

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.2896/M/2017
Assessment Year: 2008-09**

M/s. Envision Investment Consultants, 228, Busa Industrial Premises, Century Bazar Lane, Prabhadevi, Mumbai - 400 025 PAN: AAACE2990G	Vs.	ACIT-CIR 9(1), Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Dharmesh Shah, A.R.
Revenue by : Shri Pankaj Kumar, D.R.

Date of Hearing : 05.09.2019
Date of Pronouncement : 22.10.2019

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 15.04.2013 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2008-09.

2. The assessee has raised following grounds of appeal:

"1) On the facts and circumstances of the case, the learned CIT(A) erred in upholding the order of the Assessing Officer in imposition of penalty u/s 271(l)(c) of the Act of Rs 38,38,802 on the differential tax on treatment of profit on sale of shares as business income as against short term capital gains as returned by the appellant.

1.1 The learned AO erred in levying penalty merely on the change of the head, i.e. by treating the short-term capital gain of Rs.2,07,05,512 as business profit. The change of head per se does not amount to concealment of income nor the inaccurate particulars of income.

2) On the facts and circumstances of the case, the Ld. CIT(A) legally erred in not considering the additional ground filed by the appellant filed on 23.08.2016. Additional ground is reproduced as under:

"Without prejudice, without admitting and in the alternative, the order of penalty passed under section 271(l)(c) of the Act is bad in law as the notice issued under section 274 read with section 271 of the Act is not discernable as to whether the penalty proceedings is initiated for furnishing of inaccurate particulars of income or concealment of income under the facts and in the circumstances of the appellant's case and therefore, the impugned order passed deserves to be cancelled. "

3) The appellant craves leave to add, to alter or amend the Grounds of Appeal on or before the hearing of this appeal.

3. The issue raised in ground No.1 is against the confirmation of penalty of Rs.38,38,802/- by Ld. CIT(A) as made by the AO under section 271(1)(c) of the Act on differential tax which has resulted from assessing the profit on sale of shares as business income as against short term capital gain returned by the assessee.

4. The facts in brief are that the assessment under section 143(3) was framed on 10.12.2010 assessing the total income at Rs.100,13,51,470/- as against the return of income of Rs.78,52,11,071/- by making the following disallowances.

5. Thereafter, the penalty notice under section 274 read with section 271 of the Act was issued on 10.12.2012 which was replied by the assessee vide letter dated 19.03.2013 by submitting that penalty is not imposable on account of treatment of short term capital gain as business income, disallowance under section 14A and addition on account of unexplained cash credit. The assessee submitted that disallowance under section 14A was partly allowed by the Ld. CIT(A) whereas the addition under section 68 was completely deleted and only the surviving addition is on account of change

of heads of income from short term capital gain to business income. The AO imposed the penalty in respect of the issue of treating the short term capital gain as business income by holding that the assessee has filed inaccurate particulars of income qua the short term capital gain of Rs.2,07,05,512/- and finally a penalty of Rs.70,37,803/- being 100% of the tax sought to be evaded was imposed.

6. In the appellate proceedings, the Ld. CIT(A) partly sustained the penalty by holding that the penalty can not be levied by calculating the tax as calculated by the AO whereas it has to be levied on differential amount of tax as the assessee has already paid tax @ 10% by showing the short term capital gain under the head capital gain and now the AO has treated the said gain as business income and charged the income at the maximum applicable rate. The Ld. CIT(A) thus directed the AO to impose penalty on the differential tax only and thus partly allowed the appeal which has resulted in the partly sustaining the penalty to the extent of Rs.38,38,802/-.

7. The Ld. A.R. submitted before the Bench that in this case the penalty has been imposed by AO for filing inaccurate particulars of income in respect of short term capital gain of Rs.2,07,05,512/- which was assessed as business income in the assessment framed under section 143(3) dated 10.12.2010. The Ld. A.R. vehemently submitted before the Bench that assessee has fully disclosed all the particulars of income qua the short term capital gain in the return of income and what the AO has done is merely changing the heads of income from capital gain to business income which is not amenable to levying the penalty

under section 271(1)(c) of the Act. In defence of his argument, the Ld. A.R. relied on a series of decisions:

1. CIT vs. Shri Hiralal Doshi (ITA No.2331 of 2013) dated 09.02.2016
2. CIT vs. Bennett Coleman & Co. Ltd. (259 CTR 383)

The Ld. A.R. submitted that the Hon'ble Bombay High Court in both the above decisions have held that in case of change of heads of income while framing the assessment order would not result into levying of penalty under section 271(1)(c) even though it results in higher income tax liability payable by the assessee. The Ld. A.R. therefore prayed that the penalty as sustained by Ld. CIT(A) may kindly be deleted by following the ratio laid down in the aforesaid two decisions by the Jurisdictional High Court.

