

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Ramlal Negi, Judicial Member**

ITA No. 2784/Mum/2016
(Assessment Year: 2008-09)

Ms. Pushpavati Khushalchand Mehta C/o. Sujan Impex Pvt. Ltd. C-3 Nanddham Indl. Estate Marol Maroshi Road Andheri (E), Mumbai 400059	Vs.	Income Tax Officer-20(2)(1) Pratyaksahakar Bhavan C-10, B.K.C., Bandra Mumbai 400050
PAN – AHPPM7568P		

Appellant

Respondent

Appellant by: None
Respondent by: Shri Suman Kumar

Date of Hearing: 04.01.2017
Date of Pronouncement: 11.01.2017

ORDER

Per Jason P. Boaz, A.M.

This appeal by the assessee is directed against the order of the CIT(A)-31, Mumbai dated 05.01.2016 upholding the levy of penalty of ₹1,18,735/- under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2008-09.

2. The facts of the case, briefly, are as under: -

2.1 The assessee filed her return of income for A.Y. 2008-09 on 30.03.2009 declaring total income of ₹46,99,360/- under the heads of income from house property, short term capital gains (STCG), long term capital gains (LTCG) and 'income from other sources'. The case was subsequently taken up for scrutiny. In the course of assessment proceedings the Assessing Officer (AO) observed that the assessee was engaged in the activity of purchase and sale of equity shares of various companies. On examination thereof, the AO came to the view and held that the income shown under the head STCG by the assessee is to be assessed

under the head income from 'Business and Profession' and in this regard initiated penalty proceedings under section 271(1)(c) of the Act r.w. Explanation 1 thereunder for furnishing of inaccurate particulars of income by issue of notice under section 274 r.w.s. 271 of the Act simultaneously while completing the order of assessment under section 143(3) of the Act vide order dated 26.11.2010.

2.2 Penalty proceedings were taken up by the AO by issue of show cause notice. The assessee's submissions dated 26.06.2013 and 16.09.2013 sought dropping of penalty proceedings submitting, inter alia, that penalty under section 271(1)(c) of the Act cannot be levied for reclassification of STCG income declared by the assessee as 'business income' by the AO and in this context relied on the decision of the Hon'ble Apex Court in Reliance Petroproducts Ltd. (230 CTR 320). It was also submitted that for the immediately succeeding year A.Y. 2009-10, in the order of assessment dated 25.11.2011 passed u/s 143(3) of the Act, the AO has accepted the assessee's claim of STCG. It was submitted that no inaccurate particulars of income were furnished and there was only a change of head of income from STCG to business income made by the AO in respect of the very same income. The AO rejected the assessee's contentions and proceeded to levy penalty of ₹1,18,735/- under section 271(1)(c) of the Act in the order dated 23.03.2013.

2.3 On appeal, the learned CIT(A)-31 vide the impugned order dated 04.01.2016 upheld the AO's action in levying the penalty under section 271(1)(c) of the Act for A.Y. 2008-09 holding as under at para 5.10 thereof:-

510. I have gone through the facts marshaled during the assessment and penalty proceedings and observed that the appellant is in the business of investment in shares. Appellant's plea that the issue was debatable cannot be stretched beyond the point to believe. Besides, if the claim itself is impossible to accept and is contrary to fundamentals of tax or accountancy it cannot be accepted. That is why in the instant case AO's stand has been upheld by the appellate authorities. Bona fide belief of an appellant in treating a particular item of income has limited role for deciding the issue of penalty to be imposed u/s 271(1) (c). Facts of the case decide whether a belief could be treated as bona fide or not. In other words it can safely be held that if an appellant, disregarding all the relevant facts and

*circumstances, interprets a section that suits its interest then such interpretation cannot be held bona fide belief. AO's view that appellant consciously attempted to reduce tax liability to the extent of Rs.1,18,735/- being the difference between tax on Short Term Capital Gain of Rs. 81,945/- and tax on Business Income of Rs.2,00,6801- and as such appellant comes in the purview of section 271(1)(c) of the Act, is upheld. In view of this sole **ground of appeal raised by the appellant is dismissed.**"*

3.1 Aggrieved by the order of the CIT(A)-31, Mumbai dated 05.01.2016 upholding the levy of penalty under section 271(1)(c) of the Act for A.Y. 2008-09, the assessee has preferred this appeal raising the following grounds: -

"1. *The Ld. Commissioner of Income Tax (Appeals) - 36, Mumbai [hereinafter referred to as the "Ld. CIT(A)"] erred in passing the order dated 05.01.2016 confirming the penalty levied by the Ld. A.O. in penalty order dated 23.09.2013 passed under section 271(1)(c) of the Income Tax Act, 1961 [hereinafter referred to as "the Act"]. The Appellant strongly objects to the levy of penalty confirmed by the Ld. CIT(A)-36.*

2. **Penalty u/s 271(1)(c) of Rs.1,18,735/-**

The Ld. CIT(A) erred in confirming the action of the Ld. A.O. in levying penalty u/s 271(1)(c) of Rs.1,18,735/- for the attempt to reduce tax liability, consciously furnished inaccurate particulars by showing the income of Rs.8,19,451/- under the head "short term capital gain" which ought to have been declared under the head "income from business or profession" without appreciating the facts and circumstances of the case. Hence, the levy of penalty of Rs.1,18,735/- is unjustified and the same may be deleted.

3. *The Appellant craves leave to add, alter, rescind or amend any of the above grounds of appeal."*

The only issue raised in this appeal is against the order of the learned CIT(A) for confirming the levy of penalty by the AO under section 271(1)(c) of the Act for furnishing of inaccurate particulars of income.

3.2 When the case was called for hearing, none was present for the assessee, but the learned D.R., who was present, fairly conceded that the assessee's appeal is to be allowed in view of the decision of the Hon'ble Bombay High Court in the case of Bennett Coleman & Co. Ltd. 259 CTR 383 (Bom); wherein penalty for furnishing of inaccurate particulars of income, for change of head of income, was deleted.

3.3.1 We have heard the learned D.R. for Revenue and perused and carefully considered the material on record, including assessee's submissions before the CIT(A) and the judicial pronouncement referred to. From the facts on record it is clear that the assessee's income is mainly from STCG/LTCG arising from dealings in shares and securities and also from 'house property' and 'income from other sources'. The AO was of the view that the income from STCG of ₹8,19,450/- arising from investment activity as declared by the assessee is to be assessed under the head 'business income' and after assessing the same accordingly in the order of assessment dated 26.11.2010, simultaneously initiated penalty proceedings under section 271(1)(c) of the Act for furnishing inaccurate particulars of income. The AO levied the said penalty despite the explanation of the assessee, inter alia, that penalty was not leviable for mere change of head of income from STCG to business income, there being no furnishing of inaccurate particulars and also that the STCG declared by the assessee was accepted by the AO in the very next A.Y. 2009-10. On appeal by the assessee, the AO's action was upheld by the learned CIT(A).

3.3.2 We find from the details on record, placed before authorities below by the assessee, that the assessee's proposition was that its activity of dealing/investment in shares and securities are investment activity and not business activity as held by the AO/CIT(A) and that there was only a change of head of income from STCG to business income and therefore there was no furnishing of inaccurate particulars of income as is being sought to be made out. From the details on record before us, we too observe that there is only a change of head of income by the AO from 'STCG' income on account of investment in shares and securities declared by the assessee to 'business income' by the AO and there is no addition to income of the assessee. In the factual matrix, it is clear that there is no furnishing of inaccurate particulars of income by the assessee. No doubt, the tax effect would be there since the rate of tax for 'business income' is higher than for 'STCG'. The Hon'ble Bombay High Court in the case of Bennett Coleman & Co. Ltd. (supra) has held that when there is only a

change of head of income and in the absence of any evidence to show that the assessee's claim was not bona fide, penalty levied under section 271(1)(c) for furnishing of inaccurate particulars of income/concealment of income was to be deleted. At para 3 of its order the Hon'ble Bombay High Court held as under: -

“3. So far as question (ii) is concerned, the respondent- assessee had claimed premium on redemption of debentures as income from capital gains. Whereas the assessing officer held that the redemption of debentures is revenue receipt assessable to tax under the head income from other sources. The CIT(A) confirmed the order of the assessing officer. The respondent-assessee did not file any further appeal on the quantum proceedings. Thereafter, the assessing officer levied penalty under Section 271(1)(c) of the Act on the respondent-assessee. The CIT(A) also confirmed the levy of penalty upon the respondent-assessee. On further appeal, the Tribunal held that there is no dispute with regard to the fact that the respondent- assessee had disclosed that the amount received as premium on redemption of debentures in its computation of income. Further, the Tribunal records that it is not the case of the department that the respondent-assessee had concealed any particulars of income or furnished inaccurate particulars of income by stating incorrect facts. The assessing officer considered the said premium received on redemption of debentures to be taxable under the head income from other sources while the respondent-assessee considered the same to be taxable under the head capital gains. In view of the fact that there is only a change of head of income and in the absence of any facts that the claim of the assessee was not bonafide, the Tribunal deleted the penalty imposed under Section 271(1)(c) of the Act. The revenue has not been able to point out that the finding of the Tribunal is perverse. In these circumstances, we see no reason to entertain the proposed question (ii). ”

3.3.3 The aforesaid decision of the Hon'ble Bombay High Court in the case of Bennett Coleman & Co. Ltd. (259 CTR 383) (Bom) on similar fact situation was followed by a Coordinate Bench of the Tribunal in the case of Mita J. Jhaveri in ITA No. 6210/Mum/2012 dated 30.08.2016. We find that in the case on hand, the assessee had declared the income arising out of purchase and sale activity in shares and securities as STCG as against business income assessed by the AO. It is seen that the assessee had also filed written submissions before the authorities below that she was under the bona fide belief that its activity of purchase/sale of shares and securities was only capital gain and not business income and also that the assessee's claim of capital gains/loss has been accepted by the AO in the

assessee's own case for the next assessment year i.e. A.Y. 2009-10, which was completed in scrutiny under section 143(3) of the Act. It was also contended by the assessee that there was no furnishing of inaccurate particulars of income or concealment of income in her case. In view of the above arguments put forth by the assessee, we are of the opinion that the authorities below were not able to controvert them or hold them to be false. In this view of the matter and respectfully following the decision of the Hon'ble Bombay High Court in the case of Bennett Coleman & Co. Ltd. (supra) and of the Coordinate Bench of the Tribunal in the case of Mita J. Jhaveri (supra), we hold that since there is only a change of head of income from 'STCG' as declared by the assessee to 'business income' as held by the AO and no evidence brought on record that the assessee's claim was not bona fide, we delete the penalty of ₹1,18,735/- levied under section 271(1)(c) of the Act for A.Y. 2008-09. We hold and direct accordingly. Consequently grounds 1 to 3 of assessee's appeal are allowed.

4. In the result, the assessee's appeal for A.Y. 2008-09 is allowed.

Order pronounced in the open court on 11th January, 2017.

Sd/-
(Ramlal Negi)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 11th January, 2017

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -36, Mumbai*
4. *The CIT - 24, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.