

आयकर अपीलिय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH, CHENNAI
श्री महावीर सिंह, उपाध्यक्ष एवं श्री जी.मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE-PRESIDENT
AND SHRI G.MANJUNATHA, ACCOUNTANT MEMBER

आयकरअपीलसं./I.T.A.No.222/Chny/2018

(निर्धारणवर्ष / Assessment Year: 2007-08)

M/s. Advent Computer Services Ltd., C/o.M/s. Anil Nair Associates Casa Blanca, 1 st floor,11,Casa Major Road. Egmore, Chennai-600 008.	Vs	The Assistant Commissioner of Income Tax, Company Ward-1(1), Chennai-600 034.
PAN:AACEA 0326L		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Mr. S.Sridhar,Advocate
प्रत्यर्थीकीओरसे/Respondent by	:	Mr. AR.V.Sreenivasan , Addl.CIT

सुनवाईकीतारीख/Date of hearing	:	27.10.2020
घोषणाकीतारीख /Date of Pronouncement	:	10 .11.2020

आदेश / O R D E R

PER G.MANJUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals)-4, Chennai dated 28.11.2017 and pertains to assessment year 2007-08.

2. The assessee has raised the following grounds of appeal:-

"1. The Commissioner of Income tax (Appeals) erred in confirming the penalty levied u/s.271(1)(c) of the Act by the Assessing Officer.

2. The Commissioner of Income tax (Appeals) ought to have appreciated that omission of inclusion of capital gain on

transfer of shares that too arising out of a book adjustment was purely inadvertent and accidental and not deliberate.

3. The Commissioner of Income tax (Appeals) ought to have appreciated that appellant had no intention and no incentive to conceal the capital gain on transfer of shares inasmuch as the appellant had huge carried forward loss and consequently there was no tax impact.

4. The Commissioner of Income tax (Appeals) ought to have considered from the behaviour and conduct of the appellant during and after assessment proceedings that omission was purely inadvertent and not deliberate or by neglect.

5. The statutory process for levy of penalty has not been satisfied and that the notice for levy of penalty is void ab initio.

6. The levy of penalty ought to be cancelled on the ground that notice dated 30.11.2009 seeking show cause u/s.274 r.w.s 271 of the Act is fundamentally defective.”

3. Brief facts of the case are that the assessee has filed its return of income on 28.10.2007 declaring total loss at Rs.8,12,979/-. During the course of assessment proceedings, the Assessing Officer noticed that assessee's investments have come down from 25 lakhs as on 31.03.2006 to Nil as on 31.03.2007, but the assessee has not admitted any capital gains on transfer of investments, therefore called upon the assessee to explain and file necessary details in respect of reduction in value of investments. In response, the assessee stated that it has transferred its

investments to Mr. Arif B.Rehman, Founder / Director of M/s. iTheories Business Factory India Pvt. Ltd., to settle its outstanding liability of Rs.50,94,386/- in pursuant to the order passed by the Hon'ble High Court of Madras. The Assessing Officer by taking note of the above facts was of the opinion that the assessee ought to have computed capital gain from transfer of shares, and hence, computed long term capital gain of Rs.23,91,261/- after reducing indexed cost of acquisition of sale of Rs.27,03,125/-. Subsequently, penalty proceedings u/s.271(1)(c) of the Act was initiated and called upon the assessee to explain as to why penalty shall not be levied for concealment of income. In response, the assessee contended that it has neither concealed particulars of income nor furnished inaccurate particulars of income, but omitted to include long term capital gain in the return of income for the year by inadvertent mistake and hence the same cannot be considered as concealment of income to levy penalty u/s. 271(1)(c) of the Act. The Assessing Officer was not convinced with the explanation of the assessee and according to him, the assessee has concealed the particulars of income in respect of long term capital gain derived from transfer of shares, even though the said transactions generate

long term capital gain . The Assessing Officer further referring to the decision of the Hon'ble Supreme Court in the case of UOI Vs. Dharmendra Textiles (2008) (306 ITR 277) observed that penalty u/s.271(1)(c) is a civil liability and wilful concealment is not an essential ingredient for attracting such liability, accordingly rejected the explanation furnished by the assessee and levied penalty of Rs.5,36,600/- which is at 100% of the tax sought to be evaded.

4. Being aggrieved by the penalty order, the assessee preferred an appeal before the learned CIT(A). Before the learned CIT(A), the assessee reiterated its arguments taken before the Assessing Officer along with certain judicial precedents, including the decision of Hon'ble Supreme Court in the case of M/s. Price Waterhouse Coopers Pvt. Ltd. vs. CIT (2012) 348 ITR 306. The learned CIT(A), after considering the relevant facts and also by following certain judicial precedents, including the decision of the Hon'ble Supreme Court in the case of JCIT Vs. Saheli Leasing & Industries Ltd. in Civil Appeal No.4278 of 2010 arising out of SLP(C) No. 5241 of 2007 held that the contention of the assessee that it has inadvertently missed out to reflect the amount of capital gains in

the relevant return of income is not found tenable . Further, there has been series of events which ultimately resulted in transfer of the impugned shares to Mr. Arif B.Rehman and further the same has resulted into long term capital gain. Although the assessee is aware of transfer of shares, but failed to report the said transaction in the return of income filed for the relevant year and hence the arguments of the assessee that it had inadvertently omitted to include the long term capital gain derived from transfer of shares cannot be accepted. The learned CIT(A) has also negated another arguments taken by the assessee that when there is no demand of tax consequent to determination of capital gains after adjustment of carried forward loss, penalty u/s.271(1)(c) of the Act cannot be imposed by holding that even if the returned income is in loss, the penalty for concealment of income can be levied and this was supported by the decision of the Hon'ble Supreme Court in the case of JCIT Vs. Saheli Leasing & Industries Ltd. (supra). The learned CIT(A) also distinguished the decision of the Hon'ble Supreme Court in the case of M/s. Price Waterhouse Coopers Pvt. Ltd. vs. CIT (supra) and held that facts of those case are entirely different, where the assessee has reported the payment of gratuity in the tax

audit report but omitted to add back in the statement of total income. Under those facts, the Hon'ble Court came to a conclusion that because of human error on the part of the assessee, the relevant disallowances was not added back to the total income. In this case, there has been series of events including order of the Hon'ble High Court before the shares could be transferred to another person and hence arguments of the assessee that there is no element of deliberate concealment of income cannot be accepted and accordingly confirmed the penalty levied by the Assessing Officer u/s.271(1)(c) of the Act. Aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

5. Learned A.R for the assessee submitted that the learned CIT(A) ought to have appreciated that omission of inclusion of capital gain on transfer of shares, that too arising out of book adjustment was purely inadvertent and accidental and the same cannot be considered as deliberate concealment of particulars of income . The learned A.R further submitted that the assessee never had an intention and no incentive to conceal the capital gains inasmuch as the assessee had huge carried forward loss and consequently

there was no tax impact, even if the capital gain is reported on transfer of shares. The learned A.R further submitted that the learned CIT(A) ought to have considered the behavior and conduct of the assessee during and after the assessment proceedings that omission was purely inadvertent and not deliberate or by neglect.

6. The learned DR, on the other hand, supporting the order of the learned CIT(A) submitted that *mens rea* is not essential for civil liability and further penalty proceedings u/s.271(1)(c) of the Act is civil liability and the element of wilful concealment is not required to be looked into for levy of penalty. He further argued that what is to be seen is whether there is concealment of income which resulted in enhancement of returned income or reduction of returned loss. Once there is an element of increase in income or reduction in loss, as per Explanation 4(a), penalty u/s.271(1)(c) of the Act can be levied.

7. We have heard both the parties, perused the material available on record along with case laws cited by both parties and gone through the orders of authorities below. It is an admitted fact that assessee has not reported capital gain derived from transfer of

equity shares in pursuant to the direction of the Hon'ble High Court of Madras for amalgamation of M/s. i Theories Business Factory India Pvt. Ltd., with the assessee company, even though the said transactions resulted into long term capital gain of Rs.23,91,261/-. The contention of the assessee is that because of book adjustment there being no monetary consideration for transfer of shares, and hence, it was inadvertently omitted to include long term capital gain derived from transfer of shares in the return of income filed for relevant year and such a mistake is purely human error without any deliberate attempt to evade payment of taxes which is evident from the fact that even after computation of long term capital gain, the assessed income for the year was Nil. We have gone through the arguments of the assessee in light of the facts brought out by the authorities including learned CIT(A) and found that the assessee has transferred its investments in shares in pursuant to the directions of the Hon'ble High Court of Madras for amalgamation of M/s. iTheories Business Factory India Pvt. Ltd., with the assessee company to settle the outstanding dues payable to Mr. Arif B.Rehman for Rs.50,94,386/-. The said transaction is a book adjustment without there being any monetary

consideration for transfer of equity shares. From the above, one can infer that explanation furnished by the assessee that by inadvertent mistake and human error, the capital gain derived from transfer of equity shares has not been reported in the return of income filed for the relevant year appears to be bonafide. Had it been the case of the Assessing Officer that the assessee has received consideration for transfer of equity shares and yet not reported capital gain from transfer of shares in the return of income, then obviously explanation furnished by the assessee cannot be held to be bonafide. It is quite possible when a transaction is settled by book adjustment that too on the direction of Hon'ble High Court, there is every possibility to have an understanding that particular transaction cannot lead to tax. Moreover, in the instant case, even after computation of long term capital gain from transfer of equity shares the assessed income for the impugned year results into net loss. Thus, from the above, we are of the considered view that there is no deliberate attempt from the assessee to conceal particulars of income or evade payment of taxes. Therefore, the explanation furnished by the assessee that it was by inadvertent mistake omitted to include long term capital gain derived from

transfer of shares in the return of income is bonafide and for this liability cannot be fastened u/s.271(1)(c) of the Act. The learned CIT(A) without appreciating these facts simply confirmed the penalty levied by the Assessing Officer u/s.271(1)(c) of the Act. Hence, we reverse the findings of the learned CIT(A) and direct the Assessing Officer to delete the penalty levied u/s.271(1)(c) of the Act.

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

Order pronounced in the open court on 10th November, 2020

Sd/-
(महावीरसिंह)
(Mahavir Singh)
उपाध्यक्ष/ Vice-President

Sd/-
(जी.मंजुनाथ)
(G. Manjunatha)
लेखा सदस्य / Accountant Member

चेन्नई/Chennai,
दिनांक/Dated 10th November, 2020
DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Appellant
2. Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.