

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH “C”, MUMBAI**  
**BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND**  
**SHRI PAWAN SINGH, JUDICIAL MEMBER**  
**ITA No.3892/Mum/2014 for (Assessment Year: 2008-09)**

Ms. Priti Tarun Shah, 68-A, 78/80, Ali Chambers, Tamarind Lane, Fort, Mumbai-400023 <b>PAN: ANRPS7924B</b>	Vs.	Assistant Commissioner of Income Tax,CC-22, Mumbai.
(Appellant)		(Respondent)

Appellant by : Sh.Vijay Mehta (AR)  
Revenue by : Ms. Mahua Sarkar (DR)  
Date of hearing : 27.12.2016  
Date of Pronouncement : 27.12.2016

**Order Under Section 254(1) of Income Tax Act**

**PER PAWAN SINGH, JM:**

1. This appeal filed by assessee u/s 253 of the Income-tax Act ('Act') is directed against the order of Commissioner of Income-tax (Appeals) [for short 'the CIT(A)] -23, Mumbai dated 04.04.2013 for Assessment Year (AY) 2008-09. The assessee has raised the following grounds of appeal:
  - (i) *The ld CIT(A) erred in law and in facts in confirming the penalty levied by AO u/s 271(1) (c) of the Act in respect of LTCG of Rs.1,21,31,692/- computed by him after declining to grant exemption u/s 54 of the Act claimed by the appellant.*
  - (ii) *The ld CIT(A) erred in law and in facts and not holding that the penalty order passed by AO under section 271(1)© of the act was in violation of Principles of Natural Justice and bad in law.*
2. The brief facts of the case are that assessee filed return of income for relevant assessment year on 30 September 2008 declaring total income of Rs. 18,01,735/- . The assessment was completed under section 143(3) on 1 December 2010

determining the total income of assessee of Rs. 1,41,33,920/-. While making the assessment the assessing officer disallowed the claim for exemption under section 54 of the Act and brought the amount of Rs. 1,21,31,692/- to tax. The AO initiated penalty proceeding by issuing notice under section 274 r.w.s 271(1)(c ) on 21<sup>st</sup> of December 2010. The assessee filed her reply. In reply the assessee contended that assessee transferred the residential flat in May 2007 and was entitled to claim deduction under section 54 of the Act. However due to her inability to prove the claim the deduction under section 54, she accepted it as income. The assessee further contended that she voluntarily offered this income before any adverse finding from the Revenue. The contention of the assessee was not accepted by AO and the AO levied the minimum penalty@ 100% of the tax sought to be evaded. On appeal before Commissioner (Appeals) the penalty was upheld. Thus, further aggrieved by the order of Commissioner (Appeals) the assessee has filed present appeal before us.

3. We have heard the Id AR of the assessee and the Id DR for Revenue and perused the material available on record. The Id AR of the assessee would argue that assessee sold her residential property vide agreement to sell dated 16.07.2007 for a sum of Rs. 1.50 Crore to Sh Dalipkumar Atmaram Nagpal through her Power of Attorney holder and brother Shri Ram Chand Atmaram Nagpal and two others. The said transaction had resulted into Long-term Capital Gain (LTCG) thus, in the Return of income, the exemption under section 54 of the Act was claimed in respect of residential flat purchased on 11 July 2006. The AO hold that as the agreement for sale was registered on 16 July 2007 irrespective of receipt of substantial part of the sale consideration for the said flat in May 2007. It was argued that the possession of the flat was given in May 2007 itself. However, during the assessment the assessee was not able to prove that the transfer of the old flat as per section 2(47) of the Act was on 16 July 2007. However, the flat was purchased by assessee on 11 July 2006. The assessee was unable to prove that a purchase of the house was within one year from the transfer of the house, she was not held entitled to the claim. As claim was not

prove before the AO thus, the AO brought the aforesaid amount of Rs. 1,21,31,692/- to tax. The assessee accepted the addition and paid the tax to avoid the further litigation with the Department and to buy the peace. The AO initiated penalty proceeding on the aforesaid disallowance. The assessee in the reply to the notice of initiation of the penalty made the position very clear. The assessee pleaded that no inaccurate particular of income was filed at the time of filing return of income. It was further argued by Id AR that mere disallowance would not *ipso facto* leads to initiation of penalty for filing inaccurate particular of income. The learned AR of the assessee relied upon the decision of Hon'ble Apex Court in CIT Versus Reliance Petroproducts Pvt limited 322 ITR 158(SC), on the point that mere making of claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particular, regarding the income of the assessee and such a claim made in the return of income cannot amount to furnishing inaccurate particulars. Further on the decision of Hon'ble Gujarat High Court in case of National Textile Versus CIT 249 ITR 125, on the point that if the explanation which is un approved but not disproved i.e. it is not accepted but circumstances does not lead to reasonable and positive difference that assessee claim is false. And on the decision of Hon'ble Karnataka High Court in case of CIT Versus Manjunatha Cotton and Ginning Factory (359 ITR 565) on the points that merely because assessee agreed to the addition and the assessment order was passed on the basis of the addition, when the assessee has paid the tax and interest thereon, in absence of any material on record to show the concealment of income, cannot be inferred that the addition was on account of concealment. On the other hand the learned DR for the revenue strongly supported the order of authorities below and would argue that it was a fit case for sustain the penalty and submits that the order passed by Id CIT(A) does not require any interference at our end.

4. We have considered the rival contention of the parties and further gone through the orders of authorities below. In the reply of the notice u/s 274 rws 271(1)(c), the assessee contended that she had transferred residential flat in May 2007 and

was within right to claim deduction u/s 54. However, due to her inability to prove her claim she withdrew the claim of deduction u/s 54 and accepted the Capital Gain as income. The assessee voluntarily offered this income as there was time gap of one year and five days between the registration of purchase and sale. The contention of the assessee was not accepted by AO. The AO while levying the penalty observed that the assessee has not filed appeal against the assessment order, which shows that the assessee has no defense against the additions. The Id CIT(A) while considering the contention of the assessee observed that the onus to prove/ substantiate the claim was on the assessee. The perusal of agreement to sale shows that the assessee handed over the vacant and peaceful possession of premises on 16/07/2007 and / or there is no clause in the agreement to suggest otherwise. Thus, the Id CIT(A) concluded that the transfer would be effective on 16/07/2007 which is the date of full value of consideration and not the date of entering into agreement to sale. The lower authorities have not disputed that the substantial part of the sale consideration was paid vide three cheques dated 15/05/2007 and the balance was paid later on through cheques of Rs. 10.00/- lacs each. Further, it is not in dispute that the assessee purchased a residential flat on 11.06.2006. The assessee could be held entitled for deduction u/s 54 if the transaction of sale and purchased was proved within one year. The assessee during the assessment not pressed the claim of deduction u/s 54. The AO has not identified as to what inaccurate particulars were furnished by assessee. It is settled law that mere making of a claim which is not sustainable in law or disallowed, by itself will not amount to furnishing inaccurate particular of income as held by Hon'ble Apex Court in CIT Vs Reliance Petroproduct Pvt ltd (supra). We are conscious that the penalty proceeding are independent of the assessment order, though initiates by way of assessment order. Merely, the assessee has not filed appeal and accepted the addition in the quantum assessment cannot be ground for slapping the penalty unless there is material on record to show that the said addition was on account of concealment. The facts of the decision of CIT Vs Zoom Communication P Ltd (327 ITR 510) cited by Id

CIT(A) in its order are at variance, in the said case the assessee made incorrect claim with the hope that it may get away from the detection if the return of income is subjected to section 143(1) of the Act. We have noticed that the assessee has sufficiently explained the facts in her reply to the notice u/s 274, which has been ignored by AO and the Id CIT(A). Thus, as per our considered opinion the assessee not furnished the inaccurate particular of income nor concealed the income, hence no penalty was warranted against the assessee. In the result the appeal of the assessee is allowed.

5. In the result the appeal filed by the assessee is allowed.

Order pronounced in the open court on 27<sup>th</sup> December, 2016 while hearing.

Sd/-  
**(R.C. SHARMA)**  
**ACCOUNTANT MEMBER**  
Mumbai; Dated 09/01/2017

Sd/-  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

**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.

BY ORDER,  
(Asstt.Registrar)  
**ITAT, Mumbai**