

IN THE INCOME-TAX APPELLATE TRIBUNAL “F” BENCH MUMBAI
BEFORE SHRI PAWAN SINGH JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
ITA No. 4641/Mum/2018 (Assessment Year 2004-05)

Vinod K. Shah 30, Warden Court, 79-81, August Kranti Marg, Mumbai-400361. PAN: AACPS7717E	Vs.	ITO – 16(3)(5) Mumbai.
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Appellant

Respondent

Appellant by : None
Respondent by : Mrs. Kavita Kaushal (DR)

Date of Hearing : 02.12.2019
Date of Pronouncement : 06.12.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the order of Id. CIT(A)-4, Mumbai dated 08.05.2018 for Assessment Year 2004-05. The Id. CIT(A) confirmed the order of Assessing Officer in levying the penalty under section 271(1)(c) dated 18.02.2015. The assessee has raised the following grounds of appeal:

1. The CIT(A) Completely fails to consider the submission made by assessee and failed to consider the quantum order passed by hon'ble ITAT which is in favor of the assessee.
2. CIT (A) has confirmed the penalty order without looking in to the facts and ignored the submission made by the assessee.

3. Quantum order has been passed in favour of the assessee by hon'ble tribunal, hence penalty cannot be levied, hence Principle of natural justice is violated.
 4. As regards the allowability of transfer fees is concerned which is not allowed in quantum order But penalty u/s. 271 (1) (c) is no attracted as the same have been disclosed in capital gain statement and disclosed in return of income which does not amount to concealment of the facts or furnishing the inaccurate particulars.
2. Brief facts of the case are that for Assessment Year 2004-05 assessment was completed under section 143(3) r.w.s 147 on 30.12.2011 of the Income Tax Act (the Act). While making assessment, the Assessing Officer treated the Long Term Capital Gain (LTCG) as unexplained investment. The Assessing Officer further added 5% of the unexplained investment and exemption under section 54 F was denied. Further, 5% of the above amount was treated as commission paid to M/s Gold Star Finvest Pvt. Ltd for providing accommodation entry and also added Rs. 3,00,000/- as a transfer fee for the want of evidence, thereby total addition of Rs. 9,25,096/- was added.
3. On appeal before the Id. CIT(A), the treatment of LTCG as undisclosed income and difference of Rs. 3,00,000/- was sustained. However, the addition of 5% commission was restricted to .15% vide order dated 30.12.2013. On receipt of order from the Id. CIT(A), the Assessing Officer issued show-cause notice under section 271(1)(c) rws 274. In reply to the show-cause notice, the assessee filed its reply and submitted that the assessee has filed appeal before the Tribunal and till the disposal

of appeal, the penalty proceeding be kept in abeyance. The contention of assessee was not accepted by Assessing Officer. The Assessing Officer levied the penalty @ 100% of tax sought to be evaded. The Assessing Officer noted that amount involved/added is Rs. 9,25,096/- and 100% tax sought to be evaded is Rs. 2,51,942/-. Accordingly, the Assessing Officer levied the minimum penalty of Rs. 2,51,942/-. On appeal before the Id. CIT(A), the action of Assessing Officer was confirmed. Further, aggrieved by the order of Id. CIT(A), the assessee has filed the present appeal before this Tribunal.

4. None, appeared on behalf of assessee despite the service of notice of hearing of appeal, therefore, we left no option except to hear the submission of Id. Departmental Representative (DR) for the revenue and to decide the appeal on the basis of material available on record. The Id. DR for the revenue supported the order of lower authorities. However, the Id. DR of her all fairness submitted that in the statement of fact filed with the grounds of appeal, the assessee has claimed that addition on the basis of which the penalty was levied has been deleted by the Tribunal, however, copy of order of Tribunal is not placed on record. The Id. DR further submits that penalty proceeding are separate and independent and may be decided on the basis of merit of the case.
5. We have considered the submission of Id. DR for the revenue and perused the material available on record. There is no dispute that while

passing the assessment order under section 143(3) r.w.s. 147 dated 30.12.2011, the Assessing Officer made the addition by treating the LTCG as unexplained investment, disallowed 5% commission on such unexplained investment. The Assessing Officer also added Rs. 3,00,000/- on account of difference of income for want of evidence.

6. We have noted that against the quantum addition, the assessee filed appeal before the Tribunal vide ITA No. 1736/Mum/2014, which was adjudicated by Tribunal vide order dated 14.12.2016. The Tribunal in its order in ITA No. 1736/Mum/2014, wherein the additions on the basis of which the penalty was levied, has been deleted. For completeness of this order the grounds of appeals raised by the assessee and the relevant part of the order of Tribunal in quantum assessment in ITA No. 1736/Mum/2016 is extracted below.

“Assessee's appeal for A.Y. 200405 (ITA No. 1736/Mum/2014)

9. In this appeal the assessee has raised the following grounds: -

1. CIT (A) has erred in law and facts confirming order of A.O. ignoring submission made by appellant. Appellant was prevented by sufficient cause for not attending on appointed date.
2. CIT[A] has erred in confirming addition on the basis appellant own case confirm in A.Y. 2003-04 by CIT[A] 27 without appreciating fact that appeals of ground are different and each year assessment is independent asst year.
3. CIT[A] had wrongly mentioned that the appellant has also raised similar contentions / grounds of appeal. Contention and grounds of appeal both are different in both appeal.
4. CIT[A] has not disposed off all grounds of appeal no observation on action u/s 147 reason recorded are not relevant to escapement of income which are challenge by appellant.
5. CIT[A] has not made any observation on the capital gain added to income.

6. Reopening u/s 147 is bad in law, notice u/s 148 is bad in law no application of mind by A.O. No independent enquiry were made by A.O.
7. CIT[A] has confirm order passed by A.O. by violating principle of natural justice.
8. CIT[A] has ignore fact that appellant purchase physical shares which were duly transfer in his name than send for demate. The sold shares has been debited in demate account.
Shri Vinod K. Shah
9. A.o. has mentioned that bogus income if it is bogus income how it can be taxes as undisclosed income
10. Notice under section 148 issued after 4 year so in reason recorded A.O. had come to conclusion that there is a failure on the part of the assessee to disclose material facts in the return.
11. A.O. has not proved nexus.
12. CIT[A] has erred in retaining .15% commission on transaction value.
13. CIT [A] has erred in disallowing transfer fee of Rs 300000/-
14. Appellant craves your leave to add alter and modify these grounds of appeal."

10.1 These grounds are general in nature and do not call for adjudication thereon. Not being urged before us, these ground are rendered infructuous and are accordingly dismissed.

11. Ground No. 13 - Disallowance of Transfer fee 11.1 At the outset of the hearing, the learned A.R. of the assessee submitted that this ground is not being pressed in this appeal. This ground is therefore rendered infructuous and is accordingly dismissed.

12. Grounds No. 4, 6, & 10 - Validity of Reopening of assessment 12.1 The issue raised in these grounds, on the validity of reopening the assessment for A.Y. 2004-05 are factually/legally similar to those raised in the assessee's own case for A.Y. 2003-04. We have addressed the same at paras 5.1 to 5.3.3 of this order in ITA No. 1264/Mum/2013 (supra) and dismissed the assessee's pleas. Following this decision of ours and in order to maintain judicial consistency, the same finding mutatis mutandis applies in the assessee's case for A.Y. 2004-05 also and we therefore finding no merits in these grounds raised by the assessee at S. Nos 4, 6 & 10 dismiss them.

13.1 The issues raised in these grounds for A.Y. 2004-05 are factually similar on identical issues, as those raised in the assessee's own case for A.Y. 2003-04. We have addressed the same at paras 6.1 to 6.3.2 of this order in ITA No. 1264/Mum/2013 (supra) and decided those issues in Shri Vinod K. Shah favour of the assessee to the extent indicated therein. Following this decision of ours and in order to maintain judicial consistency, the same findings mutatis mutandis applies in the assessee's case for A.Y. 2004-05 also. We hold and direct accordingly."

7. We have noted that this fact that the additions on the basis of which the penalty was levied has been deleted by Tribunal, is brought on record by assessee by way of statement of fact, annexed along with the grounds of appeal. It is settled law that once the addition in the quantum assessment is deleted, the penalty order does not survive. Therefore, we quash/ set-aside the penalty order dated 18.02.2015 passed by assessing order.
8. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 06/12/2019.

Sd/-
S. RIFAUH RAHMAN
ACCOUNTANT MEMBER

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 06.12.2019

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Copy of the Order forwarded to :

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

BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai