

आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

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

**BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.5834/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2009-10)

Mrs. Sunanda V. Agarwala, Damini, Flat No. 301, 3 rd floor, Juhu Tara Road, Juhu, Vile Parle (West), Mumbai - 400 049.	बनाम/ v.	Income Tax Officer - 21(2)(4), C-10, 5 th floor, Pratyaksha Kar Bhavan, BKC, Bandra (East), Mumbai - 400 051.
स्थायी लेखा सं./PAN : ABLPA9852A		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Vijay Kothari
Revenue by :	Shri Vishwas Jadhav (D.R.)

सुनवाई की तारीख / **Date of Hearing** : 03-08-2016

घोषणा की तारीख / **Date of Pronouncement** : 24-10-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 5834/Mum/2013, is directed against the appellate order dated 28th August, 2013 passed by learned Commissioner of Income Tax (Appeals)- 32, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2009-10, the appellate proceedings before the learned CIT(A) arising from the order of penalty dated 29th May. 2012 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 271(1)(c) of the Income-tax Act,1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called “the Tribunal”) read as under:-

“1. The learned Commissioner of Income Tax (Appeals) erred in levying penalty u/s. 271 (1)(c) of Rs. 81,030/- and while doing so he amongst others failed to appreciate that:

a. The appellant had neither concealed the particulars of his income nor had he furnished any inaccurate particulars of income;

b. The details and particulars of the long term capital gains earned on the transfer of shares of Ranbaxy Laboratories Ltd. was entirely disclosed;

c. The appellant was under a bonafide belief that the gain arising on transfer of shares of Ranbaxy Laboratories Ltd. was exempt u/s. 10(38) of the Act.

d. Merely because the appellant had inadvertently committed an error in claiming exemption of capital gain on transfer of shares of Ranbaxy Laboratories Ltd., it could not be said that the appellant had concealed the particulars of income or had furnished inaccurate particulars of income.”

3. The brief facts of the case are that the assessee is an individual and during the year under consideration , the assessee has , inter-alia, declared long term capital gain of Rs.3,95,769/- arising out of sale of 537 shares of M/s. Ranbaxy Laboratories Ltd. sold for a total consideration of Rs.3,95,769/- and claimed exemption u/s 10(38) of the Act. The sale was effected on buyback option and STT was not paid by the assessee , and in view of this the long term capital gain of Rs. 3,95,769/- was not allowed to be exempted by the AO and taxed accordingly .

Penalty proceedings were initiated against the assessee u/s 271(1)(c) of the Act and notice u/s. 274 of the Act was issued to the assessee by the AO , but the assessee neither appeared before the A.O. nor any explanation was offered

by the assessee before the AO in penalty proceedings u/s. 271(1)(c) of the Act read with Section 274 of the Act. The A.O. accordingly came to the conclusion that the assessee did not have any explanation to offer w.r.t. penalty proceedings initiated against the assessee u/s 271(1)(c) of the Act read with Section 274 of the Act and had furnished inaccurate particulars of income whereby she had concealed her true income in the return of income filed with the Revenue. The A.O. held that the assessee has wrongly claimed exemption of Rs. 3,95,769/- u/s 10(38) of the Act in the return of income filed with the Revenue , whereby exemption from tax u/s 10(38) of the Act was claimed with respect to Long Term capital gains on sale of shares on which STT was not paid and hence, the assessee is liable for penalty u/s 271(1)(c) of the Act and taking a lenient view, the A.O. levied minimum penalty @ 100% of the tax sought to be evaded of Rs. 81,030/-, vide order of penalty dated 29.05.2012 passed u/s 271(1)(c) of the Act by the AO.

4. Aggrieved by the penalty order dated 29.05.2012 passed by the A.O. u/s. 271(1)(c) of the Act, the assessee filed her first appeal before the Id. CIT(A).

4. Before the Id. CIT(A) the assessee submitted that rectification application u/s 154 of the Act was filed before the A.O. wherein it was contended that as per proviso to section 112(1) of the Act capital gains earned by the assessee would be chargeable to tax @ 10% as against tax charged @ 20% by the A.O. and further the A.O. has not considered the cost of acquisition in respect of such 537 shares of Ranbaxy Laboratories Limited whose sale was effected under buyback option and the STT was not paid. The assessee relied on the following judicial decisions:-

- M/s Doral Trading Pvt. Ltd. v. DCIT – ITA No. 6280/Mum/2011.
- Asia Attractive Dividend Stock Fund v. DDIT (IT) – ITA No. 3908/Mum/2012.

- ACIT v. Amit Bajaj – ITA No. 7707/Mum/2010.

The assessee contended that the penalty proceedings may be dropped or to reduce the penalty levied u/s 271(1)(c) of the Act on account of computational error in applying higher tax rate of 20% instead of 10% as also not providing deduction of cost of acquisition of shares while calculating long term capital gains, in working out the penalty.

The ld. CIT(A) considered the contentions of the assessee and observed that the assessee has earned long term capital gain on sale of 537 shares of Ranbaxy Laboratories Ltd. wherein total sale consideration was Rs. 3,95,769/- which was sold under an buyback option and STT was not paid on the same by the assessee. Thus, the long term capital gain earned by the assessee is not exempt u/s 10(38) of the Act. The ld. CIT(A) observed that the present issue is covered by the decision of ITAT in the case of Asia Management Consultancy Pvt. Ltd. decided on 13th April, 2011 and not by the decision in the case of Doral Trading Pvt. Ltd. (supra) and Asia Attractive Dividend Stock Fund v. DDIT(supra) relied on by the assessee. The ld. CIT(A) held that the assessee has claimed long term capital gain earned by her as exempt u/s 10(38) of the Act under buyback option and as there was no STT paid on such transaction, the long term capital gain earned by the assessee is chargeable to tax and hence the assessee has furnished inaccurate particulars of income by claiming the long term capital gains earned by the assessee on sale of shares under buyback scheme on which STT was not paid as exempt u/s 10(38) of the Act. Thus, the ld. CIT(A) held that the case of the assessee is covered by the Explanation 1 of section 271(1)(c) of the Act and the levy of penalty by the A.O. is justified vide appellate orders dated 28.08.2013.

5. Aggrieved by the appellate order dated 28.08.2013 passed by the ld. CIT(A), the assessee is in appeal before the Tribunal.

6. The ld. Counsel submitted that the assessee has sold 537 shares of Ranbaxy Laboratories Ltd. for a total sale consideration of Rs. 3,95,769/- which was held for more than one year. Sale proceeds were received by the assessee under the buyback scheme whereby no STT was paid. The ld. Counsel submitted that it was an inadvertent mistake and during the course of assessment proceedings the assessee surrendered the amount and declared that the long term capital gain is not exempt from tax u/s 10(38) of the Act. Due taxes along with applicable interest have been paid. The ld. Counsel submitted that the rate of taxation is 10% and not 20% as charged by the AO . Without prejudice, it was submitted that the penalty levied should be reduced. The ld. Counsel has relied on the following decisions:-

1. Doral Trading Pvt. Ltd. v DCIT (ITA 6280/M/2011) dated 26.2.2013:
2. Virtuous Capital Limited v ACIT (ITA 5647/M/2013) dated 19.11.2015:
3. Asia Attractive Dividend Stock Fund v DDI (International Tax) (ITA 3908/M/2012) dated 28.9.2012:
4. Shri Vikramaditya Singh v DCIT (ITA 188/Asr/2014) dated 16.11.2015:
5. ACIT v Amit Bajaj (ITA 7707/M/2010) dated 3.8.2012:
6. Asia Management & Consultancy Pvt: Ltd. v ACIT (ITA 1916/M/2010) dated 13.4.2011:
7. Price Waterhouse Coopers P. Ltd. v CIT 348 ITR 306 (SC)
8. CIT v Reliance Petroproducts 322 ITR 158 (SC).

The ld. Counsel submitted that the above case laws clearly shows that no penalty is leviable as the facts are identical.

6. The ld. D.R. relied on the order of the ld. CIT(A) and also relied on the judicial decisions in the case of Union of India & Ors v. Dharmendra Textile Processors & Ors, (2008) 306 ITR 277 (SC) , Mak Data Private Limited v. CIT (2013) 358 ITR 593(SC) and CIT v. Zoom Communication Private Limited (2010) 327 ITR 510(Del. HC) .

7. In the rejoinder, the ld. Counsel submitted that the Tribunal in the case of Virtuous Capital Limited v. ACIT in ITA No. 5647/Mum/2013 for the assessment year 2009-10 vide orders dated 19th November, 2015 has considered all the case laws referred by the ld. D.R.

8. We have considered the rival contentions and also perused the material available on record including case laws relied upon by both the parties. We have observed that the assessee has sold 537 shares of Ranbaxy Laboratories Ltd. under buyback scheme whereby no STT was paid. The long term capital gain earned on such transaction of sale of shares of Ranbaxy Laboratories Limited under buyback scheme was chargeable to tax as no STT was paid by the assessee but in the return of income filed by the assessee with the Revenue , the assessee had declared the said long term capital gains earned by her to be exempt from tax u/s 10(38) of the Act. On being asked, the assessee submitted that it is an inadvertent and bona-fide mistake taken place while filing the return of income with the Revenue. It was also submitted that the assessee has duly declared long term capital gains earned on sale of 537 shares of Ranbaxy Laboratories Limited in the return of income filed with the Revenue wherein complete particulars were furnished but under a bona-fide belief due to inadvertent mistake claimed exemption of said long term capital gains earned by assessee u/s 10(38) of the Act. It is also stated before us that the assessee withdrew the said claim on coming to know of the inadvertent mistake committed by the assessee during assessment proceedings. The assessee has relied on several case laws as stated in

preceding para's and we find that the case law in the case of Doral Trading Pvt. Ltd. v DCIT (ITA 6280/M/2011) dated 26.2.2013 whereby reliance was placed on the decision of the Tribunal in the case of Asia Attractive dividend Stock Fund v. DDIT in ITA no. 3908/Mum/2012 wherein the facts were identical to the facts of the assessee in ITA no 3908/Mum/2012 which decision of Asia Attractive dividend Stock fund (supra) was approved by Hon'ble Bombay High court in (2013) 35 taxmann.com 265(Bom.) in DIT v. Asia Attractive Dividend Stock Fund, and also decision in the case of Virtuous Capital Limited v ACIT (ITA 5647/M/2013) vide orders dated 19.11.2015 are clearly applicable in this case. The decision of the Tribunal in ITA no 5647/Mum/2013 has duly considered the various case laws relied upon by learned DR . The Hon'ble Bombay High Court in the case of DIT v. Asia Attractive Dividend Stock Fund (2013) 35 taxmann.com 265(Bom.) held as under:

“2. In this appeal by the Revenue for assessment year 2008-09, although several questions have been formulated in the memo of appeal, the basic dispute is whether the Tribunal was justified in deleting the penalty under Section 271(1)(c) of the Income Tax Act, 1961 levied upon the respondent - assessee by the assessing officer.

3. The respondent - assessee had originally filed its return of income claiming a refund of Rs. 4.32 crores. This was on the basis of computing its tax payable on the short-term capital gain at the rate of 10% under Section 111A of the Income Tax Act, 1961 ('Act' for short). However, the respondent - assessee on its own realized its mistake in claiming refund and by a letter dated 23rd November 2010 brought it to the notice of the assessing officer. The respondent - assessee pointed that the tax payable on the capital gains was at the rate of 30% at which rate even the advance tax had been paid. Consequent thereto, the respondent -

assessee filed revised computation on the basis of tax being payable at the rate of 30%. The assessing officer completed the assessment without granting the claim for refund. However, penalty under Section 271(1)(c) of the Act was levied upon the respondent - assessee by the assessing officer. The Commissioner of Income Tax (A) upheld the order of the assessing officer levying penalty.

4. On further appeal, the Tribunal deleted the penalty as it found that this was a case of bona fide clerical error while computing the tax liability in the process of filing its return of income. However, as the same was rectified by the respondent - assessee on its own before the assessment was finalized, penalty was not justified. The fact of the clerical error was also fortified by the fact that the advance tax had been paid by the respondent - assessee at the rate of 30% and not at the rate of 10%.

5. In view of the fact that the order of the Tribunal is based on finding of fact, we see no reason to entertain the present appeal. Accordingly, the appeal is dismissed with no order as to costs.”

In our considered view based on above detailed reasoning and discussions, it is an inadvertent and bonafide mistake made by the assessee while filing return of income with the Revenue wherein long term capital gains earned on sale of shares under Buyback scheme wherein no STT was paid was claimed exempt u/s. 10(38) of the Act, and the assessee explanation offered thereto is a bona-fide whereby the assessee claimed it to be inadvertent and bonafide mistake was under an impression that long term capital gains earned on sale of shares is exempt from tax u/s 10(38) of the Act albeit no STT was paid , while complete particulars were filed in the return of income filed with the Revenue claiming exemption u/s 10(38) of the Act on long term capital gains earned on sale of shares. It is an inadvertent bona-fide mistake and as such

the penalty is not sustainable in the eye of law and the same is hereby ordered to be deleted as the assessee has come forward with an explanation which is a bona-fide explanation which takes it out of provisions of Section 271(1)(c) read with explanation 1 to Section 271(1)(c) of the Act. Merely because a claim is made by the assessee which is not accepted by the AO to be sustainable in law penalty is not leviable automatically more so when all the details were duly furnished by the assessee in the return of income filed with the Revenue and the particulars of income filed by the assessee were not inaccurate. The assessee has rightly placed reliance on decision of Hon'ble Supreme Court in the case of CIT v. Reliance Petroproducts Private Limited (2010) 322 ITR 158(SC) and decision of Hon'ble Supreme Court in the case of Price Waterhouse Coopers Private Limited(supra). Hence, in view of our foregoing detailed discussions and reasoning, we order deletion of penalty of Rs.81,030/- levied on the assessee by the AO u/s 271(1)(c) of the Act which was sustained by learned CIT(A) in the first appeal by setting aside the orders of the authorities below imposing penalty on the assessee u/s 271(1)(c) of the Act. We order accordingly.

9. In the result, appeal filed by the assessee in ITA No. 5834/Mum/2013 for the assessment year 2009-10 is allowed.

Order pronounced in the open court on 24th October, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 24-10-2016 को की गई ।

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 24-10-2016

I

आदेश की प्रतिलिपि अद्येषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai