

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH

Before: Shri S. S. Godara, Judicial Member
And Shri Amarjit Singh, Accountant Member

ITA No. 3294/Ahd/2014
Assessment Year 2006-07

Anisha R. Dhanani, Flat No. 281, 28 th Floor Kalpataru Heights, Mahalaxmi, Mumbai PAN: ACTPD3111C (Appellant)	Vs	The ACIT, Circle-1(2), Baroda (Respondent)
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Revenue by: Shri S.K. Verma, Sr. D.R.
Assessee by: Shri Surendra Modiani, A.R.

Date of hearing : 20-12-2017
Date of pronouncement : 08-02-2018

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This assessee's appeal for A.Y. 2006-07, arises from order of the CIT(A)-I, Baroda dated 12-09-2014, in proceedings under section 271(1)(c) of the Income Tax Act, 1961; in short the Act.

2. The assessee has raised following grounds of appeal:-

"1. The order of the learned Commissioner(Appeals) is against law and facts.

2. The learned Commissioner(Appeals) erred in confirming the levy of penalty of Rs.2,58,400/-.

Your appellant submits that the penalty of Rs.2,58,400/- is not justified and prays that the same be deleted."

3. The facts in brief to the issue in appeal is that in this case during the course of assessment proceedings the assessing officer has made addition on account of peak negative cash balance during the year from 01-04-2005 to 23rd March, 2006 amounting to Rs. 8,74,800/- and short term capital gain of Rs. 1,09,624/- from sale of NTPC. The CIT(A) has sustained the addition to the extent of Rs.8,24,800 and Rs.109624 respectively. The assessing officer has initiated penalty proceedings in respect of peak negative cash amounting to Rs. 8,24,800/- and short term capital gain of Rs. 1,09,624/- from sale of NTPC shares which was shown as long term capital gain u/s. 10(18) of the act. Consequently, the assessing officer has imposed penalty of Rs. 2,47,350u/s. 271(1)(c) of the act.

4. Aggrieved assessee filed appeal before the Id. CIT(A). The Id. CIT(A) has dismissed the appeal of the assessee by observing as under:-

"5. I have considered the facts of the case, submission of the appellant and the AO's observations. The first issue in the case of appellant relates to levy of penalty u/s 271(1)(c) on addition of Rs. 1,09,624/-. The AO in the penalty order has mentioned that the appellant had shown long term capital gain of Rs. 5,94,08,417/- as exempted from tax and this long term capital gain also included gain of Rs. 1,09,624/- on purchase and sale of 9000 shares of NTPC Ltd. As per the AO on verification of dates of acquisition, it was found that the appellant had held shares of NTPC less than 12 months and therefore as per proviso to section 2(42A) of the Act, the gain arisen out of the above transaction was short term capital gain. Thus, as per the AO, the appellant had wrongly treated the capital gain of Rs. 1,09,624/- as long term capital gain as the same was only short term capital gain and was not eligible for exemption. However, the AR of the appellant in his submission date 04/09/2014 as filed through tapal has submitted that this amount, of Rs. 1,09,624/- was shown as long term capital gain and was claimed exemption u/s 10(38) inadvertently due to clerical mistake while computing the income from long term capital gain. As per the AR there was no intention of the appellant to show this amount as long term capital gain and this mistake occurred due to the fact that there were huge numbers of transactions of the same investment on long term basis as well as on short term basis. But this plea of the AR is not found to be tenable. The fact is that the appellant has not filed any revised return of income or any revised computation of income for the year under consideration rectifying the above mistake. This wrong claim of the appellant was detected only as a result of scrutiny of the case. If the case of the appellant was not picked up for scrutiny, the above wrong claim would have gone undetected. In view of this fact, I hold that the AO has correctly levied the penalty u/s 271(1)(c) on the amount of Rs. 1,09,624/- and therefore the same is confirmed.

5.1 The second issue in the case of appellant relates to levy of penalty u/s 271(1)(c) on addition of Rs. 8,74,800/- being unexplained cash deposits. The AO in the penalty order has mentioned that from the bank statements of HDFC and ABN Amro, it was observed that the appellant had deposited huge cash in the bank account. The appellant during the course of assessment proceedings stated before the AO that cash deposits of Rs.

2,00,000/- was made on 29/04/2005 in HDFC Bank out of opening balance of cash lying with her. Regarding other cash withdrawals from HDFC Bank, ICICI Bank and ABN Amro Bank, it was observed by the AO that the appellant had not furnished any documentary evidence to prove that the opening balance of Rs. 3,32,467/- was available with the appellant. The AO held that no cash balance as contended by the appellant was available with her. As per the AO, in her explanation, appellant has shown cash withdrawal of Rs. 8,00,000/- on 07/06/2005 from HDFC Bank. However, as per the AO such an amount of Rs. 8,00,000/- was paid by the appellant to Sandoz, Mumbai by way of clearing of cheque. Thus, as per the AO, there was no cash withdrawal of Rs. 8,00,000/- on 07/06/2005 from HDFC Bank. As per the AO, on verification it was also found that there was no cash withdrawal from other Banks also. Later on, the Ld. CIT(A) vide his appeal order in appeal no. CAB-1/192/08-09 dated 04/07/2011 directed the AO to accept opening cash balance at Rs. 50,000/- and to rework the day-to-day cash balance. Thus, the Ld. CIT(A) has confirmed the addition to the extent of Rs. 8,24,800/-. The AO in the penalty order u/s 271(1)(c) has mentioned that with regard to cash deposits of Rs. 8,00,000/-, no explanation was submitted by the appellant in compliance to show-cause notice as issued and therefore it was established that the appellant had accepted his faults and she had nothing to say for the same. Thus, the AO levied the penalty u/s 271(1)(c) on addition of Rs. 8,24,800/-. On the other hand, the AR of the appellant in his submission dated 04/09/2014 has mainly stated that the AO has imposed penalty u/s 271(1)(c) of Rs. 2,45,350/- on negative peak credit amounting to Rs. 8,24,800/- during the AY 2006-07. The AR has enclosed with his submission cash balance statement and has stated that from such cash balance statement it can be observed that there was no negative cash balance during the year under review and there was opening cash balance of Rs. 3,32,467/- as on 01/04/2005. Thus, as per the AR there was no peak negative cash credit amounting to Rs. 8,24,800/- during ASSESSMENT YEAR 2006-07, in view of the new fact which came into light during the assessment proceedings u/s 153A. /The appellant has enclosed with his submission the confirmation received from HDFC Bank wherein the Bank has confirmed that on 07/06/2005 cash amounting to Rs. 8,00,000/- was withdrawn vide cheque no. 0134083.

