

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.1848 OF 2014**

The Director of Income Tax (IT)- II Appellant
Mumbai

Vs.

M/s Nomura India Investment Fund Respondent
Mother Fund, Mumbai.

Mr. Tejveer Singh for the Appellant.

Mr. J.D. Mistri, Senior Counsel a/w Mr. Niraj Sheth a/w Mr. Atul K.
Jasani for the Respondent.

**CORAM : S.V. GANGAPURWALA AND
 G.S. KULKARNI, JJ.**

DATE : 15 JUNE, 2017

PER COURT :

The present appeal is arising from the order of the Tribunal allowing the appeal of the assessee against the penalty order under Section 271(1) (c) of the Income Tax Act.

2 The Appeal relates to the Assessment Year 2008-2009.

3 The Assessee is an approved Sub-Account of the master Trust Bank of Japan, a foreign institutional investor, registered with Securities Exchange Board of India. During the year under consideration, the Assessee has earned long term capital gain as well as long term capital loss on purchase and sale of shares. While computing the total income, the Assessee did not set off long term capital loss of Rs.80.64 crores from long term capital gain of Rs.697.70 crores, which was exempt under Section 10 (38) of the Income Tax Act. The Assessee in its return had put a note reserving his rights to carry forward the long terms capital loss of Rs.80.64 crores. The Assessing Officer found that the said claim of the Assessee to carry forward long term capital loss is not admissible and rejected the same. The Assessing Officer initiated penalty proceedings under Section 271 (1)(c) and levied penalty of Rs.17,02,90,407/-. The Assessee filed an appeal before the Commissioner, the same was rejected. The Assessee thereafter filed an appeal before the Tribunal. The Tribunal has allowed the appeal.

4 Mr. Singh, the learned counsel for the appellant submits that the appeal is filed on following substantial questions of law :

“1 Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in deleting the order of the CIT(A) without

appreciating the fact that the order of the CIT (A) is derived from the provisions of the Income Tax Act ?

2 Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in deleting the penalty levied u/s 271 (1)(c) of Rs.8.51 crores by AO for computing the revenue neutral income by the assessee as per provisions of Section 10(38) of the I.T. Act for the Long Term capital gain of Rs.697.70 crore, thereby not deducting the Long Term capital loss of Rs.80.64 crores and allowing the same to be carried forward as per Section 74 of the I.T. Act?

5 According to the learned counsel, the Tribunal has failed to consider the provisions of Section 271 (1)(c) in it's correct perspective. The explanation to Section 271(1)(c) is relevant. According to the learned counsel, the provisions of Section 271 are required to be invoked in various contingencies as laid down therein. If the Assessee has given incorrect particulars, or has concealed the particulars, he makes himself liable to be proceeded under Section 271. The further contention is that the Assessee is not in a position to substantiate and offer a plausible explanation, as such the Assessing Officer had rightly imposed the penalty. The

learned counsel also relies on the provisions of Section 271(1)(c) to contend that where the amount is added or disallowed in computing total income or loss of an assessee in any order of assessment, even in case of loss, not being shown, the initiation of penalty proceeding is permissible. The Tribunal has failed to consider the said aspect. Reliance is placed on the judgment of the Apex Court in Commissioner of Income-Tax, U.P. vs. Manmohan Das (Deceased), reported in Income Tax Reports [Vol. LIX 1966], 699 is also misplaced and same is not relevant to the present facts of case.

6 Mr. Mistri, the learned Senior Counsel for the Respondent submits that the Assessee had not concealed any information or had given inaccurate particulars. In the return, the Assessee had given a note reserving his rights to carry forward loss of Rs.80.64 Crores. The return filed by the Assessee was based on bonafide interpretation of 10 (38) of the Income tax Act. The said provision very categorically states that any income arising from the transfer of a long term capital asset, being an equity share in a Company or a Unit of an equity orientated fund. The said provisions contemplates income and does not take within its ambit the loss. According to learned Senior Counsel interpretation of the Assessee is also supported by the judgment of the Tribunal in Income Tax Appeal No. 3317/ Mumbai/ 2009 and 1692/ Mumbai/

2010 dated 10th June, 2015. The learned Senior Counsel further submits that in case the assessee carries forward the loss, then at the time of assessing return of the next year, the Assessing Officer is required to consider the pros and cons of carrying forward the loss. It is further submitted that in any case there is no effect on the tax liability.

7 We have considered the submissions canvassed by the learned counsel for the respective parties. Provisions of Section 271 (1)(c) can only be invoked upon satisfaction of the ingredients as laid down in the said section. In the present case, it appears that the Assessee had disclosed in its return the loss of Rs.80.64 Crores sustained by him and further in the return, note was also given that it reserves its right to carry forward the loss. The same was made by the Assessee keeping in mind its interpretation of Section 10(38) of the Income Tax Act. According to the Assessee, the Assessee bonafidely believed that under Section 10(38), the loss is not required to be considered and only income is required to be considered relying on the phraseology of the said provision.

8 In the present matter, we are not testing the interpretation on the provisions of Section 10(38). However, suffice it to state that the assessee bonafidely and in good faith acted upon the said interpretation.

9 It is also not a matter of debate that on the tax liability also, there was no effect of not setting off the said loss of Rs.80.64 Crores.

10 The Tribunal has considered the aspect in it's correct perspective. We do not see that the act of the assessee in giving the said note was with some ulterior intention or concealment of income or giving inaccurate particulars.

11 In light of above, no substantial question of law arises. The appeal is dismissed. No costs.

(G.S. KULKARNI, J.)

(S.V. GANGAPURWALA, J.)