

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI**

**BEFORE SHRI B.P.JAIN, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 6516/Del /2014
Asstt. Year: 2005-06**

**ITA No. 6517/Del /2014
Asstt. Year: 2005-06**

**ITA No. 6518/Del /2014
Asstt. Year: 2007-08**

**ITA No. 6519/Del /2014
Asstt. Year: 2008-09**

DCIT, Circle 1(2), New Delhi.	vs	ACEE Enterprises, Punjabi Bhavan, 4 th floor, 10, Rouse Avenue, New Delhi-110002 (PAN: AAACA0857G)
(Appellant)		(Respondent)

Appellant by : Shri Satendra Pal, Sr. DR
Respondent by : Shri M.P. Rastogi, Adv.

**Date of Hearing : 01.11.2017
Date of Pronouncement: 13.11.2017**

ORDER

PER BENCH:

These four appeals have been filed by the Department and challenge the action of the Ld. Commissioner of Income Tax

(Appeals) – IV, New Delhi in deleting the penalty imposed under section 271 (1) (c) of the Income Tax Act, 1961 (hereinafter called “the Act”). Since all the appeals have identical issue, they were heard together and they are being disposed of through this common order.

2. The brief facts in assessment year 2005–06 are that the assessment was completed at an income of Rs. 43,63,166/- against the returned income of Rs. 43,23,166/-. While making the assessment, the AO treated income from short-term capital gains amounting to Rs. 42,09,883/- as business income. Against the order of the assessing officer, the assessee successfully contested before the first appellate authority. However, the ITAT decided the issue in favour of the Income Tax Department and upheld the findings of the AO. The change of head of income from capital gains to business income resulted in difference in the tax rate. Subsequent to the order of the ITAT, the AO held that change of head of income amounted to furnishing of inaccurate particulars of income and proceeded to impose penalty of Rs. 15,10,295/- under section 271 (1) (c) of the Act. On appeal, this penalty was deleted by the Ld. CIT (Appeals) vide order dated

15/09/2014. Now, the Department has approached the ITAT and has challenged the deletion of penalty by the Ld. CIT (Appeals).

2.1 Similarly, for assessment year 2006–07, the assessee filed its return of income declaring income of Rs. 75,08,999/- on account of short-term capital gains arising on account of sale of shares held by it as an investment. In the assessment order passed under section 143 (3) of the Act, the AO held that the income was from business as the assessee was a trader in shares as against the claim of the assessee that income was from short-term capital gain. The assessee took the matter to the Ld. CIT (Appeals) who decided the issue against the assessee. Thereafter, the assessee filed an appeal before the ITAT who confirmed the view of the AO and of the Ld. CIT (Appeals) that the income was to be treated as business income and not as short term capital gain. Thereafter, the AO imposed penalty of Rs. 16,86,000/- for furnishing inaccurate particulars of income. This penalty was deleted by the Ld. CIT (Appeals) vide order dated 15/09/2014 and now the Department has approached the ITAT and has challenged the action of the Ld. CIT (Appeals) in deleting the said penalty.

2.2 For assessment year 2007–08, the return of income was filed declaring income of rupees 25,35,470/- on account of short-term capital gain from sale of shares held by the assessee as investment. However, the AO proceeded to hold that the income was from business and not from short-term capital gains. The AO's view was confirmed by the Ld. CIT (Appeals) as well as by the ITAT. Thereafter, the AO imposed a penalty of Rs. 5,69,000/- under section 271(1)(c) of the Act, which on appeal, was deleted by the Ld. Commissioner of Income Tax (Appeals) vide order dated 15/09/2014. Now, the Department has approached the ITAT and has challenged the aforesaid deletion of the penalty by the Ld. CIT (Appeals).

2.3 For assessment year 2008–09, the return of income was filed declaring an income of Rs. 80,81,01,397/- which included an amount of Rs. 60,60,894/- on account of short-term capital gain arising on account of sale of shares held as investment by the assessee. However, in the assessment order passed under section 143 (3) of the Act, the AO held that the income of Rs. 60,60,894/- was from business as the assessee was a trader in shares. Both, the Ld. CIT (Appeals) as well as the ITAT confirmed

the view of the AO. Thereafter, the AO imposed a penalty of Rs. 13,34,000/- furnishing inaccurate particulars. On appeal, the Ld. CIT (Appeals) deleted the penalty vide order dated 15/09/2014. Now, the Department has approached the ITAT and has challenged the deletion of the penalty by the Ld. CIT (Appeals).

3. The Ld. Senior Departmental Representative submitted that a close look at section 271 (1) (c) of Act along with Explanation 1 thereto would show that in course of any proceedings under the Act, if the AO is satisfied that a person has concealed the particulars of income or has furnished inaccurate particulars of such income, such person may be directed to pay penalty. It was further submitted that the quantum of penalty is prescribed in clause (iii) and that Explanation 1 provides that if a person fails to offer an explanation or the explanation offered by such person is found to be false or the explanation offered by him is not substantiated and he fails to prove that such explanation is *bona fide* and that all the facts relating to the same and material to the computation of total income have been disclosed, the amount added or disallowed in computing the total income is deemed to

represent the concealed income. The Ld. Sr. DR submitted that this penalty is neither criminal nor quasi-criminal but a civil liability and in such cases *mens rea* was not essential. It was submitted that on facts, the penalty had been rightly imposed. Reliance was also placed by the Ld. Sr. DR on the judgment of the Hon'ble Delhi High Court in the case of CIT v. Zoom Communications Ltd reported in 327 ITR 510(Del) for the proposition that a claim wholly untenable in law and lacking *bona fide* will attract penalty.

4. In response, the Ld. Authorised Representative submitted that the penalty was imposed only on a difference of opinion as to whether a particular item of income was taxable under 'short-term capital gains' or under 'business income'. The Ld. Authorised Representative submitted that the assessee had neither concealed any income nor furnished any inaccurate particulars of income. It was submitted that there was only change of income head from "short-term capital gains" to "business income" and the issue was at best debatable. It was submitted that the change of income head does not tantamount to furnishing of inaccurate particulars of income as all the

material facts had been duly disclosed by the assessee. It was submitted that the transaction details of purchase and sale of shares were duly disclosed in the return of income and it was not a case where the assessee had failed to disclose the particulars of income or furnished inaccurate particulars of income. It was further submitted that assessee was both an investor as well as a trader of shares and during the course of his assessment proceedings, no inaccuracy was found in the details furnished by the assessee. The Ld. Authorised Representative also placed reliance on judgment of the Hon'ble Delhi High Court in the case of Commissioner of Income Tax *versus* Auric Investment and Securities Ltd reported in 310 ITR 121 (Delhi) wherein the Hon'ble Delhi High Court had held that mere treatment of business loss as a speculation loss by the AO did not automatically warrant the inference of concealment of income. Reliance was also placed on another judgment of the Hon'ble Delhi High Court in the case of CIT vs. Amit Jain reported in 351 ITR 74 (Delhi) wherein, on identical facts, the order of the ITAT was upheld by Hon'ble Delhi High Court.

5. We have heard the rival submissions and have perused the material on record. The facts of the case are undisputed. It is undisputed that penalty has been levied only on the change of head of income from 'short-term capital gains' to 'business income'. Although the ITAT has upheld the view of the AO that the impugned income was chargeable under the head "short-term capital gains" in all the four years, it is settled law that assessment and penalty proceedings are distinct. The Hon'ble Apex Court has held that the findings recorded in the assessment proceedings may constitute evidence in the course of penalty proceedings but they cannot be regarded as conclusive. In the instant appeals, it cannot be said that the assessee had withheld any relevant information regarding its receipts and income from the AO. With regard to the provisions of section 271 (1) (c) of the Act pertaining to penalty, the Hon'ble Apex court has laid down that making of a claim by the assessee which is not sustainable will not amount to furnishing inaccurate particulars. In the case of CIT *versus* Reliance Petroproducts (P) Ltd reported in 322 ITR 158 (SC), the Hon'ble Apex Court held as follows –

"A glance at this provision 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 present is not a case of concealment of income. That is not the case of the revenue either. However, the Ld. counsel for the revenue suggested that by making inaccurate claim for the expenditure on interest, the assessee has furnished inaccurate particulars of the income. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in the section 271 (1) (c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars. The Ld. counsel argued that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income". We do not think that such can 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 inaccurate particulars. In CIT versus Atul Mohan Bindal (2009) 9 SCC 589, where this court was considering the same provision, the court observed that the assessing officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. This court referred to another decision of this court in Union of India versus Dharamendra Textile Processors (2008) 13 SCC 369 as also, the decision in Union of India versus Rajasthan Spg. & Wvg. Mills (2009) 13 SCC 448 and reiterated in paragraph 13 that (page 13 of 317 ITR):

"13. It goes without saying that for applicability of section 271 (1) (c), conditions stated therein must exist."

5.1 The Hon'ble Delhi High Court in the case of CIT versus Amit Jain (supra) upheld the order of the ITAT upholding the deletion of the penalty by the Ld. CIT (Appeals) on facts similar to the facts in the present appeals. In this case the assessee had declared an income of rupees 2,60,73,558/- from short-term capital gains. The AO, on an interpretation of the relevant provisions and having regard to the nature of transactions treated it as income from business. He also levied penalty under section 271 (1) (c) of the Act to the tune of Rs. 58,45,899/- on the ground that the assessee had furnished inaccurate particulars of income. The Commissioner (Appeals) cancelled the penalty. This deletion by the CIT (Appeals) was confirmed by the ITAT. On an appeal by the Department, the Hon'ble High Court of Delhi held dismissing the appeal that the amount in question, which formed the basis for the AO to levy penalty, was in fact to fully reported in the returns. The Hon'ble Delhi High Court held that in view of this circumstance, that the AO chose to treat the income under some other head could not characterise the particulars reported in the return as "inaccurate particulars" or as suppression of facts. The Hon'ble Delhi High Court held that the ITAT was not in

error in deleting the penalty while placing reliance upon the decision in CIT *versus* Reliance Petroproducts Private Limited (supra).

5.2 In the appeals before us, it is undisputed that the impugned amounts, which formed the basis for the AO to levy penalty, were in fact fully reported in the returns. The fact that the AO chose to treat the income under some other head cannot characterise the particulars reported in the return as “inaccurate particulars” or as suppression of facts. Respectfully applying the ratio of the decisions of the Hon’ble Apex Court in the case of Reliance Petroproducts Private Limited (supra) and of the Hon’ble Delhi High Court in the case of CIT *versus* Amit Jain (supra), we find no reason to interfere with the adjudication of the Ld. CIT (Appeals) in deleting the impugned penalties in all the four years under consideration. Accordingly, we refuse to interfere and uphold the orders of the Ld. CIT (Appeals) for all the four years under consideration.

6. In the final result all the four appeals of the Department’s stand dismissed.

Order is pronounced in the open court on 13th November,
2017.

Sd/-
(B.P. JAIN)
ACCOUNTANT MEMBER

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 13th NOVEMBER, 2017
'GS'

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

TRUE COPY

By Order

ASSISTANT REGISTRAR