

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

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER

ITA No. 442/MUM/2015
(Assessment Year : 2007-08)

Mrs. Chilamika Lalini Hariani,
C/o. Grew Industries Pvt. Ltd.,
202A, Poonam Chambers,
Dr. Annie Besant Road, Worli,
Mumbai 400 018
PAN:AAAPH 7884B

... Appellant

Vs.

The ITO , Ward 6(3)(1),
Mumbai.

.... Respondent

Appellant by : Shri Shri Mayur R. Makadia
Respondent by : Shri Santosh Mankoskar

Date of hearing : 30/06/2016
Date of pronouncement : 30/06/2016

ORDER

The captioned appeal filed by the assessee pertaining to assessment year 2007-08 is directed against an order passed by CIT(A)-12, Mumbai dated 07/10/2014, which in turn arises out of an order passed by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act') dated 15/03/2013.

2. In this appeal, the solitary issue relates to penalty of Rs.2,01,425/- imposed under section 271(1)(c) of the Act.

3. Briefly put, the relevant facts are that assessee is an individual who filed her return of income for assessment year 2007-08 declaring a total income of Rs.20,26,270/-, which inter-alia, included incomes by way of salary, capital gains and other sources. It was noticed that assessee had declared a total capital gain of Rs.14,57,109/-, which inter-alia, included gain from derivative trading. The Assessing Officer held that the gain earned by the assessee in derivative trading could not be assessed as 'short term capital gain' but was to be treated as 'business income'. However, finally assessed-income remained the same as returned by the assessee at Rs.20,26,270/-. The only difference between the returned and the assessed income being the treatment of the income earned on derivative trading of Rs.5,98,411/-, which was taxed as 'business income' instead of 'short term capital gain' declared by the assessee.

4. Subsequently, the Assessing Officer held the assessee guilty of default within the meaning of section 271(1)(c) of the Act, qua the aforesaid difference because, according to him short term capital gain was taxable at the lower rate on 10%, whereas the business income was taxable at normal rates. Accordingly, vide order dated 15/3/2013, the Assessing Officer levied a penalty of Rs.2,01,425/- under section 271(1)(c) of the Act. Such penalty has since been affirmed by CIT(A) and accordingly, assessee is in further appeal before the Tribunal.

5. Before me, the Ld. Representative for the assessee submitted that the gain earned from derivative trading has been considered as

business income by the Assessing Officer primarily, in view of the provisions of section 43(5) of the Act, which deals with speculative transactions to mean a transaction in shares or commodities, which is ultimately settled otherwise than by the actual deliveries of the shares or difference. Ld. Representative for the assessee pointed out that Explanation -2 below to section 28 is also relevant, which reads as under:-

Explanation 2.—Where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business (hereinafter referred to as “speculation business”) shall be deemed to be distinct and separate from any other business.

5.1 According to the Ld. Representative for the assessee, on a combined reading of section 43(5) and the Explanation -2 below section 28, it can be inferred that every speculation transaction may not constitute a business transaction, therefore, according to him the action of the Assessing Officer in treating the gain on derivative trading as a business income is an issue on which two views are possible. It was, therefore, contended that in such a situation, penalty under section 271(1)(c) of the Act is not merited.

6. The Ld. Departmental Representative has defended the action of the lower authorities by pointing out that derivative transactions were wrongly considered by the assessee as short term capital gain to avail lower rate of taxation and, therefore, it is a case meriting penalty under section 271(1)(c) of the Act.

7. I have carefully considered the rival submissions. Ostensibly, the entire conspectus of facts and circumstances of the case does not show that any of the particulars filed by the assessee in the return of income were found to be incorrect or false. It is a case where only the nature of income is in dispute. The assessee declared income from derivative trading as capital gains, whereas the Assessing Officer has treated it as business income. No doubt, the treatment of such income as capital gain would have resulted in a lower tax liability in the hands of the assessee but at the same time there is nothing to suggest that any concealment or furnishing of inaccurate particulars can be attributed to the assessee. A claim made by the assessee in the return of income for being taxed at a lower rate does not automatically warrant inference of concealment or furnishing of inaccurate particulars of income within the meaning of section 271(1)(c) of the Act. At the time of hearing Ld. Representative for the assessee had referred to the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Auric Investment & Securities Limited, 310 ITR 121(Del), wherein penalty levied under section 271(1)(c) of the Act was found to be untenable in a case, where the business loss returned by the assessee was found to be assessable as speculation loss. The Hon'ble Delhi High Court noted that requisite information as required by the income tax authorities was furnished by the assessee and none of it was found to be reflecting concealment or furnishing of inaccurate particulars of income. In my view, in the present case too, there is no justification for levy of penalty under section 271(1)(c) of the Act as there is nothing on record to show that

while furnishing her return of income assessee had either concealed her income or had furnished any inaccurate particulars of income.

7.1 Apart therefrom, the Ld. Representative for the assessee had also relied upon the judgment of the Hon'ble Bombay High Court in the case of CIT vs. Bennett Coleman & Co. Ltd., 259 CTR 383(Bom) to canvass that where there was only a change of head of income and in the absence of any claim being found to be non-bonafide, penalty under section 271(1)(c) of the Act is not maintainable. The said judgment of the Hon'ble High Court also support the stand of the assessee that in the present case, penalty under section 271(1)(c) of the Act is not merited . Quite clearly, the assessment has resulted in only a change of head of income and there is no material to suggest that the claim of the assessee in the return was lacking in bonafides. For all the above reasons, I set-aside the order of the CIT(A) and direct the Assessing Officer to delete the penalty of Rs.2,01,425/- imposed under section 271(1)(c) of the Act.

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

The above decision was pronounced in the open court at the conclusion of hearing in the presence of both the parties on 30/06/2016.

Sd/-

(G.S. PANNU)
ACCOUNTANT MEMBER

Mumbai, Dated 30/06/2016

Vm, Sr. PS

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai