



**आयकर अपीलीय अधिकरण "ए" न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"A" BENCH, MUMBAI**

श्री शक्तिजीत दे, न्यायिक सदस्य एवं  
 श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।  
**BEFORE SHRI SAKTIJIT DEY, JM AND**  
**SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./ I.T.A. No.2054/Mum/2018  
 (निर्धारण वर्ष / Assessment Year: 2009-10)

<b>ACIT-33(1)</b> Room No. 711, 7 <sup>th</sup> Floor Bdg. No. C-12, Pratyakshkar Bhavan Bandra Kurla Complex, Bandra(E) Mumbai -400 051	<b>बनाम/</b> Vs.	<b>Shri Amit P. Pandya</b> 2201, Heena Elegance CHS Ltd. Near Sai Baba Nagar Opp. Bhatia School, Borivali (W) Mumbai-400 092.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No. <b>AFVPP-0474-K</b>		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )
<b>Assessee by</b>	:	Shri Pradeep Sagar-Ld.AR
<b>Revenue by</b>	:	Shri Vidhyadhar V.-Ld.DR
सुनवाई की तारीख/ <b>Date of Hearing</b>	:	16/04/2019
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	23/04/2019

**आदेश / ORDER**

**Per Manoj Kumar Aggarwal (Accountant Member):-**

1. Aforesaid appeal by revenue for Assessment Year [AY] 2009-10 contest the order of Ld. Commissioner of Income-Tax (Appeals)-45, Mumbai [CIT(A)], Appeal No. CIT(A)-45/ACIT-33(1)/ITA-187/2016-17 dated 12/12/2017 on effective grounds of appeal: -

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty, without appreciating the fact that the Ld. CIT(A), has confirmed the addition made by the AO in quantum appeal.*



2. *On facts and in circumstances of the case, and in law, the Ld. CIT(A) erred in relying upon the case of Kanabay Software India (P) Ltd. Vs. DC1T Circle 8, Pune (2009) 31 SOT 153, Pune, 1TAT Bench and Evergreen Investment Services (P) Ltd. of the ITAT Mumbai, which do not squarely apply to the present case.*
3. *The appellant prays that the order of the Ld. CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.*

2. Facts leading to the dispute are that the assessee, a *resident individual*, was assessed for impugned AY u/s 143(3) on 07/12/2011 at Rs.66,720/- as against returned income of Rs.58,860/- *e-filed* by the assessee on 30/09/2009. The assessee reflected *Short Term Capital Losses* of Rs.149.94 Lacs and *Long-Term Capital Losses* of Rs.11.90 Lacs. These losses were related to dealing in *shares & securities*. After examining these transactions, Ld. AO came to a conclusion that loss reflected under the head *Capital Gains* were to be treated as *Business losses*. Another addition for Rs.7,863/- was also made in the hands of the assessee, being interest reflected in *AIR information* but which was not offered to tax by the assessee. The stand of Ld. AO has since been confirmed by Ld. first appellate authority.

3. Accordingly, penalty proceedings u/s 271(1)(c) were initiated in quantum assessment order on both these counts for furnishing of inaccurate particulars of income. In the penalty proceedings, the assessee was saddled with impugned penalty of Rs.50.03 Lacs u/s 271(1)(C) by Ld. Assessing Officer vide penalty order dated 29/03/2016.

4. The assessee contested the imposition of penalty before Ld. first appellate authority with success vide impugned order dated 12/12/2017. The Ld. CIT(A) deleted the penalty *qua* change of head of losses in view of the fact that there was mere change of head of income under which the loss



was offered by the assessee vis-à-vis the head under which the loss was finally assessed by the Ld. AO. Further the issue was debatable one. Moreover, there was no change in returned loss or assessed loss. It was also noted that similar penalty levied for AY 2008-09 was deleted by its predecessor on identical facts. The penalty against addition of Rs.7,863/- was also deleted finding strength in assessee's plea that the same was purely human error and the interest was not received by the assessee. Aggrieved, the revenue is in further appeal before us.

5. We have carefully heard the rival submissions and perused relevant material on record. Upon perusal of impugned order, we find that penalty was levied by Ld. AO for mere change of head of income, there being no change in overall returned loss and assessed loss. The assessee offered the loss under the head *capital gains* which, in the opinion of Ld. AO, was assessable under the head *business income*. The issue, as rightly noted by Ld. CIT(A) was highly debatable one and subject matter of numerous litigations. Nevertheless, the basic condition viz. furnishing of inaccurate particulars / concealment of particulars of income so as to attract the provisions of Section 271(1)(c), in our opinion, have remained unfulfilled in the present case. The same is evident from the fact that penalty proceedings u/s 271(1)(c) for AY 2010-11, on identical facts, was dropped by Ld. AO himself vide order dated 24/05/2013, a copy of which is on record. Therefore, penalty was not justified on this count, as rightly held in the impugned order.

6. So far as penalty against addition of Rs.7,863/- is concerned, the explanation as furnished by the assessee that the same was human error



since the interest was never received, was plausible one and the penalty was rightly deleted against the same also. Finding the stand of Ld. CIT(A) in the impugned order to be quite fair & logical, we dismiss the appeal.

7. Resultantly, the appeal stands dismissed.

*Order pronounced in the open court on 23<sup>rd</sup> April, 2019.*

**Sd/-**

**(Saktijit Dey)**

न्यायिक सदस्य / **Judicial Member**

**Sd/-**

**(Manoj Kumar Aggarwal)**

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 23/04/2019

*Sr.PS, Jaisy Varghese*

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)

आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.