

आयकर अपीलीय अधिकरण, मुंबई ई, न्यायपीठ, मुंबई

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES 'E' MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं

श्री आर.सी. शर्मा, लेखा सदस्य, के समक्ष

**BEFORE SHRI JOGINDER SINGH, JUDICIAL MEMBER AND
SHRI R.C.SHARMA, ACCOUNTANT MEMBER**

आयकर अपील सं. / ITA No.8223/MUM/2010

निर्धारण वर्ष /Assessment Year: 2004-05

M/s Schrader Duncan Limited, LBS Marg, Mulund (W), Mumbai-400080	Vs.	Additional Commissioner Of Income-tax (10)-3, Mumbai
(निर्धारित /Assessee)		(राजस्व /Revenue)
P.A. NUMBER : AAACS0769H		

निर्धारित की ओर से / Assessee by:	Shri Haresh G. Buch
राजस्व की ओर से / Revenue by	Shri Neil Philip

सुनवाई की तारीख / Date of Hearing :	17/12/2014
घोषणा की तारीख / Date of Pronouncement :	01/01/2015

ORDER

PER JOGINDER SINGH, JM:

The assessee is aggrieved by the impugned order dated 15/09/2010 of the ld. First Appellate Authority, Mumbai. The assessee has raised the following grounds:

GROUND I:

- I. *The Commissioner of Income Tax (Appeals)-22 ("the CIT(A)") erred in upholding the action of the Asst. Commissioner of Income tax-10(3) ("the AO") in levying penalty on the*

disallowance of Long term Capital Loss on repurchase of US 64 units of Unit Trust of India, without giving adequate opportunity to the Appellant, on the alleged ground that no satisfactory evidence was furnished for the same.

II. *The Appellant prays that it be held that no adequate opportunity had been given to it and hence the order passed u/s. 271 (1) (c) of the Act be held as ab-initio and/or otherwise void and bad-in-Law.*

WITHOUT PREJUDICE TO THE ABOVE

GROUND II:

1. *On the facts and circumstances of the case and in law, the CIT(A) erred in upholding the action of the AO in levying penalty of Rs. 66,36,077/- u/s section 271(1)(c) of the Act on the alleged ground that there was concealment of income and that the Appellant had furnished inaccurate details of income with respect to the long term capital loss claimed by the Appellant.*

2. *The Appellant prays that a mere difference in opinion would not amount to raising a question on the bonafide claim made by the Appellant with respect to the Long term capital Loss.*

3. *The Appellant prays that the said penalty levied by the AO and confirmed by the CIT(A) be deleted.*

2. At the time of hearing, ld. Counsel for the assessee, Shri Haresh G. Buch, contended that substantial question of law has been admitted by the Hon'ble High Court, therefore, no penalty is imposable u/s 271(1)(c) of the Act. Reliance was placed upon the decision from Hon'ble jurisdictional High Court in the case of CIT vs M/s Nayan Builders & Developers (ITA No.415/2012) order dated 8th July, 2014. Our attention was invited to the case of the assessee itself (ITA No.602/2012) order dated 19th September,

2014 admitting the substantial question of law. The ld. DR, Shri Neil Philip has neither controverted the assertions of the assessee nor brought on record any contrary material on record.

2.1. We have considered the rival submissions and perused the material available on record. Before coming to any conclusion, we are reproducing hereunder the relevant portion from the conclusion arrived at by the ld. Commissioner of Income tax (Appeals) for ready reference:

“2.3 I have considered the facts of the case, perused the penalty order and submissions made by the appellant and also discussed the case with the AIR of the appellant. A.O. in the penalty order has mentioned that in response to notice dated 08.03.2010 fixing the case for hearing on 17.03.2010 neither anybody attended nor any submission have been filed. The appellant submits that the said notice was received by it on 23.03.2010. However, before me the appellant failed to furnish any evidence in support thereof. The order has been passed on 29.03.2010 and before that there was no communication from the appellant and hence in my opinion there is no discrepancy in the findings given by A.O. The appellant has relied on the decision of Hon'ble [TAT in the case of Mahesh Lunch Home (supra). However, on perusal of this judgment it is noted that the issue there relates to non recording of satisfaction for initiating penalty proceedings which is not the issue in the present case. Accordingly, the ratio of the judgment doesn't apply in this case. Thus, this ground of appeal is dismissed.

3.1 Ground of appeal No.2 is against the levying penalty of Rs.66,36,077/- u/s 271(1)(c) of the I.T.Act. During the course of assessment proceedings A.O. made the addition of Rs.6,34,72,767/- on account of disallowance of long term capital loss, During the course of assessment proceedings

A.O. noted that assessee has claimed long term capital loss of Rs.6,34,72,767/- on account of repurchase of units of mutual funds of Unit Trust of India. A.O. observed the details and noted that the units valued at Rs.7,14,42,394/- were purchased during A.Yrs. 1992-1993 to 2001-2002 and have been sold by way of repurchase by UTI and after repurchase the same were invested in tax free bonds. A.O. referred to Sub section 6 of section 45 and noted that non obstante clause which mentions that the difference between the repurchase price of the units and capital value of units shall be deemed to be capital gains arising to the assessee in the previous year in which such a repurchase takes place and will be taxed accordingly. In view of these facts A.O. disallowed the claim of long term capital loss of Rs.6,34,72,767/- and allowed short term capital loss at Rs.97,17,302/-. On appeal, the Ld.CIT(A) made enhancement of Rs.97, 17,302/- which had been allowed by the A.O. as short term capital loss and was allowed to be carried forward. Accordingly. the A.O. levied minimum penalty of Rs.66,36.077/- treating that the assessee has deliberately furnished inaccurate particulars of its income and sought to evade income to the extent of Rs.6,34,72.767/-.

3.2 During the course of appellate proceedings the appellant has furnished written submissions wherein it has been submitted that capital gains on the conversion of subject US 64 units into US 64 tax free bonds should be computed under normal provisions u/s45(I) and not u/s.4S(6) of the I.T.Act. Appellant further submitted that US 64 units are capital asset to the appellant within the meaning of section 2(14) of the Act which excludes from the ambit thereof six types of assets. Appellant also relied on the following decisions:

(i) Addl.CIT Vs. Trustees of H.E.H. The Nizams Second Supplementary Family Trust, 102 ITR 248.

(ii) *Kirloskar Asia Ltd. Vs. CIT, 117 ITR 82 (Kar.)*

(iii) *Anarkali Sarabhai, 224 ITR 422.*

Appellant further submits that statement showing the calculation of the long term capital loss arising from the conversion of units into bonds was attached with the return of income and same was also provided 'during assessment proceedings, therefore, there was no concealment of any particulars or furnishing of any inaccurate particulars, justifying invoking of the penal provisions. Appellant also submitted that actual state of affairs presented to the department does not contain any error and no discrepancy is found in any of the material facts, hence it is established beyond that proceedings u/s. 271 (1)(c) for alleged default of concealment of income or furnishing inaccurate particulars thereof is unwarranted and unjustified and does not stand a moment's scrutiny. Appellant further submitted that it is a settled law that before penalty could be levied, the entirety of circumstances must reasonably point the A.O. to conclusion that the disputed amount represented income and that it had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars. Appellant also submitted that view taken by the A.O. which formed the basis of levying the penalty was in any case not accepted by the CIT(A)-X in quantum appeal, hence even in such case there was no question of levying any penalty. In this respect appellant relied on the following decisions:

- i. CIT Vs. Mithalal Ramachandra, 82 ITR 470*
- ii. CIT Vs. Indo American Electricals Ltd. 45 CTR 146*
- iii. Hindustan Steel Ltd. Vs. State of Orissa, 83 ITR 26*
- iv. Yasmin Properties (P) Ltd. 46 ITD 331*
- v. D.M. Dahanukar Vs. CIT, 65 ITR 280*
- vi. ITO Vs. H.A. Sodhan (Greater HUF) 17 ITD 479 (Ahd.)*
- vii. CIT Vs. Indian Metals & Ferro Alloys Ltd. 211 ITR 35 (Ori.)*
- viii. Nuchem Ltd. Vs. DCIT. 47 ITD 487 (Del.)*

ix. *Associated Cement Companies Ltd. Vs. DCIT, 40 ITD 70 (80m.)*

In view of these submissions, appellant prayed that penalty levied u/s.271 (I)(c) amounting to Rs.66,36,077/- may be dropped.

3.3 I have considered the facts of the case, perused the penalty order and submissions made by the appellant and also discussed the case with the A/R of the appellant. The A.O. made disallowance of long term capital loss on sale of units of UTI but allowed the short term capital loss (difference between purchase price & sale price of units) to be carried forward. While considering the issue during first appellate proceedings, the Ld.CIT(A) in Para 1.13 of his order No.CIT(A)-XIIT/275/2006-07 dated 28.11.2008 observed as under:

"1.13 However, in the course of appellate proceedings, it was noticed that the capital gains accruing on US 64 were specifically exempted from taxation u/s. 10(33). Therefore, vide order sheet entry dated 18.11.2008, the assessee was specifically asked to show cause as to why the capital loss should not also be disallowed on transfer of US 64. In other words, it would lead to an enhancement as envisaged u/s 251(2). In this regard the assessee has submitted as follows:

(a) As per section 10 only positive income is exempt and not loss.

(b) Capital loss is not included in total income and is carried forward.

(c) Section 10(35) deals with positive income and therefore, section 10(33) is also confined to positive income.

(d) That the intention of section 10(33) was to give relief to investors. Its intention was not to deprive.

1.14 I have examined the provisions of law in this case Section 10 begins with the clause that in computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included. Now, clause (33) specifically refers to income arising from transfer of capital assets, being units of US 64.

Thus, section 10 is an exemption clause and not a deduction. Any income of the type defined in clause (1) to (36) of that section will not be included in the total income. Now it is a well accepted proposition that under the Income Tax Act, the word "income" includes "loss". In other words, any income/loss on transfer of US 64 assets would be exempted from being included in the computation of total income. In the circumstances, I fail to understand how the assessee can argue that section 10(33) is confined to only positive income and not losses. In the circumstances, the assessee will not be entitled to claim of capital loss on transfer of us 64. The A.O. is directed to exclude the entire loss from the computation of total income. This would result in an enhancement Rs.97,17,302/-. For statistical purposes this ground of appeal is treated as dismissed.

From the above it may be noted that an amount of Rs.97,17,302/- have been disallowed by the CIT(A) and accordingly the penalty has been computed by the A.O. including the amount disallowed by the A.O. Before me it was stated that no particulars were concealed and CIT(A) has confirmed the disallowance following the enhancement procedure. However, I do not agree with the contention of the appellant since CIT(A) has been given specific power to make enhancement which is coterminus to the jurisdiction appellant further submits that the details were attached with the return of income. However, this is not correct since the appellant did not suo moto offer the disallowance of u/s.10(33) in its return of income and hence the claim or loss was not bonafide. The appellant has further stated that the A.O. has nowhere concluded the disputed amount were consciously concealed or had deliberately furnished inaccurate particulars. This argument of the appellant is unfounded in view of the judgment of Hon'ble Supreme Court in the case of Union of India Vs. Dharmendra Textile Processors (2008) 306 ITR 277, where in order dated 29.9.2008 it was held that the object behind enacting section 271(1)(c) read with explanation indicates that the said section has been enacted to provide a remedy for loss of revenue. Penalty u/s. 271(1)(c) is a "civil liability". Willful

concealment is not essential ingredient for attracting a civil liability as in the matter of prosecution u/s. 276C. Thus, it may be noted that the appellant has failed to offer an explanation before the A.O. by way of not responding to penalty notice u/s.271(1)(c). Even during the course of appellate proceedings it failed to prove that its action to claim loss was bonafide. In view of these facts and legal position. I am of the considered opinion that the penalty u/s.271(1)(c) has rightly been imposed by the A.O. which is upheld.

4 Ground of appeal No. III is general in nature, hence not adjudicated upon.

5. In the result, appeal is dismissed.”

2.2. Without going into much deliberation and merits of the case, now question arises since the substantial question of law “*whether on the facts in the circumstances of the case and in law, the Tribunal was justified in holding that the appellant was not entitled to claim the loss of Rs.6.34 crore arising on conversion of UTI US 64 units in to 6.75% Tax Free Bonds of UTI?*” has been admitted by the Hon’ble jurisdictional High Court, vide order dated 19th September, 2014, now question arises whether penalty u/s 271(1)(c) of the Act survives when the addition has become debatable? We note that the Hon’ble jurisdictional High court vide order dated 08/07/2014 in the case of CIT vs M/s Nayan Builders & Developers (ITA No.415/2012) held that no penalty is imposable u/s 271(1)(c) of the Act. Likewise, the Tribunal, in the case of M/s Nayan Builders & Developers Pvt. Ltd. (ITA No.2379/Mum/2009) order dated 18th March 2011, deleted the penalty. In another case Advaita Estate Development (P.) Ltd. vs ITO (2013) 40

Taxman.com 142 (Mumbai-Trib.) vide order dated 27/08/2013 deleted the penalty. In view of these facts, when the Hon'ble jurisdictional High Court has admitted substantial question of law on the addition, it becomes apparent that the addition so made has become debatable. The penalty was imposed on the basis of addition so made, therefore, when the addition on the basis of which the penalty was imposed has become doubtful/debatable, therefore, penalty imposed u/s 271(1)(c) of the Act cannot survive. Respectfully following the Hon'ble jurisdictional High Court, the appeal of the assessee is allowed. However, it is made clear that if at any stage, the order of the Tribunal on quantum addition is upheld by the Hon'ble High Court, the Department is free to proceed in accordance with law on penalty proceedings.

Finally, appeal of the assessee is allowed.

This order was pronounced in the open court in the presence of ld. Representatives from both sides at the conclusion of the hearing on 17/12/2014.

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Sd/-
(JOGINDER SINGH)
JUDICIAL MEMBER

MUMBAI, DATED - 01/01/2015

Shekhar, P.S./नि.स.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai