assessee is a resident individual and her sources of income are capital gains on sale of mutual fund units and income from other sources, which includes bank interest on savings bank account and fixed deposits in banks. The assessee in her return of income for assessment year 2004-05 declared long term capital gains and short term capital gains on shares and also claimed brought forward long term losses and short term losses as under:-

| | |
|---|----------------------------|
| <i>"1. Long Term Capital Gain (with Index)</i> | |
| <i>For A. Y. 2004-2005 on sale of mutual funds</i> | <i>Rs.6,68,838</i> |
| <i>Less: B/f. Long Term loss of A. Y. 2000-2001</i> | |
| <i>Adjusted</i> | <u><i>Rs.6.68.838</i></u> |
| <i>Long Term Capital Gain</i> | <u><u><i>N I L</i></u></u> |

| | | |
|-------|---|----------------------|
| II. | <i>Short Term Capital Gain on sale of Mutual fund for A. Y. 2004-2005</i> | Rs.7,19,844 |
| Less: | <i>B/f. Long Term loss of A.Y.2002-2003 Adjusted</i> | <u>Rs. 97,262</u> |
| | <i>Short Term Capital Gain</i> | Rs.6,22,582 ===== |

The AO disallowed the claim of Long Term Capital loss as well as Short Term Capital Loss brought forwarded on the reason that the assessee is not entitled for claim of Long Term Capital Loss or Short Term Capital Loss because earlier years capital losses which were shown in the return of her father by virtue of clubbing provisions u/s 64(1A) of the Act. Accordingly, he disallowed the claim of Long Term Capital Loss or Short Term Capital Loss which has been arisen in assessment year 2002-03 and 2000-2001 respectively. Aggrieved, the assessee preferred appeal before the CIT (A) and also before the Tribunal, wherein the disallowance of brought forward losses on account of Long Term Capital Gains and Short Term Capital Gains of earlier years was confirmed. Subsequently, penalty proceedings u/s 271 (1) (c) of the Act were initiated and the AO levied the penalty to the extent of 100% of the tax to be evaded at Rs.2,00,488/- by observing as under:-

“The penalty proceedings were initiated for wrong claim of set off of earlier years long term capital loss. The assessee by her letter dt. 18/11/2008 has submitted various Supreme Court and Hon’ble High Court judgments on various issues of penalty u/s. 271 (1) (c). I have gone through of these case laws but I find that these case laws are totally different and have no relevance to the issues involved in the present case.

The assessee belongs to the family who is the owner of Parle Group of Industries where reputed CAs and Tax Consultants are doing the job of filing of IT return of family members. If it were not the CASS selection, the present A. Y. 2004-05 would not have come under scrutiny and the assessee would have enjoyed the wrong claim of capital losses of

earlier year against the current year long term and short term capital gains and there would have been a revenue loss accordingly.

Aggrieved against the action of the AO, the assessee preferred appeal before the CIT (A).

5. The CIT(A) confirmed the action of the AO vide Para 5 of his appellate order by observing as under:-

"5. It is seen that during this year also, all the facts and submissions of the appellant are same. The Ld. AR has not been able to put forward any reason against the very well considered logical decision of my predecessor sustaining the penalty in A. Y. 2005-06. I also endorsed his decision as I do not find any valid reason to differ from it. On facts, it is a case, where the appellant has not disclosed complete and correct particulars of income. The assessee has deliberately withhold the disclosure of most relevant and material fact that her brought forward losses were clubbed and merged with the income of her father in earlier years. Though the assessee had annexed the figures of these losses in computation of income but nowhere this most important fact was disclosed in the said annexure. Therefore, it is a case, where provisions of 271 (1) (c) are clearly attracted. Accordingly, the penalty levied by the AO of Rs.2,00,488/- is confirmed".

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

6. We have heard the rival contentions and gone through the facts and circumstances of the case. Before us, the learned Counsel for the assessee Shri Girish Dave, Sr. Counsel first of all stated that the assessee is born on 26-07-1984 and by virtue of which she filed her first return of income for assessment year 2003-04, when she became major. According to him, prior to assessment year 2003-04 she being a minor, her income was clubbed with her father's income Mr. Raj Kantilal Chauhan u/s 64 (1A) of the Act. According to the learned Counsel for the assessee there is no doubt about the brought forward losses on both

counts i.e. long term capital losses as well as short term capital losses from the assessment year 2001-02, 2002-03 and 2003-04 exists and the same are genuine losses. Learned Counsel for the assessee filed details of carry forward and set off of losses which are as under:

| Sr. No. | Assessment Year | Raj Chauhan | | Ambika Chauhan | | Total | |
|---------|--|------------------|------------------|--------------------|-----------------|--------------------|------------------|
| | | Long Term | Short Term | Long Term | Short Term | Long Term | Short Term |
| 1. | 2000-01 | (106,842) | - | (1,101,303) | - | (1,28,145) | - |
| 2. | 2001-02 | - | - | - | - | - | - |
| 3. | 2002-03 | (342,393) | (310,689) | (60,262) | (97,262) | (402,915) | (407,951) |
| | Total losses (including clubbed losses of Ambika Chauhan) | (449,235) | (310,689) | (1,161,825) | (97,262) | (1,611,060) | (407,951) |
| 4. | 2003-04 | (311,482) | (221,002) | (56,528) | 3,568 | | |
| 5. | 2004-05 | 1,904,271 | 4,301,673 | 668,838 | 719,844 | | |
| | <u>Less set off of brought forward loss:</u> | | | | | | |
| | 2000-01 | (106,842) | (310,689) | (668,838) | (97,262) | | |
| | 2002-03 | (342,393) | (221,002) | | | | |
| | 2003-04 | (311,482) | | | | | |
| | Balance offered to tax in AY 2004-05 | | | | | | |
| | 2005-06 | | | | | | |
| | Less intra head set off of short term capital loss of AY 2005-06 | | | | | | |
| 6. | <u>Less set off of brought forward long term capital loss:</u> | | | | | | |
| | | 1,43,554 | 3,769,982 | - | 622,582 | | |
| | 2000-01 | 2,022,448 | | 732,401 | | | |
| | 2002-03 | | | (38,298) | | | |
| | 2003-04 | | | 694,103 | | | |
| | Balance offered to tax in AY 2005-06 | | | (432,465) | | | |
| | | | | (60,522) | | | |
| | | | | (56,528) | | | |
| | | 2,022,448 | | 144,588 | | | |

In terms of the above, learned Counsel for the assessee stated that, from the above chart it is clear that assessee's father Shri Raj Kantilal Chauhan has not claimed any brought forward loss on account of long term capital gain or short term capital gain in the AY under consideration. He explained that the income of both the assessee as well as her father is in same tax bracket/slab and cannot be said that there is revenue loss rather assessee's case is totally revenue neutral. According to him, the assessee has filed all the particulars before the AO in respect to claim of loss on both the counts i.e. long term capital gains and short term capital gains. In view of this, learned Counsel for the assessee stated that there is neither concealment nor furnishing of inaccurate particulars of income as alleged by the authorities below. He took us through the penalty order of the AO and argued that there is no mention of concealment or furnishing of inaccurate particulars of income by the AO in his penalty order and the penalty is levied on wrong claim of set off of earlier year's long term capital gains or short term capital gains, which is a genuine claim but claimed under wrong understanding that henceforth assessee has to claim these losses instead of father of the assessee in whose hands assessee's income used to be clubbed prior to earlier assessment year 2003-04. He also explained that the assessee being owner of Parle Group of Industries but was not aware of the claim of loss because the AO himself has allowed the claim of loss for assessment year 2003-04 although u/s 143 (1) of the Act. He further explained that once the Revenue has itself allowed the claim, the assessee was under bona fide

belief that it is allowable loss. Even otherwise, there is no revenue loss to the Department for the reason that both the assessee as well as her father are under same tax bracket/slab of tax as is evident from the above chart. In view of the above facts, the learned Counsel for the assessee requested for deleting the penalty. He also stated that similar are the facts in ITA NO.1686/Mum/2011 for assessment year 2005-06 of assessee's appeal.

7. On query from the Bench, the learned SR. DR only relied on the orders of the lower authorities and stated that this addition has been confirmed by the Tribunal and accepted by the assessee. According to him, it is a fit case for levy of penalty u/s 271 (1) (c) of the Act.

8. We have heard the rival contentions and gone through the facts and circumstances of the case. We find from the facts of the case that that assessee's father Shri Raj Kantilal Chauhan has not claimed any brought forward loss on account of long term capital gain or short term capital gain in the AY under consideration and both the assessee as well as her father is in same tax bracket/slab and cannot be said that there is revenue loss rather assessee's case is totally revenue neutral. We also find that assessee has filed all the particulars before the AO in respect to claim of loss on both the counts i.e. long term capital gains and short term capital gains and there is neither concealment nor furnishing of inaccurate particulars of income as alleged by the authorities below. We find from the records that the penalty is levied on wrong claim of set off of earlier year's

long term capital gains or short term capital gains, which is a genuine claim but claimed under wrong understanding that henceforth assessee has to claim these losses instead of father of the assessee in whose hands assessee's income used to be clubbed prior to earlier assessment year 2003-04. Moreover, the assessee was under bonafide belief about the claim of this loss, because the AO himself has allowed the claim of loss for assessment year 2003-04 although u/s 143 (1) of the Act. And once the Revenue has itself allowed the claim, the assessee was under bona fide belief that it is allowable loss. Even otherwise, there is no revenue loss to the Department for the reason that both the assessee as well as her father are under same tax bracket/slab of tax as is evident from the above chart. We find support to the arguments of Ld. Counsel , wherein he referred to the decision of the Hon'ble Bombay High Court in the case of CIT Vs Nalin P. Shah (HUF) [(2013) 40 Taxmann.com 86 (Bombay)] wherein almost on similar facts the Hon'ble High Court confirmed the order of the Tribunal deleting the penalty by observing as under:-

“4. In this case, the respondent-assessee had declared long term capital loss of Rs.4.39 crores which were inclusive of loss incurred on the sale of US-64 units. The assessing officer disallowed the loss on sale of US-64 units on the ground that where income from particular source was exempt from tax then the loss from such source could not be set off from another source under the same head of income. In view of the above, the assessing officer also initiated penalty proceedings and imposed penalty under Section 2371 (1) (c) of the Income Tax Act, 1961.

5. In appeal, the CIT (A) upheld the order of Assessing Officer levying penalty.

6. On further appeal, the Tribunal in the impugned order held that the respondent-assessee had in its return of income filed a note with its computation of income disclosing all details about the sale of US-64 units, the loss and resultant carry forward. Further, all details were disclosed in

its return of income as is evident from the fact that the assessing officer gathered information about the carry forward loss and sale of units from return filed by the respondent-assessee. The Tribunal held that from the aforesaid facts at the highest it can be said that the claim of the assessee was not sustainable in law but there was no furnishing of inaccurate particulars or concealment of income on the part of the respondent-assessee. Thus, the penalty was set aside. We find that the same view is taken by the Apex Court in the matter of CIT v. Reliance Petroproducts (P) Ltd. [2010] 322 ITR 158/189 Taxman 322 (SC). As the decision of the Tribunal is essentially based on finding of fact, we see no reason to entertain the proposed question of law”.

In view of the above facts and discussion carried out above, we are of the view that this penalty levied u/s 271(1) © of the Act cannot sustain and hence, the same is deleted for both the years. Both appeals of assessee are allowed.

9. In the result, the appeals of the assessee are allowed.

Order pronounced in the open court on 17/06/2016.

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Sd/-

(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated 17/6/2016

Lakshmitikanta Deka/Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI

| | | Date | Initial | |
|-----|--|-----------------------|---------|-------|
| | Dictation pad attached with the Draft Order | Yes | | |
| 1. | Draft dictated on | 13-06-16 | | Sr.PS |
| 2. | Draft placed before author | 15-06-16/ 16-06-16 | | Sr.PS |
| 3. | Draft proposed & placed before the second member | | | JM |
| 4. | Draft discussed/approved by Second Member. | | | AM |
| 5. | Approved Draft comes to the Sr.PS/PS | | | Sr.PS |
| 6. | Kept for pronouncement on | | | Sr.PS |
| 7. | File sent to the Bench Clerk | | | Sr.PS |
| 8. | Date on which file goes to the AR | | | |
| 9. | Date on which file goes to the Head Clerk. | | | |
| 10. | Date of dispatch of Order. | | | |