

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.6360/MUM/2009
निर्धारण वर्ष / Assessment Year : 2005-06

Shri Amarnath Jain, L/H of
Mrs. Sarojbala A. Jain,
Plot No. 289, Sector No. 25,
Pradhikaran, Nigdi,
Pune – 411044

PAN : AASPJ0386N

.....अपीलार्थी / Appellant

बनाम / V/s.

Asstt. Commissioner of Income Tax,
Central Circle – 11, Mumbai

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.846/MUM/2010
निर्धारण वर्ष / Assessment Year : 2006-07

Shri Amarnath Jain, L/H of
Mrs. Sarojbala A. Jain,
Plot No. 289, Sector No. 25,
Pradhikaran, Nigdi,
Pune – 411044

PAN : AASPJ0386N

.....अपीलार्थी / Appellant

बनाम / V/s.

Asstt. Commissioner of Income Tax,
Central Circle – 11, Mumbai

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos.716 & 717/MUM/2012
निर्धारण वर्ष / Assessment Years : 2005-06 & 2006-07

Shri Amarnath Jain, L/H of
 Mrs. Sarojbala A. Jain,
 Plot No. 289, Sector No. 25,
 Pradhikaran, Nigdi,
 Pune – 411044

PAN : AASPJ0386N

.....अपीलार्थी / Appellant

बनाम / V/s.

Dy. Commissioner of Income Tax,
 Central Circle – 11, Mumbai

.....प्रत्यर्थी / Respondent

Assessee by : N O N E
 Revenue by : Dr. Vivek Aggarwal

सुनवाई की तारीख / Date of Hearing : 02-04-2018

घोषणा की तारीख / Date of Pronouncement : 06-04-2018

आदेश / ORDER

PER VIKAS AWASTHY, JM :

These four appeals have been filed by the assessee. ITA No. 6360/MUM/2009 is directed against the order of Commissioner of Income Tax (Appeals)-37, Mumbai dated 09-11-2009 for the assessment year 2005-06. ITA No. 846/MUM/2010 is against the order of Commissioner of Income Tax (Appeals)-37, Mumbai dated 09-11-2009 for assessment year 2006-07. In both these appeals the assessee has assailed the additions

confirmed by the Commissioner of Income Tax (Appeals) made by Assessing Officer during scrutiny assessment proceedings. In ITA No. 716/MUM/2012 for assessment year 2005-06 and ITA No. 717/MUM/2012 for assessment year 2006-07, the assessee has assailed the order of Commissioner of Income Tax (Appeals)-37, Mumbai dated 20-12-2011 common for the assessment years 2005-06 and 2006-07 confirming levy of penalty u/s. 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

2. These appeals have been transferred from Mumbai Benches to Pune Benches on the request of Shri Amar Nath Jain, legal heir of late Smt. Sarojbala Jain vide application dated 23-03-2017. The notice of appeal was sent to legal heir of assessee on 30-11-2017 for 05-02-2018 on the fresh address furnished at the time of making request for transfer of appeals. The notice sent through RPAD has been received back un-served with postal remarks "Not Claimed Returned To Sender". Fresh notice was issued to the legal heir of assessee on 06-02-2018 for 02-04-2018. The notice of appeal again has been received back with postal remarks "Not Claimed Returned To Sender". The notice of appeal was also sent to the counsel of the assessee on 06-02-2018 for 02-04-2018. The notice has been duly served as is evident from acknowledgment available on record. Despite service of notice on the Counsel, none has appeared on behalf of the assessee nor any letter of adjournment has been received. It appears that the legal heirs of assessee are not interested in pursuing the appeal. Accordingly, the appeals are being taken up for adjudication with the assistance of ld. DR and the material available on record.

Since, the issues involved in all these appeals are arising from same set of facts, these appeals are taken up together for adjudication and are being disposed of vide this common order.

Though, the facts in both the assessment years 2005-06 and 2006-07 are identical, for the sake of convenience we will first take the appeal of assessee in ITA No. 6360/MUM/2009 for assessment year 2005-06.

ITA No. 6360/MUM/2009, (A.Y. 2005-06)

3. The brief facts of the case as emanating from records are : The assessee is a partner in M/s. D.K. Associates. The assessee in its return of income for assessment year 2005-06 has disclosed Long Term Capital Gain on sale of shares. The assessee claimed exemption u/s. 54F of the Act on the part of Capital Gains earned and offered the balance at lower rate of tax i.e. @ 10% u/s. 112 of the Act. During the course of scrutiny assessment proceedings the Assessing Officer observed that the assessee has purchased 38500 shares of Fast Track Entertainment (hereinafter referred to as "the FTE") through M/s. Vijay Bhagwandas & Co. on 08-04-2003 and 11-04-2003 for Rs.28,948/- and Rs.15,929/-, respectively. The said shares were subsequently sold during the Financial Year 2004-05 at unusually high rate. These penny stock shares of FTE were split into 1:10 ratio and cost of acquiring the said shares to the assessee came to Rs.1.16 only. The shares of FTE were sold for consideration of Rs.27,02,033/-. Thus, the share of FTE purchased @ Rs.1.16 per share were sold @ Rs.70.18 per share. There was huge appreciation in the value of shares, i.e. approximately 60.5 times increase in a short span. The Assessing Officer asked the assessee to furnish details of shares purchased viz. (i) proof of receipt of delivery in physical form; (ii) copy of Dmat request application; (iii) copy of share certificate and

share transfer form; (iv) details of person who recommended the assessee to buy and sell shares of FTE; (v) details of share broker through whom investment was made, etc. The assessee vide communication dated 17-08-2007 informed that the proof of receipt of delivery in physical form, copy of Dmat request application form, copy of share certificate and shares transfer form are not available/not traceable. However, the assessee furnished the name of broker. The Assessing Officer issued notice u/s. 133(6) of the Act to the broker M/s. Vijay Bhagwandas & Co. on 03-12-2007. The broker confirmed that the purchase bills vide which the assessee has allegedly purchased the shares of FTE were not issued by him. He further clarified that only one sale bill dated 08-10-2004 has been issued by him. However, the same has been issued to a different client i.e. Client Code No. 765 and not the Client Code No. 22524 as was informed by assessee. The Assessing Officer held that since the assessee has failed to substantiate sale and purchase of shares, the transactions purportedly entered into by the assessee are dubious. Accordingly, the Assessing Officer rejected assessee's claim of exemption u/s. 54F and made addition of Rs.31,33,577/- as undisclosed income. Further, the Assessing Officer disallowed assessee's claim of payment of commission on transfer of shares Rs.1,56,678/-.

Aggrieved by the assessment order dated 10-12-2007, the assessee filed appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) rejected the submissions of assessee and confirmed the additions made by Assessing Officer. Against the findings of Commissioner of Income Tax (Appeals), the assessee is in appeal before the Tribunal.

4. The assessee has raised following grounds of appeal :

- “1. On the facts and the circumstances of the case and in law, the Ld. C.IT.(A) erred in not considering and following the decision of Hon'ble ITAT in the case of the appellant for Assessment Year 2004-05 which was rendered on identical facts.
2. On the facts and in the circumstances of the case, the Ld. C.I.T. (A) erred in confirming the addition of sales proceeds of shares amounting to Rs. 31,33,577/- as unexplained cash credit u/s 68 of the Income Tax Act as against income from capital gain from the sales of shares.
3. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in considering the amount of sales proceeds wrongly at Rs.31,33,577/- as against the sales proceeds of Rs. 27,02,033/-.
4. On the facts and in the circumstances of the case and in law, the Ld. C.I.T. (A) erred in taking into consideration voluminous material from SEBI without confronting the same to the appellant.
5. On the facts and in the circumstances of the case, Ld. C.IT. (A) erred in confirming the addition of Rs.1,56,678/- on account of alleged commission paid for accommodation entries.
6. On the facts and in the circumstances of the case, the Assessing Officer erred in levying interest u/s. 234B and 234C.
7. The Appellant craves to add, alter or delete all or modify any or all the above grounds of appeal.”

5. Dr. Vivek Aggarwal representing the Department submitted that the assessee has indulged in bogus sale and purchase of shares. The assessee has not been able to show from cogent evidence, the purchase and sale of shares of FTE and the reasons for unprecedented rise in the price of shares from Rs.1.16 per share to Rs.70.18 per share. The ld. DR submitted that where the assessee had purchased shares of penny stock companies at a very nominal amount and within a year sell the shares at phenomenal price and the assessee has failed to tender cogent evidence to explain the increase in price, it is a dubious transaction. The Hon'ble Bombay High Court in the case of Sanjay Bimalchand Jain Vs. Principal Commissioner of Income Tax reported as 89 taxmann.com 196 has held such transaction

of sale and purchase of share of penny stock companies is adventure in the nature of trade. The ld. DR to further buttress his submissions placed reliance on the decision of Mumbai Bench of the Tribunal in the case of Income Tax Officer Vs. Shamim M. Bharwani reported as 69 taxmann.com 65.

6. We have heard the submissions made by ld. DR and have perused the orders of the authorities below. We have also considered the decisions on which the ld. DR has placed reliance. It is evident from the records that the assessee has failed to furnish any documentary evidence in support of sale and purchase of shares of FTE. The assessee has merely given the name of broker M/s. Vijay Bhagwandas & Co. in support his contentions. During the course of inquiry by Assessing Officer from aforesaid broker it transpired that none of the bills as mentioned by the assessee for purchase and sale of shares of FTE were issued by the broker in favour of the assessee. The assessee has miserably failed to substantiate genuineness of transactions for sale and purchase of shares on which exemption u/s. 54F of the Act has been claimed. The assessee has also failed to justify phenomenal increase in the value of share from Rs.1.16 per share to Rs.70.18 per share within a short span of one year. Under such circumstances, we do not find any infirmity in the order of authorities below in rejecting the claim of assessee. Accordingly, ground Nos. 1 to 4 raised in the appeal by assessee are dismissed.

7. In ground No. 5 of appeal, the assessee has assailed addition of Rs.1,56,678/- on account of alleged commission paid to broker. Since, the assessee has failed to substantiate the transaction of sale and purchase of shares, there is no question of payment of commission and hence, the said

claim of assessee has been rightly rejected by authorities below. Accordingly, ground No. 5 raised in appeal by assessee is dismissed.

8. In ground No. 6 of the appeal the assessee has impugned charging of interest u/s. 234B and 234C of the Act. Charging of interest u/s. 234B and 234C is consequential and mandatory, hence, ground No. 6 raised in appeal by assessee is dismissed being devoid of any merit.

9. The ground No. 7 is general in nature, hence, requires no adjudication.

10. In the result, the appeal of assessee for the assessment year 2005-06 is dismissed being devoid of any merit.

ITA No. 846/MUM/2010, (A.Y. 2006-07)

11. The facts in assessment year 2006-07 are similar to assessment year 2005-06, except that instead of shares of Fast Track Entertainment (FTE) the assessee has shown Long Term Capital Gain of Rs.13,07,407/- from sale of 6500 shares of Praneeta Industries Limited (hereinafter referred to as "the PIL"). As was in assessment year 2005-06 the assessee has failed to furnish any cogent evidence to show the purchase and sale of shares. The shares of PIL were allegedly purchased by assessee through M/s. DPS Shares & Securities Pvt. Ltd. On enquiries made from aforesaid share broker, the share broker confirmed that the bills were issued to Shri Amarnath Jain and Smt. Saroj Jain for providing accommodation entries. The shares of PIL were never transacted on stock exchange or off market. There was no physical delivery of the aforesaid shares. The assessee failed to substantiate that the transactions were ever carried out. In the absence

of any cogent evidence the authorities below made addition of Rs.13,15,998/- as unexplained cash credit u/s. 68 of the Act. Further, the Assessing Officer disallowed Rs.65,799/- on account of alleged commission paid to the brokers. Against the assessment order dated 20-11-2008, the assessee filed appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) confirmed the additions.

Since, the modus operandi of assessee for claiming Long Term Capital Gain exempt u/s. 10(38) on sale of shares in the assessment year under appeal is similar to the assessment year 2005-06, the findings given by us in ground Nos. 1 to 4 in ITA No. 6360/MUM/2009 for assessment year 2005-06 would mutatis mutandis apply to the ground Nos. 1 and 2 for assessment year 2006-07. Hence, for the detailed reasons given therein, the ground Nos. 1 and 2 raised in present appeal are dismissed.

12. The ground No. 3 raised in the present appeal relating to payment of commission for providing accommodation entries is identical to ground No. 5 in ITA No. 6360/MUM/2009 for assessment year 2005-06. For the reasons given while deciding ground No. 5, the ground No. 3 is dismissed.

13. In ground No. 4 of the appeal the assessee has impugned charging of interest u/s. 234A, 234B and 234C of the Act. Charging of interest u/s. 234A, 234B and 234C is consequential and mandatory, hence, ground No. 4 raised in appeal by assessee is dismissed being devoid of any merit.

14. The ground No. 5 is general in nature, hence, requires no adjudication.

15. In the result, the appeal of assessee for the assessment year 2006-07 is dismissed being devoid of any merit.

ITA Nos. 716 & 717/MUM/2012, (A.Ys. 2005-06 & 2006-07)

16. These two appeals by the assessee are in respect of penalty levied u/s. 271(1)(c) of the Act. The Commissioner of Income Tax (Appeals) has confirmed levy of penalty Rs.9,21,000/- in assessment year 2005-06 and Rs.4,10,000/- in assessment year 2006-07.

17. The ld. DR has vehemently supported the order of Commissioner of Income Tax (Appeals) in confirming levy of penalty u/s. 271(1)(c) of the Act.

18. A perusal of assessment order for assessment years 2005-06 and 2006-07 shows that while recording satisfaction for initiating penalty proceedings the Assessing Officer has not specified the charge for levy of penalty u/s. 271(1)(c) of the Act. The Assessing Officer has merely mentioned that the “penalty proceedings u/s. 271(1)(c) are separately initiated in respect of this addition”. In respect of both the additions, i.e. (i) Addition of sales proceeds of shares as unexplained cash credit u/s. 68; (ii) Disallowance of commission paid for accommodation entries, satisfaction has been recorded in similar manner in assessment years 2005-06 and 2006-07. However, while concluding the assessment orders the Assessing Officer has mentioned that proceedings u/s. 271(1)(c) for concealment of income/furnishing of inaccurate particulars of income are initiated separately. Thus, the manner in which satisfaction has been recorded clearly indicates that there was vagueness and ambiguity in the mind of Assessing Officer with respect to the charge for which penalty u/s. 271(1)(c) is to be levied.

19. Thereafter, while passing the order levying penalty u/s. 271(1)(c) in assessment year 2005-06, the Assessing Officer observed as under :

“I hold that the assessee has concealed real nature of income and furnished inaccurate particulars of income to the extent of Rs.28,37,135/- as discussed above and therefore, he is liable for penalty u/s. 271(1)(c) r.w.s. 274 of the Act.”

Similar observation has been recorded by Assessing Officer at the time of levy of penalty u/s. 271(1)(c) for assessment year 2006-07. A perusal of orders levying penalty reveals that Assessing Officer was not clear as to under which limb of section 271(1)(c) the penalty has to be levied.

20. The Hon'ble Karnataka High Court in the case of Commissioner of Income Tax Vs. Manjunatha Cotton and Ginning Factory reported as 359 ITR 565 has held that 'concealment of income' and 'furnishing inaccurate particulars of income' are two different expressions carrying different connotations. The Assessing Officer has to specifically state the charge for levy of penalty u/s. 271(1)(c) of the Act. There should be no ambiguity in the mind of Assessing Officer with respect to charge for which penalty u/s. 271(1)(c) is to be levied while recording satisfaction, as well as at the time of levy of penalty.

21. The Pune Bench of the Tribunal have been consistently deleting levy of penalty u/s. 271(1)(c) where there has been ambiguity in recording of satisfaction and levy of penalty. The charge for levy of penalty u/s. 271(1)(c) has to be specifically conveyed to the assessee at the time of recording satisfaction, otherwise, the principles of natural justice are offended. The assessee should know the charge which he has to meet while defending levy of penalty.

22. Thus, in view of the defect in recording satisfaction for levy of penalty, the impugned order is set aside and penalty in both the assessment years 2005-06 and 2006-07 is deleted.

23. In the result, both the appeals of assessee are allowed.

24. To sum up, ITA No. 6360/MUM/2009 for assessment year 2005-06 and ITA No. 846/MUM/2010 for assessment year 2006-07 are dismissed and ITA Nos. 716 & 717/MUM/2012 for assessment years 2005-06 and 2006-07 are allowed.

Order pronounced on Friday, the 06th day of April, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 06th April, 2018

RK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-37, Mumbai
4. आयकर आयुक्त / The CIT, Central-I, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune