

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH KOLKATA

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI RAKESH MISHRA, ACCOUNTANT MEMBER**

**ITA No. 931/KOL/2024
Assessment Year: 2014-15**

Mitul Pravinchandra Malani, Unit 1A, 1 st Floor, 12, Ho Chi Minh Sarani, Kolkata - 700071 (PAN: AJHPM7946B)	Vs	Assistant Commissioner of Income Tax, Circle 33, Kolkata, 10B, Middleton Row, Kolkata - 700071
(Appellant)		(Respondent)

Present for:

Assessee by : Anil Kochar, Advocate
Respondent by : Subhendu Datta, CIT DR
Monali Shaha Mukherjee, JCIT

Date of Hearing : 25.07.2024

Date of Pronouncement : 17.10.2024

ORDER

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of the Commissioner of Income-tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi (“the Ld. CIT(A)”) passed u/s 250 of the Income Tax Act, 1961 (“the Act”) for AY 2014-2015, dated 28.03.2024, which has been passed against the penalty order u/s 271(1)(c) of the Act passed by the Assistant Commissioner of Income Tax, Circle 33, Kolkata (“the Ld. AO”), dated 28.06.2017.

2. The grounds of appeal raised by the assessee are reproduced as under:

“1. For that the Ld. CIT(A) erred in dismissing the appeal of the assessee without discussing case laws relevant to the issue involved in the appeal as submitted by the appellant.

2. For that the issue involved in the appeal of the assessee was covered in the favour of the assessee by the various decision of the Hon'ble Income Tax Appellate Tribunal and also the Hon'ble High Court, Calcutta which was duly noted in the written submissions made before the Ld. CIT(A).

3. For that the Ld. CIT(A) ought to have properly considered the submission made by the assessee challenging the legality of the notice issued by the A.O. u/s 274/271 and ought to have allowed the appeal of the appellant.

4. For that levy of penalty u/s 271(1)(c) of the amount of Rs.9,560/- is wrong and uncalled for.

5. For that further grounds of appeal may kindly be allowed to be taken at the time of hearing of the appeal.”

3. Brief facts of the case are that assessee filed his return of income on 20.11.2014 for the AY 2014-15, declaring total income of Rs. 10,12,950/- Subsequently, an assessment u/s 143(3) of the Act was completed by the Ld. AO on 23.12.2016 assessing the total income of the appellant at Rs. 10,43,880/- after treating short term capital loss of Rs. 30,927/- claimed by the assessee as 'Bogus'. Penalty proceedings under section 271(1)(c) of the Act were also initiated by the Ld. AO for furnishing inaccurate particulars of income and penalty show cause notice was issued to the appellant. Consequently, penalty order u/s 271(1)(c) of the Act was passed on 28.06.2017 levying a penalty of Rs. 9,560/- against the assessee for furnishing inaccurate particulars of income at the minimum rate of 100% of the tax sought to be evaded on the aforesaid addition of Rs. 30,927/-. Aggrieved by the said penalty order, the assessee filed the appeal before the Ld. CIT(A) but the assessee could not succeed. Hence, the appeal before the Tribunal.

4. Rival contentions were heard and the records & the submissions made were examined and the same have been considered. The return of income

showing total income of ₹10,12,950/- was filed and the case were selected for scrutiny through CASS for the main reason of “suspicious transactions on shares”. The Ld. AO found on going through the return of income, share trading details and other details that the assessee had shown short term capital gains during the financial year under consideration and had also suffered short-term loss. The assessee had claimed share loss for the “alleged penny stock” of M/s Life Line Drugs and Pharma Limited which was adjusted against the short-term capital gain arising during the financial year and which had reduced the tax liability. The assessee had purchased 15,000 shares of M/s Life Line Drugs and Pharma Limited on 31.01.2014 for ₹24,07,940/- and the same were sold on 03.02.2014 for ₹23,77,013/-, thereby incurring short term capital loss of (-)₹30,927/-, which was adjusted against the capital gains. The quantum of capital gains is not mentioned in the assessment order. The reasons for the addition are mentioned as under in the assessment order:

The assessee surprisingly at the fag end of the year, with a view to avail short term capital loss, assessee has made huge investment in the alleged penny stock scrip i.e. M/s Life Line Drugs & Pharma Limited in which he never invested in the past. From the details submitted by the assessee it is showing that assessee had purchased 15,000 number shares of M/s Life Line Drugs & Pharma Limited through broker on 31.01.2014 and paid total purchase amount of Rs.24,07,940/- The assessee sold the total number of 15000 shares of M/s Life Line Drugs & Pharma Limited within a very short period at a much lesser price on a particular date i.e. one 03.02.2014 through the broker and received Rs. 23,77,013/-. The copy of broker's ledger and other details in relation to transaction as submitted by the assessee is placed on record.

3. The details of purchase and sales of the scripts M/s. Life Line Drugs & Pharma Limited (herein after refer The scrip) were examined. It was found that assessee has purchased 15000 shares at the fag end of the year and within a very short term period assessee has sold the particular script at a much lesser price which resulted bogus short term capital loss with a view to adjust the same with short term capital gain during the financial year under consideration and reduce the tax liability of the assessee. On verification of the investment history made by the assessee it is

observed that assessee is an experienced player in the share market but assessee invested in the alleged penny stock scrip with a view to avail short term loss knowing fully well that the above share scrip was in downwards trend. Thus a deeper study was needed to ascertain whether the transactions were genuine investment transactions or sham ones and colourable device only to convert the unaccounted cash into tax exempt income. In short, it was to be ascertained whether the apparent was real.

On going through the financial position of the Scrip (M/s. Life Line Drugs & Pharma Limited) it is crystal clear that during the period from financial year 2009-10 to 2013-14 business health of the company was poor and EPS is showing almost 'nil'. During the Period, no material corporate announcement was made by M/s. Life Line Drugs & Pharma Limited The price of the scrip in the market mainly depends on the EPS, the business health of the company or some new development of the company which promises bright futures of the share holders. In the present scrip there were no such factors were occurred. In the present case it is observed that the assessee is an experienced player in the share market but assessee invested in the alleged penny stock scrip with a view to avail short term loss knowing fully well that the above share scrip was in downwards tend.

Conclusion: Reasons for Investment at the fag end of the year in such penny stock with the intention to generate abnormal bogus short term capital loss which could be adjusted with short term capital gain.

5. The Ld. AO thereafter has analysed the price movement of the scrip, the modus operandi, the common finding of SEBI in all these cases, the discussion of SEBI in the case of Kailash Auto Finance Limited, which incidentally is not the scrip in which the assessee has dealt (as was also pointed out by the Ld. AR during the course of the hearing), the discussion regarding increase of share price of M/s. SRK Industries Limited (Para 4.1 of the assessment order) and the factor that the assessee is an experienced player in the field of share trading and had invested mostly in blue chips/reputed shares and according to the Ld. AO it was surprising that the assessee suffered loss in the scrip of Life Line Drugs and Pharma Limited in which he never invested and concluded that the scrip was a penny stock and used as an instrument to claim bogus long term capital

gain/short term capital loss. The investment was made at the fag end of the year with predetermined objective to make short-term capital loss and to adjust the same with the short-term capital gain which already was earned in the beginning of the year under consideration. The assessee on the other hand had submitted that purchase and sale transactions were through registered broker and all the payments in respect of which had been made through account payee cheques, but the Ld. AO concluded on the basis of his analysis, documentary evidences, circumstantial evidences, human conduct and preponderance of probabilities that what is apparent in this case is not real, that the financial transactions were sham ones and that this entire edifice was only a colourable device used to evade tax. Relying upon several judicial pronouncements, the loss of ₹30,927/- was treated as bogus and was not adjusted against the short-term capital gains earned during the financial year under consideration. Penalty proceedings were also initiated.

6. The assessee did not contest the addition. The assessee had furnished a reply before the Ld. AO that no appeal had been preferred against the disallowance of loss only to avoid litigation, which is time-consuming and because of the smallness of the case and the assessee requested that the penalty proceedings maybe dropped. In the penalty proceedings, after reproducing Para 10 and Para 11 of the assessment order, it was held by the Ld. AO that the assessee had deliberately produced inaccurate particulars of the income to the extent of ₹30,927/- for which no satisfactory explanation was filed and the penalty of ₹9,560/- was imposed.

7. Since no explanation was given before the Ld. AO nor the addition of ₹30,927/- made by the Ld. AO was challenged in any quantum appeal, therefore, the Ld. CIT(A) concluded that there was no infirmity in the action of the Ld. AO in concluding that the appellant had deliberately made incorrect claim of short-term capital loss on sale of the penny stock in his ITR and hence it had furnished inaccurate particulars of income.

Accordingly, the penalty of ₹9,560/- was upheld and the appeal was dismissed.

8. It was argued before us that the notice was defective and, therefore, the penalty imposed maybe deleted. It was conveyed to the Ld. AR that in view of the decision in the case of the **Principal Commissioner of Income-tax v. Thakur Prasad Sao & Sons (P.) Ltd. [2024] 163 taxmann.com 449 (Calcutta)**, this issue was no longer relevant. It has been held in this case that:

In the present set of facts the Assessing Officer has noted in the assessment order the concealment of particulars of income by the respondent/assessee. Notices were also directed to be issued as has been observed in the assessment orders. Once, in the assessment order the Assessing Officer has mentioned concealment of particulars of income by the assessee, the notice under section 274 is merely consequential. The respondent/assessee was well aware of the grounds of concealment of income recorded in the assessment order which he admitted. Section 274 prohibits imposition of penalty unless the assessee has been heard or has been given a reasonable opportunity of being heard. It is admitted fact of the case that the respondent/assessee was heard by the Assessing Officer who passed the penalty order. The submissions made by the respondent/assessee before the Assessing Officer in penalty proceedings, have been noted by the Assessing Officer. Thus, it is undisputed that the assessee has been heard. Under the circumstances, when a satisfaction has been recorded by the Assessing Officer during the assessment proceedings, consequential notice under section 274 was issued to the assessee and the assessee has been afforded an opportunity of being heard then the Tribunal has committed a manifest error of law and facts and has completely misdirected itself to set aside the penalty orders on the ground that 'the grounds for imposition of penalty were not mentioned in the show cause notice under section 274 and thus, the show cause notice was defective'. [Para 37]

The assessee relied upon judgment in Manjunatha Cotton And Ginning Factory (supra) to contend that 'Notice under section 274 of the Act should specifically state the grounds mentioned in section 271(1)(c)'. In the instant notice under Section 274 for penalty under section 271(1)(c) of the Act, 1961 was issued by the Assessing Officer to the respondent assessee to afford him opportunity of hearing for concealment of particulars of income. Details of undisclosed/concealed income have been well mentioned in the assessment order of the respondent assessee and being well aware of it, the respondent assessee made specific submission in penalty proceedings. Thus, essential requirements of section 271(1)(c) read with section 274 have been complied with. [Para 38]

When the Assessing Officer had recorded in the assessment order the particulars of concealed income/undisclosed income of the assessee and on that basis initiated penalty proceeding under section 271(1)(c) then consequential notice under section 274 issued by Assessing Officer to the assessee to afford him opportunity of hearing, was specifically a notice for penalty for concealment of particulars of income/undisclosed income. Such a notice complied with the principles of natural justice and was a valid notice under section 274. [Para 39]

8.1 Hence, Ground No. 3 of the appeal challenging the legality of the notice issued is dismissed as in the assessment order a clear finding of furnishing of inaccurate particulars had been made in para 11.

9. As regards the merit of the case, it was conveyed by the Ld. AR that no query was made regarding the scrips traded by the assessee and discussion was made regarding the scrips of Kailash Auto Finance Limited in which there was adverse finding of the SEBI while the assessee had purchased and sold the scrips of Life Line Drugs and Pharma Limited. There may be reasons like low tax effect for not preferring an appeal but penalty under section 271(1)(c) cannot be automatically levied on the basis of the addition made. In the case of **National Textiles v. CIT [2001] 249 ITR 125 (Guj.)**, it has been held that no penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If the assessee gives an explanation which is unproved but not disproved, *i.e.*, it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false, the *Explanation* cannot help the department because there will be no material to show that the amount in question was the income of the assessee.

9.1 Further, in **CIT v. Indian Metals & Ferro Alloys Ltd. [1994] 117 CTR (Ori.) 378**, It has been held that the expressions 'has concealed the particulars of income' and 'has furnished inaccurate particulars of income' have not been defined either in section 271(1)(c) or elsewhere in the Act. One thing is certain that these two circumstances are not identical in details although they may lead to the same effect, namely, keeping off a certain portion of income. The former is direct and the latter may be indirect in its execution. The word 'conceal' is derived from the Latin word

'concolare' which implies 'to hide'. *Webster's New International Dictionary* equates its meaning to 'hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of; to withhold knowledge of'. The offence of concealment is thus a direct attempt to hide an item of income or a portion thereof from the knowledge of the income-tax authorities. In furnishing its return of income, an assessee is required to furnish particulars and accounts on which such returned income has been arrived at. These may be particulars as per its books of account if it has maintained them, or any other basis upon which it has arrived at the returned figure of income. Any inaccuracy made in such books of account or otherwise which results in keeping off or hiding a portion of its income is punishable as furnishing inaccurate particulars of its income.

9.2 It has also been held in the case of **CIT v. Anwar Ali [1970] 76 ITR 696 (SC)** that it cannot be said that the finding given in the assessment proceedings for determining or computing the tax is conclusive. However, it is good evidence. Before penalty can be imposed the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee has consciously concealed the particulars of his income or has deliberately furnished inaccurate particulars. of the addition made in the assessment order as it is a separate proceeding.

9.3 It has also been held in the case of **CIT v. Ajaib Singh & Co. [2002] 253 ITR 630 (Punj. & Har.)** that merely because certain expenses claimed by the assessee are disallowed by an authority it cannot mean that the particulars furnished by the assessee are wrong. Disallowance of an expense *per se* cannot mean that the assessee has furnished incorrect particulars of its income. Concealment involves penal action. It has to be proved as a conscious act. It is true that direct evidence may not be available in every case. Yet, it must be

proved as a necessary corollary from the facts and circumstances established on the record.

10. In the assessment order, only general discussion has been made in regard to the penny stock and manipulation of the transactions without bringing on record any evidence how the assessee had indulged in such manipulations and how the transactions carried out independently through the stock exchange were bogus when the difference in price was only ₹2.06 per share for purchase price of ₹160.53 and sale price of ₹158.47 and the assessee, in the absence of any further evidence regarding his involvement in a transaction carried out through the stock exchange, cannot be said to have unduly benefited. The assessee is an “experienced player in the share market”, as has been pointed out by the Ld. AO in the assessment order in para 3, had invested a sum of Rs. 24,07,940/- in the shares on 31.01.2014, which apparently was not off market and the amount had been paid by cheque and the shares were sold on 03.02.2014 and a loss of Rs. 30,927/- was incurred but total income of Rs. 10,12,950/- was declared. Thus, the loss works out to only 3.05% of the total income shown and 1.28% of the investment made and was apparently incurred in the normal course of share transactions and from the assessee’s point of view, the same cannot be said to be bogus. Hence, in the totality of the facts and circumstances of the case, the penalty of ₹9,560/- on transactions of ₹24,07,940/- involving “bogus loss” of ₹30,927/- cannot be sustained and is hereby deleted as the assessee had carried out the transactions through the stock exchange in the normal course and while the capital gains on other scrips have been accepted, the loss arising in this particular scrip has been denied. Hence, Ground Nos. 1, 2 and 4 are allowed and the penalty of ₹9,560/- imposed is hereby cancelled. Ground No. 5 being general in nature does not require any separate adjudication.

11. In the result, the appeal of the assessee is partly allowed while the penalty of ₹9,560/- imposed is hereby cancelled.

Order pronounced in the open court on 17th October, 2024.

Sd/-

(Rajpal Yadav)
Vice President

Sd/-

(Rakesh Mishra)
Accountant Member

Dated: 17th October, 2024

AK, P.S.

Copy to:

1. The Appellant:
2. The Respondent.
3. CIT(A)
4. The CIT,
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar

ITAT, Kolkata Benches, Kolkata