

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI**

**BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 1262/MUM/2016
Assessment Year: 2009-10**

Mr. Santosh R. Shetty 501,
Bhavna Apartment, Vallabh Nagar, CHS Ltd., JVPD
Scheme, Ville Parle (West),
Mumbai-400056.

ITO-9(1)(2),
AayakarBhavan,
Mumbai.

PAN No. ADQPS4997K

Appellant

Respondent

Assessee by : Mr. V.C. Shah, AR
Revenue by : Mr. D.W. Pansari, DR

Date of Hearing : 26/09/2018
Date of pronouncement : 28/09/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2009-10. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-21 [in short 'CIT(A)'], Mumbai and arises out of the penalty imposed u/s 271(1)(c) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:
 1. On the facts and circumstances of the case and in law the Ld. CIT(A) erred in confirming penalty levied by the Income Tax Officer – 9(1)(2) u/s 271(1)(c) amounting to Rs.11,00,000/- when there is no concealment as alleged. He erred in confirming the penalty levied for concealment when in fact the claim of long term capital gain made by your appellant has been treated as short term capital gain which is due to difference in opinion.

2. On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in wrongly confirming that there was concealment of income even though the additions made in computing total income as the same was made only by denying claim for deduction made u/s 54 by treating the sale of house as held for short term period as against holding for a long term period claimed by your appellant were improper. There being no concealment within the meaning of section 271(1)(c).”

3. In a nutshell, the facts of the case are that the assessee filed his return of income for the assessment year (AY) 2009-10 on 30.09.2009 declaring total income at Rs.23,76,096/-. During the course of assessment proceedings, the Assessing Officer (AO) observed that the assessee had claimed Long Term Capital Gains (LTCG) on sale of immovable property, though the same was sold within three years of purchase. In response to a query raised by the AO to explain, the assessee submitted that he had purchased the Powai flat from M/s Ekta Supreme in the previous year relevant to the AY 2005-06 and sold it on 01.08.2008. The main contention of the assessee was that substantial sale consideration had been paid prior to 20.07.2005 and therefore, the period of holding the assets should be taken to be over three years, considering the fact that the asset was sold on 01.08.2008 and hence, he was eligible for deduction u/s 54 of the Act.

However, the AO was not convinced with the above explanation of the assessee for the reasons that (i) the assessee had purchased the said flat *vide* agreement for sale dated 07.09.2006, duly registered with Sub-Registrar on 04.10.2006 and the same had been sold on 01.08.2008; therefore, the asset was not held by the assessee for three years prior to selling the same and hence the asset cannot be held to be long term assets(ii) the assessee must have taken possession of the

said asset after 03.05.2007 as the builder M/s Ekta Supreme Housing itself got occupation certificate from the local Municipal Authority on 03.05.2007 and (iii) since the full development of work of the said building was not completed before the registration of the said asset, the question that possession for the said asset had been taken by the assessee before the date of registration does not arise.

With the above reasons, the AO concluded that the assessee did not hold the asset for three years, which is requirement for an asset to be called a long term capital asset which in turn would be taxed for LTCG. Therefore, the AO treated the capital gain arising out of sale of the said asset as short term capital gains (STCG) and rejected the claim of exemption u/s 54 of the Act. In appeal, the Ld. CIT(A) upheld the order of the AO of treating the capital gains as STCG.

Thereafter, the AO initiated the penalty proceedings u/s 271(1)(c) on the assessee for furnishing inaccurate particulars of income leading to concealment with reference to STCG. The AO held that the assessee had failed to substantiate his explanation regarding consideration of capital gains as LTCG as against STCG earned by it, leading to incorrect claim of deduction u/s 54 of the Act. Thus the AO levied a penalty of Rs.11,00,000/- u/s 271(1)(c) of the Act.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) observed that the appeal of the assessee in quantum addition had been dismissed in appeal before CIT(A)-19 Mumbai. He held that the suppression of facts showing that there was STCG were facts material to the computation of total income. By not substantiating his offer of income in tax return, the assessee has failed to offer an explanation. This is more so when he does not explain

how his claim is justified in assessment proceedings as well as in penalty proceedings. As per *Explanation 1* to section 271(1)(c) of the Act, the amount added to income in assessment is deemed to represent the income in respect of which particulars have been concealed. With the above reasons, the Ld. CIT(A) dismissed the appeal filed by the assessee.

5. Before us, the Ld. counsel of the assessee submits that in the instant case there was only a difference of opinion on the capital gain earned as to whether it is a STCG or LTCG. Penalty has been charged, though there was a difference of opinion. It is stated that the assessee had disclosed all the facts before the AO and had made a claim which was bona fide. Reliance was placed by him on the decision in *Reliance Petroproducts (P) Ltd. v. CIT* 322 ITR 158 (SC), *CIT v. Nalin P Shah (HUF)* 85 CCH 132 and *CIT v. Sidhartha Enterprises* (2009) 184 Taxman 460 (P&H) stating that though the claim of the assessee was unsustainable, it cannot be said that there was furnishing of inaccurate particulars of income and therefore, no penalty can be levied.

6. *Per contra* the Ld. DR submits that the suppression of facts by the assessee clearly indicates that there was STCG and the facts are material to the computation of total income. By not substantiating his offer of income in the tax return, it is clear that the assessee has failed to offer an explanation. Thus the Ld. DR supports the order passed by the Ld. CIT(A).

7. We have heard the rival submissions and perused the relevant materials on record. Indisputably, in the instant case there was a difference of opinion on the capital gain earned as to whether it was

STCG or LTCG. The assessee has claimed LTCG on sale of the immovable property. The AO has treated the same transaction as STCG.

In *Reliance Petroproducts Pvt. Ltd.* (supra), the Hon'ble Supreme Court has held that "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".

In *CIT v. S.M. Construction* (2015) 60 taxmann.com 135 (Bom), the Hon'ble Bombay High Court has held that where there was complete disclosure of facts by the assessee that an amount of Rs.1.11 crore, which was received on account of a project not being fructified, was credited to partner's capital account and the assessee's claim was not found acceptable, no penalty could be imposed on the assessee u/s 271(1)(c) of the Act. The mere fact that explanation of assessee was not accepted in the quantum proceedings, would not *ipso facto* become a reason to levy penalty for concealment on the assessee.

We are of the considered view that the ratio laid down in *Reliance Petroproducts Pvt. Ltd.* and *S.M. Construction* narrated hereinbefore squarely applies to the instant case. Following the same, we delete the penalty of Rs.11,00,000/- levied by the AO u/s 271(1)(c) of the Act.

8. In the result, the appeal is allowed.

Order pronounced in the open Court on 28/09/2018.

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 28/09/2018
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai