

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

AND SHRI AMARJIT SINGH, JUDICIAL MEMBER

आयकर अपील सं/ I.TA Nos. 2960 & 3028/Mum/2014

(निर्धारण वर्ष / Assessment Years:2009-10 & 2010-11

The DCIT-8(3), Aayakar Bhavan, Mumbai-400 020	<b>बनाम/</b> Vs.	M/s. Rinita Impex Pvt. Ltd., 2 <sup>nd</sup> Floor, Bombay Mutual Bldg., Dr. D.N. Road, Fort, Mumbai-400 001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACR 5451R		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से/ Appellant by:		Shri A.K. Srivastava
प्रत्यर्थी की ओर से/Respondent by:		Shri Jitendra Jain

सुनवाई की तारीख / Date of Hearing :26.10.2015

घोषणा की तारीख /Date of Pronouncement :28.10.2015

आदेश / O R D E R

**PER N.K. BILLAIYA, AM:**

These are appeals by the Revenue against the very same order of the Ld. CIT(A)-18, Mumbai dated 25.2.2014 pertaining to assessment years 2009-10 and 2010-11. Since the First Appellate authority has decided these two appeals by a consolidated order, both these appeals were heard together and disposed of by this common order for the sake of convenience.

2. Although the issues are common in both these appeals, but facts of A.Y. 2010-11 are slightly different from the facts of 2009-10, therefore, we are first taking up ITA No. 2960/M/2014 for A.Y. 2009-10. The sum and substance of the grievance of the Revenue is that the Ld. CIT(A) erred in deleting the penalty of Rs. 6,30,28,304/- imposed u/s. 271(1)(c) of the Act.

3. The roots for the levy of penalty lie in the assessment order dated 29.11.2011 made u/s. 143(3) of the Act. The assessee company is engaged in the business of trading in shares and securities and providing financial services. While scrutinizing the return of income, the Assessing Officer noticed that the assessee company was holding opening and closing stock of Rs. 128,51,24,748/-. The AO further found that the stock in hand comprises of only shares of one company viz., Centrum Capital Ltd. The AO observed that though the assessee is claimed to be engaged in share trading activity but the assessee has not done any trading activity during the year under consideration. The AO was of the firm belief that the stock of shares was nothing but investment and the investment was made out of borrowed funds. With these assumptions, the AO disallowed the entire claim of expenditure and the income from business was assessed at Rs. Nil. The AO simultaneously initiated penal proceedings u/s. 271(1)(c) of the Act.

3.1. Against this assessment order, the assessee preferred an appeal before the Ld. CIT(A) but without any success. The assessee finally accepted the order of the First Appellate Authority and no further appeal was filed.

3.2. With this factual matrix, the AO proceeded with the penal proceedings u/s. 271(1)(c) of the Act. The assessee was asked to explain why an order imposing a penalty on it should not be passed u/s. 271(1)(c) of the Act. The assessee filed a detailed reply explaining its nature of business vis-à-vis holding of shares and the claim of expenditures. The assessee strongly contended that it has neither concealed its income nor it has furnished inaccurate particulars of income, therefore penal proceedings should be dropped.

3.3. The submissions of the assessee did not find any favour with the AO. Drawing support from the decisions of the hon'ble Supreme Court in the case of CIT Vs Dharmendra Processors 306 ITR 277 and Dilip Shroff 291 ITR 519, the AO concluded by levying minimum penalty of Rs. 6,30,28,304/-.

4. The assessee strongly agitated the matter before the Ld. CIT(A) and reiterated its contention. After considering the facts and the submissions, the First appellate authority posed a question to itself – Whether the assessee has concealed any particulars of income and submitted inaccurate particulars of income. The Ld. CIT(A) answered this question as under:

*To answer this question, it is clear from the facts of the case that the assessee has purchased shares and shown stock-in-trade and also debited the interest paid on borrowed funds to the profit & loss account. The return for A.Y. 2008-09 was accepted on the basis of which the assessee has carried forward the stock-in-trade as on 31.03.2009 and 31.03.2010. The AO. has not accepted the contention of the appellant as business income and treated it as investment which was confirmed by the CIT(A). From these*

*facts, it is clear that the assessee has not concealed any particulars of income, but, in his view he has taken the trading of shares as business income which was duly reflected in the books of account and audited profit & loss account and balance sheet which were submitted along with the return of income, therefore, the assessee has not concealed any facts and submitted inaccurate particulars of income. The view of the A.O. by treating it as investment and not business income is confirmed by the CIT(A) and even for A.Y. 2010-11, the assessee has also agreed with the decision of the A.O. and CIT(A) and revised its return of income. Thus, the assessee has not concealed the facts, but, the A.O. has taken a different view on the basis of the profit & loss account and balance sheet filed by the appellant along with the return of income. It is now well established fact that assessment proceedings and penalty proceedings are different and independent to each other. Merely because the disallowance made by the A.O. is confirmed in appeal does not mean that assessee has concealed its income. In the present case, the issue is that share trading is treated by the assessee as business income but A.O. has held it an investment and profit or loss will be taken under the head Capital Gain which means change of head of income. Thus, it is clearly a legal & debatable issue."*

4.1. Having answered the question as mentioned hereinabove and drawing support from the decision of the Hon'ble Supreme Court in the case of CIT Vs Reliance Petro Products Pvt. Ltd. 322 ITR 158, the Ld. CIT(A) deleted the penalty for the year under consideration.

5. Aggrieved by this, the Revenue is before us.

6. The Ld. Departmental Representative strongly supported the findings of the AO and placed reliance on the decision of the Hon'ble High Court of Delhi in the case of CIT Vs Zoom Communication (P) Ltd 327 ITR 510 and on the decision of the Hon'ble Supreme Court in the case of Mak Data (P) Ltd Vs CIT 358 ITR 593. It is the say of

the Ld. DR that the conduct of the assessee is a deliberate ploy to reduce the taxable income.

7. Per contra, the Ld. Counsel for the assessee reiterated what has been stated before the lower authorities. Once again, the Ld. Counsel heavily relied upon the decision of the Hon'ble Supreme Court in the case of Reliance Petro Products (supra).

8. We have heard the rival submissions and carefully considered the orders of the authorities below. We have examined the facts in issues in the light of the judicial decisions relied upon by the representatives of both the sides.

8.1. There is no dispute that the assessee was holding shares of only one company and showing it as stock-in-trade. The shares were purchased in financial year 2007-08 relevant to assessment year 2008-09 which is the preceding assessment year to the assessment year under consideration. It is also an undisputed fact that having found no trading activities, the holding of shares were considered under the head investment and accordingly all expenditures claimed by the assessee were disallowed. The major expenditure was in relation to the interest paid on borrowed capital utilized for the purchase of shares of that one company viz., Centrum Capital Ltd. The AO has levied the penalty holding that assessee has filed inaccurate particulars by not showing the shares under the head 'investment' and claiming business expenditures including interest on borrowed capital. By this conduct, the assessee reduced its tax liability. In our considered opinion, this observation of the AO is against the facts of the case. Firstly, the shares were purchased in

F.Y. 2007-08 and in assessment year 2008-09, the revenue has accepted the claim of the assessee that it is in the business of trading in shares and securities. For the allegation of filing inaccurate particulars of income, the conduct of the assessee has to be seen on the date of the filing of return of income. On the date of filing of return of income, the assessee had an assessment order for A.Y. 2008-09 accepting assessee's claim of business of trading in shares and securities. Thus on the date of filing of return, the assessee was not aware of the possible view that might be taken by the AO during the course of the assessment proceedings.

8.2. Finally, the view taken by the AO simply changed the head of income i.e. from the head 'Profits and gains of business or profession', the shares became part of capital gains. No doubt, the claim of the assessee was also denied by the First Appellate authority in the quantum proceedings but that by itself do not prove of filing inaccurate particulars of income when on the same set of facts, there are two possible views and both the views are well supported by a plethora of judicial decisions whether the income to be taxed under the head 'business income' or 'capital gains'

8.3. The Hon'ble Supreme Court in the case of Reliance Petro Products has clearly laid down the ratio "by any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars". The Hon'ble Supreme Court further observed "there can be no dispute that everything would depend upon the return filed because that is the only document, where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise".

8.4. Applying this ratio of the Hon'ble Supreme Court on the facts of the present case as mentioned elsewhere on the date of the filing of the return of income, the assessee had assessment order for A.Y. 2008-09 wherein business of trading in shares and securities was accepted by the Revenue authorities even if that order was made u/s. 143(1) of the Act. Till date neither the assessment of A.Y. 2008-09 has been reopened nor any revisionary action u/s. 263 of the Act have been taken by the Commissioner. Considering all these facts in totality, we do not find any reason to interfere with the findings of the Ld. CIT(A). Appeal filed by the Revenue is accordingly dismissed.

**ITA No. 3028/M/2014 - A.Y. 2010-11**

9. As mentioned elsewhere, the facts of this year is slightly different from the facts of immediately preceding assessment year inasmuch as in this year the assessee withdrew the claim of expenditure by filing a revised return of income. The return was revised after knowing the view taken by the AO and the First Appellate Authority for A.Y. 2009-10. Except for this distinguishing fact all other issues are identical to the issues considered by us in ITA No. 2960/M/2014 for A.Y. 2009-10.

10. In our considered opinion, the distinguishing facts should not have any weightage on the outcome of our decision for earlier year inasmuch as and as mentioned elsewhere when the assessee filed the return of income, it had a possible view for A.Y 2008-09 and when that view was not accepted for A.Y. 2009-10, the assessee filed a revised return and accepted the view taken by the Revenue authorities. By any stretch of imagination, this cannot be considered

to be a fit case of treating the return of income as filing inaccurate particulars of income. For our detailed discussion in ITA No. 2960/M/14, we decline to interfere with the findings of the Ld. CIT(A).

11. In the result, both the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 28<sup>th</sup> October, 2015

Sd/-

(AMARJIT SINGH )

न्यायिक सदस्य/JUDICIAL MEMBER लेख सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 28<sup>th</sup> October, 2015

व.नि.स./ Rj , Sr. PS

Sd/-

(N.K. BILLAIYA)

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई  
/ DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार**

(Dy./Asstt. Registrar)

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**