

IN THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 6863/Mum/2019 (Assessment Year 2011-12)

Sanyam Sultania 401, 4 th Floor Prabhu Vijay, Plot No.B-17 V.M.Road, Kapole CHSL Juhu, Mumbai-400 049 PAN : CQJPS0577D (Appellant)	Vs.	ITO-31(3)(3) BKC, Bandra(E) Mumbai-400 051 (Respondent)
---	-----	--

Assessee by	Shri R.C.Jain
Department by	Shri Vijay Kumar Menon
Date of Hearing	15.07.2021
Date of Pronouncement	28 .09.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the Assessee is directed against the order of learned CIT(A)-39 dated 28.03.2019 and pertains to Assessment Year 2011-12.

2. The grounds of appeal read as under :

1. In the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (A) erred in levying penalty u/s 271(1)(c) of Rs.. 238462/- on exempt LTCG confirmed as unexplained money u/s 69A and that too without mentioning in the notice u/s 274 r.w.s. 271(1)(c) whether the Appellant furnished inaccurate particulars/concealed income which is bad in Jaw as per the catena of judgments cited from time to time.
2. In the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (A) erred in levying penalty u/s 271(1)(c) even though Appeal in respect of the quantum appeal was not yet heard.

3. Brief facts of the case are that during the year under consideration, the appellant claimed to have sold shares of Jindal South West Holding Ltd for Rs 12,81,540/- through broker HDFC Securities Limited on 19.01.2011. The appellant claimed that

he had paid STT on sale of them. The appellant declared LTCG of Rs 10,02,703/- which was claimed exempt u/s 10(38) of the Act.

In the course of the assessment proceedings, AO found that the purchased share was transferred in the Demat account of the appellant on 21.06.2010. The AO took that date (21.06.2010) as the date of acquisition of the shares. Accordingly, the AO held that the appellant had held those shares for less than one year. Therefore, the AO held that the profit on the sale of the shares constituted Long Term Capital Gain.

4. Upon assessee's appeal Ld.CIT(A) enhanced the income by treating the entire receipts as unexplained income. He also issued notices u/s. 271(1)(c) for concealment of income. Ld.CIT(A)'s order is as under:-

“ A notice under section 251(2) of the Act in the form of a letter dated 20.03.2019 was sent to the appellant proposing to treat the entire sale proceeds of Rs 12,81,540/- credited in appellant's account as unexplained money under the provision of section 69A of the Act and to enhance appellant's assessment. In response the AR appellant filed a letter dtd 28.03.2019 wherein the AR submitted that the transactions in relation to the said 1060 shares had taken place off- market and therefore, the same were not recorded by the BSE; that the transaction were genuine, lawful and certainly not accommodation entries; Off Market transaction are lawful transaction in the capital market.

I have considered the appellant's contention. In the course of the assessment proceedings the appellant had claimed that the shares were purchased from a broker who was a member of BSE. As mentioned above, the BSE had denied that those transactions took place in BSE. As stated above, that Shri Kamal Kishore Rathi had stated that he had been providing accommodation entries through Vijay Bhagwandas & Co. The appellant's contention that the shares were purchased off market is contradictory to appellant's claim made before the AO earlier that those shares were purchased through a broker registered in the Bombay stock exchange. Therefore, I reject the appellant's contention. Accordingly, I hold that the shares which were purportedly sold were not purchased in the previous year 2009-10 ; that those shares had never been purchased. Accordingly, I hold that the sum of Rs. 12,81,540/- did not represent sale proceeds of shares. I, therefore, treat the sum of Rs. 12,81,540/- as unexplained money under the provision of section 69A. Consequently, I delete the addition of Short Term Capital Gain of Rs. 10,02,703/- In the result, I enhance the assessment as mentioned above. For statistical purpose, ground of appeal no. 2 is treated as dismissed.

The appellant has not been able to substantiate his claim that the sum of Rs.12,81,540/- represented sale consideration of shares and profit from the transaction was exempt u/s 10(38) of the Act. Therefore the appellant is deemed to have concealed particulars of his income under section 271(1)(c) r.w. Explanation 1 to section 271(1). Penalty proceedings u/s. 271(1)(c) are initiated separately for concealment of particulars of income u/s 271(1)(c).”

5. In penalty proceedings, assessee requested to wait for ITAT order in quantum. But, Ld.CIT(A) imposed penalty of Rs. 2,38,462/- holding as under:-

“ Coming to the merits of the case, I find that the submissions of the assessee are not acceptable. I find that Shri Kamal Kishore Rathi had accepted that he had been providing accommodation entries through Vijay Bhagwandas & Co. Further, the assessee had made contradicted statements before the AO once it contended that the shares were purchased off market and again contended that shares were purchased through a broker registered in the Bombay Stock Exchange. Further, in response to notice u/s.133(6) issued by AO in the course of assessment proceedings for A.Y. 2010-11, the BSE informed the AO that no such transactions took place in BSE. Therefore, as per the provisions of explanation 1 to section 271(1) of the Act, the assessee is deemed to have concealed his income of Rs.12,81,540/-. Therefore, in my view, it is a fit case for imposition of penalty u/s.271(1)(c) of the Act.”

6. Against the above order, assessee is in appeal before us.

7. We have heard both the parties and perused the records. We find that assessee has challenged that in the notice of penalty, it has not been mentioned whether the assessee has furnished inaccurate particular/concealed income. Assessee has claimed that several judgments were cited. However, we note that there is no mention of this claim in the Ld.CIT(A)'s order. We deem it appropriate to remit this issue to the file of the Ld.CIT(A). He shall examine the veracity of assessee claim as above and decide as per the ratio of full bench decision of Hon'ble Bombay High Court in Farhan A. Shaikh Vs. PCIT (125 taxamnn.com 253) vide order dt. 11.3.2021

8. In the result, assessee's appeal is allowed for statistical purpose.

Pronounced in the open court on 28 .09.2021.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 28 /09/2021
Thirumalesh, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai