आयकर अपील य अ धकरण, अहमदाबाद यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
''SMC'' BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.492/AHD/2017**

नधारण वष/Asstt. Year: 2012-2013

Deepak Hirachand Bhimani, 20, Shanti Sadan Estate, Opp. Dinbhai Tower, Mirzapur, Ahmedabad. PAN: AATPB6168K	Vs.	Income Tax Officer, Ward 1(3)(1), Ahmedabad.

(Applicant)		**(Respondent)**

Assessee by :	Shri Pritesh Shah, A.R
Revenue by :	Shri Ranjan Kumar Singh, Sr.DR

सुनवाई क तारख/**Date of Hearing : 09/01/2019**
घोषणा क तारख /**Date of Pronouncement: 01/02/2019**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals)-10, Ahmedabad [CIT(A) in short] vide appeal no. CIT(A)-10/ITO.WD/1(3)(1)/291/15-16, dated 30/11/2016 arising in the matter of assessment order passed under section 271(1)(c) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 26/01/2015 relevant to Assessment Year (AY) 2012-13.

2. The assessee has raised the following grounds of appeal.

The learned CIT(A)-10, Ahmedabad erred in law and on facts in confirming the penalty of Rs.1,71,768/- imposed by AO under section 271(1)(c) of the Income tax Act, 1961, which is requested to be deleted.

3. The solitary issue raised by the assessee is that the Ld.CIT (A) erred in confirming the penalty u/s 271(1)(c) of the Act amounting to Rs. 1,71,768/-.

4. Briefly stated facts are that the assessee is an individual and deriving income under the head óô business and professionôô, other sources and loss under head ôôcapital gainôô. The assessee in the year under consideration inter-alia has declared income from other sources amounting to Rs. 3,351/- only. However, assessee against such income claimed a deduction of Rs. 10,49,415/- u/s 57 of the Act. On questioning by the AO about such deduction, the assessee vide letter dated 20/01/2015 withdrew his claim by stating that it was claimed by mistake. Accordingly, the AO disallowed the deduction claimed by the assessee and added to the total income of the assessee.

4.1 However, the penalty proceedings u/s 271(1)(c) of the Act for furnishing inaccurate particular of income and thereby concealment of income were initiated. Accordingly, the AO issued a show cause notice u/s 274 r.w.s. 271(1)(c) of the Act dated 26/01/2015 for levying the penalty on account of furnishing inaccurate particular of income.

4.2 The assessee in compliance to it vide letter dated 09/04/2016 submitted that the deduction claimed u/s 57 of the Act is debatable. Therefore there cannot be any penalty on account of such addition. However, the AO

disagreed with the submission of the assessee and levied the penalty of Rs. 1,71,768/- being 100% of the amount of the tax sought to be evaded.

5. Aggrieved assessee preferred an appeal to Ld.CIT (A). The assessee before the Ld.CIT (A) neither made any submission nor appeared before him, therefore, the Ld.CIT (A) confirmed the order of the AO.

6. Being aggrieved by order of the Ld.CIT (A) assessee is in appeal before us.

7. The Ld.AR, before us, submitted that the deduction was claimed by mistake therefore there cannot be any penalty u/s 271(1)(c) of the Act.

8. On the other hand Ld. DR submitted that there were six opportunities given by the Ld.CIT (A) but the assessee deliberately failed to appear before him. As such assessee has not furnished any reply to the Ld.CIT (A) deliberately. The Ld. DR vehemently supported the order of authorities below

9. We have heard the rival contentions and perused the materials available on records. From the preceding discussion, we note that the loss claimed by the assessee under the head capital gain was set off against the income from other sources and business income. Accordingly, the assessee filed income tax return declaring income at NIL. The necessary details of the income and the loss set off by the assessee stand as under:

2	*Business Income*		*304385*
	Income from other sources		

	Interest Income	*4539*	
	Recurring Interest	*58*	
		--------	*4597*
	Less: Expenses		
	Interest Paid to Bank	*1246*	
	Share Loss	*1048169*	
		----------	*1049415*
	Net Income from Other sources		*-1044818*
	Taxable Income		*NIL*

9.1 However, the assessee during the assessment proceedings withdrew its claim of loss under the head capital gain by submitting that it was claimed by mistake. The AO accordingly, without verifying the impugned loss reduced from the taxable income of the assessee and accordingly, worked out the total income under the head business and profession and income from other sources amounting to Rs. 3,07,740/-. However, the AO initiated penalty proceeding under section 271(1)© of the Act for the loss claimed by the assessee on the ground that the assessee has furnished inaccurate particular of income and thereby concealed his income. Accordingly, the AO finally levied the penalty under section 271(1)© of the Act on account of furnishing inaccurate particular of income in his penalty order dated 22-07-2015.

9.2 There was no representation from the side of the assessee before the Commissioner of income tax appeal despite several opportunities furnish to the assessee. Therefore, the Ld.CIT (A) confirmed the penalty levied by the AO.

9.3 Now the controversy before us arises to whether the assessee has furnished inaccurate particular of income in the given facts and circumstances. It is an undisputed fact the assessee has claimed losses against the total income for which the relevant facts were disclosed in the income tax return as discussed above. In fact, the assessee has shown share loss of Rs. 10,48,169/- against the interest income. The order of the lower authorities is silent about the share loss shown by the assessee. Therefore, we can safely assume that the share loss shown by the assessee was genuine. Thus in our considered view, there can be a wrong claim by the assessee in the income tax return, but the same cannot be equated with inaccurate particular of income. It is because there was a genuine loss incurred by the assessee, but the same was wrongly claimed against the income. In this regard, we find support and guidance from the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Reliance Petro Products Ltd reported in 322 ITR 158 wherein it was held as under:

> *"A glance of provision of section 271(1)(*c *) would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The instant case was not the case of concealment of the income. That was not the case of the revenue either. It was an admitted position in the instant case that no information given in the return was found to be incorrect or inaccurate. It was not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least,* prima facie, *the assessee could not be held guilty of furnishing inaccurate particulars. The revenue argued that submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income. Such cannot be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing of inaccurate particulars.*
>
> *Therefore, it must be shown that the conditions under section 271(1)(*c *) exist before the penalty is imposed. There can be no dispute that everything would depend upon the return filed, because that is the only document, where the assessee can furnish the particulars of his income. When such particulars*

are found to be inaccurate, the liability would arise.
*The word 'particulars' must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. In the instant case, there was no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under section 271(1)(*c*). A mere making of the claim, which is not sustainable in law by itself will not amount to furnishing of inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars"*

9.4 Thus, we are of the view that once the assessee has furnished all the particulars of income which was correct but wrongly claimed such deduction could not attract the penalty.

9.5 Besides the above, we also note that the assessee was not getting any substantial benefit by claiming the losses under the head capital gain by setting off it against the taxable income in the year under consideration. It is because the net effect on the outflow of money on account of tax for the assessee on the income was of the minor amount. The working for the tax liability on the assessee after excluding the loss under the head capital gain stands as under:

Total income assessed	Rs. 3,07,740/-
Less deduction u/s 80C	Rs. 72,970/-
Net taxable income	Rs. 2,34,770/-
Calculation of Tax liability	
Tax up to Rs. 1,80,000/-	Rs. NIL
Tax on balance of Rs. 54,770	Rs. 5,477/-
Education cess and H.Ed. cess	Rs. 164/-
Total tax liability	Rs. 5,641/-

9.6 From the above, we note that the assessee was able to save a sum of Rs. 5,641/- including surcharge in the year under consideration on account of the claim of such loss which is of negligible value in the given facts and circumstances. Thus in our considered view, no prudent assessee will furnish inaccurate particular of income to save a minor amount of tax liability. Thus, the contention of the assessee that he has claimed the loss under the capital gain against the taxable income appears to be bona fides. Thus we are of the view if the assessee has claimed the wrong deduction under the bona fides belief then he cannot be visited with the penalty under section 271(1)© of the Act. In this regard, we find support and guidance from the order of ITAT Pune bench in the case of Mula Parvara Electric co-operative society Ltd. Vs. DCIT reported in 60 taxmann.com 442 wherein it was held as under:

> *"In the present case, the AO has levied the penalty under s. 271(1)(c) on the specific charge of furnishing inaccurate particulars of income and the same has been endorsed by the learned CIT(A) while confirming the penalty. A penalty under s. 271(1)(c) can only be imposed if the mandates of the said section are fulfilled and it is not an automatic consequence of an addition made to the income of the assessee in the course of assessment proceedings. The finding recorded in the assessment order may constitute good evidence in the penalty proceedings but those findings cannot be regarded as a conclusive proof for the purpose of levy of the penalty and addition being made to the income does, because of impact of Expln. 1, effectively raised a presumption against the assessee but that is entirely rebuttable presumption and the same of rebuttal is provided in the Explanation itself. There is no dispute about the fact that the assessee has consistently taken the stand from the very beginning that the benefit received or accrued in consequence of the Govt. Resolution dt. 21st May, 1999 are to be spread over from 1977-78 to 1999-2000 which is a period covered in the said GR. The expressions "inaccurate" and "particulars" have been explained by the Hon'ble Supreme Court in the decision of Reliance Petroproducts (P.) Ltd. (supra). We have examined the explanation of the assessee in the backdrop of Expln. 1 of s. 271(1)(c) and it cannot be said that the explanation is not bona fide as the assessee has placed all the facts on record which are required for computation of the income. The only dispute is the applicability of s. 41(1) of the IT Act. As rightly argued by the learned counsel, tax law is such complex it cannot be said that there was some conscious act on the part of the assessee for not considering s. 41(1) to the extent, of benefit accrued vide*

Govt. Resolution dt. 21st May, 1999 by the reduction of the MSEB liability. We are, therefore, of the opinion that there was no justification on the part of the AO for levying the penalty on the assessee under s. 271(1)(c) of the Act. We, accordingly, delete the penalty levied by the AO and allow the grounds taken by the assessee."

In view of the above, we conclude that the assessee has claimed the set off of loss under the head capital gain under the bona fides belief and due to oversight. Therefore, in our considered view the penalty under section 271(1)C of the Act, cannot be attracted. Accordingly, we reverse the order of authorities below. The order of the Ld.CIT (A) is set aside, and we accordingly direct the AO to delete the penalty levied by him. Hence the ground of appeal of the assessee is allowed.

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

Order pronounced in the Court on 01/02/2019 at Ahmedabad.

-Sd-	**-Sd-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 01/02/2019

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आदेश क□ □□त□ल□प □ेषित/Copy of the Order forwarded to :

1. अपीलाथ□ / The Appellant
2. □□यथ□ / The Respondent.
3. संबं□धत आयकर आयु□त / Concerned CIT
4. आयकर आयु□त(अपील) / The CIT(A)
5. □वभागीय □□त□नि□ध, आयकर अपीलाय अ□धकरण / DR, ITAT,
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आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलाय अ□धकरण, अहमदाबाद / ITAT, Ahmedabad