5.2 But the above submission of the appellant is not found to be acceptable. First of all, the confirmation dated 09/09/2014 as submitted by the AR of the appellant from Branch Manager, HDFC Bank is not original. The appellant has merely submitted the copy of confirmation dated 09/09/2014 from the Branch Manager of HDFC Bank wherein it is certified that the appellant had withdrawn cash amount of Rs. 8,00,000/- from her account no. 02401000004429 vide cheque no. 0134083 dated on 07/06/2005. However, in absence of original certificate from the Bank, the submission of the AR of the appellant cannot be accepted. Secondly, the submission of the appellant as made before me at the stage of appellate proceedings is in contradiction to the submission which was made by her before the Ld. CIT(A) at the time of appellate proceedings in respect of quantum addition. The appellant had filed appeal to the CIT(A) against the additions as made by the AO u/s 143(3). The appellant at the time of appellate proceedings in respect of quantum addition clearly accepted the findings of the AO regarding entry of Rs. 8,00,000/- on 07/06/2005. At this place it would be pertinent to reproduce relevant part of decision of the Ld. CIT(A) on this issue as given by him in his appeal order in appeal no. CAB-1/192/2008-09 dated 04/07/2011 which is in respect of quantum addition:

"3.1 In appeal, appellant accepted AO's observation regarding amount of Rs. 8 lakh to be payment to Sandoz Mumbai and submitted that it was a mistake on part of the Accountant. Regarding opening balance of Rs. 3,32,467 /- as on 1.4.2005, it was submitted that appellant belonged to a well-to-do family engaged in large business and AO was, therefore, not justified in presuming that appellant would not have a single rupee of cash in hand on first April of the year. The AR further referred to provisions of Wealth

Tax Act in section 2(ea)(vi) that cash exceeding Rs. 50,000/- only is to be declared in wealth.

3.2 I have considered the matter. Appellant has accepted AO's finding regarding entry of Rs. 8 lakh on 7.6.2005 which is therefore rightly excluded for computing availability of cash. Regarding opening balance, even if appellant did not maintain books of accounts, availability of cash in hand with a person from well-to-do business family cannot be denied. Opening cash balance of Rs. 50,000/- can therefore be accepted. AO would accordingly re-work the day to day cash balance and modify the addition accordingly. "

5.3 As can be seen from the above that the appellant accepted the observation of the AO regarding amount of Rs. 8,00,000/- to be payment to Sandoz Mumbai and she submitted that it was a mistake on part of the Accountant. Surprisingly, the stand i.e. there was in fact cash withdrawal of Rs, 8,00,000/- was never taken by the appellant before the AO at the time of assessment proceedings and before the Ld. CIT(A) at the time of appellate proceedings. On the contrary, the appellant accepted the observations of the AO that the above amount of Rs. 8,00,000/- was paid to Sandoz, Mumbai by way of clearing of cheque. Now, at the stage of appellate proceedings in connection with the penalty matter a different version of AR of the appellant cannot be accepted more particularly in view of the fact that the appellant has already accepted the findings of the AO. If the finding of the AO was not correct, the appellant would have not accepted the same before the AO as well as before the Ld. CIT(A). It can be safely presumed that the appellant accepted the finding of the AO after making due verification of bank statement and other relevant records. Thus, the Ld. CIT(A) in his appeal order has rightly excluded this amount of Rs. 8,00,000/- for computing availability of cash. Thus, it is held that appellant's explanation that the sources of cash deposits as made in HDFC N and ABN Amro was from the cash amount of Rs. 8,00,000/- as withdrawn from the HDFC Bank cannot be accepted. Thus, the fact remains that sources of cash deposits in the above banks could not be explained by the appellant and therefore the AO has correctly levied the penalty on addition of Rs. 8,24,800/- by filing inaccurate particulars of income and therefore the same is confirmed. Thus, all the grounds of appeal of the appellant are dismissed.

In result, the appeal of the appellant is dismissed."

5. We have heard the rival contentions and perused the material on record carefully.

Regarding issue no. 1, we observe that the assessee had showed Rs. 34,17,2,136 as STCG and Rs. 5,94,08,417/- as LTCG. The assessee has furnished details of scrip-wise short term and long term capital gain along with the return of income. However, inadvertently shares purchased from NTPC amounting to Rs. 9,09,486/- and sale thereof of Rs. 1019110/- was included in the statement of long term capital gain on sale thereof. We observe that the assessee has provided entire particulars of transactions with the return of income, however, in respect of transactions in NTPC shares the claim as above was inadvertently made as long term capital gain instead of short term capital

