

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.750 OF 2016

Pr. Commissioner of Income-Tax-17.

... Appellant

V/s.

Prakash Mangilal Jain

... Respondent

Mr.Suresh Kumar for the Appellant.

**CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : DECEMBER 10, 2018.**

P.C.:-

1. This appeal is filed by the Revenue challenging the judgment of the Income Tax Appellate Tribunal (Tribunal for short) dated 8th May, 2015.

2. Following question is presented for our consideration:-

“Whether on the facts and in the circumstance of the case and in law, the Tribunal was correct in law in deleting the penalty levied under section 271(C) of the Income Tax Act, 1961?”

3. The issue pertains to penalty imposed by the Assessing

Officer under Section 271(1)(c) of the Income Tax Act, 1961 (the Act for short). The CIT appeals granted at partial relief to the assessee upon which the issue reached the Tribunal. Tribunal by the impugned judgment deleted the penalty upon which the Revenue has filed this appeal.

4. We have perused the orders on record with the assistance of learned counsel for the Revenue. The Tribunal in the impugned judgment in order to delete the penalty, has made following observations:

“We have heard the rival submissions and perused the material before us. We find that the AO has made additions on three counts share transactions, House property income and dividend stripping, that the AO had levied penalty u/s. 271(1)(c) of the Act for concealing the particulars of income, that the assessee did not contest additions made by the AO, that the FAA had confirmed the penalty order of the AO.

We would like to take up the issue one by one with regard to the additions made and penalty levied. The assessee had shown the income from the share transaction under the head capital gains whereas the assessee AO was of the opinion that same had to be taxed under the head business head. It is a fact that in the earlier year, income from share transaction was accepted by the AO under the head capital gains. The FAA held that mere change of head could not result levy in penalty.

But, in her opinion, by not following the FIFO method the assessee had made himself liable for levying concealment proceedings. We are of the opinion that following FIFO or LIFO method cannot be the basis for levying penalty as per the provisions of section 271(1)(c) of the Act. In order to justify the levy of penalty, two factors must co-exist, (i) there must be some material or circumstances leading to the reasonable conclusion that the amount does represent the assessee's income and the amount in question was disclosed by the assessee in his return. Explanation filed by the assessee about the disputed amount plays a vital role in deciding the justification of levying concealment penalty. In the matter before us, the assessee had disclosed all the necessary details. In our opinion, explanation filed by the assessee in that regard was bonafide. Secondly, it is an accepted principle of taxation jurisprudence that additions made during assessment proceedings cannot result in automatic levy of penalty. Therefore, we delete the penalty confirmed by the FAA with regard to share transactions. We find that the assessee had claimed that all the three house properties were his SOPs and he had made a justifiable claim in that regard. In our opinion, the provisions of the Act dealing with SOP are very clear and unambiguous and they stipulate that the assessee cannot claim SOP deduction for more than one property. In the return filed by the assessee, he had claimed that all the three properties were to be treated as self occupied. In the explanation it was stated that in one of the properties his parents were residing and the property at Nasik was used for business purposes. In our opinion the explanation of the assessee for including the income from the properties cannot be treated a bonafide explanation. A patent wrong and inadmissible claim, made against the clear cut

provisions of the Act, falls under the category of filing of inaccurate particulars of income resulting in concealment. Had the return not been picked up for scrutiny the assessee would be taken benefit of the provision even though he was not entitled for it. In these circumstances, we are of the opinion that the order of the FAA, does not suffer from any legal infirmity. We uphold her order to that extent. As far as dividend stripping is concerned, we find that the Tribunal in the case of has dealt the identical issue and has decided the issue in favour of the assessee in the case of Walter Saldanah (supra). We would like to reproduce the relevant portion of the order and same reads as under:

“On perusal of the orders of Revenue authorities, it is found that the penalty under s.271(1)(c) was levied on the ground that the assessee violated of provisions of s.94(7) by not ignoring losses while computing short-term capital gains on transactions related to s.94(7). It is important to state here that the AO made the addition only on the basis of material and information furnished by the assessee. But in the case under consideration the assessee has furnished full detail and has not concealed any particulars of income or has furnished any inaccurate particular of income. Further, it is noticed that there were no such specific requirements in the return form applicable to the year under consideration. Such requirement of the column in the return has been inserted by amendment in return form. ITR 6, at p 17, “Sch.CG capital gain” S. No.3(d) which is applicable from asst. yr.

2007-08. A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars. The assessee demonstrated that their claim was bonafide claim. In the light of above discussion, the case under consideration is not found to be a fit case for levy penalty under s.271(1)(c), therefore the penalty levied is cancelled.”

Following the above order, we reverse the order of the FAA in respect of dividend stripping. Effective ground of appeal is decided in favour of the assessee, in part.”

5. Perusal of the said portion of the Tribunal's judgment would show that the penalty comprises of two separate elements. The first was with respect to the question whether the assessee's transactions of sale of shares would result into capital gain or business income. Tribunal noted that in absence of any concealment of particulars of income, penalty cannot be attached. Likewise, the second issue was with respect to taxing the assessee's house properties which the assessee had not offered to tax. Here also the Tribunal came to the conclusion that the explanation offered by the assessee for not offering the notional

rental income of such properties was a plausible explanation. The Tribunal, therefore, did not confirm the decision of the Assessing Officer to impose penalty.

6. We are broadly in agreement with the view of the Tribunal. The Tribunal having examined the facts on record, has come to factual conclusions. No question of law in this respect therefore, arises.

7. The third element of penalty was the assessee's claim exemption on tax pursuant to the dividend stripping activity. In this respect, the Tribunal instead of giving independent findings relied upon completely on its earlier decision in case of Walter Saldanah. Learned counsel for the Revenue correctly pointed out that the decision of the Tribunal in the said case of Walter Saldanah was challenged by the Revenue and the Revenue's Income Tax Appeal No.62 of 2011 is admitted. Ordinarily, therefore we would have entertained the Revenue's present appeal also on this issue. However, we notice from the order of CIT appeals that the Revenue implication in connection with

this issue is barely Rs.66,500/-. Only on this ground of the revenue impact being small, this appeal is not entertained. We make it clear that nothing stated in this order would prevent the Revenue from raising all contentions in Income Tax Appeal No.62 of 2011 concerning the Tribunal's judgment in case of Walter Saldanah. Accordingly, Tax Appeal is disposed of.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)

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