

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

BEFORE SHRI KULDIP SINGH, JM  
AND  
SHRI S RIFAUR RAHMAN, AM

**ITA No. 446/Mum/2021**

(Assessment Year 2014-15)

Income Tax Officer 32(1)(1)  
R. No. 703, Kautilya Bhavan,  
BKC, Bandra (E),  
Mumbai-400051

Vs.

Dharam Hasmukhbhai Jagda  
154/155, Santvani Bld., LIC  
Colony, Besides Upadhya  
Dairy, Birivali(W),  
Mumbai-400092

**(Appellant)**

**(Respondent)**

**PAN No. AGLPJ0431B**

**Assessee by** : None  
**Revenue by** : Smt. Mahita Nair,

**Date of hearing:** 07.09.2023  
**Date of pronouncement :** 24.11.2023

**ORDER**

**PER KULDIP SINGH, JM:**

01. Appellant Income Tax officer [hereinafter referred to as "the Revenue"] while filling the present appeal sought to set aside the impugned order dated 31.01.2022 passed by the Ld. Commissioner of Income Tax (Appeal)-44, Mumbai [hereinafter "the CIT(A)"] deleting the penalty levied by the Assessing officer [in short "the AO"] qua the assessment year 2014-15 on the grounds inter alia that

02. The grounds of appeal of the revenue are as under:

"1. *"On the facts and in the circumstances of the case, the Ld.CIT(A) erred in deleting the penalty levied by the AO u/s.271(1)(c) of the I.T. Act, 1961, of Rs.6,42,880/- without appreciating the fact that the Assessing Officer has correctly held that the assessee has failed to substantiate the transactions claimed in its return of income thereby evaded taxes to that extent."*

2 *"On the facts and circumstances of the case and in the law, the Ld. CIT(A) erred in not appreciating the fact that the act of the assessee clearly falls within the ambit of provisions of Explanation-1 to section 271(1)(c) of the Act as the assessee has failed to offer an explanation or which was found by the AO to be false."*

3 *"On the facts and circumstances of the case and in the law, the Ld. CIT(A) erred in deleting the penalty levied by the AO u/s 271(1)(c) of the Act of Rs. 6,42,880/- without appreciating the explicit findings of the investigation wing and corroborated by the enquiries made by the AO."*

4. *"The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."*

03. Briefly stated facts necessary for consideration and adjudication of the issue at hand are : on the basis of assessment order framed u/s 143(3) r.w.s. 147 of the Income Tax Act,1961 [for short "the Act"] at income of ₹ 27,46,730/- by making addition on account of unexplained cash credit u/s 68 of the Act, the penalty proceedings were initiated u/s

271(1)(C) of the Act. Declining the contentions raised by the assessee, the AO levied the penalty to the tune of ₹ 6,42,880/- being 100% of the tax sought to be evaded i.e. ₹ 19,28,640/-.

04. The assessee carried the matter before the Ld. CIT(A) by way of filling appeal who has deleted the penalty levied by the AO by allowing the appeal. Feeling aggrieved by the impugned order passed by the Ld. CIT, the revenue has come before Tribunal by way of filling present appeal.

05. None appeared on behalf of the assessee, despite issuance of numerous of notices through Registered Post with Acknowledgement Due [RPAD] which have been not received back served or unserved. Since the period of more than month has since elapsed from issuance of notice and the notices have not been received back served or unserved, the assessee is deemed to have been served. So the bench has decided to dispose of the present appeal on the basis of material available on record with assistance of Ld. DR for the revenue, the appellant in this case.

06. We have heard the Ld. DR for the revenue and perused the material available on record in the light of the argument addressed.

07. Undisputedly, the assessee's return of income filed for the year under consideration declaring total income of ₹ 6,66,210/- was subjected to scrutiny by noticing that the assessee has claimed exemption u/s 10(38) of the Act on long term capital gain to the tune of Rs.19,39,539/-, which was found to be penny stock by the AO. The assessee accepted the assessment order by filling the revised return and by filling the tax due thereon. It is also not an dispute that the AO has disallowed the exemption of ₹ 19,39,539/- claimed by the assessee on account of LTCG by treating the same as unexplained cash credit by adding the same back to the total income of the assessee u/s 68 of the Act.

08. In the backdrop of the aforesaid facts and circumstances of the case, order passed by the lower authorities and arguments addressed by the authorized representatives of both the parties, the sole question arises for determination in this case is:-

*"as to whether the assessee has concealed particulars of income or has furnished inaccurate particulars of income during assessment proceedings?"*

We have perused the impugned order passed by the Ld. CIT(A) who has deleted the penalty levied by the AO u/s 271(1)(c) of the Act for writing following files.

*"3.3 I have considered the submissions of the appellant and perused the materials available on record. The appellant has requested to delete the impugned penalty levied u/s 271(1)(c) of the Act at Rs.6,42,880. The main contention of the appellant is that he has neither concealed particulars of income nor furnished inaccurate particulars of income; mere rejection of appellant's claim would not automatically lead to levy of penalty and he had submitted necessary evidences in support of its claim, but the same was not accepted by the AO. The appellant has also submitted that he filed all the documents for the share transactions but the AO did not accept the explanation. In such situation, he came forward and offered the amount to tax by filing a revised return of income. AO accepted the income as per the revised return of income and there is no difference between the revised income offered and the total income assessed. It is not the case that the appellant had not offered the income in the return of income filed, it is offered but because the income was arising on sale of shares which were held for more than a year in the Demat account and the STT was paid on sale of the said shares through a registered share broker on BSE, the deduction was claimed. Assessee claimed the income*

*exempt u/s 10(38) and the AO had a different opinion that the same is not allowable. Mere rejection of claim of the appellant can at best be held that there was a difference of opinion and the department did not accept, but the same cannot be held as concealment of particulars of income or furnishing inaccurate particulars of income. The Hon'ble Supreme Court in the case of CIT vs. Reliance Petro Products P Ltd reported in 322 ITR 112, has held that "Reading the words 'inaccurate' and 'particulars' in conjunction, they must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. In this case, there is no finding that any details supplied by the assessee in its return were found to be incorrect, erroneous or false. Such not being the case, there would be no question of levy of penalty under s. 271(1)(c)."*

*3.4 In a case, where the assessee volunteered to offer sum as part of his income on account of the difficulty encountered by him, the Hon'ble Madras High Court in the case of CIT vs. Jayaraj Talkies reported in 239 ITR 914 held that the penalty u/s 271(1)(c) of the Act is not leviable and further held that "The Revenue contends that as the assessee-owner of the theatre who had derived income from leasing the same, had after filing a return claiming deduction of a sum of Rs. 4,125 and Rs. 16,348 towards building maintenance and furniture repairs respectively, himself volunteered to offer these income as part of his income on account of the difficulty encountered by him in securing necessary vouchers and receipts That conduct of the assessee according to the Revenue was by itself*

*sufficient to show that there was concealment. The Supreme Court in the case of Sir Shadilal Sugar and General Mills vs. CIT, [1987] 168 ITR 705, has pointed out that not every case of non disclosure warrants imposition of penalty as the assessee may forgo a deduction or offer higher sums for taxation for a hundred and one different reasons and all of them cannot be regarded as reasons which are unworthy of acceptance." The Hon'ble Jurisdictional Bombay High Court, vide its order dated 06th July 2015 in the case of CIT vs. Mis Dalmia Dyechem Industries Ltd, after considering the decision of Hon'ble Delhi High Court in the case of CIT vs. Zoom Communication P Ltd reported in 327 ITR 510, has held..*

*"Section 271(1)(c) of the Act lays down that the penalty can be imposed if the authority is satisfied that any person has concealed particulars of his income or furnished inaccurate particulars of such income. The Apex Court in Reliance Petroproducts (supra) applied the test of strict interpretation. It held that the plain language of the provision shows that, in order to be covered by this provision there has to be concealment and that the assessee must have furnished inaccurate particulars. The Apex Court held that by no stretch of imagination making an incorrect claim in law, would amount to furnishing inaccurate particulars Thus, above conditions under Section 271(1)(c) must exist before the penalty can be imposed, Mr. Chhotaray tried to widen the scope of the appeal by submitting that the decision of the Apex Court should be interpreted in such a manner that there is no scope of misuse especially since*

*minuscule number of cases are picked up for scrutiny. Because small number of cases are picked up for scrutiny does not mean that rigors of the provision are diluted. Whether a particular person has concealed income or has deliberately furnished inaccurate particulars, would depend on facts of each case. In the present case we are concerned only with the finding that there has been no concealment and furnishing of incorrect particulars by the present assessee."*

*3.5 The Hon'ble Jurisdictional Bombay High Court vide its order dated 24th November 2014 in the case of CIT vs. Rucha Engineers P Ltd has held that Before proceeding to the explanation below Section 271 and putting the responsibility on the assessee, it is necessary for the A.O. to first demonstrate that the explanation of the assessee or the conduct of the assessee was not reasonable on human probabilities, or that it was in the nature of violating settled legal positions. It cannot be said that, the explanations given by the respondent-assessee were fanciful, baseless or unacceptable". Further, the Hon'ble Bombay High Court in the case of CIT vs. Mirc Electronics Ltd reported in 77 taxmann.com 67, while dealing with penalty levied on disallowance of deduction u/s 801A, has held that where the claim made by an assessee was a possible view. then it cannot be said that there was any filing of inaccurate particulars or concealing particulars of income. The Hon'ble Delhi High Court in the case of CIT vs. Lotus Trans Travels P Ltd, reported in 177 Taxman 37 has held as under.*

*"With regard to the question of inclusion of the interest income in the business income for the purpose of computing deduction under section 80HHD, the Tribunal was of the*

*view that the same was a debatable issue and that appeals in respect of this issue were pending before this Court. Considering this fact, the Tribunal returned a finding that the claim made by the assessee for deduction under section 80HHD was bona fide being based on adoption of one of the possible views. The Tribunal also found that the assessee had furnished all the material facts relevant to the said claim and, therefore, it could not be said that the assessee had concealed income by furnishing Inaccurate particulars so as to attract penalty under section 271(1)(c). The fact that the claim of the assessee was not finally accepted in the quantum proceedings before the Tribunal would not by itself be a ground for justifying the imposition and levy of penalty under section 271(1)(c) of the said Act*

*3.6 The Hon'ble Mumbai ITAT in the case of DCIT vs. Lingtec Construction LP in ITA No. 4835/Mum/2016, vide its order dated 14th November 2017 has considered the issue of levy of penalty u/s 271(1)(c) of the Act on disallowance made u/s 40A(3) of the Act and has upheld the order of the Ld. CIT(A) in deleting the penalty levied therein. The facts before the Hon'ble Tribunal were as under.*

*7. We are of the view that mere confirmation of addition in appeal in the quantum assessment cannot per se lead to confirmation of penalty as the quantum and penalty proceedings and assessment are independent of each other. For application of provisions of Explanation (1) to section 271(1)(c). it must be shown either, (i) the assessee failed to offer an explanation or (ii) ho offers an explanation which is found to be false or (i) he offers and explanation which cannot be substantiated or shown to be bona fide*

*explanation. We noted that the additions/disallowances are made on difference of opinion. There is no specific finding of AO that the disclosure made by the assessee was wilful concealment of income. The Hon'ble Apex Court in the case of CIT Vs Reliance Petroproducts 322 ITR 158(SC) held that a mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars. In view of the above factual and legal discussion, we do not find any illegality or infirmity in the order passed by the learned CIT(A). The grounds raised by the Revenue are dismissed."*

*3.7 In this case, as per the submissions, the assessee for the sake of peace of mind and to avoid further litigation has accepted the proposed addition and paid tax by filing a revised return of income. An addition accepted cannot per se lead to the confirmation of penalty because assessment proceedings and penalty proceedings are independent of each other. Courts have held that in all cases where addition is confirmed, penalty shall not mechanically follow. In order to attract sec 271(1)(c), there must be concealment, but where an assessee genuinely makes a claim after disclosing necessary facts, there is no concealment, even if the claim is rejected. In view of the above discussion and the facts & circumstances of the case, I am of the considered opinion that this is not a fit case to levy penalty u/s 271(1)(c) of the Act. Hence, the penalty levied at Rs.6,42,880 is Deleted. Accordingly, Ground Nos. 1 and 2 raised in appeal are Allowed."*

09. Bare perusal of the findings returned by the Ld. CIT(A) extracted in the preceding para goes to show that there was no

occasion for assessee to make the concealment of particulars of income nor he has any occasion to furnish the inaccurate particular of income. The assessee has brought on record entire facts by filing the return by claiming the exemption of ₹19,39,539/- u/s 10(38) of the Act on account of LTCG. It was for the AO to examine the claim who after declining the contention raised by the assessee disallowed the exemption claimed by the assessee u/s 10(38) of the Act. It is settled principle of law, as has been laid down by the Hon'ble Supreme Court in the case of Reliance Petro Products Pvt. Ltd. 322 ITR 112, that in the absence of any findings by the AO that any detail of income recorded by the assessee in its return of income was found to be inaccurate, erroneous or false, the provision content u/s 271(1)(c) of the Act are not attracted.

010. In the instant case since the assessee has duly brought on record all the facts as to claiming exemption u/s 10(38) on account of LTCG qua the share purchased by him which was found to be a penny stock by the AO but the assessee in order to avoid litigation and to have peace of mind filed revised return and paid the tax due, the penalty levied by the AO is not sustainable in the eyes of law. Merely because of the fact that



the assessee has accepted the addition made by the assessee by paying tax is not sufficient to attract the penalty u/s 271(1)(c) of the Act. So mere making of the claim which is not sustainable in law by itself will not constitute furnishing of inaccurate particulars.

011. So in view of the matter, the Ld. CIT(A) has rightly deleted the penalty levied by the AO u/s 271(1)(c) of the Act. Finding no illegality or perversity in the impugned order, the appeal filed by the revenue is hereby dismissed.

Order pronounced in the open court on 24.11.2023.

Sd/-  
(S RIFAUR RAHMAN)  
(ACCOUNTANT MEMBER)

Sd/-  
(KULDIP SINGH)  
(JUDICIAL MEMBER)

Mumbai, Dated: 24.11.2023

*Aniket Singh Rajput*

Copy of the Order forwarded to :

BY ORDER,

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

Sr. Private Secretary/ Asst. Registrar  
Income Tax Appellate Tribunal, Mumbai