

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD “B” BENCH

**(BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
& SHRI MAHAVIR PRASAD, JUDICIAL MEMBER)**

**ITA. No: 2246/AHD/2017
(Assessment Year: 2011-12)**

Dharmendra Vishnubhai Patel A-6, Radhe Bunglows-1, New C.G. Road, Chandkheda, Ahmedabad	V/S	Income Tax Officer, Ward- 1, Gandhinagar
(Appellant)		(Respondent)

PAN: AFIPP7719N

**Appellant by : Shri Kirit P. Shah, AR
Respondent by : Shri Sumit Kumar, Sr. D.R.**

(आदेश)/ORDER

Date of hearing : 30 -11-2017
Date of Pronouncement : 13-12-2017

PER N.K. BILLAIYA, ACCOUNTANT MEMBER

1. With this appeal, the Assessee has challenged the correctness of the order of the Ld. CIT(A), Gandhinagar, Ahmedabad dated 25.09.2017 pertaining to A.Y. 2011-12.

2. The only grievance of the assessee is that the ld. CIT(A) erred in upholding the penalty levied u/s. 271(1)(c) of the Act in respect of long term capital gain of Rs. 47,93,267/-.
3. At the very outset, the ld. counsel for the assessee stated that the Principal Commissioner, Gandhinagar has deleted the penalty of Rs. 10,00,399/- vide order dated 15.03.2017 framed u/s. 264 of the Act. It is the say of the ld. counsel that since the penalty has been deleted by the Principal Commissioner, Gandhinagar, the same should be deleted.
4. We will first like to adhere to the aforementioned submission of the ld. counsel. The order of the Principal Commissioner framed u/s. 264 of the Act is without jurisdiction. The relevant provision of Section 264 to be considered reads as under:-
 - (4) *The [Principal Commissioner or] Commissioner shall not revise any order under this section in the following cases-*
 - (a) where an appeal against the order lies to the [Deputy Commissioner (Appeals)] [or to the Commissioner (Appeals)] or to the Appellate Tribunal but has not been made and the time within which such appeal may be made has not expired or, in the case of an appeal¹ to the Commissioner (Appeals) or] to the Appellate Tribunal, the assessee has not waived his right of appeal; or*
 - (b) where the order is pending on an appeal before the [Deputy Commissioner (Appeals)]; or*
 - (c) where the order has been made the subject of an appeal [to the Commissioner (Appeals) or] to the Appellate Tribunal.*
5. As can be seen from the clause (c) above, the Principal Commissioner cannot revise any order under this section where the order has been made the subject

of an appeal. Since the assessee has also preferred appeal before the Id. CIT(A), the order of the Principal Commissioner is without jurisdiction.

6. Coming to the merits of the case, we find that the assessee had filed return of income in the form applicable to presumptive business income tax return and the same is exhibited at page 16 of the paper book. We find that the gross turnover in the business of Ambica Sales is Rs.45,20,259/-on which the presumptive income u/s. 44AD comes to Rs. 4,46,241/-.We also find that under the head gross total income, the assessee has shown income at R. 52,48,395/- which includes Rs. 47,93,267/- from long term capital gain. Since the assessee has selected presumptive business income tax return, there was no column for showing capital gains. But, at the same time, the long term capital gain earned by the assessee has been shown as part of the gross total income. We also find that the assessee has paid total taxes at Rs. 10,13,020/-.
7. We find that the A.O. has separately added long term capital gain of Rs. 47,93,267/- because the same was not found reflected in the return of income of the assessee.
8. In our considered opinion and the understanding of the fact, the A.O. has completely ignored that long term capital gains have been included in the gross total income of the assessee. Though, the assessee filed the return of income in a return form which was not applicable on the facts of the case.
9. But the fact of the matter is that the assessee did disclose the capital gains in the return of income. Therefore, we do not find this to be a fit case for the levy of penalty for concealment of income. We accordingly set aside the findings of

the ld. CIT(A) and directed the A.O. to delete the penalty levied u/s. 271(1)(c) of the Act.

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

Order pronounced in Open Court on 13s - 12- 2017

Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER **True Copy**
Ahmedabad: Dated 13 /12/2017

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad