आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI JOGINDER SINGH, VICE PRESIDENT
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.260/Mum/2017

(**निर्धारण वर्ष /** Assessment Year : 2008-09)

Mr. Shailendra Nahar 201, H Panchavan Complex, Laxman Mhatre Road, Borivali (W), Mumbai- 400051	**बनाम**/ v.	ACIT 25(2) C-10, 412 BKC Complex, Mumbai-400051
स्थायी लेखा सं./ PAN: AAVPN1018L		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri. Rajeev Khandelwal
Revenue by :	Shri. Chaudhary Arun Kumar Singh

सुनवाई की तारीख **/Date of Hearing : 10.10.2018**
घोषणा की तारीख /**Date of Pronouncement : 22.10.2018**

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member:

This appeal, filed by assessee, being ITA No. 260/Mum/2017, is directed against appellate order dated 07.10.2016 passed by learned Commissioner of Income Tax (Appeals)-44, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2008-09, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 22.12.2010 passed by learned Assessing Officer (hereinafter called

"the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2008-09.

2. The grounds of appeal raised by the Assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

> *1. The Commissioner of Income-tax (Appeals) - 44, Mumbai, (hereinafter referred to as the CIT(A)) erred in upholding the action of the Assistant Commissioner of Income-tax 25(2), Mumbai (hereinafter referred to as the Assessing Officer) in levying penalty of Rs 2,18,189 under section 271(l)(c) of the Act.*
>
> *The appellant contends that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have confirmed the impugned penalty levied by the Assessing Officer under section 271(1)(c) of the Act.*
>
> *2. The appellant further, contends that the CIT(A) erred in upholding the action of the Assessing Officer in levying penalty inasmuch as the order of the Assessing Officer levying the said penalty is bad in law.*
>
> *3. The appellant further, contends that the CIT(A) erred in upholding the action of the Assessing Officer in levying penalty in asmuch as the bona fides of the appellant cannot be doubted.*
>
> *The appellant craves leave to add to, alter or amend the aforestated grounds of appeal."*

The assessee is an individual who has undertaken transactions of sale and purchase of shares. The assessee income comprises of brokerage & commission income, short term capital gains and long term capital gains(exempt) on sale of shares and income from other sources. The assessee also earned dividend income which was claimed as an exempt income.

The assessee declared short term capital gains as well as long term capital gain in share transactions executed by it. The AO treated these capital gains as business income and accordingly brought the same to income-tax as business income. This issue of treating capital gain on sale of shares as business income attained finality so far as treatment

of short term capital gains of Rs. 12,83,843/- which was held by learned CIT(A) to be a business income which was accepted by assessee also as these gains had arisen from wrong trades executed on behalf of the clients. Thus, the assessee clearly wrongly declared the business income arisen on wrong trades executed on behalf of the clients as short term capital gains on sale of shares , claiming concessional rate of income-tax on short term capital gains on shares within provisions of Section 111A of the 1961 Act as against chargeability of business income at normal rates of income-tax, clearly causing prejudice to Revenue by way of short payment of income-tax. While framing assessment , another peculiar fact was noted by the AO that the assessee treated short term capital gain on sale of shares to the tune of Rs. 16,24,981/- as an exempt long term capital gains by wrongly declaring holding period of shares , which was claimed as an exempt from income-tax within provisions of Section 10(38) of the 1961 Act. The said short term capital gains to the tune of Rs. 16,24,981/- was clearly taxable within provisions of Section 111A of the 1961 Act at concessional rate but the assessee declared it as an exempt long term capital gains by wrongly declaring holding period of shares and sought complete exemption from income-tax u/s 10(38) of the 1961 Act, in the return of income filed with the Revenue which clearly caused prejudice to Revenue as no taxes stood paid to Revenue on these gains. Thus, the assessee who was required to pay income-tax on short term capital gains earned on sale of shares to the tune of Rs. 16,24,981/- u/s 111A of the 1961 Act did not paid any income-tax by declaring the same as an exempt long term capital gains which were claimed as an exempt from income-tax u/s 10(38) of the 1961 Act, causing prejudice to Revenue.

3. Now the short question which has arisen before us is whether the short term capital gains on sale of shares amounting to Rs. 16,24,981/- which was clearly chargeable to income-tax under provisions of Section 111A of the 1961 Act on which tax was required

to be paid albeit at concessional rates was wrongly shown in the return of income filed with the Revenue as income from long term capital gains on sale of shares which were claimed as an exempt income keeping in view the provisions of Section 10(38) of the 1961 Act and which clearly caused prejudice to Revenue as no taxes stood paid to Revenue on these gains, will lead to levy of penalty u/s 271(1)(c) of the 1961 Act. It is further accepted by the assessee also that short term capital gains on sale of shares to the tune of Rs. 12,83,843/- declared in return of income filed with the Revenue was wrongly declared and taxes were paid at concessional rate u/s 111A of the 1961 Act , while admittedly the said gains were business income on which income-tax at normal rates ought to have been paid as these gains arose from wrong trades executed by the assessee on behalf of the clients and it never arose from any investments made by the assessee. The assessee has admittedly accepted that these were clearly mistakes committed by chartered accountant in the return of the income which was filed by the assessee with Revenue and Revenue was deprived of its legitimate taxes. This led to levy of the penalty by the AO of Rs. 2,18,189/- u/s 271(1)(c) of the 1961 Act for concealment of income, which was later confirmed by Ld. CIT(A) vide appellate order dated 07.10.2016.

4. The assessee has filed an appeal with tribunal challenging levy of penalty of Rs. 2,18,189/- levied u/s 271(1)(c) of the 1961 Act. The assessee has also submitted before us that it was a mistake of Chartered Accountant who included the short term capital gains on sale of shares to the tune of Rs. 16,24,981/- which was chargeable to income-tax within provisions of Section 111A of the 1961 Act , as an exempt long term capital gains on sale of shares which were exempt from income-tax u/s. 10(38) of the Act, in the return of income filed with revenue. Similarly , it is submitted that the assessee earned gain of Rs. 12,83,843/- on wrong trades executed on behalf of the client which ought to have been offered to tax as business income and taxes

at normal rates should have been paid but the chartered accountant while filing return of income claimed it as short term capital gains and concessional income-tax was paid as against normal income-tax payable on business income. It was admitted that it definitely caused prejudice to Revenue but it was mistake of the Chartered Accountant and the assessee should not be punished for the same. The Ld. Counsel for the assessee reiterated the submissions as were made before the authorities below . The learned counsel for the assessee relied upon decision of Hon'ble Supreme Court in the case of Price Waterhouse Coopers Private Limited v. CIT reported in (2012) 348 ITR 306(SC) to contend that no penalty is exigible on the factual matrix of the case . The learned DR strongly submitted that penalty levied u/s 271(1)(c) be confirmed.

5. We have considered rival contentions and perused the material on record including orders of authorities below and cited case laws. The assessee is an individual who has undertaken transactions of sale and purchase of shares. The assessee income comprises of brokerage & commission income, short term capital gains and long term capital gains(exempt) on sale of shares and income from other sources. The assessee also earned dividend income which was claimed as an exempt income.

The assessee declared short term capital gains as well as long term capital gain with respect to share transactions entered into by the assessee. The AO treated these capital gains as business income and accordingly brought the same to income-tax as business income . This issue of treating capital gain on sale of shares as business income attained finality so far as treatment of short term capital gains of Rs. 12,83,843/- which was held by learned CIT(A) to be a business income , which was also accepted by assessee as these gains had arisen from wrong trades executed by the assessee on behalf of the clients and were never out of the investments made by the assessee.This chargeablity of income of Rs. 12,83,843/- as business

income has attained finality in quantum proceedings as this income never had any nexus with investments made by the assessee and was clearly a business income. Thus, the assessee clearly wrongly declared business income arisen on wrong trades executed on behalf of the clients as short term capital gains on sale of shares , claiming concessional rate of income-tax on short term capital gains on shares within provisions of Section 111A of the 1961 Act as against chargeability of business income at normal rates of income-tax, clearly causing prejudice to Revenue by way of short payment of income-tax legitimately due to Revenue. While framing assessment , another peculiar fact was noted by the AO that the assessee treated short term capital gain on sale of shares to the tune of Rs. 16,24,981/- as an exempt long term capital gain by wrongly declaring holding period of shares , which was claimed as an exempt from income-tax within provisions of Section 10(38) of the 1961 Act. The said short term capital gains to the tune of Rs. 16,24,981/- was clearly taxable within provisions of Section 111A of the 1961 Act at concessional rate of income-tax but the assessee declared it as an exempt long term capital gains by wrongly declaring holding period of shares and sought complete exemption from income-tax u/s 10(38) of the 1961 Act, in the return of income filed with the Revenue which clearly caused prejudice to Revenue by way of no payment of income-tax on these short term capital gains shown as an exempt long term capital gains on sale of shares . Thus, the assessee who was required to pay income-tax on short term capital gains earned on sale of shares to the tune of Rs. 16,24,981/- u/s 111A of the 1961 Act did not pay any income-tax by wrongly declaring the same as an exempt long term capital gains which were claimed as an exempt from income-tax u/s 10(38) of the 1961 Act, causing prejudice to Revenue by depriving Revenue of legitimate income-tax due to Revenue. This led to levy of penalty u/s 271(1)(c) by the AO which was later confirmed by learned CIT(A). The learned counsel of assessee admitted that these wrong declarations were in-fact made in the return of income filed with

Revenue but it was due to mistake committed by the Chartered Accountant who filed return of income and the assessee cannot be penalised for the same. The learned counsel for the assessee has made this bald statement before us but no details of the chartered accountant who made these mistakes and under what circumstances these glaring mistakes were committed by chartered accountant is not brought on record. No affidavit of the said chartered accountant nor any affidavit of the assessee is filed on record to substantiate that what is averred before us is true and correct but only bald statements are made. These mistakes are glaring mistakes committed in return of income filed with Revenue having direct impact on legitimate expectation of Revenue in depriving Revenue in collection of legitimate income-tax dues payable to them within mandate of the 1961 Act. No bonafide of committing such glaring mistakes are brought on record and these bald pleas cannot be accepted. The decision of Hon'ble Supreme Court in the case of Price Waterhouse Coopers Private Limited(supra) was decided on its own facts which cannot be applied in the instant case.The Hon'ble Supreme Court has also referred to in the judgment that this case is decided on its own peculiar and unique facts, the relevant extracts are as under:

> ***"14.*** *During the course of hearing this appeal against the judgment and order of the Calcutta High Court, we had require the assessee to explain to us how and why the mistake was committed.*
>
> ***15.*** *The assessee has filed an affidavit dated 14th September, 2012 in which it is stated that the assessee is engaged in Multidisciplinary Management Consulting Services and in the relevant year it employed around 1,000 employees. It has a separate accounts department which maintains day to day accounts, payrolls etc. It is stated in the affidavit that perhaps there was some confusion because the person preparing the return was unaware of the fact that the services of some employees had been taken over upon acquisition of a business, but they were not members of an approved gratuity fund unlike other employees of the assessee. Under these circumstances, the tax return was finalized and filled in by a named person who was not a Chartered Accountant and was a common resource.*

16. *It is further stated in the affidavit that the return was signed by a director of the assessee who proceeded on the basis that the return was correctly drawn up and so did not notice the discrepancy between the Tax Audit Report and the return of income.*

17. ***Having heard learned counsel for the parties, we are of the view that the facts of the case are rather peculiar and somewhat unique.*** *The assessee is undoubtedly a reputed firm and has great expertise available with it. Notwithstanding this, it is possible that even the assessee could make a "silly" mistake and, indeed this has been acknowledged both by the Tribunal as well as by the High Court*

18. *The fact that the Tax Audit Report was filed along with the return and that it unequivocally stated that the provision for payment was not allowable under section 40A(7) of the Act indicates that the assessee made a computation error in its return of income. Apart from the fact that the assessee did not notice the error, it was not even noticed even by the Assessing Officer who framed the assessment order. In that sense, even the Assessing Officer seems to have made a mistake in overlooking the contents of the Tax Audit Report.*

19. *The contents of the Tax Audit Report suggest that there is no question of the assessee concealing its income. There is also no question of the assessee furnishing any inaccurate particulars. It appears to us that all that has happened in the present case is that through a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income. This can only be described as a human error which we are all prone to make. The calibre and expertise of the assessee has little or nothing to do with the inadvertent error. That the assessee should have been careful cannot be doubted, but the absence of due care, in a case such as the present does not mean that the assessed is guilty of either furnishing inaccurate particulars or attempting to conceal its income.*

20. *We are of the opinion, given the peculiar facts of this case, that the imposition of penalty on the assessee is not justified. We are satisfied that the assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars.*

21. *Under these circumstances, the appeal is allowed and the order passed by the Calcutta High Court is set aside. No costs."*

At this stage , it will be relevant to refer to decision of Hon'ble Delhi High Court in the case of CIT v. NG Technologies Limited reported in

(2015) 370 ITR 7(Delhi) which also dealt with glaring mistake committed by the tax-payer while filing return of income and penalty was affirmed by Hon'ble Delhi High Court. The SLP filed against this decision by assessee with Hon'ble Supreme Court also stood dismissed , reported in (2016) 70 taxmann.com 37(SC).

Under the peculiar facts and circumstances of the assessee before us in this appeal, we have no hesitation in confirming the penalty of Rs.2,18,189/- levied by the AO u/s 271(1)(c) which was later confirmed by learned CIT(A). The assessee fails in this appeal. We order accordingly.

6. In the result , the appeal of the assessee in ITA No. 260/Mum/2017 for AY 2008-09 stood dismissed.

Order pronounced in the open court on 22.10.2018.

आदेश की घोषणा खुले न्यायालय में दिनांकः 22.10.2018 को की गई

Sd/-	Sd/-
(JOGINDER SINGH) VICE PRESIDENT	(RAMIT KOCHAR) ACCOUNTANT MEMBER

Mumbai, dated: 22.10.2018

Nishant Verma
Sr. Private Secretary

copy to…

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

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BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI