

**IN THE INCOME TAX APPELLATE TRIBUNAL “J” BENCH, MUMBAI**  
**BEFORE SHRI SHAMIM YAHYA, AM AND SHRI SANDEEP GOSAIN, JM**

I.T.A. No. 6275/Mum/2016  
(Assessment Year: 2004-05)

Mrs. Shehzeen Z. Siddique C/o. R. Sanghvi & Co. 104, Rizvi Chambers-2, Jain Mandir Marg, Off Hill Road, Bandra (W), Mumbai-400 050	Vs.	ACIT-23(3), (Erstwhile ACIT-19(3)) 104, 1 <sup>st</sup> Floor, Matru Mandir, Tardeo Road, Mumbai-400 007
PAN/GIR No. AIPPS 8400 D		
<b>(Appellant)</b>	:	<b>(Respondent)</b>
<b>Appellant by</b>	:	Shri Rajesh Sanghavi
<b>Respondent by</b>	:	Ms. Aarju Garodia
<b>Date of Hearing</b>	:	31.08.2018
<b>Date of Pronouncement</b>	:	19.09.2018

ORDER

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals)-34, Mumbai ('Id.CIT(A) for short) dated 29.07.2016 and pertains to the assessment year (A.Y.) 2004-05.

2. In the grounds of appeal, the assessee is aggrieved that the Id. CIT(A) has erred in confirming the levy of penalty u/s. 271(1)(c) of the Income Tax Act, 1961 ('the Act' for short) amounting to Rs.35,00,000/-.

3. The grounds of appeal raised in this regard reads as under:

1. In the facts & circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the penalty by not appreciating the legal infirmities wherein the AO, did not clearly specify, in the notice u/s 274 and show cause notice, the exact limb on which penalty proceeding was initiated.

2. In the facts & circumstances of the case and in law, the Ld. CIT(A) has erred by ignoring that the Long term capital gains of Rs. 1,16,59,967/- was shown in the return filed and taxed at special rate of 10% whereas the AO taxed the same @ 30% as undisclosed, hence no change in income was found and it was only an interpretational issue or at best ,change of head of income.

3. In the facts and circumstances of the case and in law, the CIT(A) erred in confirming the impugned penalty , ignoring the observation of ITAT on page # 14 (of its order dt: 25-4-2014) namely "...in our view, the genuineness of the transaction is far from proved if not disproved..-" and ignoring the ratios of judgment esp Upendra Mithani (Bombay High Court - ITA 1860/09 ) cited by the appellant.

4. In the facts & circumstances of the case and in law, the Ld.CIT(A) has erred in upholding the penalty, by not appreciating nor differentiating on the various High Court judgments and various ITAT judgments (including Mumbai ITAT) relevant to the appellant's case herein.

5. In the facts & circumstances of the case and in law the Ld. CIT(A) has erred in upholding the penalty of Rs. 35 lakhs due to "inaccurate particulars" -

- (a) By not passing a speaking well reasoned order.
- (b) By not appreciating that the bonafide explanation with voluminous evidences filed in response to the penalty proceeding were neither disproved nor negated by the AO &
- (c) By solely relying on the findings in the ITAT order.

4. Brief facts of the case are as under:

In this case, the Assessing Officer found that in the return of income for the year under consideration, the assessee had shown income of Rs.89,57,677/- under the head income from capital gains and paid taxes at Rs.8,95,768/- @ 10% on this income. The Assessing Officer has further noted that on the basis of detailed enquiries conducted at the time of assessment proceedings, it was established that shares related to M/s Eltrol Ltd. was a Penny Stock and the price of the penny stock was ramped up by circular trading involving operators for price raging. That there was a manipulation of purchase

date for completion of 12 months for making transactions eligible for long term capital gains. The Assessing Officer has further observed that the findings given in the assessment order has been confirmed by the ITAT. Accordingly, the Assessing Officer found that the assessee had furnished inaccurate particulars of her income in the return. Upon being satisfied that the assessee has furnished inaccurate particulars of her income of Rs.1,16,59,967/- for which she was liable for penalty u/s.271(l)(c). Accordingly, penalty of Rs.35,00,000/- was imposed u/s.271(l)(c) of the Act.

5. Upon the assessee's appeal in this regard, the ld. CIT(A) referred to the ITAT's finding in the case of the quantum addition wherein the ITAT had confirmed the addition. Referring to the ITAT order, the ld. CIT(A) observed that the assessee could not explain the movement of share price in terms of economic and company's specific parameters. Hence, he found himself in agreement with the Assessing Officer (A.O. for short) that this was a case of furnishing of inaccurate particulars of income. The ld. CIT(A) distinguished the decision of the Hon'ble Bombay High Court in the case of *CIT vs. Reliance Petroproducts (P.) Ltd.* [2010] 322 ITR 158 (SC) relied upon by the assessee and also the decision of Hon'ble Karnataka High Court in the case of *Manjunatha Cotton & Ginning Factory* [2013] 359 ITR 565 (Kar) and other decisions and confirmed the penalty.

6. Against the above order, the assessee is in appeal before us.

7. We have heard both the ld. Counsel of the assessee and perused the records. The ld. Counsel of the assessee submitted the assessee is engaged into the share transaction.

All the documents pertaining to purchase and sale were produced. Hence, no defect has been pointed out in the said documents. He submitted that it is only on account of preponderance of the probability that the assessee's claim has been rejected. Hence, the ld. Counsel of the assessee submitted that there is no case of the assessee furnishing inaccurate particulars of income or the concealment of income. In this regard, he referred to the ITAT decision in the quantum addition where the ITAT had observed that "In our view, the genuineness of the transactions is far from proved, if not actually disproved". Referring to this finding of the ITAT, the ld. Counsel of the assessee referred to the decision of the Hon'ble Bombay High Court in the case of *CIT vs. Upendra vs. Mithani* (in Appeal No.1860 of 2009 vide order dated 05.08.2009), the Hon'ble jurisdictional High Court has held that if the assessee gives an explanation which is unproved but not disproved, i.e., it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false. In such situation, the Hon'ble High Court has upheld the proposition that no penalty can be imposed. Further, the ld. Counsel of the assessee submitted that the Hon'ble jurisdictional High Court in the case of quantum addition has already accepted the substantial question of law vide order dated 11.12.2017. By way of this order, the Hon'ble jurisdictional High Court has admitted the substantial question of law on the addition made in this case.

8. By submitting that this issue is debatable and substantial question of law has been admitted by the Hon'ble jurisdictional High Court, the ld. Counsel of the assessee referred to the decision of the Hon'ble Bombay High Court decision in the case of *CIT vs. Nayan*

*Builders & Developers* [2014] 368 ITR 722 (Bom) for the proposition that when substantial question of law is admitted by the Hon'ble High Court the issue becomes debatable. In such circumstances, the levy of penalty u/s. 271(1)(c) is not sustainable. Furthermore, the Id. Counsel of the assessee stated that the assessee has offered the income under the head long term capital gain to be taxed @ 10%. However, the A.O. has taxed the same as income from other sources @ 30%. The Id. Counsel of the assessee submitted that when there is merely a change of head of income from capital gains, the income from other sources, penalty u/s. 271(1)(c) is not leviable. Furthermore, the Id. Counsel of the assessee submitted that the assumption of jurisdiction for the levy of penalty by the A.O. in this case is also bad in law inasmuch as the A.O. did not clearly specify in the notice u/s. 274 and show cause notice the exact limb on which the penalty proceeding was initiated. In this regard, the Id. Counsel of the assessee placed reliance upon the decision of the Hon'ble Karnataka High Court in the case of *M/s. SSA's Emerald Meadows* (in ITA No. 380 of 2015 vide order dated 23.11.2015) wherein the decision of the same court in the case of *CIT vs. Manjunatha Cotton and Ginning Factory* [2013] 359 ITR 565 was referred and the penalty levied u/s. 271(1)(c) was found to be bad in law as it did not specify which limb of section 271(1)(a) of the Act, the penalty proceeding has been initiated, i.e., whether for concealment of particular of income or furnishing of inaccurate particulars of income. The Id. Counsel of the assessee further referred that this order of the Hon'ble High Court has upheld by the Hon'ble Apex Court in the case of *CIT vs. M/s. SSA's Emerald Meadows* (in Special Leave to Appeal (C) (CC No.11485/2016) vide order dated 05.08.2016), wherein the Hon'ble Apex Court had

condoned the delay in filing the appeal and had held that they did not find any merit in this petition. Hence, the Special Leave Petition was dismissed. Referring to the above case laws, the Id. Counsel of the assessee stated that the penalty u/s. 271(1)(c) in this case is not leviable and observes to be deleted.

