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

INCOME TAX APPEAL NO.424 OF 2017

The Principal Commissioner of Income Tax-18 … Appellant
V/s.
M/s Padmini Trust … Respondent

Mr.Prakash C. Chhotaray for the Appellant.
Mr.Niraj Sheth with Mr.Jay Bhansali and Ms.Snehal Bamne for the Respondent.

CORAM : AKIL KURESHI AND
SARANG V. KOTWAL, JJ.
DATE : APRIL 30, 2019.

P.C.:-

1. This appeal is filed by the revenue to challenge the judgment of the Income Tax Appellate Tribunal. Following question is presented for our consideration :-

> "Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in cancelling the penalty imposed by the Assessing Officer under Section 271(1)(c) of the Act?"

2. Respondent-assessee is a Trust. The assessee had filed a return of income for the assessment year 2009-10. Such return

was taken in scrutiny by the Assessing Officer by issuing notice of scrutiny assessment on 27th September, 2010. When the assessment proceedings were pending, the assessee tried to rectify the return by making certain declaration and enlarging certain liability. Commensurate additional income Tax of Rs.99,05,738/- was also paid on 26th September, 2011. This was conveyed to the Officer by letter dated 15th November, 2011. While completing the assessment, the Assessing Officer held that revised return was non-acceptable, since it was filed after the last day for filing such revised return. He however, made no further additions over and above the declaration made by the assessee in such return. On the ground that the assessee had not disclosed the income in the original return, he initiated the penalty proceedings. He imposed the penalty which was also confirmed by the CIT (Appeals), upon which the assessee filed appeal before the Tribunal. Tribunal by the impugned judgment deleted the penalty making following observations:-

> "5. During the proceedings before us, Ld. Counsel for the assessee demonstrated the fact of disclosure of relevant details in return of income but under the wrong headings. He also submitted that the errors were rectified duly during the

course of assessment proceedings and paid relevant taxes. He also submitted that compensatory interest on the advance tax due on the income, which was not originally subject to tax while filing the return of income were also paid. He also submitted that the relevant income was wrongly declared under the wrong head of income and therefore, there is no default of disclosure in the return of income. Relying on the various decisions, Ld. Counsel for the assessee submitted so long as the particulars of income which disclosed, the allegation of concealment nature is not sustainable. Further, mentioning the assessee's conduct in not claiming certain capital gain loss, Ld. Counsel for the assessee tried to demonstrate the bona fide of the assessee. He also brought our attention to the contents of page 37 and 39 of the paper book, which are basically the affidavits of the accountant, Ld. Counsel for the assessee demonstrated that the mistake cannot be attributable to the assessee put his Chartered Accountants. He also submitted that similar errors were rectified in the group cases of the assessee and the Tribunal has deleted the penalty on similar cases on similar facts.

6. On the other hand, Ld. DR for the Revenue heavily relied on the orders of the AO and the CIT (A).

7. On hearing both the parties and on perusal of the paper book filed before us, we find there is wrong categorization of capital gains and loss and the same are evident from the papers filed before us. Therefore, we agree with the Ld. Counsel's argument that it is a case of wrong categorization of the income under the wrong head. The revised computation of income basically corrects the mistake in such wrong categorization. It is the case where assessee paid taxes on the extra income computed by virtue of the revised computation alongwith the statutory interest u/s 234A, 234B

> and 234C as the case may be. It is a settled issue that penalty cannot be excisable in a case where the income was disclosed but under the wrong head of income. Therefore, considering the above, we are of the opinion this is not a fit case for levy of penalty u/s 271(1)(c) of the Act. Accordingly, all the grounds raised by the assessee are allowed."

3. Learned counsel Shri Chhotaray for the Department submitted that the assessee had filed a false declaration in the original return. Only after the return was taken in scrutiny, he attempted to revise the return. Such attempt would not give immunity to the assessee from the penalty. Counsel relied on the decision of the Supreme Court in case of **Union of India and ors. Vs. Dharmendra Textiles Processors and ors.**[1] to contend that mens-rea is not necessary for imposition of the penalty and the penalty is a civil consequence. He also relied on the decision of the Delhi High Court in the case of **Commissioner of Income-tax Vs. Zoom Communication P. Limited**[2], in which highlighting the fact that very few returns filed by the assessees are taken in scrutiny, the Court held that merely because the assessee had later on surrendered the income to tax would not mean that the

1 (2008) 306 ITR 277 (SC)
2 (2010) 327 ITR 510 (Delhi)

penalty should be initiated, failing which the deterrent effect of the penalty would disappear.

4. On the other hand, learned counsel Mr.Sheth for the assessee opposed the appeal contending that there was a bonafide error in claiming short term capital gain as dividend income. This error was committed by the accountant of the group assessees. All such errors were corrected whether the returns were taken in scrutiny or not demonstrating bonafide on the part of the assessee. He pointed out that the tax on the additional income was paid even before the Assessing Officer issued specific queries in relation to the return filed. He relied on the decision of the Supreme Court in case of **Price Waterhouse Coopers(P.) Ltd. Vs. Commissioner of Income-tax, Kolkata-I**[1] to contend that mere bonafide error in claiming reduced tax liability would not give rise to penalty proceedings.

5. We agree with counsel for the revenue that once the assessee is served with a notice of scrutiny assessment, corrections

1 (2012) 348 ITR 306 (SC)

to the declaration of his income, would not grant an immunity from penalty. Particularly, in a case where the assessee during such scrutiny assessment is confronted with a legally unsustainable claim which he thereafter forgoes, may not be a ground to delete penalty. However, in the present case the facts are glaring. The assessee made a fresh declaration of revised income voluntarily before he was confronted with the incorrect claim. The assessee had blamed the accountant for an error in filing the return. Affidavit of the occupant was also filed. As stated by the counsel, such error was committed by other group assessees also. Some of them corrected the error even before the scrutiny notices. In view of such facts, we do not find that the Tribunal is in error in coming to the conclusion that the original declaration of income suffered from a bonafide unintended error. No question of law arises. Income Tax Appeal is dismissed.

(SARANG V. KOTWAL, J.) **(AKIL KURESHI, J.)**

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