IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

श्री संजय अरोड़ा, लेखा सदस्य एवं

श्री विजय पाल राव, न्यायिक सदस्य के समक्ष

BEFORE SHRI SANJAY ARORA, ACCOUNTANT MEMBER AND SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA NO. 2661/Mum/2013
Assessment year: - 2009-10

Assistant Commissioner of Income Tax, Matru Mandir, Tardeo Road, Mumbai – 400 007.	Vs.`	Smt. Cecilia Haresh Chaganlal 5th Floor, Beach View, Chawpatty Sea Face, Mumbai – 400 007.
		PAN: AAFPJ1044E
Assessee		Respondent

Revenue By	Shri Premangal
Assessee By	Shri Chetan Karia

Date of hearing	9-10-2014
Date of pronouncement	5.11.2014

ORDER

Per Vijay Pal Rao, JM

This appeal by the revenue is directed against the order dated 30.1.2013 of CIT(A) arising from the penalty order passed u/s 271(1)(c) of the Income Tax Act for the A.Y. 2009-10. The revenue has raised following ground in this appeal:-

" Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty levied u/s 271(1)(c) of Rs. 66,19,900/- for furnishing inaccurate particulars of income without appreciating the fact that filing of revised return was intentional to evade tax as clearly evidence by the payment of self assessment tax amounting to Rs. 74.12 lacs during assessment proceedings. "

2. Brief facts emerging from record are that the assessee is an individual and a senior citizen of 80 years age. For the year under consideration, the assessee filed

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the return of income on 31.07.2009 wherein long term capital gains of Rs. 5,84,27,373/- on sale of paintings, were offered to tax at the normal tax rate of 20% applicable to the long term capital gains under the Act. Thereafter, the assessee filed revised return on 08-09-2009 wherein the aforesaid long term capital gains are offered to tax at the concessional tax rate of 10% under proviso to sub section (1) of section 112 of the Act. In order to scrutinize the return filed by the assessee notice u/s. 143(2) of the Act was issued on 05-09-2010, followed by the notice u/s. 142 (1) of the Act dated 24-05-2011. During the pendency of scrutiny proceedings, assessee filed the second revised return on 11- 07 -2011, in which, the aforesaid long term capital gains were offered to tax back @ 20% tax rate as in the original return and the taxes due on the impugned capital gains were paid along with interest. While completing the assessment, the AO. in his assessment order noted that the second revised return filed on 11.7.2011 is beyond the time allowed under the Act and therefore, no cognizance can be taken thereof. Accordingly the AO considered the first revised return filed on 08-09-2009 for the purpose of assessment. Secondly the A.O. observed that by offering the impugned long term capital gains to tax @ 10% tax rate, assessee has given it the colour of long term capital gains on sale of Bonds, debentures, listed shares etc., noted in the proviso to sub section (1) of section 112 of the Act. In the opinion of the A.O., assessee has made a wrong claim in the revised return dated 08-09-2009 by offering the impugned capital gains at 10% tax rate instead of 20% tax rate and thus, furnished inaccurate particulars of her income in respect of the sale of paintings. Accordingly, the A.O. initiated penalty proceedings u/s. 271 (1)(c) of the Act. Before the A.O., assessee submitted that owing to the advice given by her Auditor she was under the bonafide impression that the impugned capital gains are taxable at the concessional rate of 10%. It is also submitted to the AO that on being advised by the another Auditor at a subsequent date that the concessional rate does not apply to the sale of paintings but only to the listed

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shares and securities, the assessee once again filed the revised return dated 11/7/2011 offering the impugned capital gains to tax back at the 20% tax rate. However the A.O. was of the opinion that the second revised return was not only out of time but it was also furnished on account of the notice issued u/s. 143(2) of the Act and not otherwise. Relying upon the decision of Hon'ble Delhi High Court in the case of CIT Vs. Zoom Communications Pvt. Ltd. (191 Taxmann 179), the A.O held that the assessee made a deliberate effort to furnish inaccurate particulars of her income with a malafide intention to get the benefit of lower tax rate. Accordingly, the Assessing Officer levied the impugned penalty.

3. The assessee challenged the action of Assessing Officer before CIT(A) and contended that the revised returns were filed by the assessee voluntarily and taxes due there on were paid. It was further submitted that these returns were filed through one Shri M.B. Thakkar, Chartered Accountant, looking after the income tax matters of the assessee for the past 20 years. Therefore, the concessional rate of tax applied to the capital gain was computed as per the advice of the Chartered Accountant without claiming the benefit of cost index. Thus it was pleaded before the CIT(A) that the act of filing the revised returns and claiming concessional tax rate on capital gain arising from sale of paintings was due to bonafide belief which was later on corrected without any show cause notice given by the department. The assessee contended that the assessee did not furnish any inaccurate particulars of her income and there was only a wrong claim of a lower tax rate thereon due to the bonafide belief, hence the penalty u/s 271(1)(c) cannot be levied. The CIT(A) accepted the explanation of the assessee and was of the view that all the facts related to the impugned capital gain were fully disclosed by the assessee in the returns filed by her. The CIT(A) held that in the given facts and circumstances, the assessee cannot be held guilty of furnishing inaccurate particulars of her income and further the explanation

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furnished by her in this regard is found to be bonafide. Accordingly the penalty levied u/s 271(1)(c) was cancelled by the CIT(A).

4. Before us, the Ld. DR has submitted that in the original return, the assessee has offered the tax at the rate of 20% on capital gain arising from sale of paintings but subsequently the assessee filed revised return on 8.09.2009 in which the assessee had offered tax on Long Term Capital Gain at a concessional rate of 10%. By doing so, the assessee has wrongly given this Long Term Capital Gain arising from sale of paintings, the colour of long term capital gains on sale of Bonds, debentures, listed shares etc., as per section 112 of the Act. Thus the Ld. DR has submitted that this is not a case of some bonafide mistake but it was claimed by the assessee to offer Long Term Capital Gain under a different category which is absolutely incorrect and false. Therefore, the assessee had made a false claim by filing inaccurate particulars of her income treating the sale of paintings wrongly under the purview of provisions of section 112 of the Income Tax Act and thereby paying less tax at the rate of 10% instead of 20%. The assessee received the refund on the revised return of income by claiming concessional rate of tax. Thereafter, the Assessing Officer issued a notice u/s 143(2) on 15.09.2010. Upon which, the assessee again re-revised her return and offered right rate of taxation as done in the original return. The Ld. DR has submitted that the second revised return is not voluntary but only after the notice u/s 143(2) was issued by the Assessing Officer. The above action and conduct of the assessee proves that the assessee was very much aware of the correct tax of rate to be levied on the said capital gain which was applied in the original return of tax then the same was lowered in the revised return and again it was corrected in the second revised return. Submitting the claim which is incorrect and impermissible in law

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amounts to furnishing inaccurate particulars of income. He has relied upon the order of Assessing Officer passed u/s 271(1)(c).

5. On the other hand, the Ld. Authorized Representative of the assessee submitted that there is no concealment or furnishing inaccurate particulars of income when the assessee has maintained the same income in all the returns of income. The only difference in the revised return is on account of fact that in the original return of income, the assessee did not claim index cost and, therefore, as per the advice of the Chartered Accountant, the assessee claimed the concessional tax at the rate of 10% on Long Term Capital Gain arising from sale of paintings. The Ld. Authorized Representative has raised a legal objection against the levy of penalty on the basis of the revised return and submitted that no penalty can be levied u/s 271(1)(c) on the basis of the revised return but only the original return has to be considered for the purpose of section 271(1)(c). He has submitted that the assessee has correctly offered the tax in the original return and, therefore, there is no question of levy of penalty based on the revised return wherein the assessee claimed concessional rate of tax at 10% instead of 20% due to the fact that the assessee did not claim index cost while computing Long Term Capital Gain. In support of his contention he has relied upon the decision of Hon'ble Supreme Court in the case of **CIT Vs. Onkar Saran & Sons (1992) 195 ITR 1 (SC)** as well as the decision of Hon'ble Allahabad High Court in the case of **Shree Ashray Lal Vs. CIT (223 ITR 705)** and submitted that only the original return of income should be taken into consideration for determination of assessee's liability for penalty u/s 271(1)© and it cannot be said that the assessee concealed particulars of income already shown in the original return merely because such income was not shown subsequently in the revised return. The second argument of the Ld. Authorized Representative is regarding the applicability of section 271(1)(c) only on the income disclosed in the return of

