

IN THE INCOME-TAX APPELLATE TRIBUNAL "C" BENCH MUMBAI
BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 1118/Mum/2018 (Assessment Year 2009-10)

Mr Chandershekhar Kapur A-5, Beach House, Gandhi Gram Road, Juhu, Mumbai-400001. PAN: AACPK9387Q	Vs.	ITO, Ward 16(1)(1), Aayakar Bhavan, M.K. Road, Mumbai-400020
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Appellant

Respondent

Appellant by : Shri Nitesh Joshi & Vipul Mody (AR)

Respondent by : Shri Pramod Nikalje (DR)

Date of Hearing : 23.04.2019

Date of Pronouncement : 30.04.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee under section 253 of Income-tax Act ('Act') is directed against the order of Id. Commissioner of Income-tax (Appeals)-6, Mumbai [hereinafter referred as Id. Commissioner (Appeals)] dated 18.12.2017 for Assessment Year 2009-10. The assessee has raised the following grounds of appeal:

(1) The learned Commissioner (Appeals) erred in upholding the order of assessing officer living penalty of Rs. 1,28,898/- under section 271(1)(c) of the act.

It is submitted that appellant had furnished full and correct particulars of its income. The appellant has neither concealed the particulars of its income nor have furnished inaccurate particulars of such income and therefore, no penalty can be levied under section 271(1)(c) of the Income tax Act, 1961.

(2) The appellant reserves the right to add to, alter or amend the grounds of appeal.

2. Brief facts of the case are that the assessee is a film director, filed its return of income for assessment year 2009-10 declaring total income at Rs. 2,89,957/-. The return of income was selected for scrutiny and assessment order was passed under section 143(3) of the Act on 18th November 2011. The assessing officer while passing the assessment order disallowed short-term capital loss (STCL) on account of dividend stripping of Rs. 2,05,631/- and long-term capital loss (LTCL) of Rs. 5,97,909/-. On appeal before learned Commissioner (Appeals) both the additions/disallowances were confirmed. The assessing officer while passing the assessment order initiated penalty proceeding under section 271(1)(c) furnishing inaccurate particulars of income. The assessing officer issued show cause notice dated 28th November 2014 for levying penalty under section 271(1)(c). The assessee filed its reply dated 31st December 2014, stating that claim of short-term capital loss was bonafide in nature and that reduction to carry forward of short-term capital loss would be tax neutral for the assessment year under consideration. With regard to the claim of carry forward long-term capital loss the assessee stated that it was withdrawn by the assessee during assessment vide his application dated 18th November 2011. The assessee further stated that long-term capital loss has not been set off against any capital gain in

subsequent years, therefore; there is no impact on the return income. The assessee prayed that no penalty is leviable on the assessee. The assessee also relied upon the decision of Hon'ble Apex Court in case of CIT Vs Reliance Petroproducts Private Ltd (322 ITR 158 SC). The explanation furnished by the assessing was not accepted by assessing officer holding that during the scrutiny assessment, the assessing officer investigated the issue and unearth the disallowability of short-term capital loss of Rs. 2,05,631/- under section 94(7). With regard to long-term capital loss the assessing officer had concluded that the transaction was subject to security transaction tax, the same was exempted under section 10(38) of the Act, when the income from long-term capital gain on such transaction is not considered for computing the tax liability, the same principle applies to the loss so incurred on such transaction. Had the case not been selected for scrutiny and the assessing officer treated the details furnished by assessee as true and correct, based to issue would have gone unnoticed causing loss to the revenue. The assessing officer levied minimum penalty @100% of the amount of tax sought to be evaded and worked out the penalty of Rs. 1, 28,898/- vide his order dated 29th January 2015. On appeal before learned Commissioner (Appeal), the action of assessing officer was confirmed. Thus, further aggrieved by the order of Commissioner (Appeals) the assessee has filed present appeal before us.

3. We have heard the submission of learned Authorised Representative (AR) of the assessee and learned the departmental representative (DR) for the revenue and perused the material available on record. The Id. AR for the assessee submits that neither the assessee concealed the particulars of income nor furnished inaccurate particulars thereof. The Id AR for the assessee submits that mere facts that the claims of the assessee was not acceptable to the assessing officer or that the claims of the assessee were wrong, but disclosed the same in the return, would not lead to make an inference that the assessee furnished inaccurate particulars and the same attract penalty under section 271(1)(c) of the Act. In support of his submissions the Id. AR for the assessee relied on the decision of Hon'ble Bombay High Court in CIT Vs Nalin P. Shah (HUF) [2013] 40 taxmann.com 86 (Bombay). On the issue of disallowance of Short Term Capital Loss under section 94(vii), the Id. AR submits that proviso of section 94(vii) prescribed three condition namely (i) Buy or acquiring any security or unit within a period of three months prior to the record date, (ii) The units or securities are sold for transfer within a period of three month after such date or within a period nine month after such date and (iii) The dividend or income on such securities or unit received or receivable by person is exempt. This information was available in the Profit & Loss Account filed along with the return of income and this mistake was admitted during the

assessment. In support of his submission, the ld. AR of the assessee relied upon the decision of Price Water Coopers Pvt. Ltd. vs. CIT (348 ITR 306) and decision of Hon'ble Andhra Pradesh High Court in case of CIT vs. Sania Mirza (ITA No. 526 of 2011). For disallowance of Long Term Capital Loss, the ld. AR submits that the Mumbai Tribunal in Raptakos Brett & Co. Ltd. vs. DCIT [69 SOT 383 (Mum)] held that Long Term Capital Loss on sale of shares attract Share Transaction Tax (STT) can be set off against Long Term Capital Gain on sale of land in accordance with section 70(3). The ld. AR further submits that the assessee has not set off the Long Term Capital Loss against the income in subsequent year. The ld. AR submits that the disallowance of Long Term Capital Loss was not set off in subsequent years. Thus, the disallowance was a tax neutral. The ld. AR of the assessee prayed for deleting the entire penalty.

4. On the other hand, the ld. DR for the revenue supported the order of lower authorities. The ld. DR further submits that the claims of Short Term Capital Loss and Long Term Capital Loss were not a result of the bonafide mistake. Had the case was not selected for scrutiny, the income chargeable to tax would have escaped.
5. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have also deliberated on various case laws relied by lower authorities and the learned

representative while making submission before us. The Assessing Officer while passing the assessment order made the disallowance of Short Term Capital Loss of Rs. 2,05,631/- and Long Term Capital Loss of Rs. 5,97,909/-. On appeal before the Id. CIT(A), the disallowances were confirmed. The Assessing Officer issued penalty proceeding under section 271(1)(c). Show-cause notice under section 271(1)(c) r.w.s. 274 dated 28.11.2014 was issued to the assessee. The assessee filed its reply dated 03.12.2014. In the reply, the assessee stated that Short Term Capital Loss was bonafide and reduction of carry forward of Short Term Capital Loss would be tax neutral and coming to know about the mistake, the same was withdrawn. For Long Term Capital Loss, the assessee stated that the same was also withdrawn vide letter dated 18.11.2011 and that it has been set off against capital gain in subsequent year and there is no impact on return income. The contention of assessee was not accepted by Assessing Officer, the Assessing Officer levied the penalty @ 100% of tax sought to be evaded on both the disallowances. The Id. CIT(A) confirmed the action of Assessing Officer holding that after due and diligent enquiry, the Assessing Officer unearthed the disallowability of losses.

6. We have noted that the assessee has furnished the complete details regarding Short Term Capital Loss and Long Term Capital Loss in its Profit & Loss Account. Further, when the claim of assessee was not

accepted, the assessee vide his letter dated 18.11.2011 submitted before Assessing Officer conceded to the non-allowance of Short Term Capital Loss on account of dividend received and covered under section 94(vii) of the Act. Similarly, the Long Term Capital Loss of Rs. 5,97,909/- was also withdrawn. These facts are duly recorded by Assessing Officer in para-5 & 6 of the assessment order. The assessee while filing reply of show-cause notice issued under section 274 r.w.s. 271(1)(c) also stated that the claim of Long Term Capital Loss was withdrawn and that loss has not been set off against Capital Gain in subsequent years and that there was no impact on return income. In our view, the assessee has furnished a satisfactory explanation within the meaning of section 273B of Income-tax Act. Therefore, no penalty under section 271(1)(c) was leviable against the assessee when the assessee has given reasonable and satisfactory explanation. We have further noted that Co-ordinate bench of Mumbai Tribunal in Reptakos Brett & Co. Ltd. (supra) held that Long Term Capital Loss on sale of shares attract Share Transaction Tax (STT) can be set off against Long Term Capital Gain on sale of land in accordance with section 70(3).

7. The Hon'ble Bombay High Court in CIT vs. Nalin P. Shah (HUF) (supra) held that where the assessee made claim for loss on sale of US-64 units, but disclosed same in the return, there was no concealment of income. In view of the above discussion, we do not find any justifiable

reason in levying penalty under section 271(1)(c). In the result, the grounds of appeal raised by assessee are allowed.

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

Order pronounced in the open court on 30/04/2019.

Sd/-
G.S. PANNU
VICE-PRESIDENT
Mumbai, Date: 30.04.2019
SK

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "C" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai