

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND  
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER  
**ITA No. 152/SRT/2021** (AY 2012-13)  
(Hearing in Virtual Court)

Parshottambhai H. Patel 43, Mahadev Nagar Society, Sangrampura, Surat-95002 <b>PAN : ABTPP 7261 N</b>	Vs	The DCIT, Circle-1(1)(1) [Original A.O. The ACIT, Circle-1(2)], Room No.108, Aaykar Bhavan, Majura Gate, Surat-395001
Appellant / assessee		Respondent / Revenue

Assessee by	ShriHiren M. Diwan, C.A
Revenue by	Shri Sita Ram Meena – Sr-DR
Date of hearing	15.02.2022
Date of pronouncement	16.02.2022

**Order under section 254(1) of Income Tax Act**

**PER PAWAN SINGH, JUDICIAL MEMBER:**

1. This appeal by assessee is directed against the order of National Faceless Appeal Centre ('NFAC' in short), Delhi, hereinafter called as "CIT(A)", dated 17.09.2021, which in turn arises penalty levied under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') dated 30.03.2018 for assessment year (AY) 2012-13. The assessee has raised following grounds of appeal:-

*"1) The ld. CIT(A) has erred in law and on facts in confirming the action of the ld. A.O of levying penalty u/s 271(1)(c) of the Act on the basis of invalid and improper show cause notice issued under section 274 read with section 271 of the Act.*

*2) The ld. CIT(A) has erred in law and on facts in confirming the action of the ld. A.O of levying penalty u/s 271(1)(c) of the Act to*

*the tune of Rs.3,08,738/- in respect of the rejection of claim of exemption u/s 54F of the Act.*

*3) The Appellant craves leave to add, amend, alter, modify, substitute, delete, change or vary all or any of the ground or grounds of appeal.”*

2. Brief facts of the case are that in the present case assessment for assessment year (AY) 2012-13 was completed on 31.03.2015. The Assessing Officer while passing assessment order made various additions / disallowances including of disallowance of deduction under section 54F of Rs.14,98,727/-. On appeal before Ld. CIT(A) in quantum assessment, the addition / disallowance of deduction under section 54F was upheld. At the time of passing assessment order, the Assessing Officer initiated penalty under section 271(1)(c) vide notice dated 31.03.2015. The assessee contested the penalty proceedings and submitted that no penalty under section 271(1)(c) is imposed against the assessee in view of several decisions of Tribunal and Hon'ble High Courts. The case laws relied by assessee were held to be not applicable on the facts of the assessee's case and distinguished by Assessing Officer. The Assessing Officer held that assessee committed default by furnishing inaccurate particulars of his income and

thereby concealed the income. The Assessing Officer levied the penalty on disallowance of deduction under section 54F of Rs.14,98,727/-. The Assessing Officer worked out the penalty of Rs.4,63,110/- being 100% of tax sought to be evaded.

3. On appeal before Ld. NFAC/CIT(A) the assessee stated that tax applicable on capital gains @ 20% plus 3% cess thereby 20.60% and the tax payable and penalty leviable @ 100% would be Rs.3,08,738/-. However, the Assessing Officer levied the penalty of Rs.4,63,110/- which is excessive of Rs.1,54,372/-. On merit of the case, the assessee submitted that he claimed exemption of Rs.14,98,727/- under section 54F for making investment in Flat No.206, 2<sup>nd</sup> Floor, Building No.A/04, Raj Abhishek City Homes, Sachin-Palsana Road against the Long Term Capital Gains ('LTCG' in short) earned on sale of asset. The Assessing Officer rejected the claim of assessee on the ground that in the balance-sheet the assessee having more than one residential property. In the show cause notice for proposed disallowance, the assessee contended that one of the property in Aashirwad Flat is occupied for commercial purposes, the property in Avadh Lake City is

under-construction copy of the photographs were furnished, the property at 43, Mahadev Nagar Society is jointly owned by assessee and his wife, for Muktanand Co.Op. Housing Society, the assessee submitted that this is one residential property which is owned by assessee on the date of sale of the land and the assessee purchased one more residential house in “ Raj Abhishek” on which capital gains was claimed. The Assessing Officer disallowed the LTCG in respect of Raj Abhishek flat by taking view that assessee having more than one residential house. The assessee further stated that the order of Ld. NFAC/CIT(A) in quantum assessment was upheld by Tribunal and furnished the copy thereof. The assessee stated that the Aashirwad Flat was being used for business purposes and the Tribunal rejected the claim only on the ground that assessee has not furnished any documentary evidence that the said flat was not used for business purposes.

4. The assessee also raised additional ground of appeal before ld CIT(A) by raising legal ground that notice under section 271 r.w.s. 274 of the Act dated 31.03.2015 was not a valid and proper notice as the Assessing Officer has not struck out

inappropriate portion in the said notice, specifying as to whether the assessee concealed income or furnished inaccurate particulars thereof. The assessee also relied on the various case laws.

5. The Ld. CIT(A) after considering the submissions of the assessee upheld the order of Assessing Officer by referring the decision of Hon'ble Bombay High Court in the case of *CIT vs. Smt. Kaushalya And Otrs.* (1995) 216 ITR 660 (Bom). The Ld. CIT(A) further held that Assessing Officer made addition on elaborate discussion. Penalty proceedings were initiated for furnishing inaccurate particulars of income and was levied for furnishing inaccurate particulars of income. Therefore, the Assessing Officer was very well aware about the issue in the assessment, on the basis of addition was made and dismissed the additional ground raised by assessee. On the merit of penalty, the CIT(A) held that addition made under section 54F have been upheld upto the level of Tribunal. The assessee has not substantiate his claim and failed to prove that explanation was *bona fide* and upheld the penalty levied under section 271(1)(c). However, on the submission of assessee that rate of

tax applicable on LTCG is @ 20% plus 3% cess and 100% tax sought to be evaded would be Rs.3,08,738/-, the ld CIT(A) directed the Assessing Officer to re-compute the tax sought to be evaded and thus given part relief on quantum of penalty. Further aggrieved, assessee has filed present appeal before this Tribunal.

6. We have heard the submission of Ld. Authorized Representative (AR) for the assessee and the Ld. Sr. Departmental Representative (DR) for the Revenue. Ground No.1 relates to validity of notice under section 271(1)(c) r.w.s. 274 of the Act. The Ld. AR of the assessee submits that show cause notice issued by Assessing Officer dated 31.03.2015 is invalid as the Assessing Officer had issued of general notice without specifying charge or striking inappropriate portion of the notice, if the assessee concealed income or furnished inaccurate particulars thereof. The Ld. AR of the assessee submits that copy of show cause notice dated 31.03.2015, is placed on record and that no other notice except this notice was issued by Assessing Officer. The charge in the notice was not clear whether the Assessing Officer intends to proceed

against the assessee on the ground that assessee concealed his income or furnished inaccurate particulars of income. To support his submission, Ld. AR of the assessee relied on the decision of Hon'ble apex court in the case of *Dilip N Shroff vs. JCIT* (2007) 161 Taxman 218 (SC), wherein the Hon'ble court held that standard proforma used by Assessing Officer in issuing a notice, despite the fact that the same proforma that inappropriate word and paragraph-3 to be deleted, the same postulates that inappropriate words and paragraphs were to be deleted, the same had not been done. Thus, the Assessing Officer was not sure as to whether he had proceeded on the basis that assessee concealed his income or he had furnished inaccurate particulars. It was further held that Revenue while placing the order of assessment laid emphasis that he had dealt with both the situations. Hon'ble Apex Court held that the order of penalty suffers from non-application of mind and allow the appeal of assessee. The Ld. AR of the assessee also relied upon the decision of Hon'ble Karnataka High Court in the case of *Commissioner of Income-tax vs. Manjunatha Cotton & Ginning Factory* (2013) 35 Taxmann.com 250 (Kar); Hon'ble

jurisdictional High Court in the case of New Sorathia Engg. Co. Vs. CIT (2006) 155 Taxman 513 (Guj) and CIT vs. Manu Engineering Works (1980) 122 ITR 306 (Guj). The Ld. AR of the assessee submits that in all cases, the penalty order was quashed, which was passed without specific charges in the show cause notice.

7. On the merit of case, which is assailed in Ground No.2, the Ld. AR of the assessee submits that in quantum assessment the addition of disallowance of exemption under section 54F was confirmed on the ground that one flat owned by assessee was used for business purposes of a partnership firm by taking view that such contention of assessee does not inspire confidence of the Bench as no evidence substantiating such use of flat for business purposes were submitted. The Ld. AR of the assessee submits copy of decision of Hon'ble Tribunal is placed on record. From the contents of the order of Hon'ble Tribunal, it is clearly emerges that use of said flat for business purposes is not found to be false. It was affirmed for the want of evidence that it is not case that assessee failed to offer an explanation with regard to claim of exemption or that

explanation offered by assessee was found to be false or that explanation offered by assessee for claim of under section 54F is not *bona fide*. The assessee furnished all facts relating to the claim of under section 54F of the Act. Merely the claim of assessee was not accepted penalty under section 271(1)(c) cannot be levied. To support his submission, Ld. AR of the assessee relied upon the decision of Hon'ble apex court in the case of *CIT, Ahmedabad vs. Reliance Petroproducts Pvt. Ltd.* [2010] 189 Taxman 322 (SC), Hon'ble jurisdictional High Court in the case of *National Textiles vs. CIT* [2001] 114 taxmann.com 203 (Guj); Hon'ble Mumbai High Court in the case of *PCIT, Mumbai vs. Rasiklal M Parikh* [ITA No.169 of 2017] (Bom); Hon'ble Karnataka High Court in the case of *PCIT vs. Deccan Mining Syndicate Pvt.Ltd.* [ITA No.501/2017] (Kar); *Megh Malhar Developers vs. ACIT, Surat* [2013] 31 taxmann.com 349 (Ahmedabad-Trib.) and *Sushil Kumar Modi vs. ACIT* [2013] 35 taxmann.com 88 (Jaipur-Trib.).

8. In other alternative submission, Ld. AR of the assessee submits that assessee made his claim on the basis of legal advice that assessee is eligible for exemption and disclosed all material

facts in his return of income, the assessee has not concealed any particulars of income and furnished complete facts for appreciation by AO. Merely the claim of assessee was not found to be admissible under the law which cannot lead to levy of penalty as the assessee acted on *bona fide* advice. On the basis of aforesaid submission, the Ld. AR of the assessee prayed for deleting the entire penalty.

9. On the other hand, Ld. Sr.DR for the Revenue supported the orders of authorities below. The Ld. Sr.DR for the Revenue submits that at the time of assessment, assessee was very well aware about the disallowance of capital gains under section 54B. The Assessing Officer while passing assessment order has clearly held that penalty notice under section 271(1)(c) issued for furnishing inaccurate particulars of income thereby concealing the income. The penalty notice is not independent of assessment order. Initially, the Assessing Officer initiated the penalty on disallowance of deduction under section 54EC & 54F. However, the Ld. CIT(A) deleted the penalty on disallowance of deduction under section 54EC. Thus, the assessee from the beginning was made aware about the

furnishing of inaccurate particulars of income in claiming wrong deduction of capital gains. The submission of Ld. AR of the assessee is that assessee was not made aware about the specific charges in the notice under section 271(1)(c) is misplaced and assessee right from the proposed disallowance in the assessment order was very well aware about the furnishing inaccurate particulars of income for claiming exemption of LTCG.

10. On the merit of the penalty, the Ld. Sr.DR for the Revenue submits that Assessing Officer made disallowance of deduction under section 54F, the same was upheld by Ld. CIT(A). The disallowance was further upheld by this Tribunal with a detailed reasoning. Once, the disallowance made by Assessing Officer has been affirmed by First Appellate Authority as well as Second Appellate Authority (Tribunal) and none of the authorities have given any finding that assessee was not at fault. The Ld. Sr.DR for the Revenue submits that order of Ld. CIT(A) may be affirmed and appeal of assessee may be dismissed.

11. In short rejoinder submission, Ld. AR of the assessee submits that Hon'ble apex court in T Ashok Pai Vs CIT ([2007] 161 Taxman 340 (SC)/[2007] 292 ITR 11 (SC) has held 'Concealment of income' and 'furnishing of inaccurate particulars' carry different connotations. Concealment refers to deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of *suppressio veri or suggestio falsi*. Further, the Tribunal in quantum assessment while upholding the disallowance merely held that "the submission of assessee does not inspire confidence. In absence of any evidence-". Thus, the addition was upheld only in absence of evidence. The Ld. AR of the assessee submits that he has filed conveyance deed of flat No.C-301 Aashirwad Flat Majura, which was purchased on a sale consideration of Rs.2.50 lakhs and the same is used for the purpose of assessee's business, such small flat is not for the use of residence of assessee who is big business man.

12. We have considered the rival submission of both the parties and perused the orders of lower authorities. There is no dispute that in the computation of income, the assessee

claimed deduction of LTCG under section 54F. The LTCG was disallowed by Assessing Officer by taking view that in the balance-sheet of assessee, the assessee owned more than one residential flat. It is further matter of recorded that disallowance of capital gains was upheld by Ld. CIT(A) and on further appeal again upheld by Hon'ble Tribunal. Before us, the Ld. AR of the assessee, besides the other submissions, submits before us that assessee computed LTCG after due deliberation and on legal advice and the same is not accepted by the Revenue authorities, the assessee cannot subject to levy of penalty under section 271(1)(c), we find merit in the submission of Ld AR of the assessee. The assessee acted in *bona fide* belief and made the claim is not acceptable due to any reason and was disallowed the same cannot be subject to levy of penalty under section 271(1)(c) of the Act. Considering the aforesaid factual legal discussion, we are of the constrained view that if the claim of assessee for deduction of LTCG was not found admissible for deduction under section 54F, the assessee cannot be subject to levy of penalty under section 271(1)(c).

Thus, we direct the AO to delete the entire penalty of Rs.3,08,738/-.

13. Considering the fact that we have allowed the appeal of assessee on merit by accepting one of the submissions of ld AR of the assessee, therefore adjudication on the submissions and on validity of notice under section 271(1)(c) r.w.s. 274 have become academic.

14. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 16/02/2022 and result was also placed on the Notice Board.

Sd/-

**(Dr ARJUN LAL SAINI)**  
**ACCOUNTANT MEMBER**  
Surat, Dated: 16/02/2022  
*Dkp. Out Sourcing P.S*

Copy to:

1. Appellant-
2. Respondent-
3. CIT(A)-
4. CIT
5. DR
6. Guard File

Sd/-

**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

By order

// True Copy //

Assistant Registrar, ITAT, Surat