आयकर अपीलीय अधीकरण, न्यायपीठ – "B" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**B**" KOLKATA*

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.736/Kol/2015 Assessment Year:2009-10

ACIT, Circle-29, Aayakar Bhawvan, Dakshin, 2 Gariahat Road, South, Kolkata-68	**V/s.**	Prakash Kumar Mohta (HUF), 7, Ronaldshay Road, Kolkata-27 [**PAN No. AADHP 6057 K**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Saurabh Kumar, Addl. CIT-DR
प्रत्यर्थी की ओर से/By Respondent	Shri Raj Kumar Agarwal, FCA
सुनवाई की तारीख/Date of Hearing	24-08-2017
घोषणा की तारीख/Date of Pronouncement	15-09-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-8, Kolkata dated 02.02.2015. Assessment was framed by JCIT, Raaange-29 Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 20.11.2011 for assessment year 2009-10. The penalty levied by Assessing Officer u/s 271(1)(c) of the Act vide his order23.12.2011. In respect of delay, we have heard the Ld. Representatives of the parties and have considered the contents of petition filed by Department. We are satisfied that the delay was due to a reasonable cause. Hence, we condone the delay on merit and appeal is admitted.

Shri Saurabh Kumar, Ld. Departmental Representative represented on behalf of Revenue and Shri Raj Kumar Agarwal, Ld. Authorized Representative appeared on behalf of assessee.

2. Solitary issue raised by Revenue in this appeal is that Ld. CIT(A) erred in deleting the penalty levied by Assessing Officer u/s. 271(1)(c) of the Act for ₹ 67,70,588/-.

3. Briefly stated facts are that assessee in the present case is a Hindu Undivided Family and has declared his income for ₹38,12,320/- under the head "income from other source". The assessee filed its return of income manually which was supported with the computation of income. The assessee in its computation of income has declared Long Term Capital Gains (LTCG for short) in shares for ₹3,45,57,985/- only which was claimed as exempted u/s. 10(38) of the Act.

Note: The Assessing Officer by mistake has recorded the Section 10(32) of the Act in place of 10(38) of the Act.

Subsequently, notice u/s. 143(2) of the Act was issued upon the assessee Thereafter notice u/s. 142(1) dated 27.01.2011 was served upon the assessee dated 29.06.2011 for fixing the date of hearing dated 08.07.2011.

In compliance thereto assessee appeared before Assessing Officer dated 30.09.2011 and filed the revised computation of income wherein LTCG in share was shown as taxable income for ₹3,38,52,941/-. Thus, assessee added the LTCG income to the income shown under the taxable income and paid the tax along with interest on the total income. The assessee claimed that LTCG income was earned by it on the sale-purchase of unlisted shares and therefore no exemption u/s. 10(38) of the Act was available to it. On noticing the mistake the revised computation of income was filed and accordingly, the LTCG income was offered to tax.

4. The AO after considering the submission of assessee has framed the assessment u/s 143(3) of the Act vide order dated 29.11.2011 after considering the LTCG of ₹3,38,52,941/- only. The AO in his assessment order initiated the penalty proceedings u/s. 271(1)(c)of the Act on the ground that

assessee furnished inaccurate particulars of income. In view of above, AO issued a notice dated 12.12.2011 for imposing the penalty u/s. 271(1)(c) of the Act. In response thereto on show cause notice, assessee submitted that the particulars of LTCG income was duly furnished in the income tax return itself but such income was claimed as exempted under the *bona fide* belief.

5. On receiving the notice u/s. 143(2) of the Act a Chartered Accountant was appointed to pursue the matter before AO and on his intervention it was discovered that LTCG is not exempted income.

6. On the advice of CA assessee immediately and voluntarily revised his computation of income and paid due tax thereon. As such, the impugned taxable LTCG income was not detected by the AO and it was declared during the course of assessment proceedings.

7. The assessee has been filing its return of income regularly and its case has been selected under scrutiny on several occasions and in all the cases, the return of income was accepted by the Revenue without making any addition to its total income. As such, assessee never intended to conceal any particulars of income and therefore in the year under consideration the bona fide mistake of claiming the LTCG exempted income has occurred inadvertently. However, AO disregarded the contention of the assessee by observing as under:-

i) Assessee did not rectify its mistake by filing revised return of income, in fact, the assessee claimed LTCG as exempted income in its return of income.

ii) The assessee revised its computation of income only after receiving the notice u/s. 143(2)/142(1) of the Act.

iii) There is no immunity available under the provision of Act from the penalty occurred due to ignorance of law.

The AO finally held that had the scrutiny proceedings not been initiated, the assessee would not have offered its LTCG as taxable income. Finally, AO imposed penalty upon the assessee on the reason of furnishing inaccurate

particulars of income @ 100% of the amount of tax sought to be evaded u/s 271(1)(c) of the Act.

8. Aggrieved, assessee preferred an appeal before Ld. CIT(A).The assessee before Ld. CIT(A) submitted that the time of filing the revised return was expired and therefore assessee failed to revise the same. Assessee reiterated the submission as made before AO. However, Ld. CIT(A) after considering the submission of assessee deleted the penalty imposed by the by the AO by observing as under:-

> "*6. I have considered the rival contentions of both sides on the issue of imposition of penalty u/s 271(1)(c). I find that the judicial precedence relied upon by the AR of the appellant squarely covers the case of the appellant. The AO had imposed the penalty on the ground that the appellant had concealed the particulars of its income. However, on a deeper scrutiny of the case, I find that it was not a case of furnishing inaccurate particulars of income but wrongly claiming exemption of capital gains arising out of sale of shares. As rightly pointed out by the AR, all details and particulars were before the AO who has not disputed on the authenticity of those particulars or details filed by the appellant along with the Return of Income. I find from the contention of the AR that the appellant was bona fidely under the wrong impression that it was entitled to claim exemption u/s 10(32) of the Act with respect to LTCG of equity shares which were not subjected to STT. Having discovered the bare facts only at a later stage during the assessment stage, did the appellant voluntarily file a revised computation of total income wherein the said capital gain was offered to tax and promptly paid up the tax liability on the same. This apart, the AR has also relied on the decision of the Apex Court in the case of CIT vs. Reliance Petro Products (P) Ltd. 322 ITR 158 (SC) wherein it was held as follows:*
>
> > "A glance at the provisions of section 271(1)(c) of the Income-tax Act, 1961, suggests that in order to be covered by it there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The meaning of the word "**particulars**" used in section 271(1)(c) would embrace the details of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty, 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.

> Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271(1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars. "

As held by the Apex Court in the foregoing, a mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars· Further, I find that the element of mens rea is missing in the case ,to come to the conclusion that the appellant really did consciously make concealment of his income or furnished inaccurate particulars of his income so as to avoid payment of tax. The High Court of Punjab and Haryana in the case of Commissioner of Income Tax-I, Ludhiana vs. Sidhartha Enterprises [2009] 184 TAXMAN 460 (PUNJ. & HAR.) followed the decision of Supreme Court of India in the case of Union of India v. Dharmendra Textile Processors [2008] wherein it was held that penalty under section 271(1)(c) is imposed only when there is some element of deliberate default and not for a mere mistake. The Appellant in the present case inadvertently committed the mistake of claiming exemption on LTCG arising out of sale of equity shares and subsequently has also paid the tax on the amount in question which was offered for taxation. I do not see any deliberate act on the part of the appellant to have concealed his income or to have furnished inaccurate particulars, the claim of exemption being a bona fide mistake. Considering the entire facts and circumstances of the case coupled with the judicial precedence supra, the penalty imposed by the AO u/s 271(1)(c) is not warranted and hence the same stands cancelled."

The Revenue, being aggrieved, is in appeal before us.

9. Before us Ld. DR vehemently relied on the order of AO whereas Ld. AR submitted that the ratio laid down by Hon'ble Supreme Court in the case of *Mak Data Pvt. Ltd. vs. CIT-II* in Civil Appeal No. 9772 of 2013 are not applicable in the instant facts of the case. He stated that assessee offered additional income to the Revenue by way of voluntary disclosure which was made to buy peace, to avoid litigation and as amicable settlement and accordingly assessee prayed before the court for the deletion of penalty. The ld. AR also submitted that the principles laid down by the Hon'ble Supreme in the case of MAK Data Pvt. Ltd. are not applicable to the instant facts of the case as in that case the Hon'ble Court rejected the contention of the assessee by observing that as under:-

> *"9. We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. in that situation, it cannot be said that the surrender of income was voluntary AO during the curse of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer deeds duly singed, have been impounded in the course of survey proceedings under Section 133A conducted on 15.12.2003, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is leer that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payment made by it and to declare its true income in the return of income filed by it from year to year. The AO, in our view, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under Section 271 read with Section 274 of the Income Tax Act, 1961."*

Thus, from the above proposition, it is clear that penalty was confirmed by Hon'ble Supreme Court on the ground of voluntary disclosure of income. However, in the present case, there is no dispute at all with the disclosure of income rather the dispute relates to the exemption claimed by assessee on the income of LTCG and income was duly shown by assessee and but under *bona fide* belief the exemption was claimed u/s. 10(38) of the Act. Ld. AR in support of assessee's claim has relied on the judgment of Hon'ble Supreme Court in the case of *CIT vs. Reliance Petro Products (P) Ltd.* 322 ITR 158 (SC) wherein the Hon'ble court has held as under:-

> *"A glance of provision of section 271(1)(*c *) would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The instant case was not the case of concealment of the income. That was not the case of the revenue either. It was an admitted position in the instant case that no information given in the return was found to be incorrect or inaccurate. It was not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least,* prima facie, *the*

assessee could not be held guilty of furnishing inaccurate particulars. The revenue argued that submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income. Such cannot be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing of inaccurate particulars. [Para 7]

*Therefore, it must be shown that the conditions under section 271(1)(*c *) exist before the penalty is imposed. 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. [Para 8]*

*The word 'particulars' must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. In the instant case, there was no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under section 271(1)(*c*). A mere making of the claim, which is not sustainable in law by itself will not amount to furnishing of inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars. [Para 9]*

*The revenue contended that since the assessee had claimed excessive deductions knowing that they were incorrect, it amounted to concealment of income. It was argued that the falsehood in accounts can take either of the two forms: (*i*) an item of receipt may be suppressed fraudulently; (*ii*) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. Such contention could not be accepted as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the revenue, that, by itself, would not attract the penalty under section 271(1)(*c*). If the contention of the revenue was accepted, then in case of every return where the claim made was not accepted by the Assessing Officer for any reason, the assessee would invite penalty under section 271(1)(*c*). That is clearly not the intendment of the Legislature. [Para 10]*

Therefore, the appeal filed by the revenue had no merits and was to be dismissed."

The ld. Counsel for the assessee also alternatively submitted by drawing our attention to the decision of the Hon'ble Karnataka High Court in the case of

CIT vs. SSA's Emerald Meadows in **ITA No.380 of 2015** dated 23.11.2015 wherein the Hon'ble Karnataka High Court following its own decision in the case of *CIT vs Manjunatha Cotton and Ginning factory* (2013) 359 ITR 565 took a view that imposing of penalty u/s 271(1)(c) of the Act is bad in law and invalid for the reason that the show cause notice u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealment of particulars of income or furnishing of inaccurate particulars of income. The ld. Counsel further brought to our notice that as against the decision of the Hon'ble Karnataka High Court the revenue preferred an appeal in SLP in CC No.11485 of 2016 and the Hon'ble Supreme Court by its order dated 05.08.2016 dismissed the SLP preferred by the department. The ld. Counsel also brought to our notice the decision of the Hon'ble Bombay High Court in the case of *CIT vs Shri Samson Perinchery* in **ITA No.1154 of 2014** dated 05.01.2017 wherein the Hon'ble Bombay High Court following the decision of the Hon'ble Karnataka High Court in the case of *Manjunatha Cotton and Ginning factory* (supra) came to the conclusion that imposition of penalty on defective show cause notice without specifying the charge against the assessee cannot be sustained. Our attention was also drawn to the decision of ITAT in the case of *Suvaprasanna Bhattacharya vs ACIT* in **ITA No.1303/Kol/2010** dated 06.11.2015 wherein identical proposition has been followed by the Tribunal. The ld. AR relied on the order of ld. CIT(A).

10. We have heard the rival contentions of the parties and perused and carefully considered the material on record; including the judicial pronouncements cited and placed reliance upon. In relation to instant case the facts of the case as discussed above are not in dispute, therefore for the sake of brevity the same are not repeated/ reproduced. The ld. AR in his alternate contention has relied on the principle laid down by the Hon'ble High Court of Karnataka High Court in the case of *Manjunatha Cotton and Ginning Factory* (supra) where it held that imposing of penalty u/s 271(1)(c) of the Act is bad in law and invalid for the reason that the show cause notice u/s 274 of the Act

does not specify the charge against the assessee as to whether it is for concealment of particulars of income or furnishing of inaccurate particulars of income.

10.1 It is also undisputed fact that the assessee has not filed any appeal against the order of ld. CIT(A). Thus, the issue arises whether the ld. AR of the assessee can raise the plea which is not arising from the order of the ld. CIT(A). In this regard we find that the Hon'ble Gauhati High Court in the case of *Assam Co. (India) Ltd. v. Commissioner of Income-tax* reported in 256 ITR 423 has decided the issue in favour of assessee by observing as under :

> *"Whether or not the applicant-company can be permitted to raise that plea only on the ground that it had not preferred any appeal or cross-objection against the order of the Commissioner of Income-tax (Appeals) is the question which now engages the attention of this Court. It need not be over-emphasised that the Appellate Tribunal Rules framed by the Tribunal in exercise of its power under section 255(5) of the Act are wholly for the purpose of regulating its own procedure and the procedure of the Benches of the Tribunal. The rules therefore embody the principles of procedure to be followed by the Tribunal and its Benches for the discharge of its functions. The scheme of the Rules read as a whole does not suggest that the Rules in any way have the effect of curtailing or circumscribing the power, authority and jurisdiction of the Tribunal in dealing with matters at its disposal. We have not been able to read any prohibition in the rules totally precluding the Tribunal from considering any ground beyond those mentioned in the memorandum of appeal filed by a party, whether the assessee or the Department, in the absence of an appeal or cross-objection by the other side projecting the new ground. It is a settled principle of law that procedural law is the hand maid of justice and has to be so interpreted to advance the cause of justice and not to thwart it. Considering the language used in section 254(1) of the Act conferring powers on the Tribunal which is in the widest possible terms, we feel guided in this regard by the emphatic observations of the Apex Court contained in its decision of National Thermal Power Co. Ltd.'s case (supra). We have also taken note of the observations of the Apex Court to the effect that the purpose of the assessment proceeding before the taxing authority is to assess correctly the tax liability of an assessee in accordance with law. We consider it to be a solemn duty of the taxing authorities to correctly assess the tax liability of an assessee by duly following the relevant provision of law and therefore do not countenance an inflexible and mechanical adherence to the law of procedure and in the process deny an assessee a benefit to which it is otherwise entitled in law. In our considered opinion, that could not have been the purpose of framing the Appellate Tribunal Rules. There cannot be any estoppel against law. In this regard, we are reinforced by the observations of the Apex Court in Sangram Singh v. Election Tribunal AIR 1955 SC 425, with reference to the Code of Civil Procedure as under :*

"Now a code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends : not a penal enactment for punishment and penalties ; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it." (p. 429)

***31.** We are therefore not in favour of granting such a primacy to the rules of procedure so as to wipe off a substantial right otherwise available to the assessee in law. We find this view of ours also reinforced by the language of rule 11 which does not require the Tribunal to be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal provided the party who may be affected thereby had sufficient opportunity of being heard on that ground. In taking this view, we are conscious about the observations of the Madras High Court and the Calcutta High Court made in the decisions relied upon by learned Counsel for the Revenue but we are, in the facts and circumstances of the case, persuaded to accept the observations of the Apex Court made in this regard in the case of National Thermal Power Co. Ltd.'s case (supra). We are therefore of the view that it is permissible on the part of the Tribunal to entertain a ground beyond those incorporated in the memorandum of appeal though the party urging the said ground had neither appealed before it nor had filed a cross-objection in the appeal filed by the other party. We must however hasten to add that in order to enable either the assessee or the Department to urge a ground in the appeal filed by the other side, the relevant facts on which such ground is to be founded should be available on record. In the absence of such primary facts, in our opinion, neither the assessee nor the Department can be permitted to urge any ground other than those which are incorporated in the memorandum of appeal filed by the other party. In other words, if the assessee or the Department, without filing any appeal or a cross-objection seeks to urge a ground other than the grounds incorporated in the memorandum of appeal filed by the other side, the evidentiary facts in support of new ground must be available on record."*

10.2 Thus, we admit the alternate plea raised by the ld. AR for the assessee and find force in the alternate argument of the AR that the show cause notice issued in the present case issued u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealing particulars of income or furnishing inaccurate particulars of income. The show cause notice u/s 274 of the Act does not strike out the inappropriate words. In these circumstances, we are of the view that imposition of penalty cannot be sustained. The plea of the ld. Counsel for the assessee which is based on the decisions referred to in the earlier part of this order has to be accepted. We, therefore hold that imposition of penalty in the present case cannot be

sustained and the same is directed to be cancelled. Accordingly, AO is directed.

11. **In the result, Revenue's appeal stands dismissed.**

Order pronounced in the open court 15/09/2017

Sd/-	Sd/-
(न्यायिक सदस्य)	(लेखा सदस्य)
(N.V.Vasudevan)	(Waseem Ahmed)
(Judicial Member)	(Accountant Member)

Kolkata,

*Dkp, Sr.P.S
दिनांकः- 15/09/2017 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-ACIT, Circle-29, Aayakar Bhavan Dakshin, 2 Gariahat Rd. Kolkata-68
2. प्रत्यर्थी/Respondent-Prakash Kr. Mohta (HUF), 7, Ronaldshay Road, Kolkta-27
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Sr. Private Secretary, Head of Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता ।