आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER AND

SHRI C.N. PRASAD, JUDICIAL MEMBER

आयकर अपील सं/ I.TA No. 6853/Mum/2010

(**निर्धारण वर्ष** / Assessment Year: 2004-05

GE Asset Management Incorporated A/c. General Electric Pension Trust, C/o Pricewaterhouse Coopers Pvt. Ltd., PWC House, Plot 18/A, Guru Nanak Road, Stational Road, Bandra (W), Mumbai-400 050	**बनाम**/ Vs.	Ofice of the Dy. Director of Income-tax(International Taxation), Range 3(1), R. No. 136, Scindia House, N.M. Road, Ballard Estate, Mumbai-400 038
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAATG 3740P		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Appellant by:**	Shri S.E. Dastur Shri Neeraj Sheth Ms Fereshte D. Sethna Shri Mrunal Parikh
प्रत्यर्थी की ओर से/**Respondent by:**	Shri Jasbir Chouhan

सुनवाई की तारीख / **Date of Hearing :12.01.2016**

घोषणा की तारीख /**Date of Pronouncement :15.01.2016**

आदेश / O R D E R

PER N.K. BILLAIYA, AM:

With this appeal the assessee has challenged the correctness of the order of the Ld. CIT(A)-10, Mumbai dated 30.7.2010 pertaining to assessment year 2004-05.

2. The solitary grievance of the assessee is that the Ld. CIT(A) has erred in upholding the penalty of Rs. 4,17, 12,555/- levied by the AO u/s. 271(1)(c) of the Act.

3. The roots for the levy of penalty lie in the assessment order dated 27.12.2006 made u/s. 143(3) of the Act.

4. In this case, the original return of income was filed on 27.10.2004 declaring taxable income at Rs. 20,57,99,040/- which included Long Term Capital Gain of Rs. 11,84,38,710/-, Short Term Capital Gain of Rs. 8,65,56,931/- and other income in the form interest on I.T. Refund of Rs. 8,03,399/-. This return was processed u/s. 143(1) of the Act by order dated 15.3.2005.

4.1. Thereafter, the assessee filed a revised return of income on 29.6.2005. The reasons given for revising the return of income is that the assessee was of the firm belief that since it is trading in shares of Companies in India as well as other countries, the income has been shown under the head 'capital gains' but in a recent Advance Ruling given by AAR in the case of Fidelity Advisor Series VIII 271 ITR 0001 on similar facts as that of the assessee and also on similar set of facts the Rulings of the Authority for Advance Ruling in the case of Morgan Stanley & Co. International Ltd 272 ITR 416, it has been held that the profit realized on sale of security should be characterized as business income.

4.2. Taking a leaf out of these rulings of the AAR, the assessee revised its return of income and treated the profits under the head 'business income' and drawing support from the Double Tax

Avoidance Agreement with the Republic of USA, the income was claimed to be exempt from tax in India and hence the return was filed at Nil income.

4.3. During the course of the scrutiny assessment proceedings, this claim of the assessee did not find any favour with the AO. Tlthough the AO treated the income arising on sale and purchase of securities under the portfolio investment scheme in India as business income instead of capital gain but than denied the benefit of DTAA on the ground that the assessee is not entitled to claim treaty benefit. Accordingly, the entire income of Rs. 21,79,71,073/- was taxed under the head 'Profits and Gains of Business or Profession'.

4.4. Penalty proceedings u/s. 271(1)(c) of the Act were initiated to levy penalty on the ground that the assessee has concealed particulars of income by not offering the taxable income under the head 'Capital Gains'. It would be pertinent to mention here that against the assessment order, the assessee preferred an appeal before the Ld. CIT(A) and the Ld. CIT(A) in his order dated 19.9.2008 held that assessee's income should be taxed under the head Capital Gains and directed the AO accordingly.

4.5. It will also not be out of place to mention that during the course of the assessment proceedings, the assessee filed an application u/s. 245Q(1) of the Act on 8.4.2005 before the AAR for Advance Ruling of the authority on the following questions:

> *"1. Whether on the facts and the circumstances of the cases, the profits arising to General Electric Pension Trust (hereinafter referred to as the 'Applicant') from the sale of*

portfolios investments in India will be treated as business income of the Applicant.

2. Whether in the absence of permanent establishment in India and in light of the provisions of Article 7 read with article 5 of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to taxes on Income and Capital Gains entered into between the Government of the Republic of India and the Government of the United States of America (hereinafter referred to as the 'Treaty'), such business income of the applicant will be taxable in India ?"

4.6. The AAR vide order No. 659 of 2005 dated 20.12.2005 gave the ruling that the profits arising on sale of portfolio investment in India are business income but the assessee is not entitled to avail the benefits of the terms of the treaty and as such business income of the assessee are taxable in India.

4.7. In the penalty proceedings, taking a leaf out of the ruling of the AAR and the order of the Ld. CIT(A), the AO levied a penalty of Rs. 4,17,12,555/- by holding that provisions of Explanation-1 to Sec. 271(1)(c) squarely apply.

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

6. The Ld. Senior Counsel Shri S.E. Dastur argued the case at length questioning the validity of the levy of penalty. Strong reliance was placed on the decision of the Hon'ble Supreme Court in the case of Hindustan Steel Ltd. 253 (V 57 C 52) , CIT Vs Reliance Petroproducts (P) Ltd 322 ITR 158 and also on the decision of the Hon'ble High Court of Bombay in the case of Bennett Coleman & Co. 259 CTR 383, Hon'ble Supreme Court in the case of Pricewaterhouse Coopers

Pvt. Ltd., 348 ITR 306 and on the decision of the Tribunal in the case of M/s. Fidelity Management Trust Co. in ITA No. 1617, 1618 & 1619 & 1620/M/2010.

7. Per contra, the Ld. Departmental Representative strongly supported the findings of the Revenue authorities. The DR also relied upon the decision of the Tribunal in the case of LG Asian Plus Ltd 11 Taxmann. Com 414, Hon'ble High Court of Delhi in the case of Zoom Communication 327 ITR 510 and Hon'ble High Court of Delhi in the case of CIT Vs Escorts Finance Ltd 328 ITR 0044.

8. We have heard the rival submissions on length. We have also carefully perused the orders of the authorities below. We have also gone through the relevant documentary evidences referred to and brought to our notice by the Ld. Senior Counsel.

8.1. We have already explained the factual matrix elsewhere. Let us first consider the observations of the Hon'ble Supreme Court made in the case of Hindustan Steel Ltd AIR 1970 (SC) 253.

> *"Penalty will not be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows a bonafide belief that the offender is not liable to act in the manner prescribed by the statute."*

8.2. In the light of the aforementioned observations of the Hon'ble Supreme Court, let us once again consider the factual matrix emanating from the assessment proceedings. In the original return the assessee disclosed the income under the head 'Capital Gains'. The same income was treated as income from business in the revised return of income and taking the benefit of DTAA the return was filed as Nil. While scrutinizing the return of income, it was made clear that the assessee is changing its stand by drawing support from the ruling given by the AAR in the case of Fidelity Advisor Series VIII and Morgan Stanley & Co. International (supra). There is no denial that even while giving ruling in assessee's own case, the AAR treated the income as business income though the benefit of the treaty was denied. There is also no dispute that the assessment was completed by the Officer by treating the income as business income though the benefit of the treaty was once again denied. It is a matter of fact that the First Appellate Authority over ruled the findings of the AAR and directed the AO to treat the income under the head 'Capital Gains'.

8.3. The aforementioned conduct of the Revenue authorities/AAR itself show that different views have been taken by different authorities on the same set of facts for same income. With so much of debatable views taken by the Revenue authorities themselves would clearly establish that this is not a fit case for the levy of penalty u/s. 271(1)(c) of the Act.

8.4. As mentioned elsewhere, the view adopted by the assessee while revising its return of income was well supported by rulings of the AAR in two cases mentioned elsewhere which means that the assessee has taken a possible view which was different from the view

adopted by the Revenue authorities. In our considered opinion and in our understanding of the law and facts of the case, by no stretch of imagination, it can be said that the stand taken by the assessee was devoid of bonafide. The Hon'ble Supreme Court in the case of Reliance Petroproducts (supra) has, inter alia, held " *where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the assessee 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. To attract penalty, the details supplied in the return must not be accurate , not exact or correct, not according to the truth or erroneous".*

8.5. As mentioned elsewhere, in the revised return of income, the assessee treated the income under the head Profits & Gains of Business. The same was accepted by the AAR and also by the AO though the benefit of the treaty was denied. This claim of the benefit of treaty denied by the Revenue authorities would not lead to the levy of penalty in the light of the ratio laid down by the Hon'ble Supreme Court in the case of Reliance Petroproducts (supra).

8.6. Reliance placed by the Ld. DR on the decision of the Honble High Court of Delhi in the case of Escorts Finance Ltd (supra) is misplaced inasmuch as in that case it was held that it was not a case

where two opinions about the applicability of Sec. 35D were possible, therefore the claim was not considered as a bonafide error on the part of the assessee but a clear case of false claim. However, in the present case, as we have seen that the claim of the assessee was supported by the rulings of the AAR, therefore, the facts are clearly distinguishable. Reliance on the decision of the Zoom Communication (supra) is also misplaced because the return of income of the assessee under the head 'business income' has been assessed as such by the AO therefore, it cannot be said that the assessee was taking a chance that its return of income would not be selected for scrutiny assessment. Decision of the Tribunal in the case of LG Asian Plus Ltd relied upon by the Ld. DR is also misplaced because the AO himself has treated the income under the head 'Business income".

8.7. To recapitulate, the stand taken by the assessee is a possible view supported by judicial decisions. The head of income has been accepted by the Authority of Advance Ruling and also by the AO therefore it is not a case where the assessee has filed inaccurate particulars of income and merely because the benefit of the treaty was not allowed would not result into the levy of penalty in the light of the ratio laid down by the Hon'ble Supreme Court (supra)

9. Another cause for the levy of penalty is that in the original return of income, the assessee had shown interest on Income tax refund but the same was not shown in the revised return of income. The AO was of the firm belief that the assessee has concealed the income.

10. Before us, the Ld. Senior Counsel stated that the error was human error and there was no malafide and since the income was disclosed in the original return of income, it cannot be said that while filing the revised return of income, the assessee has intentionally concealed the income.

11. Per contra, the Ld. DR supported the findings of the lower authorities. It is the say of the Ld. DR that once the income was declared in the original return of income by not showing the income in the revised return of income, the assessee has deliberately concealed the income. Therefore, the levy of penalty is justified.

12. We have given a thoughtful consideration to the facts of the case. There is no doubt that in the original return of income, the assessee had offered Rs. 8,03,399/- under the head 'Income from other sources' being interest received on Income tax refund. It is also a fact that in the revised return of income, the assessee did not disclose this income. It is a clear case of human error because no prudent person would conceal the income from the payer i.e. no person with some sensibility would conceal the income earned from the Income tax department itself. This was only a silly mistake which cannot justify the levy of penalty. Our view is supported by the decision of the Hon'ble Supreme Court in the case of Pricewaterhouse Coopers Pvt. Ltd 348 ITR 306 wherein the Hon'ble Supreme Court interalia held as under:

> *"The assessee should have been careful but the absence of due care, in a case such as the present, did not mean that the assessee was guilty of either furnishing inaccurate particulars or attempting to*

conceal its income. On the peculiar facts of this case, the imposition of penalty on the assessee was not justified".

13. For similar reasons, considering the facts of the present case, in the light of the above observation of the Hon'ble Supreme Court, we do not find this to be a fit case for the levy of penalty. We, accordingly set aside the findings of the Ld. CIT(A) and direct the AO to delete the levy of penalty made u/s. 271(1)(c) of the Act.

14. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 15th January, 2016.

Sd/-	Sd/-
(C.N. PRASAD)	**(N.K. BILLAIYA)**
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 15th January, 2016

व.नि.स./ *Rj* , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

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**