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income and not on the tax applied on such income. He has contended that there is no concealment or incorrect particulars of income in any of the return filed by the assessee but the only difference is the rate of tax applied by the assessee in the revised return. Therefore, without prejudice to the contention of the assessee even if the revised return is taken into account, no penalty is leviable because there is no inaccurate particulars of income but only concessional rate of tax was applied. The third argument of the Ld. Authorized Representative is regarding bonafide mistake. The Ld. Authorized Representative has submitted that the assessee is a senior citizen of 80 years old and dependent upon the advice of the Chartered Accountant so far as the income tax matters are concerned. The original return as well as revised returns were filed on the basis of the advice of Chartered Accountant, therefore, if a mistake is committed by the Chartered Accountant due to inadvertence or oversight then it cannot be said that the assessee has furnished inaccurate particulars of income but the same falls under the bonafide mistake. In support of his contention he has relied upon the decision of Hon'ble Supreme Court in the case of ***Price Waterhosue Coopers Pvt. Ltd. (2012) 348 ITR 306 (SC).*** He has further submitted that the computation of income and filing of return of income falls under the provisions of section 239 whereas the tax computation on the income falls u/s 140A, therefore, any incorrect particular in computation of tax would not amount to furnishing of inaccurate particulars of income. Further the Assessing Officer has not made any addition in the income of the assessee, therefore, in the absence of any addition in the return income of the assessee, the provisions of section 271(1)(c) are not applicable.

6. In rebuttal the Ld. DR has submitted that the return of income is furnished in the prescribed form which also contains the computation of tax, therefore, the computation of tax application of correct rate of tax is part and parcel of the

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return of income. Section 140A mandates only the payment of tax and adjustment of the tax not computation of tax. He has referred the explanation 4 to section 271(1)(c) and submitted that if the assessee pays less tax that would have been charged on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, had such income being the total income. The difference between the tax on the total income assessed and the tax that would have been chargeable at such total income have been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished, therefore, the concealment of the income will be considered in the context of the tax assessed and paid by the assessee is less than what would have been if the correct particulars of income was furnished.

7. We have considered the rival submissions as well as relevant material on record. The question arises for our consideration and adjudication is whether offering the tax at a concessional rate applicable on a different category of income would amount to furnishing inaccurate particulars of income attracting the provisions of section 271(1)(c). The facts in the case of the assessee are not in dispute as the assessee filed its original return of income on 31.07.2009 and offered the Long Term Capital Gain on sale of paintings to tax at the normal rate of 20% as applicable on such Long Term Capital Gain. Subsequently, the assessee has filed a revised return on 8.09.2009 and offered the tax at a concessional rate of 10% under the proviso to section 112(1) of the Income Tax Act. It is pertinent to note that the concessional rate of tax @ 10% as per second proviso to section 112(1) read with second proviso to section 48 is applicable on the Long Term Capital Gain arising from sale of Securities, listed Bonds, shares etc., if the assessee while computing such Long Term Capital Gain has not taken the benefit of indexed cost. Therefore, as per the provisions of section 112(1) of the Income

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Tax Act., an option is available to the assessee in respect of the Long Term Capital Gain arising from sale of such Listed shares, Bonds, securities etc., either to take the benefit of indexed cost or apply concessional rate of tax at 10% whichever is beneficial to the assessee. Therefore, there is no ambiguity or scope of any misunderstanding about the applicability of section 112 of the Income Tax Act only on the Long Term Capital Gain arising from sale of such Listed Shares, Securities, Bonds etc. In the case in hand, the Long Term Capital Gain arose on sale of paintings, therefore, the income from Long Term Capital Gain from sale of paintings is not allowable for concessional rate of tax as per the proviso to section 112(1) of the Income Tax Act. The assessee has also filed a second revised return of income on 11.7.2011, in which the assessee offered the Long Term Capital Gain to tax at the rate of 20% as it was offered in the original return of income, though the said return of income was treated as invalid being barred by limitation. The Penalty proceedings have been initiated by the AO based on the first revised return filed by the assessee wherein the concessional rate of tax was claimed on the Long Term Capital Gain. The amount of Long Term Capital Gain remains same in all the three return of income filed by the assessee and the only change and difference in the original return of income and first revised return of income is the rate of tax applied by the assessee. Though, by applying concessional rate of tax at 10% on the ground that the assessee has not taken the benefit of indexed cost for computation of Long Term Capital Gain would help the assessee if in the return of income, the assessee has given the impression that the Long Term Capital Gain in question is arising from the transfer of listed shares, bonds, securities etc., however, in the return of income the assessee has specifically and categorically mentioned the capital gain arising from the sale of paintings. The source of income has been explained by the assessee in all the return of income which remains same and, therefore, there is no change in the source of income and the category of income which is specified as capital gain

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from sale of paintings then even if the assessee has applied incorrect rate of tax in the revised return, it would not constitute that the assessee has changed the class/nature of income eligible for concessional tax u/s 112(1) of the Income Tax Act. When there is no attempt on the part of the assessee to show the Long Term Capital Gain in a different category then merely because a concessional rate of tax was applied in the revised return does not *ifso facto* lead to the conclusion that the assessee has concealed the particulars of income. Even otherwise, all these facts and circumstances supports the explanation of the assessee that the concessional rate of tax on Long Term Capital Gain was applied on the basis of the advice of the Chartered Accountant, therefore, it was a bona fide mistake. This explanation, in our view is quite reasonable as per the Explanation 1B of section 271(1) of the Income Tax Act particularly in view of the fact that the assessee did not claim the benefit of indexed cost while computing the Capital Gain in question. This is not a case that the Long Term Capital Gain in question is not eligible for benefit of indexed cost. The claim of concessional tax applied on the Long Term Capital Gain, though, is against the provisions of Income Tax Act, however, it is based on the fact that the benefit of indexed cost was available to the Capital Gain in question which was not claimed by the assessee. In view of the above facts and circumstances of the case, we do not find any error or illegality in the impugned order of CIT(A) in deleting the penalty by following the Judgment of Hon'ble High Court in the case of Price Watercoopers (Supra).

8. The assessee has also raised a legal point that penalty cannot be levied by considering the revised return and relied upon the decision of Hon'ble Supreme Court in the case of CIT Vs. Onkar Saran & Sons **(supra)** as well as decision of Hon'ble Allahabad High Court in the case of Shri Ashray Lal Vs. CIT (supra). We are not inclined to accept the said contention of the Ld. AR, as in those cases the issue before the Hon'ble Supreme Court and Hon'ble High Court was regarding

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levy of penalty based on the return filed in response to notice u/s 148 whereas in the present case, the revised return was filed as per the provisions of section 139(5). There is a marked difference between the return filed in response to a notice u/s 148 and revised return filed u/s 139(5). In the case of return filed in response to notice u/s 148, the original return filed u/s 139(1) remains intact and does not become nonest. Whereas in the case of revised return filed u/s 139(5), it merges with the original return and for all legal and procedural purposes, the original return cease to exist on filing of a valid revised return. Therefore, the decision relied upon by the Ld. AR cannot be applied in the facts of the present case.

9. In the result appeal of the revenue is dismissed

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Order pronounced in the open court today i.e 5 -11-2014

Sd/-	Sd/-
(Sanjay Arora)	**(Vijay Pal Rao)**
(Accountant Member/लेखा सदस्य)	**(Judicial Member/न्यायिक सदस्य)**

Mumbai dated 5-11-2014
SKS Sr. P.S,

Copy to:

1. *The Assessee*
2. *The Respondent*
3. *The concerned CIT(A)*
4. *The concerned CIT*
5. *The DR, "C" Bench, ITAT, Mumbai*

By Order

Assistant Registrar
Income Tax Appellate Tribunal,
Mumbai Benches, MUMBAI

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