

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

श्री डी.टी.गरासिया, न्यायिक सदस्य तथा

श्री ओ.पी.मीना, लेखा सदस्य के समक्ष

BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER
AND SHRI O.P. MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A. No. 507/Ind/2016

निर्धारण वर्ष /Assessment Year: 2005-06

ACIT Circle 4(1)

Indore

:: अपीलार्थी /Appellant

Vs

Sanjay Lunawat

Indore

PAN – AAKPL – 1062B

:: प्रत्यर्थी /Respondent

राजस्व की ओर से/Revenue by	Shri K.G. Goyal
निर्धारिती की ओर से/Assessee by	Shri S.N. Agrawal
सुनवाई की तारीख Date of hearing	12.1.2016
उद्घोषणा की तारीख Date of pronouncement	19.01.2016

आदेश /O R D E R

PER SHRI D.T. GARASIA, JM

This appeal by the Revenue is directed against the order of the learned CIT(A)-II, Indore, dated 27.3.2012.

2. The sum and substance of the grounds of appeal taken by the Revenue is that the learned CIT(A) was not justified in deleting the penalty levied by the Assessing Officer u/s 271(1)(c) of the Act.

3. The brief facts of the case are that the Assessing Officer while passing the assessment order U/s 143[3] had added an amount of Rs 5615590/- to the income of the assessee by the treating the Long term capital gain as unaccounted income of the assessee and initiated penalty U/s 271[1][c] of the Act. The assessee had preferred an appeal before the Ld CIT[A] but could not succeed. Thereafter, the assessee preferred appeal to the Tribunal where also the assessee met with the same fate. The assessee had purchased 94000 Equity Shares at a consideration of Rs. 222899/-. The entire purchase amount was paid by the assessee through account payee cheques. The shares of Hindustan

Continental Limited as purchased by the assessee were duly credited in his D-MAT account. The assessee out of 94000 Equity shares, sold 61200 Equity shares at a consideration of Rs 5615595/- from Dec 2014 to March 2015. The assessee in his return of total income has offered the Long term capital gain on sale of shares as exempt. However, the Assessing Officer on the basis of his inquiry reached to a conclusion that the amount of long term capital gain as offered by the assessee was not a genuine transactions and, therefore, the same was added to the income of the assessee. On the basis of these facts, the Assessing Officer came to the conclusion that the assessee has not disclosed full and correct particulars of his income and thereby he had concealed the income and he accordingly initiated penalty proceedings u/s 271(1)(c) of the Act and accordingly levied the penalty.

4. Against the levy of penalty, the assessee preferred appeal before the learned CIT(A) and the learned CIT(A) deleted the same by observing as under :-

“3.5 I have considered the entirety of the facts and circumstances brought out in the relevant assessment order, penalty order & the written submission filled by the Appellant which was duly reproduced above. After considering the same and in the view of the above discussion, I find sufficient merit in the arguments put forth by the appellant. It is undisputed fact that in the appellants own case the Hon’ble MP high court has admitted a substantial question of law on the issue of genuineness of transaction, making the issue debatable. It is now a settled position of law that once the issue becomes debatable penalty cannot be levied. The Hon’ble jurisdictional ITAT in the case of Kusum Oswal has upheld this view and held that when a substantial question of law has been admitted, the penalty cannot be levied since the issue has become debatable.

3.6] In the case of Rupam mercantile ltd vs DCIT (ITAT Ahmadabad bench) 91 ITD 273 it has been held that the hon’ble high court having admitted appeal of the SISI finding a substantial question of law involved in the matter the claim of the assessee was found mala fide and penalty under 271(1)(c) was not attracted. Similarly in cit vs Liquid Investment Ltd Delhi High Court(ITA 240/2009 dated 05.10.2010). It is been held that where the

high court has exceptional substantial question of law under section 260A, this itself shows that the issue is debatable and accordingly it was held that no penalty was imposed under section 270(1)(c) of the income tax act 1961. Hon'ble Bombay High Court wide order dated 8th July 2014 in the case of Nayan builders and has dismissed the appeal of revenue upholding The order of tribunals holding that the appeal cannot be entertained as it does not raise any substantial question of law imposition of penalty was found not to be justified and the appeal was allowed and held as a proof that the penalty was to be tabled at our way able issue that we been referred to the order as assessee's appeal is quantum preceding and a substantial question of law which has been framed therein.

3.7] In the view of the above preceding laid down not only by the Jurisdictional ITAT but also by the Hon'ble High Courts of Mumbai & Delhi, it is settled position of law and there is no reason to deviate from the same. Therefore, the AO is directed to delete the penalty amounting Rs.17,00,000/-. Both the grounds of appeal are allowed.

*4.0 In the result, the appeal is **allowed.***"

Now the assessee is in appeal before the Tribunal.

5. Before us, the learned DR submitted that the learned CIT(A) was not justified in deleting the penalty levied by the Assessing Officer under section 271(1)(c)

of the Act as the assessee has not been able to prove his case. He, therefore, prayed that the order of the learned CIT(A) be reversed and that of the Assessing Officer restored.

6. On the other hand, the learned counsel for the assessee submitted that the assessing officer during the course of assessment proceeding failed to pinpoint any defects in the documents as filed by the assessee. The share holding of the assessee duly proved with the holding period in the D_MAT account of the assessee itself wherein the shares of the assessee were lying kept for more than 12 months. The learned counsel for the assessee further submitted that the Assessing Officer has also not disputed the rate on which these shares were purchased by the assessee. The purchase consideration was paid through account payee cheques and duly reflected in the bank account of the assessee.

The learned counsel for the assessee further submitted that during the course of assessment proceeding broker through whom these shares were purchased by the assessee duly received the letter as issued by the Income Tax Officer and also filed its reply duly accepting the transactions as executed with him. The learned counsel for the assessee further submitted that the assessee had sold these shares through M/s Shree Ranisati Shares & Securities P Limited having its office at Indore and Mumbai. He also submitted that in the year in which these shares were sold out by the assessee, the said broking firm having its office at Indore. He submitted that in subsequent year local office of the Broking firm was closed and broking transactions were executed from Mumbai office. The assessee during the course of assessment proceeding filed copy of sale bill, D- MAT account and copy of

account of the assessee in the book of the brokers and duly explained that sale of shares were genuine. The learned counsel for the assessee submitted that the Assessing Officer himself made independent inquiry and reached to a conclusion that cheques were received by the assessee from his broker M/s Shree Rani Sati Shares and Securities P Limited but in turn amount was credited in the bank account of the broker from the bank account of M/s Jakson Traders, M/s Arihant Securities Shares and M/s Agrawal Road Carriers Limited. That when the Assessing Officer himself found that cheques were received by the assessee from his broker, in that case the onus of the assessee has properly been discharged and there was no reason to disbelieve the transactions as executed by the assessee. In this case, as brought out in the assessment order, the genuineness of the long term

capital gain on sale of shares of Rs.56,15,595/- was rejected mainly on the ground that there was sharp increase in the sale price and the brokers to whom letter were issued did not respond and there was also cash deposit in the bank account of M/s Jactson Traders which was ultimately transferred in the bank account of the broker through which these shares were sold-out by the assessee. In the wake of these facts, the learned counsel for the assessee submitted that in the present case, the assessee has furnished complete details to justify the genuineness of the capital gain. The shares as sold by the assessee were kept in his D-MAT account for more than 12 months. The amount at the time of purchase paid through the account payee cheques duly supported with the purchase invoices and sale proceed realized through an account payee cheques duly supported with the sale invoices. Hence,

the assessee has not neither concealed any particulars of his income nor furnishing any inaccurate particulars as to attract the penal provision U/s 271(1)(c) of the Income Tax Act. The assessee in this case preferred an appeal before the Hon'ble High court and the same was admitted on the ground of substantial question of law. The learned counsel for the assessee, therefore, prayed that the order of the learned CIT(A) be maintained.

7. We have considered the submissions of both the sides. Looking to the facts and circumstances of the case, we find that in this case the Hon'ble High Court has framed the following substantial question of law :-

“Whether the Hon'ble Tribunal, while passing the non-speaking impugned order dated 30th April, 2014, was justified in concurring with the views of the Respondent No. 1 and 2 that under the Income Tax Act, 1961 some transactions entered through banking channels, entire details of which have already been disclosed and placed on record by the assessee concerned at the time of assessment, can be said to be a sham transaction, just because some other person disassociated with the assessee

has failed to provide information, unrelated to the transaction in hand, if yes, under what provision of the Income Tax Act, 1961 ?”

Hon'ble High Court of Madhya Pradesh has admitted the above question which is a substantial question of law and it is not a question of fact. Therefore, we are of the view that the decision of the Hon'ble Gujarat High Court in the case of Prakash S. Vyas; 58 taxman.334 (Guj.) is not applicable. Hon'ble Gujarat High Court has held that mere admission of appeal by the High Court cannot be without there being any further be an indication that the judgment is debatable as to delete the penalty u/s 271(1)(c) of the Act even if there are independent grounds and reasons to believe that the assessee's case falls under the mischief in clause (c) of sub-section (1) of section 271 of the Act. Hon'ble Gujarat High Court has held that if the admission by the High Court suggests that it is a substantial

question of law then the penalty cannot be levied.
Therefore, we are of the view that the CIT(A) is justified
in deleting the penalty and our interference is not
called for.

8. In the result, the appeal of the department is
dismissed.

The order has been pronounced in open Court on
19th January, 2016.

Sd/-
(ओ.पी.मीना)
लेखा सदस्य
(O.P.Meena)
Accountant Member

sd/-
(डी.टी.गरासिया)
न्यायिक सदस्य
(D.T.Garasia)
Judicial Member

दिनांक /**Dated : 19th January, 2016.**

Dn/