आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'एस.एम.सी', अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH, AHMEDABAD

सर्वश्री एन.के. बिल्लैया, लेखा सदस्य एवं महावीर प्रसाद, न्यायिक सदस्य के समक्ष ।

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER And SHRI MAHAVIR PRASAD, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 357/Ahd/2016

(**निर्धारण वर्ष /** Assessment Year : 2011-12)

Rameshbhai Ravjibhai Dobaria Prop. of Akash Spintex, 4, Mamta Industrial Estate, Near Gandhi Laprosy, Amraiwadi, Ahmedabad - 380026	**बनाम**/ Vs.	Dy. Commissioner of Income Tax, Circle -12 Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ADGPP 7842 Q		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से / **Appellant by** :	Ms. Arti N. Shah, AR
प्रत्यर्थी की ओर से/**Respondent by** :	Shri Rahul Kumar, Sr. DR

सुनवाई की तारीख / **Date of Hearing**	05/04/2017
घोषणा की तारीख /**Date of Pronouncement**	29/05/2017

आदेश / O R D E R

PER SHRI MAHAVIR PRASAD, JUDICIAL MEMBER :

This is an appeal by the assessee for levy of penalty and directed against the order of the Commissioner of Income Tax(Appeals)-VI, Ahmedabad, dated 27/11/2015 for the Assessment Year (AY) 2011-12.

2. Assessee has taken the following Ground of appeal:

> *The learned Commissioner of Income Tax (Appeals)-6, Ahmedabad has erred in law and on facts of the case by confirming penalty of Rs.4,79,464/- out of Rs.10,00,000/- levied u/s. 271(1)(c) of the Income Tax Act, 1961 by Assessing Officer.*

3. The relevant facts as culled out from the materials on record are as under:-

In this case, assessment u/s.143(3) of the I.T. Act was completed on 24.03.2014, determining total income at Rs.33,00,260/- as against returned income of Rs.25,69,120/- (as per revised return). Penalty proceedings u/s. 271(1)(c) of the Act were also initiated for furnishing inaccurate particulars of income and Notice u/s.274 r.w.s. 271(1)(c) of the Act was issued on 24.03,2014 and duly served on the assessee. It was noticed that the assessee has not filed any appeal against the addition made in the assessment. As the proceedings were getting barred by limitation of time, a fresh notice was issued on 28.08.2014 and on 09.09.2014 and duly served on the assessee. In reply to the said notice issued, the assessee stated as under:-

> *"[1] Sir, Your Honorable Sir, have made the addition of Rs.7,31,142/- regarding the Short Term Capital Gain and the same was not disclosed in our income.*
>
> *Sir, the contention of hiding the Income as well as furnishing of inaccurate particulars is basically wrong.*
>
> *Sir, it was a genuine mistake done by the Professional Accountant at the time of passing the Accounting Entries, so it is clear at our site that we had recorded the entries in our Books of Accounts.*

Where there is a genuine mistake, penalty for concealment is not leviable: *It has been held by the Madhya Pradesh High Court in the* cose *of* CIT vs. *Pitambarads Dulichond reported at 273 ITR 271 that were the mistake was made by the munim and there was no iota of evidence to suggest that it was done with the consent or knowledge of the partner, there was no reason to sustain the penalty for concealment.*

Where complete particulars given by the assessee, penalty for concealment is not leviable*: The Allahabad High Court in the case of CIT vs. Hori Om Ashok Kumar reported at 295 ITR 507 held that were the assesses had disclosed the particulars of sale of machinery and plot in the return of income but income from the same was not disclosed in the return of income, penalty for concealment could not be levied as the assessee had not concealed any facts, This decision of the Allahabad High Court is in consonance with the decision of the Andhra Pradesh High Court in the case of CIT vs. Sania Mirza(supra).*

Sir, looking to the above it is clear that our intention is not to hide any details and / or any particulars that please note.

[2] Sir, Your Honorable Sir, have made addition of difference in Tax Calculation of Short Term Capital Gain disclosed in our Income and Tax paid on above.

Sir, from the above para, itself speak that there is no any inaccurate particulars is there as well as no any hiding of income, as we had disclosed the same in our return of income and already tax paid on such income that please note. So, it clear that there is no any hiding of taxable income as well as furnishing of inaccurate particulars that please note.

Sir, from the above para it clear that there is no any intention of the assessee is not to avoid any tax and /or any particulars but it called a genuine mistake done by the Tax Practitioner at the time of Preparing the Return.

For the year under consideration there is two types of Short Term Capital Gain Tax and the Tax rate as well as calculation for both the Short Term Capital Gain was different and due to that reason the mistake was done by the Tax Practitioner at the time of calculating the Tax.

Sir, we explain the calculation for both the types of Short Term Capital Gain, below:

[1] Short Term Capital Gain on sale of Shares:

Sir, Short Term Capital Gain on Shares is taxable at special Tax Rate @15% flat and there is no any deduction is available. Short Term Capital Gain is totally excluded from the Gross Total Income.

[2] Short Term Capital Gain other than the sale of Shares

Sir, Short Term Capital Gain other than the sale of Shares is considered as the normal tax and was eligible for the deduction as claimed in the normal income.

Sir, the Short Term Capital Gain other than sale of Share is included in the income from other head than the tax is calculated i.e. the Short Term Capital Gain was taxed as a normal income and charged the tax as normal rate in which slab it is chargeable.

Sir, from the above explanation it is clear that there is a lots of chance for the mistake. In our case we would like to inform you that, at the time of preparing the Return of Income, entry of Short Term Capital Gain are done in the Short Term Capital Gain on Shares instead of Short Term Capital Gain other than Shares.

***No concealment for change in head of income**: It has been held by the ITAT Ahmedabad Bench in its order dated 31/01/2013 in the case of Crown Tradelinks Pvt. Ltd. vs. ACIT in ITA No. 2768 of 2012 that where the transaction of share trading had been disclosed and the assessee had shown income from the trading as long term capital gain*

as well as speculation income and the long term capital gain was ultimately assessed as speculation income, there was no concealment of income as particulars of the transaction had been disclosed and the transactions were not shorn transactions.

Sir, from the above explanations and information and Judgment from Honorable ITAT, Ahmedabad Bench, it is clear that the intention of the assessee is not to hide any income and any particulars but there is Data Entry mistake done by the Tax Practitioner only that please note.

Sir, looking to the above fact, it is clear that, the intention of the assessee is not to hide and / or avoid any particulars in his books accounts but is a genuine human mistake.

Sir, go through the section 271(1)(c), the section itself speak that if the assessee has furnished and / or provide any inaccurate particulars/details/formation and the assessing officer has find out the same, penalty u/s. 271(1)(c) levied.

Sir, in our case your honorable sir had not found out any inaccurate particulars but they found out only wrong accounting entries from our books, so it is clear that the assessee had not hide any details in his books of accounts.

Sir, basically section 271(1)(c) relied on the intention of the assessee. If the intention of the assessee is to hide the tax as well as income and got the benefit, your honorable sir has power to charge penalty for the act of the assessee.

Sir, in our case there is no intention of the assessee to hide the tax and income and he doesn't get any benefit. He recorded all the accounting entries in his books as well as paid the tax as he is liable for. But due to the human mistake i.e. at the time of passing the accounting entries by an accountant and calculation mistake of Tax Practitioner at the time of calculating the tax.

Sir, also there is a general clause in section 271(1)(c) is that, if the mistake done by the other parties and due to that reason the taxable income raised and on that income, penalty u/s. 271(1)(c) is charged. No penalty can be levied on such Income."

2. The above submission of the assessee has carefully been considered, but the same is not found to be convincing. The assessee has also submitted various judicial pronouncements in support of his above contentions, however, the same were found to be irrelevant to the facts of the case.

3. It was also mentioned in the penalty order that it was noticed that STCG of Rs.16,41,057/- has shown on sale of land. Such STCG was taxable at the rate of 30%. However, the assessee had worked out the tax at 15% instead of applicable rate of 30%. During the course of assessment proceedings, in response to various queries raised in this regard, the assessee submitted that the matter was noticed by him only during the course of assessment proceedings. As the assessee was not in a position to offer any explanation in support of his bogus claim, the STCG income was ordered to be taxed as per the rates stipulated.

4. Further, the assessee has shown STCG on sale of property, being land situated at Survey No.131 at Nikol. The said property was purchased in the year 2007, by the assessee, along with Shri Hareshbhai Talavia, having 50% share each. Subsequently, through banakhat dated 11.09.2008, 35% share of the above land was transferred to Shri Nileshbhai Panchani and Shri Hiteshbhai Polara for a consideration of Rs.10,23,600/- Out of the above transferred share of 35%, the assessee's share was 25% and his partner Shri Hareshbhai Talavia's share was 10%. (Finally, the assesee had, in his position, 25% share of the entire property). As per the banakhat deed, the assessee was to receive Rs.7,31,142/- as the value of his share of property transferred. As the transfer took place on 11.09,2008, such sale proceeds were required to be offered for taxation in the A.Y.2009-10, which he failed to do. Moreover, in the working of STCG for the year under consideration, the assessee has not reduced the cost of acquisition to that extent. Either the assessee should have offered the entire sale consideration in the year of

transfer or that much share should have been reduced from the cost of asset while working out STCG during the year under consideration. However, the assessee has failed to do so. As it was evident that the assessee has intentionally excluded the receipts on transfer of his 50% share in the property while filing the return of income for the relevant assessment year and has also not cared to reduce the cost of the property to that extent while working out the STCG in the year under consideration, i.e. A.Y. 2011-12, an amount of Rs.7,31,142/- was reduced from the cost of the property and an addition of Rs.7,31,142/- was made.

5. Further, on analysis of the facts of the case, it becomes clear that it is a case of furnishing of inaccurate particulars of income. As regards the tax rate to be adopted, the fact that the assessee has intentionally charged the tax at a lower rate, is evident from the fact that even in the revised return filed on 07.01.2012, the assessee had worked out the tax on STCG at 15% only. It cannot be treated as a case of ignorance of law as the assessee is well aware of the provisions of IT Act and has been filing his return of income since many years. Similarly, as regards the wrong claim of purchase cost while working out the STCG, the assessee had intentionally made the excessive claim of purchase cost, when it was in the knowledge of the assessee that he was making a wrong claim, which was not allowable as per the provisions of IT Act. Therefore, in this case, Explanation 1 below 271(1)(c) is clearly applicable. Assessee has furnished inaccurate particulars of income. It is also stated that the onus was on assessee to prove each entry in the return of income as the primary facts were in the knowledge of assessee."

4. Against the said order assessee preferred first statutory appeal before the learned CIT(A), but to no avail and learned CIT(A) confirmed the penalty.

5. We have gone through the relevant record and impugned order. Learned AR filed a judgment of Hon'ble Supreme Court in the case of **Price Waterhouse Coopers (P.) Ltd. vs. Commissioner of Income Tax, Kolkata-I [2012] 348 ITR 306 (SC),** head note of which read as under:-

> *"It has been held that Penalty for concealment of income – Bona fide mistake – Assessment Year 2000-01 – Assessee firm filed its return of income along with tax audit report – In its tax audit report it was indicated that provision towards payment of gratuity was not allowable but it failed to add provision for gratuity to its total income – Whether it was a bona fide and inadvertent error – Held, yes – Whether assessee was not guilty of either furnishing inaccurate particulars of attempting to conceal its income – Held, yes – Whether imposition of penalty was unjustified – Held, yes. The case was decided in favour of the assessee.*

6. Therefore, respectfully, following the above said judgment, we delete the penalty.

7. In the result, appeal filed by the assessee is allowed.

This Order pronounced in Open Court on	**29/05/2017**

Sd/-
एन.के. बिल्लैया
(लेखा सदस्य)
(N.K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-
महावीर प्रसाद
(न्यायिक सदस्य)
(MAHAVIR PRASAD)
JUDICIAL MEMBER

Ahmedabad; Dated 29/05/2017
Priti Yadav, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-VI, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
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