8. The Ld. D.R. heavily relied on the order of Ld. CIT(A) and submitted that the first appellate authority has directed the AO to calculate the penalty on the differential amount of tax which becomes payable as a result of change of head from capital gain to business income. The Ld. D.R. submitted that the assessee has filed inaccurate particulars of income by showing the short term capital gain under the heads capital gain whereas the same was assessable under the head income from business and profession and thus justified the imposition of penalty on the differential amount of tax which became payable as a result of change of heads of income.

9. After hearing both the parties and perusing the material on record, we observe that the penalty has been sustained by the Ld. CIT(A) on the differential amount of tax resulting from

change of heads of income from capital gain to income from business and profession by the AO. This has happened because the assessee was of the bonafide belief that the short term capital gain arising from the sale shares is assessable under the head capital gain whereas according to the AO, the same is assessable under the head income from business and profession. Thus there is no dispute that penalty has arisen only due to the differential tax liability arising from change of heads of income. In our opinion, the assessee has disclosed full particulars as to the income from short term capital gain in the return of income and therefore no penalty can be imposed under section 271(1)(c) of the Act as there has been no concealment of facts or filing of inaccurate particulars on the part of the assessee. The case of the assessee finds support of the decision of Hon'ble Bombay High Court in the case of CIT vs. Shri Hiralal Doshi (ITA No.2331 of 2013) dated 09.02.2016 wherein the Hon'ble Bombay High Court has held that no penalty would be attracted under section 271(1)(c) of the Act if the tax liability has arisen on account of change of heads of income during the assessment proceedings. While passing the order the Hon'ble Bombay High Court has followed another decision of the Hon'ble Bombay High Court in the case of CIT vs. Bennett Coleman & Co. Ltd. (259 CTR 383) in which the co-ordinate bench of the High Court has held that no penalty can be levied under section 271(1)(c) of the Act in case of change of heads of income which is not shown to be perverse. In this case the AO has assessed the premium receipt on redemption of debenture under the head income from other sources which was disclosed by the assessee under the head capital gain and the Tribunal deleted the penalty

on the ground that there is only change of head of incomes which is not perverse and the Hon'ble Bombay High Court dismissed the appeal of the Revenue as not having any substantial question of law. Therefore, on this count the penalty is liable to be deleted. Even otherwise, the notice issued by the AO under section 274 read with section 271(1)(c) of the Act dated 10.12.2010, a copy of which is filed at page No.1 of the paper book that has been issued in a mechanical manner without specifying the limb under which the penalty is proposed to be levied. On this count also the assessee has not been given a reasonable opportunity to respond on which one of the two limbs, the assessee is being penalized. Accordingly, the penalty proceedings are bad in law. The case of the assessee is supported by the decision of the Hon'ble Bombay High Court in the following cases:

- "a) CIT Vs SSA's Emerald Meadows(SC) (2016) 73 Taxmann.com 241 Karnataka – SLP dismissed as reported in (2016) 73 Taxmann.com 248 (SC)
- b) CIT vs. Manjunath Cotton and Ginning Factory (2013) 359 ITR 565 (Kar.)
- c) CIT vs. Shri Samson Perinchery (2017) 392 ITR 4 (Bom.)
- d) CIT vs. Mrs. Piedade Perinchery ITXA No.1310 of 2014 order dated 10.01.2017 (Bom. – HC)"

10. In view of the above discussion and in the light of the ratio laid down by the Hon'ble Bombay High Court, we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the penalty.

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

Order pronounced in the open court on 22.10.2019.

Sd/-
(Mahavir Singh)
JUDICIAL MEMBER
Mumbai, Dated: 22.10.2019.

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.