THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

Before: Shri P.M. Jagtap, Vice President
And Shri Siddhartha Nautiyal, Judicial Member

ITA No. 1798/Ahd/2018 **Assessment Year 2011-12**

Texmat Agencies Pvt. Ltd. 47/48 Odhav Industrial Estate, Odhav Road, Ahmedabad-382415 PAN: AABCT3251G (Appellant)	Vs	ITO, Ward-4(1)(1), Pratyakashkar Bhawan, Ambawadi, Ahmedabad (Respondent)

Assessee by: **None**
Revenue by: **Smt. Leena Lal, Sr. D.R.**

Date of hearing : 07-04-2022
Date of pronouncement : 17-06-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the ld. Commissioner of Income Tax (Appeals)-6, Ahmedabad in Appeal no. CIT(A)-6/188/14-15 vide order dated 23/02/2016 passed for the assessment year 2011-12.

2. The assessee has taken the following grounds of appeal:-

"1. We would like to draw your honour's attention to the fact that section 271(l)(c) empowers the income tax authority to levy penalty under the act if any of the following conditions get attracted.

(a) Appellant has concealed the particulars of his income.
(b) Appellant has furnished inaccurate particulars of income.

In the present case, there is neither concealment of fact nor the appellant has furnished inaccurate particulars of income. And hence there should arise no question of imposition of penalty under section 271(1) (c) and the act done by the officer stands bad in law.

2. The AO & CIT(A) must look at the facts that the additions in returned income were made, In the present case, admittedly, appellant made a claim on bonafide belief but the same was rejected and disallowed not for the reason that the claim was not genuine or was fabricated but in view of provisions of law that assessee has taken bogus STCG. At the stated facts alone it does not lead to the conclusion that the appellant either concealed the particulars of his income or furnished inaccurate particulars of such income. There has to be a positive act of concealment on his part and the onus to prove is on the Department.

3. The leaned CIT(A) grossly erred in law in relying on explanation to section 271(1) (c) to raise a prejudice presumption against the appellant. The appellant has justified his estimate of income on the basis of all the business expenditures carried out during the year. The appellant has disclosed his income as per the law and to the best of his knowledge and the addition made on does not stand any ground for levy of penalty u/s 271 (1)(C).

4. It is also further contended that the show cause notice issued u/s 274 does not specify as to whether the Appellant is guilty of having "furnished inaccurate particulars of income" or of having "concealed particulars of such income".

From the fact of the present case, the show cause notice is defective as it does not spell out the grounds on which the penalty is sought to be imposed. Following the decision of the Hon'ble Karnataka High

Court, the order imposing penalty shall be held invalid and consequently penalty imposed shall be cancelled.

5. The provisions of the sec. 271(1) (c) are not attracted to cases where income of an appellant is assessed on the basis of disallowance of any expense by the officer and additions are made thereon on that basis. In the present case the facts are similar and hence it is submitted that no penalty should be levied.

6. It is to be noted that in the case of penalty, the appellant need not substantiate the explanation to the satisfaction of the assessing officer. So if the appellant furnishes plausible explanation, no penalty can be levied for concealing the particulars of income or furnishing inaccurate particulars of income. The concealment can only be of facts and not of conclusions. Even if the appellant is not able to substantiate the explanation is bona fide, no penalty for concealment can be levied.

7. The ld AO and CIT(A) must hasten to add here that in this case, there is no finding that any details supplied by the appellant in its Return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under Section 271(l)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the appellant. Such claim made in the Return cannot amount to the inaccurate particulars.

Merely because the appellant had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue that by itself would not, in appellant's views, attract the penalty under Section 271(1) (c). If in all cases accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the appellant will invite penalty under Section 271 (l)(c). That is clearly not the intendment of the Legislature."

Law does not bar or prohibit an assessee for making a claim, which he believes may be accepted or is plausible. When such a claim is

made during the course of regular or scrutiny assessment, liberal view is required to be taken as necessarily the claim is bound to be carefully scrutinized both on facts and in law. Full probe and appraisal is natural and normal. Penalty cannot become a gag and/or haunt an assessee for making a claim which may be erroneous or wrong, when it is made during the course of the assessment proceedings. Normally, penalty proceedings in such cases should not be initiated unless there are valid or good grounds to show that factual concealment has been made or inaccurate particulars on facts were provided in the computation. Law does not bar or prohibit a person from making a claim, when he knows the matter is going to be examined by the Assessing Officer.

8. Consequently, the imposition of penalty on the appellant was not justified at all in the order passed. Therefore, we request your honour for non-imposition of penalty under section 271 (1) (c) considering the above mentioned facts.

9. The appellant craves leave to add, alter or amend all the above grounds of appeal at or during the course of hearing."

3. The brief facts of the case are during the course of assessment proceedings under section 143(3) of the Act, the AO observed that the assessee had claimed bogus short-term capital loss of ₹ 35, 33, 650/-and when the same was brought to the notice of the assessee, he admitted his mistake and submitted a revised statement of income stating that the above loss may be treated as a "speculative loss". No reasons were cited by the assessee as to why such bogus loss may be treated as a speculative loss. Accordingly, the AO added the bogus short-term capital loss of ₹ 35,33,650/- to the income of the assessee and also initiated penalty proceedings u/s 271(1)(c) of the Act. Notably, the assessee did not file appeal against the quantum additions made in the assessment order u/s

143(3) of the Act. During the course of penalty proceedings, the assessee filed submission dated 11-03-2014, and on consideration of the same, the AO held that the assessee has not disclosed the income which was added during the course of assessment proceedings on voluntary basis, but only accepted his mistake when the assessing officer had issued a show cause notice after conducting a thorough investigation in respect of the bogus claim of the assessee. Thus, assessee had intentionally concealed the particulars of income. The AO relied on the case of **Snita Transport Private Limited v ACIT 42 Taxman.com 54 (Gujarat)** and the case of **Bharatkumar G. Rajani v DCIT40 Taxman.com 344 (Gujarat)**, wherein it was held that when the assessee has accepted concealed income after the assessing officer has detected the concealment of income after examination during the course of assessment proceedings, it was a fit case for the levy of penalty u/s 271(1)(c) of the Act. In the instant case, the AO held that the assessee had concealed the income by showing bogus trading in the shares and claimed loss on sale of shares under the head capital gains with the intention to set-off the loss against capital gains arisen on sale of immovable property under section 50 of the Income Tax Act to reduce the tax liability on the said capital gains. Accordingly, the AO imposed penalty u/s 271(1)(c) of the Act amounting to ₹ 10,60,095/- being 100% of the tax sought to be evaded. In appeal filed by the assessee against the aforesaid penalty order, Ld. CIT(A) dismissed the appeal of the assessee with the following remarks:

> *"8. I have carefully considered the penalty order, assessment order and the submission of the appellant. The brief facts of the case is that the appellant filed return of income on 20-9-2011 declaring total income of Rs. 26,31,790/- and claimed Short Term Capital Loss*

of Rs, 35,33,650/-. The AO examined the issue in the assessment proceedings and called for details of Short Term Capital Loss and found certain discrepancies in the claim made by the appellant. Thereafter the appellant filed a letter before the AO and submitted that due to mistake the Short Term Capital Loss was claimed. However, the same has been revised and tax of Rs, 10,55,000/- has been paid on 28-12-2013. The appellant did not file any reason/ explanation for filing the revised computation, The appellant In computation merely submitted that instead of speculation loss, the same was claimed as Short Term Capital Loss. The AO did not accept the claim of the appellant and

8.1 It is fact that the appellant filed revised calculation after the wrong claim of Short Term Capital Loss was detected by the AO. Therefore the same cannot be treated as voluntary disclosure of income. The AO has rightly analyzed the facts of the case and relied on the laws which are squarely applicable in the facts of the appeal, under consideration. The appellant has relied on various case laws however the facts of the appeal under consideration are different and distinguishable. In all the cases relied upon by the appellant, the basic issue involved is that the filed revised return and there was no detection of concealment by the AO and the assessee committed mistake under bonafide belief. However, in the appeal under consideration the malaftde intention of the appellant brought on the record by the AO and there is no such circumstances which justify the wrong claim of the appellant. Had the case was not selected for scrutiny the appellant would have the concealment of income from taxation. The departmental proceedings and inquiry conducted by the AO forced the appellant to come forward and accepted the concealment by way of filing revised computation of income.

8.2 Considering the above, I am of the view that the appellant has furnished inaccurate particular and concealed the income by way of claiming wrong deduction. Therefore the penalty levied by the AO of Rs. 10,60,095/- is upheld. The ground is dismissed."

4. The assessee is in appeal before us against the aforesaid order passed by the Ld. CIT(A).

5. At the outset we note that the appeal is time barred by 825 days. The assessee has filed condonation application dated 30-7-2018, wherein he has stated that the signed appeal documents were handed over to the tax consultant but the appeal documents were misplaced by the tax consultant. Further, the office clerk of the tax consultant proceeded to leave due to certain personal emergency and left the job without handing over the papers to tax consultant. It is for the above reasons that there was a delay in filing of appeal. No affidavit of the tax consultant in this respect has been filed by the assessee in support of its contention. In our considered view, in the instant facts, the assessee has acted negligently and has not brought on record any cogent reason for delay in filing of appeal. In the case of **Tractors & Farm Equipments Ltd.[2007] 104 ITD 149 (Chennai) (TM)**, the ITAT held that where assessee justified delay of 310 days in filing appeal before Tribunal by stating that Commissioner (Appeals)'s **order was misplaced and forgotten and when same was found while sorting out unwanted papers**, steps were taken for preparation of appeal, the delay in filing of appeal before Tribunal could not be condoned as same was due to negligence and inaction on part of assessee and assessee could have very well avoided delay by exercise of due care and attention. While rejecting the assessee's application for condonation of delay, the Tribunal made the following observations:

The delay cannot be condoned simply because the appellant's case is hard and calls for sympathy or merely out of benevolence to the party seeking relief. In granting the indulgence and condoning the delay, ***it must be proved beyond the shadow of doubt that the appellant was diligent and was not guilty of negligence, whatsoever****. The sufficient cause within the contemplation of the limitation provision must be a cause which is beyond the control of the party invoking the aid of the provisions.* ***The cause for the delay in filing the appeal, which by due care and attention, could have been avoided, cannot be a sufficient cause within the meaning of the limitation provision.*** *Where no negligence, or inaction, or want of bona fides can be imputed to the appellant, a liberal construction of the provisions has to be made in order to advance substantial justice.* ***Seekers of justice must come with clean hands.***

In the instant case, the assessee justified the delay only with reference to the affidavit of its director. In the said affidavit it was stated that the Commissioner (Appeal)'s ***order was misplaced and forgotten. It was found while sorting out the unwanted papers and thereafter steps were taken for the preparation of the appeal and consequently the delay was caused. That clearly showed that the delay was due to the negligence and inaction on the part of the assessee. The assessee could have very well avoided the delay by the exercise of due care and attention. There existed no sufficient and good reason for the delay of 310 days****. Therefore, reasonings adduced by the Accountant Member were to be concurred with. [Para 8]*

5.1 The ITAT Hyderabad in the case of **T. Kishan[2012] 23 taxmann.com 383 (Hyderabad)** held that in condoning delay in filing appeal, it must be proved beyond shadow of doubt that assessee was diligent and was not guilty of negligence whatsoever.

5.2 In the instant facts, we note that the assessee has been clearly negligently in filing appeal before the Tribunal. The assessee has not brought forth any persuasive reason for delay in filing the appeal. By simply stating that the delay in filing of appeal was due to mistake of the counsel/his clerk in our view is not sufficient ground for condoning the inordinate delay of 825 days in filing of appeal. No affidavit of the previous tax consultant to whom the assessee is seeking to attribute the inordinate delay in this respect has been filed by the assessee before us. In the instant facts, the assessee has not been able to give any convincing reason for the delay in filing of appeal. In the result, assessee's application for condonation of delay is hereby dismissed.

5.3 Even on merits, in our view, in the instant facts the Ld. CIT(Appeals) has rightly confirmed the penalty imposed by the Ld. Assessing Officer. The assessee had made bogus claim of short-term capital loss in the return of income. When, after due investigation, the same was detected by the Ld. Assessing Officer during the course of assessment proceedings, the assessee filed revised computation and requested that the short-term capital loss may be treated as a "speculative loss". No reason for this revised stand/position was given by the assessee. The Ld. Assessing Officer confirmed additions in respect of this bogus short-term capital loss and the assessee did not file

appeal against the above addition in quantum proceedings. The Ld. CIT(Appeals) has correctly pointed out that it is only when the incorrect claim of bogus short term capital loss was detected by the Ld. Assessing Officer that the assessee offered to pay tax in respect of the same. Accordingly, the Ld. CIT(Appeals) confirmed the penalty u/s 271(1)(c) of the Act imposed by the Ld. Assessing Officer. In our considered view, there is no infirmity in the order passed by the Ld. CIT(Appeals) confirming the penalty u/s 271(1)(c) of the Act in the instant facts. In the result, the appeal of the assessee is hereby dismissed.

6. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 17-06-2022

Sd/-	**Sd/-**
(P.M. JAGTAP)	**(SIDDHARTHA NAUTIYAL)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Ahmedabad : Dated 17/06/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद