IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND SHRI SANJAY GARG, JUDICIAL MEMBER

ITA No.210/MUM/2015
(Assessment Year : 2009-10)

Anurag Toshniwal,
12 Ishwar Bhavan,
"A"Road,Churchgate,
Mumbai 400 020
PAN: AADPT 9118P ... Appellant
Vs.
The DCIT-1(3)
Room No.540, 5th Floor,
Aaykar Bhavan, M.K.Road,
Mumbai 400 020 .... Respondent

ITA No.211/MUM/2015
(Assessment Year : 2009-10)

Arun Toshniwal,
12 Ishwar Bhavan,
"A"Road,Churchgate,
Mumbai 400 020
PAN: AADPT 9121P ... Appellant
Vs.
The DCIT-1(3)
Room No.540, 5th Floor,
Aaykar Bhavan, M.K.Road,
Mumbai 400 020 .... Respondent

Appellants by	:	S/Shri Sanjay Sanghavi/ Ashish Mehta
Revenue by	:	Shri Yogesh Kamat
Date of hearing	:	09/06/2015
Date of pronouncement	:	30/09/2015

ORDER

PER G.S. PANNU,AM:

The captioned are two appeals relating to two individuals of the same family and involve a common issue. The appeals are directed against separate but similarly worded orders of the CIT(A) dated 26/12/2014, whereby the penalty levied by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961 (in short ' the Act') for assessment year 2009-10 vide respective orders dated 12/3/2013 have been affirmed. Since the facts and circumstances in both the appeals are common, the appeal in the case of Shri Arun Toshniwal in ITA No.211/Mum/2015 is taken as the lead case.

2. The appellant in ITA NO.211/Mum/2015 is an individual, who filed his return of income for Assessment Year 2009-10 on 30/07/2009 declaring total income at Rs.88,33,904/-. The income returned by the assessee comprised of income from salary from M/s. Toshbro Medicals Pvt. Ltd. and Chemito Technologies Pvt. Ltd. along with income from house property, income from capital gains and income from other sources. The assessment under section 143(3) of the Act was completed on 30/9/2011, whereby the total income was assessed at Rs.5,88,33,904/-. The difference between the reported and the assessed income of Rs.5.00 crores was on account of 'Non-compete fees' received by the assessee from M/s. Termo Electron LLS India Pvt. Ltd. In the return of income assessee had declared the said sum of Rs.5.00 crores as a long term capital gain against which he claimed deduction under section 54EC to the tune of Rs.50.00 lacs and the balance amount of Rs.4.50 crores was deposited in the capital gain

saving account. The Assessing Officer however, differed with the assessee and held that the 'Non-Compete fee' was liable to be treated as an income under the head 'profits or gains from business or profession' on the strength of section 28(va) of the Act. This stand of the Assessing Officer has since been upheld by the CIT(A) as well as by the Tribunal vide order ITA No.7034/Mum/2012 & others dated 16/1/2013.

3. Subsequently, the Assessing Officer has held the assessee guilty of concealment/furnishing of inaccurate particulars of income within the meaning of section 271(1)(c) of the Act, qua the aforesaid amount. As a consequence the Assessing Officer levied a penalty under section 271(1)(c) of the Act equivalent to 100% of the tax sought to be evaded on the aforesaid sum, which came to Rs.1.50 crores. As per the Assessing Officer, assessee had willfully claimed the 'Non-Compete fee' of Rs.5.00 crores as long term capital gain to avoid taxability of business income which had resulted in a loss of revenue. The penalty so imposed by the Assessing Officer was carried in appeal before the CIT(A), who has also affirmed the action of the Assessing Officer. Not being satisfied with the order of CIT(A), assessee is in further appeal before us.

4. Before us, the Ld. Representative for the assessee has assailed the levy of penalty on facts and in law. It is sought to be pointed out that in the return of income filed, assessee had made complete disclosure of the receipt as a capital receipt and, therefore, there was no concealment. Secondly, it is pointed out that the addition made by the Assessing Officer by invoking section 28(va) of the Act was merely

based on an interpretation of law, which was in variance with that of the assessee. According to the appellant, at the time of filing of the return of income the decision of Mumbai Bench of the Tribunal in the case of Mrs. Hami Aspi Balsara Vs. ACIT, 126 ITD 100(Mum) supported the stand of the assessee and, therefore, the claim made by the assessee in the return of income was a bona-fide claim. Thirdly, it is pointed out that it is a case where a claim made in the return of income had been found to be unsustainable and, no penalty under section 271(1)(c) of the Act is leviable having regard to the judgment of the Hon'ble Supreme Court in the case of CIT vs. Reliance Petro Products Ltd., 322 ITR 158(SC). It has also been pointed out that there is no variation in the amount of 'Non-Compete fee' disclosed and the amount assessed by the Assessing Officer and that merely the head of income has been changed, which does not justify the levy of penalty and in support reliance has been placed on the judgment of the Hon'ble Bombay High Court in the case of CIT vs. Bennet Coelman & Co. Ltd., Income Tax Appeal (LOD) No. 2117 of 2012 dated 26/2/2013, a copy of which has been placed on record.

5. On the other hand, Ld. Departmental Representative appearing for the Revenue has defended the levy of penalty by pointing out that applicability of section 28(va) of the Act was clearly established in the present case and, therefore, the action of the assessee in considering 'Non-Compete fee' as a long term capital gain was erroneous. Ld. Departmental Representative also pointed out that it could not be said that the issue was debatable so as to mitigate the levy of penalty under section 271(1)(c) of the Act. At the time of hearing Ld. Departmental Representative has relied upon the judgment of Hon'ble Supreme

Court in the case of Mak Data P. Ltd. vs. CIT, 358 ITR 593(SC) to submit that even in a case of a voluntary addition, penalty under section 271(1)(c) is justified. Ld. Departmental Representative has referred to the discussion made by the CIT(A) in his order whereby it has been concluded that the explanation of the assessee regarding non-application of section 28(va) of the Act was incorrect and not bonafide. Therefore, the penalty levied under section 271(1)(c) of the Act has been sought to be defended.

6. We have carefully considered the rival submissions. Section 271(1)(c) of the Act provides for a levy of penalty where the Assessing Officer is satisfied that an assessee has concealed the particulars of his income or has furnished inaccurate particulars of such income. Notably, the imposition of penalty is circumscribed by fulfillment of the condition that the assessee has either concealed the particulars of his income or has furnished inaccurate particulars of such income.

6.1 In the present case, the penalty has been levied with regard to an amount of Rs.5.00 crores, which has been found to be assessable as income under the head 'profits and gains of business or profession' by invocation of section 28(va) of the Act. In so far as the merit of the said stand of the Assessing Officer is concerned, the same is not the issue before us. What we are concerned is the purported satisfaction of the Assessing Officer that it is a fit case for levy of penalty under section 271(1)(c) of the Act on the ground that the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income. In this context, we may briefly touch upon the claim made by the assessee in the return of income and the manner in which it did not

find favour with the Assessing Officer in the quantum assessment proceedings. Briefly put, the relevant facts are that assessee is one of the directors of a company called Chemito Technologies Pvt. Ltd. since 1/7/1983. The said concern is engaged in the manufacture and assembling of various types of laboratory equipments. The said concern sold one of its Division called 'analytical technologies and instrumentation' to M/s. Termo Electron LLS India Pvt. Ltd. on slump sale basis vide agreement dated 27/5/2008 for a consideration of Rs.58,00,00,000/-. In the said agreement there was a Non-Compete clause, in terms of which the seller for an agreed period of four years was prohibited, without the prior written consent of the purchaser directly or indirectly, whether through affiliate or otherwise, engage in any business involving production, manufacture sale or distribution of products that were the same or similar to the products produced, manufactured, marketed, sold or distributed by the acquired business as of date thereon. The restrictive covenant also prohibited the seller from assisting third parties whether as Consultant or otherwise in carrying out activities of the acquired business. Subsequently on 2/6/2008, purchaser company M/s. M/s. Termo Electron LLS India Pvt. Ltd. entered into a separate Non-Compete and Non-Solicitation agreement with the assessee whereby the assessee received a sum of Rs.5.00 crores. In the return of income filed, assessee treated such receipt on account of Non-Compete and Non-Solicitation agreement as a long term capital gain. So however, the Assessing Officer was of the view that such receipt was assessable as a business income under section 28(va) of the Act. Broadly speaking, the amount of Rs.5.00 crores received by the assessee from M/s. Termo Electron LLS India

Pvt. Ltd. was for not carrying out the business of the similar nature for four years. The Assessing Officer stressed on the provisions of section 28(va) of the Act, which are as follows:-

> *"(va) any sum, whether received or receivable, in cash or kind, under an agreement for –*
>
> *(a) Not carrying out any activity in relation to any business; or....."*

and concluded that the sum of Rs.5 crores was an amount assessable under the head 'profits and gains of business or profession' and not as capital gains.

6.2 As per the Revenue, the aforesaid provision inserted by Finance Act, 2002 w.e.f. 1/4/2003 clearly established that the sum of Rs.5.00 crores received by the assessee for not carrying out any activity in relation to the business acquired by M/s. Termo Electron LLS India Pvt. Ltd. was chargeable to tax under the head 'profits and gains of business or profession' and not as 'capital gains', contended by the assessee. At this stage, we may point out that we are not considering the merits of the respective stands of the assessee and the Revenue, but are merely trying to ascertain as to whether the claim made by the assessee in his return of income that the sum of Rs.5.00 crores received from M/s. Termo Electron LLS India Pvt. Ltd. was chargeable to tax as a long term capital gain was a bonafide claim or not. In support of the bonafides of assessee's claim, it has been asserted before us that at the time of filing of the return of income the decision of the Mumbai Bench of the Tribunal in the case of Mrs. Hami Aspi Balsara(supra) dated 22/5/2009 was prevailing which was in favour of assessee's stand. In the said decision, the Tribunal was dealing with receipt of Non-Compete fee for assessment year 2005-06, which was after insertion of section

28(va) of the Act, and yet it was held that the Non-compete fee was chargeable to tax under the head 'capital gains', having regard to the facts and circumstances of the case. In the said decision, the Tribunal observed that the Provisions of section 28(va) would be attracted, where the Non-Compete fee was received by the assessee who was carrying on business and not where assessee only had a right to carry on business in the form of a capital asset. On the strength of the aforesaid, the point made out by the assessee is that the business which has been transferred was being carried out by Chemito Technologies Pvt. Ltd. and not by the assessee himself because assessee was a director of Chemito Technologies Pvt. Ltd.

6.3 Factually speaking, the proposition sought to be canvassed by the assessee in the return of income filed on 30/7/2009 was indeed supported by the then prevailing decision of the Mumbai Bench of the Tribunal in the case of Mrs. Hami Aspi Balsara(supra). It is only subsequently the Special Bench of the Tribunal in the case of Dr. B.V. Raju , 135 ITD 1(Hyd)(SB) upheld a proposition which is contrary to that laid down by the Mumbai Tribunal in the case of Mrs. Hami Aspi Balsara(supra). The Special Bench of the Tribunal in the case of Dr. B.V. Raju(supra) noted that when a business is sold and the purchaser enters into an agreement that there is no competition, he may enter into such agreement not only with the transferor of the business but also with persons connected with the transferor. Accordingly, as per Special Bench the purchaser of business may pay consideration to the transferor of business for not engaging in any competition but also to persons associated with the transferor for not engaging in competition. As per the Special Bench, the receipt of Non-Compete fee by the

persons connected with the transferor for not indulging in competition would also fall for consideration under section 28(va) of the Act. It is this proposition which has prevailed and the issue has been decided against the assessee in the quantum assessment proceedings.

6.4 Be that as it may, the aforesaid discussion clearly brings out that the claim made by the assessee in his return of income to the effect that the Non-Compete fee and Non-Solicitation fee received from M/s. Termo Electron LLS India Pvt. Ltd. was a long term capital gain, cannot be construed to be non-bonafide or fanciful, because it was supported by the decision of the Tribunal in the case of Mrs. Hami Aspi Balsara(supra), which was prevailing at the relevant time. In fact the Ld. Representative for the assessee also referred to another decision of the Tribunal in the case of Savita Mandhana in ITA No.3900/Mum/2010 for Assessment Year 2006-07 dated 7/10/2011, wherein also the proposition laid down by the Tribunal in the case Mrs. Hami Aspi Balsara(supra) has been affirmed. The decision of the Special Bench of the Tribunal in the case of Dr. V.V. Raju (supra), which has disagreed with the earlier rulings has been pronounced on 13/02/2012, which is much after the return of income filed by the assessee on 30/07/2009. Therefore, in our view, the return of income filed by the assessee claiming the impugned sum as a long term capital gain cannot be construed as a claim made '*to avoid taxability of the business income*', as charged by the Assessing Officer in the impugned penalty order.

6.5 Pertinently, the scenario can also be looked at from another angle, which is based on a parity of reasoning laid down by the Hon'ble Supreme Court in the case of Reliance Petro Products Pvt. Ltd. (supra).

As per Hon'ble Supreme Court, where no information given in the return of income is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. As per the Hon'ble Supreme Court, mere making of wrong claim in the return of income would not tantamount to furnishing of inaccurate particulars of income. Quite clearly, in the present case, there is no charge much less a finding by the Revenue that any of the particulars regarding the receipt of Rs.5.00 crores from M/s. Termo Electron LLS India Pvt. Ltd. have been found to be incorrect or erroneous or false. The only point of difference between the assessee and the Revenue is the relevant head of income under which the receipt from M/s. Termo Electron LLS India Pvt. Ltd. is liable to be taxed. Therefore, it is a case where a claim made in the return of income of taxing the receipt from M/s. Termo Electron LLS India Pvt. Ltd. under the head 'capital gain'has been found to be not sustainable in law. As per the authoritative pronouncement of the Hon'ble Supreme Court in the case of Reliance Petro Products Ltd. (supra), such a fact-situation does not amount to furnishing of inaccurate particulars regarding income within the meaning of section under 271(1)(c) of the Act. Thus, on this aspect itself the penalty is unsustainable.

6.6 To repeat, the entire fact-situation of the dispute reveals that difference between the assessee and the Revenue revolves around the head of income under which the impugned receipt from M/s. Termo Electron LLS India Pvt. Ltd. is liable to be taxed. The Hon'ble Bombay High Court in the case of M/s. Bennett Coleman & Co. Ltd.(supra) held that where there is only a change of head of income and in the absence of facts to show that the claim of the assessee was not bonafide,

penalty under section 271(1)(c) of the Act is not maintainable. On this count also, we find that the penalty imposed under section 271(1)(c) in the present case is unsustainable.

6.7 Before parting, we may refer to the reliance placed by the CIT(A) as well as by the Ld. Departmental Representative on the judgment of Hon'ble supreme Court in the case of Mak Data P. Ltd.(supra) to justify the levy of penalty in the present case. We have carefully perused the judgment of Hon'ble Supreme Court and find that the said decision has been rendered under different facts and circumstances and the same is not applicable to the facts of the present case. The Hon'ble Supreme Court was considering a situation where the penalty was deleted by the Tribunal on the ground that the amount was surrendered by the assessee to settle the dispute with the Department. Notably, Hon'ble Supreme Court affirmed the decision of the High Court to the effect that the imposition of penalty could not be deleted solely on the basis that assessee surrendered an income to settle the dispute. In fact, the fact-situation before us stands on a different footing. The Hon'ble Supreme Court explained that in the course of examining the efficacy of penalty imposed under section 271(1)(c) of the Act, the question to be examined is whether the assessee has offered any explanation for concealment of particulars of income or furnishing of inaccurate particulars of income. As per Hon'ble Supreme Court, the Explanation to section 271(1) of the Act raises a presumption of concealment when a difference is noted by the Assessing Officer between the reported and assessed income; that in such a situation the burden is on the assessee to show otherwise, on the basis of any cogent and reliable evidence. The Hon'ble Supreme Court further explained that when assessee

discharges such initial onus, then the burden shifts on the Revenue to show that the amount in question constituted an income and not otherwise. Hon'ble Supreme Court applied the aforesaid proposition to the facts of the case before it and found that the penalty under section 271(1)(c) of the Act was exigible. So however, in the context of the factual matrix which is before us, the penalty under section 271(1)(c) of the Act cannot be justified even on application of the aforesaid legal proposition laid down by the Hon'ble Supreme Court in the case of Mak Data P. Ltd.(supra). We say so for the reason that in the present case assessee has been able to demonstrate that the claim made in the return of income was a bonafide claim and that the same was also supported by the decision of the Tribunal prevailing at the relevant point of time. Therefore, the initial onus on the assessee is discharged in the present case and in our view, the burden was on the Revenue to demonstrate that the explanation rendered by the assessee is bereft of any substance. In our considered opinion, the Revenue has failed to demonstrate that there is any conscious concealment or furnishing of inaccurate particulars of income in the return of income qua the amount of Rs.5.00 crores received by the assessee as Non-compete and Non-solicitation fee from M/s. Termo Electron LLS India Pvt. Ltd. Therefore, the ratio of the judgment of Hon'ble Supreme Court in the case of Mak Data P. Ltd.(supra) does not help the case of the Revenue in the instant appeal.

6.8 In conclusion, we therefore, hold that having regard to the aforesaid discussion, the lower authorities have erred in imposing penalty under section 271(1)(c) of the Act amounting to Rs.1,50,00,000/-. Accordingly, the order of the CIT(A) is set aside and

the Assessing Officer is directed to delete the penalty levied under section 271(1)(c) of the Act.

6.9 In so far as the other captioned appeal in the case of Anurag Toshniwal is concerned, the facts and circumstances are identical to those considered in the case Arun Toshniwal in the earlier paras. Therefore, our decision in the appeal of Arun Toshniwal(supra) would apply *mutatis mutandis* in the other captioned appeal also.

7. Resultantly, the captioned appeals are allowed, as above.

Order pronounced in the open court on 30/09/2015

Sd/-	Sd/-
(SANJAY GARG)	(G.S. PANNU)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dated 30/09/2015

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai

Vm, Sr. PS