9. Per contra, the Id. Departmental Representative ('Id.DR' for short) relied upon the orders of the authorities below.

10. We have carefully considered the submissions and perused the records. We find that the assessee in this case is engaged into the purchase and sale of shares. The assessee has offered the gain as long term capital gain chargeable @ 10%. The A.O., on the other hand, made certain enquiries and came to the conclusion that on the economic and financial parameter, the huge gain was not justified. Hence, quoting the case laws on the subject of preponderance of probability, the A.O. rejected the claim of the long term capital gain and charged the same @ 30% as income from other sources as undisclosed income. In this regard, the submission of the assessee is that all the documents in support of the genuineness of the transactions were submitted. The assessee has duly offered the gain to tax. Hence, it is the assessee's submission that there is no concealment of income or furnishing of inaccurate particulars of income. In this regard, we find it gainful to refer to the decision of the ITAT in the quantum addition wherein while confirming, the ITAT had held that the genuineness of the transaction was not proved if not actually disproved.

11. From the above, it is clear that no defect was found in the documentation supporting the transaction and the ITAT had gave a finding that the assessee's

explanation was unproved but not disproved. In identical situation, the Hon'ble jurisdictional High Court in the case of *Upendra vs. Mithani* (supra) has held that in these circumstances, the penalty u/s. 271(1)(c) cannot be imposed.

12. We further note that the Hon'ble Bombay High Court in the case of *Bennett Coleman & Co. Ltd.* (in ITA No. 2117/2012, vide order dated 26.02.2013) has held that no penalty is leviable where there is only a change of head of income. The assessee deserves to succeed on the touch stone of this case law also. Another plea of the Id. Counsel of the assessee is that substantial question of law has been admitted by the Hon'ble jurisdictional High Court in the case of the quantum addition pursuant to the order of the ITAT. Hence, the assessee's counsel has placed reliance upon the Hon'ble Bombay High Court decision in the case of *Nayan Builders* (supra) for the proposition that when substantial question of law is admitted, the issue become debatable and penalty u/s. 271(1)(c) cannot be levied. In our considered opinion, this case law also supports the plea of the Id. Counsel of the assessee that the substantial question of law having been already admitted by the Hon'ble jurisdictional High Court.

13. In the background of the above discussion and precedent, we find that in this case the penalty u/s. 271(1)(c) cannot be sustained as firstly the addition is based upon the theory of preponderance of probability and defect in the documentation for claim of long term capital gain, *per se* have not been found to be defective. The ITAT in fact in the quantum addition has held that the genuineness of the transaction is far from proved if not actually disproved. Hence, on the touch stone of the Hon'ble jurisdictional High Court

decision in the case of *Upendra vs. Mithani* (supra) penalty u/s. 271(1)(c) is not leviable. Furthermore, as held by the Hon'ble Bombay High Court in the case of *Bennett Coleman & Co. Ltd.* (supra) mere change of head of income from capital gains, income from other sources cannot lead to levy of penalty u/s. 271(1)(c). Similarly as held by the Hon'ble Bombay High Court in the case of *Nayan Builders* (supra) when substantial question of law is admitted in the quantum appeal by the Hon'ble Bombay High Court, the issue becomes debatable and penalty u/s. 271(1)(c) cannot be levied.

14. Hence in the background of the aforesaid discussion and precedent we set aside the order of the authorities below, the penalty levied in this case is directed to be deleted.

15. In view of our adjudication on the issue of levy of penalty in favour of the assessee, the adjudication on other aspect of the challenge submitted by the Id. Counsel of the assessee regarding non specification of the charge in the notice u/s. 274 is now of academic interest. Hence, we are not engaging into the same.

16. In the result, the assessee's appeal stand allowed.

*Order pronounced in the open court on 19.09.2018*

Sd/-

(Sandeep Gosain)  
Judicial Member

Mumbai; Dated : 19.09.2018

Roshani, Sr. PS

Sd/-

(Shamim Yahya)  
Accountant Member

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai