

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISA KHAPATNAM BENCH, VISA KHAPATNAM**

श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A.No.48/Viz/2015
(निर्धारण वर्ष/ Assessment Year: 2004-2005)

M/s Usha Tubes & Pipes Pvt. Ltd.
D.No.11-8-34
Daspalla Hills
Visakhapatnam

Vs. Asst. Commissioner of
Income Tax
Circle-5(1)
Visakhapatnam

[PAN : AAACU4259N]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से / Respondent by

: Shri G.V.N.Hari, AR
: Smt. Suman Malik, DR

सुनवाई की तारीख / Date of Hearing

: 14.11.2018

घोषणा की तारीख/Date of Pronouncement

: 28.11.2018

आदेश / ORDER

PER D.S. SUNDER SINGH, Accountant Member:

This appeal is filed by the assessee against the order of the
Commissioner of Income Tax (Appeals) [(CIT(A))-2, Visakhapatnam

vide Appeal No.0867/2013-14/Trnsf./CIT(A)-6 Mum/2014-15 dated 24.12.2014 for the assessment year 2004-05.

2. The assessee filed the return of income on 07.12.2004 declaring total income of Rs.2,35,440/-. The return was processed u/s 143(1) and subsequently the case was selected for scrutiny. In the return of income, the assessee claimed short term capital loss on sale of shares / mutual funds amounting to Rs.66,92,169/-. The AO further observed that the assessee claimed the loss of Rs.70,61,600/- on sale of equity shares and earned the profit of Rs.3,69,431/- on sale of mutual funds which resulted in net loss of Rs.66,92,169/-. Thus the resultant loss on sale of shares and mutual funds was adjusted against the short term capital gain on fixed assets. The Assessing Officer (AO) furnished the details of the sale of shares and the resultant losses as under :

S.No	Name of the company	Quantity	Rate and cost of value	Date of purchase/ sale	Quantity	Rate and sale proceeds	Net Loss
1.	Golden Herbert (I) Ltd.	1,00,000	@54% Rs.54 lacs	14.06.2003 06.03.2004	1,00,000	@10%	44 lacs
2.	Usha Housing & Development Co.Ltd.	3,32,700	@9% Rs.29,94,300	14.06.2003/ 09.03.2004	3,32,,700	@1%	26,61,600
Total Loss							70,61,600

3. Initially, the AO asked the assessee as to why the loss should not be treated as speculation loss u/s 43(5) of the Income Tax Act, 1961 (hereinafter called as 'Act'). The assessee filed objection for treating the loss as speculation loss stating that Explanation to Section 73 of the Act is not applicable in the assessee's case, since, the transactions were directly done with the parties and no contract note was made and both the scripts traded by the assessee were listed companies. After considering the explanation of the assessee, the AO accepted the contention of the assessee that explanation to Section 73 of the Act cannot be invoked in this case for the reason that the assessee's case is covered by one of the exceptions mentioned therein, i.e. gross total income of the assessee mainly consists of income from capital gains. The AO observed that the assessee has not proved the genuineness of the sale and purchase of the shares with the concerned parties. The AO suspected the genuineness of the purchase and sale transactions due to the reason that the shares were neither purchased nor sold from the market and the transactions were effected directly from the parties but not through any recognized share broker. The AO had doubt as to how the assessee came to know the intention of the seller to sell the shares. The AO further observed that the earlier record of assessee shows that it had never dealt with any shares and claimed any loss or gain

there from. The AO was of the view that no prudent business man would even thought of selling the shares at such unreasonable low prices and incurs such a huge loss. Therefore, held that the purchase and sale of share transactions are sham transactions and accordingly disallowed the loss claimed by the assessee and initiated penalty for furnishing inaccurate particulars of income u/s 271(1)(c) of the Act and accordingly issued notice u/s 271(1)(c) r.w.s. 274 of the Act.

4. In response to the notice issued u/s 271(1)(c), the assessee filed reply dated 16.11.2009 and submitted that the assessee had furnished all the particulars and evidences during the assessment proceedings and there is no case of furnishing the inaccurate particulars, hence, requested to drop the penalty proceedings. However, the Ld.AO was of the view that the assessee has never made any attempt to prove the genuineness of the transactions, therefore held that the assessee has not discharged its onus and the case is fit for levying penalty u/s 271(1)(c) of the Act, accordingly levied penalty of Rs.25,35,000/- by an order dated 30.10.2009.

5. On appeal before the CIT(A), the Ld.CIT(A) confirmed the penalty stating that the assessee failed to prove the transaction to be genuine and

claimed the loss as genuine with sufficient materials and the documentary evidences either during the assessment proceedings or appellate proceedings. Therefore, confirmed the penalty levied by the AO.

6. Aggrieved by the order of the CIT(A), the assessee is in appeal before this Tribunal. During the appeal hearing, the Ld.AR submitted that the assessee is engaged in the business of manufacturing of tubes and pipes. During the previous year relevant to the assessment year 2003-04, the assessee has sold shares of M/s Golden Herbert Ltd. and Usha Housing & Development Co. Ltd., and had incurred a loss of Rs.70,61,600/-. The Ld.AR further submitted that considering the market expectations, the assessee has made the purchase of shares at higher rate. Since the market rate of shares were falling steeply, the assessee was forced to sell the shares at whatever rate it fetches. The shares were purchased from the share broker and the assessee has furnished the copy of the debit note given by Orphic Investments Pvt.Ltd. dated 14.06.2003 and the account copy from 01.04.2001 to 09.05.2006. The company has sold the shares and copy of the invoice cum delivery note is furnished in the paper book. The assessee has furnished the account copy of R.K.K.R Agencies Pvt. Limited. Similarly in page No.27 of the paper book, the assessee has furnished the confirmation

from the purchaser of shares of R.K.K.R.Agencies Pvt. Ltd. for purchase of shares relating to Golden Herbert (India) Ltd. In respect of Usha Housing Development Company Limited, the assessee has furnished the delivery note in page No.29 of Varren Financial Services Ltd and also an account copy of Varren Financial Services Ltd. In page No.22-31 of the paper book, the assessee has furnished the complete details of the purchase and sale of shares from Golden Herbert Ltd. and Usha Housing & Development Co. Ltd. The assessee also furnished the account copies and income tax return acknowledgement copies of the purchasers of the shares. All these papers were placed before the AO during the assessment proceedings. The Ld.AR argued that during the assessment proceedings, the assessee has furnished all the details and the evidences with regard to the purchase and sale of shares and hence there is no case of furnishing inaccurate particulars, thus there is no case for initiating penalty u/s 271(1)(c) or for furnishing inaccurate particulars. The Ld.AR further submitted that the assessee has furnished all the details before the AO itself, but the AO did not make any enquiry with the buyers and the sellers of the shares, thus argued that there was no fault on the part of the assessee. Accordingly, the Ld.AR argued that there is no case for imposing penalty u/s 271(1)(c) and the same should be cancelled. The Ld.AR relied on the decision of ITAT Kolkata

'B' Bench in the case of Sri Deo Kumar Saraf Vs. ACIT, Circle-49, Kolkata in I.T.A. No.199/Kol/2015 dated 07.10.,2015.

7. On the other hand, the Ld.DR vehemently opposed and strongly supported the orders of the lower authorities. The Ld.DR submitted that ITAT has given a finding that no material was placed before the ITAT and the transaction was not genuine. Explanation 1 to section 271(1)(c) is applicable and the onus is on the assessee to establish the transaction as bonafide transaction. In this case, the assessee did not establish the transaction as genuine. Therefore, argued that the Ld.CIT(A) has rightly confirmed the penalty and no interference is called for in the order of the Ld.CIT(A).

8. We have heard both the parties and perused the material placed on record and gone through the relevant orders. In this case, the assessee has declared loss of Rs.70,61,600/- on purchase and sale of shares. The assessee's main business is manufacturing and sale of tubes. Initially, the AO suspected the transaction as speculation transaction and subsequently having satisfied that there is no speculative transactions in the case of the assessee dropped the issue and suspected the genuineness of the share

transactions itself because of the reason that the said transactions were not made through recognized share brokers, even though, both the scripts of the company are listed in the Bombay Stock Exchange. The suspicion is further strengthened by the doubt that the AO could not ascertain how the assessee came to know the intention of buying and selling of shares by the buyers and sellers. Since the companies were listed, the AO found that the assessee ought to have purchased the shares through Stock Exchange or recognized stock broker. Purchase of shares at high price and sale of shares at very low price gave rise to the suspicion the AO. Because of the above suspecting instances, the AO did not believe the purchase and sale of shares as genuine and held that the transactions were sham and accordingly disallowed the loss. The assessee has furnished all the relevant details relating to purchase and sale of shares with the buyers and sellers and also furnished the account copies before the AO which were enclosed in the paper book as per page No.22 to 29. Scrutiny of the documents indicates that the assessee has furnished the relevant details supporting the transaction. However, the AO without causing any enquiries with the buyers and sellers concluded that the transaction was sham transaction. The detailed address of buyers and sellers , the copies of income tax returns were made available to the AO. Therefore, it is established by the

assessee that the assessee had furnished all the relevant details before the AO. Therefore, there is no case for levying of penalty u/s 271(1)(c) for furnishing of the inaccurate particulars. The assessment and the penalty proceedings are two different proceedings. Though for the addition, the material available is sufficient, for the sake of penalty, the AO required to make a detailed enquiry and bring the evidences establishing the concealment or furnishing of inaccurate particulars. From plain reading of the penalty order and the assessment order it is evident that the AO simply relied on the decision of the Ld.CIT(A) and confirmed the penalty levied by the AO. There is no independent enquiry caused by the AO during the penalty proceedings. Similarly, the Ld.CIT(A) while confirming the penalty placed heavy reliance on the order of the AO and confirmed the addition. Since the assessee placed all the material before the AO, we are of the considered opinion, there is no case for imposing penalty for furnishing inaccurate particulars. On similar facts, Hon'ble ITAT, Kolkata 'B' Bench in the case of Sri Deo Kumar Saraf (supra) deleted the penalty. For the sake of clarity and convenience, we extract relevant part of the order of the Tribunal in para No. 6, 9 and 11 which reads as under :

"6. Coming to the merits of the case. The first aspect added by the AO is bogus speculation income. Briefly stated facts are that the assessee has disclosed speculation profit to the extent of Rs.53,34,463/- in the audited profit

and loss account for the year ending 31.03.2009 and set off the same against brought forward speculation loss of earlier years and the difference of Rs. 1,58,786/- was shown as income from profit and gains of business and profession. During the course of assessment proceedings the AO required the assessee to explain the details of speculation profit earned by assessee amounting to Rs.53,39,463/- but assessee could not file any detail except a certificate dated 05.12.2011 from Nakamichi Securities Ltd. 23A, N. S. Road, Kolkata-700001. The AO served a notice u/s. 133(6) of the Act to Nakamichi Securities Ltd. having its registered office at Mercantile Building, Block A", 0 floor, 9/12, Lal Bazar St., Kolkata-700001. Nakamichi Securities Ltd responded to the notice u/s 133(6) of the Act stating that no such share trading profit was given to the assessee company and they have denied the same. The AO accordingly, added the undisclosed speculation profit to the income of the assessee and adjustment of brought forward speculation loss of the earlier years was disallowed. This was not contested by assessee in appeal and accepted the assessment of the same.

9. In respect to above three items the AO initiated penalty proceedings and penalty was also levied only on the basis that the assessee did not offer any written explanation in response to the notice issued and no evidence was filed contrary to the observation of the AO made in the assessment order in respect to all these three items. Accordingly, AO levied penalty u/s. 271(l)(c) of the Act for furnishing inaccurate particulars of income as under:

"On the basis of the above discussion, total penalty u/s. 271(1)(c) on the issues as discussed above, is computed as under.

Penalty imposed as per discussion in para 2.0	Rs.17,60,912/-
Penalty imposed as per discussion in para 3.0	Rs. 3,82,940/-
Penalty imposed as per discussion in para 4.0	Rs. 1,02,511/-
Total penalty imposed	Rs. 22,46,363/-"

11. We have heard rival submissions and gone through facts circumstances of the case. The first aspect of merits of the case is that the assessee has claimed speculation profit amounting to Rs.53,34,463/- earned on account of share trading with Nakamichi Securities Ltd. but Nakamichi Securities Ltd. vide letter dated 21.12.2011 denying having any transaction with the assessee. It was also clarified by Nakamichi Securities Ltd. that no certificate was issued by the Nakamichi Securities Ltd. to Deo Kumar Saraf, the assessee in respect of any speculation income from shares in Balarampur Chini Mills Limited in NSE for FY 2008-09 relevant to AY 2009-10. According to them, he does not have any transaction with the assessee. But, assessee's main claim was that this letter of Nakamichi Securities Ltd. was never confronted to the assessee during the course of assessment proceedings or during the penalty proceedings. Even during first appeal, this letter of Nakamichi Securities Ltd. was never confronted to the assessee. When a specific query was put to Ld. Sr. DR he categorically stated that this statement was never confronted to the

assessee. When a query was put from the bench whether any details or evidence were filed by the assessee in respect to speculation profit of Rs.53,39,463/- other than a certificate purportedly received from Nakamichi Securities Ltd. We find that the entire basis of penalty is the denial letter issued by Nakamichi Securities Ltd. dated 21.12.2011 and there is no other evidence available with revenue which suggests that the assessee has concealed the particulars of income. Once the very basis for levy of penalty is no doubt, it cannot be said that the assessee has concealed the particulars of income or furnished inaccurate particulars of income, as the case may be. Here in the present case, the assessee has disclosed income from speculation profit only and the case is that he could not prove that this is speculation income or any other income for the want of evidence and merely he has not challenged the quantum addition. Hon'ble Rajasthan High Court in the case of CIT Vs. G. Nemichand (1976) CTR (Raj) 193 held that an assessee may file an appeal against an order of imposition of penalty even though he might not have filed an appeal against the order of assessment. The assessment proceedings are quite distinct and different from penalty proceedings. Although the order of assessment is a good evidence but it is not a conclusive proof that the assessee has concealed the particulars of income. In the present case before us, the AO's levy of penalty is entirely based on the assessment order that the assessee is unable to prove the profit declared in speculation income received to be one from Nakamichi Securities Ltd. in the absence of evidence. In levying penalty the burden is on the revenue to prove that the particular amount is profit not from speculation income but income from other sources against which speculation loss cannot be adjusted. No doubt the findings during assessment proceeding for determining or computing the income is conclusive and it is also a good piece of evidence for initiating penalty proceeding but before penalty could be imposed the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income that the assessee has concealed the particulars of income or has deliberately furnished inaccurate particulars of income. Here none of the case is present. In view of the above, we are of the considered view that the penalty u/s.271(l)(c) of the Act in the given facts and circumstances is not leviable. Accordingly, we delete the penalty and allow this issue of assessee's appeal."

In the instant case, the assessee has furnished the details for purchase and sale of shares and furnished the names and addresses of the buyers and sellers of the shares. However, the AO on the basis of the evidences placed before him held that the transaction was sham transaction. However, the AO did not make any enquiry and disproved the

claim of the assessee to hold that the transaction was bogus. Having furnished all the particulars by the assessee and the AO having failed to disprove evidences placed before him, we hold that there is no case for imposing penalty u/s 271(1)(c). Accordingly, we set aside the orders of the lower authorities and cancel the penalty imposed by the AO. The assessee's appeal on this ground is allowed.

9. The assessee filed petition for admission of additional ground relating to issue of defect notice u/s 274 r.w.s. 271(1)(c) of the Act. However, during the appeal hearing, the Ld.AR did not press this ground, therefore, the additional ground of the assessee is dismissed as not pressed.

10. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 28th November, 2018.

Sd/-

(वी.दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/**JUDICIAL MEMBER** लेखा सदस्य/**ACCOUNTANT MEMBER**

विशाखापटणम /Visakhapatnam

दिनांक /Dated : 28.11.2018

L.Rama, SPS

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant – M/s Usha Tubes & Pipes Pvt. Ltd., D.No.11-8-34, Daspalla Hills, Visakhapatnam
2. प्रत्यर्थी / The Respondent – Asst.Commissioner of Income Tax, Cicle-5(1) Visakhapatnam
3. The Commissioner of Income Tax(Appeals)-2, Visakhapatnam
4. The Commissioner of Income Tax-2, Visakhapatnam
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

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आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, VISAKHAPATNAM