

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD “SMC” BENCH

**(BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT
MEMBER & SHRI MAHAVIR PRASAD, JUDICIAL MEMBER)**

**ITA. No: 721/AHD/2015
(Assessment Year: 2003-04)**

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| Sudhir Balraj Jumani- HUF Lante 12/234, Satyagrah Chhavni, Satellite, Ahmedabad- 380015 | V/S | Income Tax Officer, Ward- 3 (3)(5), Ahmedabad |
| (Appellant) | | (Respondent) |

PAN: AABHJ5877K

**Appellant by : Shri Parin Shah, AR
Respondent by : Shri T. Sankar, Sr. D.R.**

(आदेश)/ORDER

Date of hearing : 29 -01-2019

Date of Pronouncement : 29-03-2019

PER MAHAVIR PRASAD, JUDICIAL MEMBER

1. This appeal filed by the Assessee is directed against the order of the Ld. CIT(A)-3, Ahmedabad dated 24.02.2015 pertaining to A.Y. 2003-04 and following grounds have been taken:

1. *The Ld. CIT(A) erred in law and on facts in rejecting the submission made by appellant that the AO has failed to give proper opportunity of being heard before imposing the penalty u/s 271(1)(c) of the Act and order passed imposing Penalty u/s. 271(1)(c) of the Act is against natural justice. It is therefore prayed that penalty order so passed may be set-a-side.*

2. *The Ld. CIT(A) erred in law and on facts in confirming order imposing penalty u/s 271(1)(c) of the Act, whereas, the penalty order is passed on the reopening of assessment proceedings, for which the AO was not having any jurisdiction. Thus, on facts and in law, the Id. CIT(A) ought to have cancelled penalty so levied. It is therefore prayed that penalty may kindly be deleted.*

2. In this case the information received from DIT(Invt.)-1, Mumbai for involvement in fictitious share transaction during the F.Y. 2002-03 and had availed whopping tax benefits. The case was transferred in from ITO Ward 10(4), Ahmedabad after recording the reasons and after obtaining the approval of Jt. CIT, Range-10, Ahmedabad and notice u/as 148 issued to the assessee. The assessee has challenged to ITO Wd. 10(4), Ahmedabad the notice u/s 148 on the ground that since the assessee is regularly filing his return of income with ITO Ward 7(3), Ahmedabad, the ITO ward 10(4) has no jurisdiction over the assessee. But under protest the assessee has complied with the notice by furnishing various information stating that the return of income for A.Y. 2003-04 filled on 29/09/2003 declaring total income of Rs. 2,54,280/- may be treated as return filled in response to notice u/s 148. Thereafter notice u/s 143(2) has been issued on 30/04/2010 by ITO ward 10(4), Ahmedabad. The ITO Ward 10(4), Ahmedabad has transferred the case records to the assessee for the same AY on 16/01/2010. Due to change of incumbency notice u/s 143(2) was issued on 18/11/2010. On request for furnishing the reason recorded for re-opening the assessment u/s 148 in his case, reason recorded for

- re-opening the assessment u/s 148 have been given to the assessee on 22/11/2010. Subsequently, notice u/s.142(1) was issued on 26/11/2010, alongwith questionnaire, which was duly served upon the assessee.. In response to the notice the assessee has submitted details. Order u/s 143(3) r.w.s. 147 of the IT. Act, 1961 has been passed on 27/12/2010.
3. During the course of assessment proceedings, it was observed that the assessee has purchased the shares from Goldstar Finvest Pvt. Ltd and choose to sell the shares with the same broker. In fact, the assessee has not submitted "De-mat account" and therefore it is presumed that transactions stated to be purchase and sale in physical certificates. The assessee has not submitted any evidences i.e. delivery notes, De-mat statement, As the assessee has introduced unexplained income of Rs. 3,99,070/- and reduced capital gains claim to be set-off against carried forwarded capital loss of earlier years and tried to evade the legitimate tax payable by the assessee, capital gains of Rs. 3,99,070/- was withdrawn and added to the income of the assessee as income from undisclosed sources. Penalty proceedings u/s 271(1)(c) of the Act are also initiated for furnishing inaccurate particulars of income.
 4. The assessee has filed appeal before CIT(A) against order passed by AO on 27/12/2010. The Ld. CIT(A) vide order dated 15/05/2012 dismissed the appeal of the assessee.
 5. A show notice u/s. 274 read with section 271(1)(c) dated 12-07-2012 was issued to the assessee which was served on the assessee. The assessee was requested to appear before the A.O. and to show cause why an order imposing a penalty should not be made u/s. 271 of the IT. Act. The notice clearly mentioned that If the assessee do not wish to avail of the opportunity of being heard in person or through authorized representative, he may show cause in writing on or before the said date which will be considered before any such

order is made under section 271, but the same remained un-replied from the assessee. The assessee has neither appeared before me nor submitted anything in writing till date. It is, therefore, presumed that the assessee has nothing to say in the matter. It is also a fact that the wrong claim of set off of loss was detected by the Assessing Officer during the course of scrutiny proceedings. It is pertinent to mention here the fact that the assessee willfully and deliberately furnished inaccurate particulars and misguided the department. Thereafter ld. A.O. imposed a penalty of Rs. 1,25,707/-.

6. Against the said penalty, assessee preferred first statutory appeal before the ld. CIT(A) who confirmed the action of the ld. A.O.
7. Now appellant has come before us.
8. We have gone through the relevant record and impugned order and both the parties. In this case, it was observed that assessee has purchased the shares from Goldstar Finvest Pvt. Ltd. and choose to sell the shares with the same broker who were engaged in fraudulent billing and in the business of providing bogus speculation. The appellant was found to be one of the beneficiaries of bogus entry for purchasing of shares. In quantum proceeding, appellant lost his case to the level of ITAT.
9. In support of its contention, assessee cited an order of ITAT, Mumbai Bench in the case of Shri Rameshkumar D. Jain vs. ITO in ITA No. 1093/Mum/2013 wherein with following observation:

6. We have considered the rival submissions. We find from the assessment order that the additions in respect of LTCG claim made by the assessee were made by

the AO for want of proper evidence to prove the genuineness of transactions. In appeal before the Ld. CIT(A), the assessee submitted that the Shri Rameshkumar D. Jain transactions were carried out through a broker and the contract note was issued by the broker in this respect. The assessee had also furnished the bills issued to the assessee against the transactions executed by broker on his behalf. It was also submitted that the shares in question were purchased in the year ended on 31.03.05. In the same financial year, the assessee made speculative profit of Rs.17,847/- from trading in shares. The said share profit was invested in purchase of the shares in question which was evident from the profit & loss account. The investment in shares was settled against the speculative profit made. The said shares were sold in A.Y. 2006-07 and the long term capital gains earned were shown in the return of income. It was also stated that the transaction was done before dt.01.10.04, hence the condition of executing the transaction through exchange was not applicable to the transactions in question. The transaction was an off market transaction. The Ld. CIT(A), however, did not agree with the contention of the assessee and held that the assessee could not prove about the genuineness of transaction relating to the purchase of shares in the absence of sufficient evidence. He, thereafter, held that once the purchase of shares was held as non genuine, there was no reason for holding the sales also as genuine, though the same were found having affected through banking channels as well as reflected in assessee's D-mat account. The Tribunal, in its order dated 15.06.11, while dismissing the appeal of the assessee in relation to quantum assessment proceedings, has not held that the Revenue has been able to disprove the contentions of the assessee. The Tribunal upheld the additions made by the AO holding that the assessee could not satisfactorily prove the genuineness of the transactions. The Tribunal further observed that when viewed with the angle of human probabilities, the claim put forward by the assessee of the capital gains could not be accepted. However, the fact remains that the claim of the assessee of long term capital gains was not allowed because the assessee could not prove Shri Rameshkumar D. Jain the same by way of sufficient positive evidence. The Revenue could not prove that the claim put by the assessee was wrong or bogus. It has been the case of the assessee that the purchase transaction was off market transaction. The assessee has produced the purchase bill and contract note of the broker. There was no compulsion under any law that the shares should be held only in D-mat account form. No evidence was found by the Revenue authorities to show that the purchase of shares in physical form was wrong or illegal. Even no doubt has been raised by any of the lower authorities regarding the genuineness of the sale transactions of the shares which admittedly have been

done through banking channel. Merely because the broker did not turn up in response to the summons issued by the AO under section 131 of the Act, that itself, did not disprove the factum of purchase of shares by the assessee through broker. The addition had been made in the case of the assessee on the basis of assumption that the transaction of purchase did not look genuine. However penalty proceedings are separate from quantum assessment proceedings. In the case of levy of penalty, it should be proved on the file that the particulars furnished by the assessee were inaccurate particulars of income or that there was concealment of income. Every case of confirmation of disallowance cannot be regarded as a case of furnishing of inaccurate particulars of income or concealment of income. Even it cannot be said that this case of the assessee was a case of no evidence at all. The assessee has submitted evidence in the shape of contract note, purchase bills, sale bills, bank statement, D-mat account statement reflecting the sale of shares etc. The evidence produced on the file by the assessee has not been proved wrong or false. The Hon'ble Bombay High Court in the case of "CIT vs. Upendra V. Mithani" ITA (L) No.1860 of 2009 decided on 05.08.2009, has observed in the matter of levy of penalty under section 271(1)(c) of the Act, that if the assessee gives an explanation which is unproved but not disproved i.e. it is not accepted but circumstances do Shri Rameshkumar D. Jain not lead to the reasonable and positive inference that the assessee's case is false, then no penalty can be imposed in such cases. When the facts of the case in hand are considered in the light of the decision of the Hon'ble Bombay High Court in the case of " CIT vs. Upendra V. Mithani" (supra), the levy of penalty cannot be held to be justified in this case. The same is accordingly ordered to be deleted. In the result, the appeal of the assessee is hereby allowed.

10. Assessee was given relief by the ITAT. In our considered opinion, benefit of the cited judgment cannot be given to the appellant as facts and circumstances are different in this case. In the above said cited case, assessee submitted the details of Demat account and transactions were done through banking channels.
11. On the other hand, in assessee's/appellant's case he did not submit any evidence which could establish the delivery of 9000/- equity shares of Buniyad

Chemicals Ltd. such as Demat statement, delivery note and communication company etc. Moreover, it is seem that there were shares purchase on the date and evidently bills were fictitious. In this case, appellant has not come before us with clean hands and he has taken false and frivolous plea in order to get exonerated from the penalty proceeding. The Id. CIT(A) in our view, has rightly concluded the issue in favour of the Revenue in the given set of facts as noted by him. Consequently, we decline to interfere.

12. In the result, appeal filed by the Assessee is dismissed.

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| Order pronounced in Open Court on | 29 - 03- 2019 |
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Sd/-

(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER True Copy
Ahmedabad: Dated 29 /03/2019

Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad