**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH: 'G' NEW DELHI**

**BEFORE SHRI G. D. AGRAWAL, PRESIDENT**
**AND**
**MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 5196/DEL/2016 ( A.Y 2007-08)**

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| Saurabh Arvind Desai<br>11, Rushil Bunglows, B/H Pride Hotel<br>Near AUDA Fire Station, Bodakdev<br>Ahmedabad AGMPD2427J<br>**(APPELLANT)** | Vs | ACIT<br>Circle-1<br>Noida<br><br>**(RESPONDENT)** |

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| **Appellant by** | **Sh. Arun Kishore, CA** |
| **Respondent by** | **Sh. S. R. Senapati, Sr. DR** |

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| **Date of Hearing** | **05.06.2018** |
| **Date of Pronouncement** | **07.06.2018** |

**ORDER**

**PER SUCHITRA KAMBLE, JM**

This appeal is filed by the assessee against the order dated 29/07/2016 passed by CIT(A)-1, Noida.

2. The grounds of appeal are as under:-

1. *"That the Order of Ld. CIT Appeals-1 in Appeal No. 152/2015-16/Noida (AY - 2007-08) DT. 12.07.2016 is illegal, unjust, opposed to facts and suffers from the vice of arbitrary acts.*

2. *(i) That on facts and circumstances of the case and in law the Ld. CIT appeals has erred in not dealing with ground No.2.*

*(ii) That the penalty order was the time barred order not served upon the appellant within the stipulated time.*

3. *(i)That without prejudice to the above contentions on the facts and*

*circumstances of the case and in law, the Ld. CIT Appeals erred in confirming the penalty of Rs. 10,50,000/- illegally levied.*

*(ii) That all facts of the case were transparently available on record. By revising the return and claiming long term capital gain on sale of ESOPS originally declared as short term capital gain, there is no concealment of income.*

4. *(i)That without prejudice to the above contentions on the facts and circumstances of the case and in law, the Ld. CIT Appeals has erred in ignoring the written submissions and case laws referred under identical circumstances.*

(ii) *That penalty u/s 271(l)(c) is not attracted on debatable issues.*

(iii) *That the appellant is not be penalized for acting on the advice of his consultant, for minimizing his tax liability.*

3. The assessee is employed with Freescale Semiconductor India Pvt. Ltd., Noida and earning salary. For assessment year 2007-08, the assessee filed his return on 31.7.2007 declaring income of Rs. 1,55,48,470/-, which included short term capital gain. Subsequently, the assessee filed a revised return electronically on 31.3.2009 wherein the assessee declared income of Rs. 1,52,92,030/-. In this revised return, the assessee treated the capital gain as long term capital gain, which was originally shown as short term capital gain. The case was selected under scrutiny. The Assessing Officer noticed that the assessee has income from capital gain on sale of shares under Employees Stock Option Plan (ESOP). The Assessing Officer held that the date of purchase of these shares would be the date when the employee exercised his option and consequently, the gain would be short-term capital gain. The AO accordingly assessed capital gain of Rs.98,49,788/- on sale of ESOP/RSU under the head 'Short Term Capital Gain' as against long term capital gain shown by the assessee.

4. Penalty proceedings u/s 271(1)(c) of the I.T. Act, 1961 was also initiated by issuing notice u/s 274 read with Section 271(1)(c). In the meantime

against the assessment order, the assessee preferred an appeal before the CIT(A). The CIT(A) vide order dated 29/11/2010 dismissed the appeal of the assessee.

5. The Assessing Officer while passing penalty order u/s 271(1)(c) held that the CIT(A) in quantum confirmed that the profit on sale of ESOP shares comes to Rs.97,17,279/- which is assessable as Short Term Capital Gain instead of Long Term Capital Gain. The assessee has already shown Short Term Capital Gain of Rs.10,56,000/- and therefore the Assessing Officer held that the assessee furnished inaccurate particulars with regard to Short Term Capital Gain of Rs.86,61,279/. The Assessing Officer further observed that the assessee made a false claim of Short Term Capital Gain of Rs. 86,61,279/- as long term capital gain in the ITR with a view to pay less tax. There were other additions i.e. Short Term Capital Gain at Rs.5,376/- and additions as unexplained money u/s 69A at Rs. 11,035/-. For these additions also, the Assessing Officer imposed penalty.

6. Being aggrieved by the Penalty Order, the assessee filed the appeal before the CIT(A). The CIT(A) dismissed the appeal of the assessee.

7. The Ld. AR submitted that the Assessing Officer as well as the CIT(A) was not correct in imposing penalty. The Ld. AR relied upon the decision of the Hon'ble Supreme Court in case of CIT vs. Reliance Petro Products Pvt. Ltd 322 ITR 158 (S.C). The Ld. AR submitted that all the documents relating to the additions were before the Assessing Officer during the regular assessment proceedings. In fact, while imposing the penalty there is a recorded finding by the Assessing Officer that the assessee's claim to treat part of the capital gain as long term capital gain is a matter of opinion. Thus, the Assessing Officer himself admits that there is a difference of opinion and there is no case for furnishing of inaccurate particulars. As regards additions of Rs.5,376/- &

8,276/- & 11,035/-, the Ld. AR submitted that the assessee is a regular tax payer and inadvertently the same was escaped while filing the returns. But the assessee has voluntarily surrendered the said amount before the Revenue authorities. The Ld. AR further submitted that this was due to the assessee's pre-occupation in Noida Job. Therefore, the assessee should have not been penalized.

8. The Ld. DR relied upon the penalty order and CIT(A) order. The Ld. DR further submitted that the assessee has not contested the addition before the Tribunal.

9. We have heard both the parties and perused the material available on record. The Revenue has not made out any case that the assessee filed inaccurate particulars. In fact all the particulars were before the Assessing Officer during the assessment proceedings. The Hon'ble Apex Court in case of Reliance Petroproducts Pvt. Ltd. (Supra) held as under:

*"18. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its Return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under Section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the Return cannot amount to the inaccurate particulars.*

*19. It was tried to be suggested that Section 14A of the Act specifically excluded the deductions in respect of the expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. It was further pointed out that the dividends from the shares did not form the part of the total income. It was, therefore, reiterated before us that the Assessing Officer had correctly reached the conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the*

*taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income.*

*20. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the Legislature."*

Thus, the Apex Court decision in case of Reliance Petro Product (supra) is applicable in assessee's case. Regarding the other two additions, the assessee explained his genuine mistake and has surrendered the said amount to the Revenue Authorities and offered to tax. Therefore, the same cannot be held as act of furnishing inaccurate particulars on part of the assessee. Thus, the order of CIT(A) is set aside and appeal of the assessee is allowed.

9. In result, the appeal of the assessee is allowed.

**Order pronounced in the Open Court on 07th June, 2018**.

Sd/- Sd/-

**(G. D. AGRAWAL)** **(SUCHITRA KAMBLE)**
**PRESIDENT** **JUDICIAL MEMBER**

Dated: 07/06/2018
*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT

4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

| | | Date | |
|---|---|---|---|
| 1. | Draft dictated on | 05/06/2018 | PS |
| 2. | Draft placed before author | 05/06/2018 | PS |
| 3. | Draft proposed & placed before the second member | .2018 | JM/AM |
| 4. | Draft discussed/approved by Second Member. | | JM/AM |
| 5. | Approved Draft comes to the Sr.PS/PS | 7.06.2018 | PS/PS |
| 6. | Kept for pronouncement on | | PS |
| 7. | File sent to the Bench Clerk | 7 .06.2018 | PS |
| 8. | Date on which file goes to the AR | | |
| 9. | Date on which file goes to the Head Clerk. | | |
| 10. | Date of dispatch of Order. | | |