IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH,CHANDIGARH

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND Ms.ANNAPURNA MEHROTRA, ACCOUNTANT MEMBER

ITA No. 961/CHD/2014
Assessment Year: 2008-09

The ACIT, Circle 3(1), Chandigarh.	Vs	Ms. Harjinder Dhiman, SCO 1132-33, Sector 22-B, Chandigarh. PAN: AACCC4558L

&

ITA No. 148/CHD/2013
Assessment Year: 2008-09

The ACIT, Circle 3(1), Chandigarh.	Vs	Mrs Harjinder Dhiman, SCO 186-187, Ist Floor, Sector 17, Chandigarh. PAN: AACCC4558L

&

ITA No. 882/CHD/2014
Assessment Year: 2008-09

Ms. Harjinder Dhiman, SCO 186-187, 1st Floor, Sector 17-C, Chandigarh. (Now N: 163,Panchsheel Park, New Delhi. PAN: AACCC4558L	Vs	The DCIT, Circle 3(1), Chandigarh.

(Appellant) (Respondent)

Department by : Shri Sunil Verma
Assessee by : Shri A.K.Jindal &
Ms. Rattan Kaur

Date of Hearing : 25.08.2015
Date of Pronouncement : 10.09.2015

O R D E R

PER BHAVNESH SAINI,JM

This order shall dispose of all the above appeals for assessment year 2008-09 pertaining to the same assessee.

2. We have heard ld. Representatives of both the parties, perused the findings of authorities below and considered the material available on record. The appeals are decided as under.

ITA 148/2013 (Departmental Appeal)

3. This appeal of department is filed against the order of ld. CIT(Appeals) Chandigarh dated 30.11.2012 for assessment year 2008-09.

4. On ground No. 1, revenue challenged the order of ld. CIT(Appeals) in deleting the disallowance of loss on shares/securities made by Assessing Officer as the assessee failed to produce the statement of DEMAT Account.

5. The facts of the issue are that the assessee had adjusted short term capital loss of Rs. 1,41,33,145/- against long term capital gain. The short term capital loss was on account of investment in Portfolio Management Scheme (hereinafter referred to as 'PMS) of M/s BNP Paribas Investment Services India (P) Ltd. (hereinafter referred to as 'M/s BNP'). The Assessing

Officer called for information from M/s BNP. M/s BNP supplied profit and loss account and balance sheet of PMS account of the assessee. The Assessing Officer was of the view that the loss claimed could be verified from the DEMAT statement only and so he asked the assessee to give a copy of DEMAT statement, which was not given by her. According to the Assessing Officer, only the DEMAT account could authenticate the purchase and sale of shares by the assessee and so he disallowed the loss claimed of Rs. 1,41,33,145/-.

6. During the course of appellate proceedings, the Ld. Counsel for the assessee has submitted that the assessee had suffered loss of Rs. 1.41 crores, details of which were as per Audit Financial Statement of assessee's portfolio with M/s BNP. It has also been submitted that the assessee had used portfolio management services from M/s BNP under which securities were held in a pool account by the Portfolio Manager for its clients and there was no requirement for maintaining a separate DEMAT account. Reliance has been placed by the assessee on the decision of Hon'ble ITAT, Pune Bench in the case of M/s ARA Trading and Investments (P) Ltd. (47 SOT 172).

7. The ld. CIT(Appeals) considering the submissions of the assessee and material on record, following the decision of ITAT Pune Bench in the case of M/s ARA Trading and Investments (P) Ltd. (supra) deleted the addition and allowed appeal of the assessee. His findings

in para 3.3 to 3.3.2 of the appellate order are reproduced as under :

"3 I have considered the submission of the Ld. Counsel and gone through the Audited Financial Statement of the PMS portfolio of the appellant with M/ s BNP. M/ s BNP had its PMS operations through a 'pool bank account and 'pool securities account'. The said pool bank account and pool securities account were opened and maintained by M/s BNP with BNP Paribas Bank, which is a scheduled commercial bank and is a depository participant of NSDL. The shares purchased/sold were received and delivered through 'pool securities account. M/s BNP has confirmed that all the transactions in the account were delivery based. The Assessing Officer disallowed the short term capital loss claimed by the appellant on the ground that the loss was verifiable only if the DEMAT account of the appellant was on record, but the reason given by the Assessing Officer for disallowing the loss is not correct, since under the PMS, the shares remain in the pool account and are not transferred to the DEMAT account of the person concerned.

3.3.1 I have also gone through the decision of the ITAT, Pune Bench in the case of M/s ARA Trading and Investments (P) Ltd. (supra), cited by the Ld. Counsel, in which it has been held:

> *"On the basis of the above discussions and considering the activity of the assessee once the admitted position is that the assessee himself has not traded the shares and for the alleged activity entirely dependent upon portfolio manager appointed to look after its investments then in such peculiar circumstances is it legally justifiable to hold that the assessee can be said to be a dealer in shares. In such a scenario their investment is never termed as a trading in a day to day share transaction by the member of mutual fund. In the present case as well the object is to maximize the value of the portfolio held by the*

company as the status of the company as well undisputedly declared as an investment company.----------

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One more aspect as emerged is that the transactions were on delivery basis and not speculative in nature i.e. without taking the delivery. In the present case, the badla transaction and the speculative transactions have been specifically forbidden as per the mutual agreement, nevertheless the significant aspect is that the decision to buy and sell was not dependent upon investor i.e. the assessee-company but ultimately the choice and the decision was entirely of the Portfolio Manager. This distinction of self governed business activity viz-a-viz activity of someone else who is at the helm of affairs can be a vital significance. The subtle distinction such intricate issue. In this situation when neither the purchase not sales are decided by the assessee but for that purpose the portfolio manager is assigned, then the term "dealing" cannot be attached with the assessee. Facts have revealed that the portfolio manager is empowered to decide what is to be purchased and what is required to be sold in the market as also the time of transaction, which is a core factor in this business: is altogether under the control and supervision of the portfolio manager. As we have seen from the case law cited supra merely selling and buying by itself does not mean the business activity of systematic purchase and sale, nevertheless it has not been done directly by the assessee in the present case."

3.3.2 The facts of the appellant's case are identical to the facts of the cited case and so the ratio of this decision is squarely applicable to the case of the appellant. Hence, the Assessing Officer was not right in disallowing the short term capital loss of

Rs. 1,41,33,145/- claimed by the appellant. Ground of appeal No. 2 is allowed."

8. The ld. DR relied upon order of the Assessing Officer and submitted that no information was supplied to the Assessing Officer and additional evidence was produced before ld. CIT(Appeals), therefore, matter may be remanded to the Assessing Officer.

9. On the other hand, ld. counsel for the assessee reiterated the submissions made before authorities below and referred to para 1.29 of the assessment order in which the Assessing Officer called for the information from M/s BNP Paribas Investment Services India (P) Ltd. and that they produced complete details before Assessing Officer. The ld. counsel for the assessee, therefore, submitted that DEMAT account is not required for mutual funds/portfolio. PB-72 is Profit & Loss Account giving complete details on account of loss on sale of shares. Complete details and certificate of M/s BNP Paribas Investment Services India (P) Ltd. is filed at PB-2/I with complete details of capital register in respect of the assessee and bank pass-book of M/s BNP Paribas Investment Services India (P) Ltd. to show that all the transactions were carried out actually by the Portfolio Manager. PB-75 is certificate issued by M/s BNP Paribas Investment Services India (P) Ltd. Explaining that in terms of SEBI (Portfolio Managers) Regulations 1993 which was inforce for assessment year under appeal

prescribing therein that the Portfolio Manager may hold the securities belonging to the portfolio account in its own name on behalf of his client only as per contract. PB-76 is also a letter of M/s BNP Paribas Investment Services India (P) Ltd. explaining that as per normal industry practice prevalent, assessee had an account with them and all PMS operations of all funds and securities were conducted through Pool Bank Account and Pool Security Account. M/s BNP Paribas Bank is scheduled commercial bank and is also a depository participant of National Securities Depository Ltd. (NSLD). All the shares purchased/sold are received and delivered respectively through the Pool Securities Account.

10. The ld. counsel for the assessee, therefore, submitted that in view of the above, the objection of the Assessing Officer was wholly incorrect and ld. CIT(Appeals) on proper appreciation of facts and material on record, correctly deleted the addition.

11. We have considered rival submissions and do not find any merit in this ground of appeal of the revenue. The assessee produced complete details before Assessing Officer. The Assessing Officer has also obtained information from M/s BNP Paribas Investment Services India (P) Ltd. under section 133(6) of the Income Tax Act. The Portfolio Manager also filed detailed reply before Assessing Officer. The assessee also produced Profit & Loss Account and other details to show that genuine

transactions were conducted through Pool Securities Account of Portfolio Manager. The complete details through audited financial statement of PMS Portfolio of the assessee with M/s BNP Paribas Investment Services India (P) Ltd. were produced on record which shows that M/s BNP Paribas Investment Services India (P) Ltd. had its PMS operations through a Pool Bank Account and Pool Securities Account. The said Pool Bank Account and Pool Securities Account were opened and maintained by M/s BNP with BNP Paribas Bank which is a scheduled commercial bank and is a depository participant of NSDL. SEBI regulations noted above also support explanation of assessee. All the transactions were received and delivered through Pool Securities Account. M/s BNP has confirmed that all the transactions in their account on behalf of the assessee were delivery based. The Assessing Officer disallowed claim of assessee because DEMAT account was not filed but reason given by the Assessing Officer was incorrect because there was no requirement to maintain separate DEMAT account by assessee. The ld. CIT(Appeals) rightly relied upon decision of Pune Bench in the case of M/s ARA Trading & Investments (P) Ltd. for the purpose of deleting the addition. No material is produced before us to contradict finding of fact recorded by ld. CIT(Appeals). Thus, assessee has been able to prove that it has incurred loss on shares/securities handled by Portfolio Manager. No errors have been pointed out in the order of the ld. CIT(Appeals). We, therefore, do not find any justification

to interfere with the order of ld. CIT(Appeals) in deleting the addition. The ground No. 1 of appeal of revenue is thus, dismissed.

12. On ground No. 2, revenue challenged the order of ld. CIT(Appeals) in deleting the disallowance of deduction under section 54F of the Income Tax Act as the assessee failed to produce evidence for the deposit made in the Capital Gain Scheme Account on or before 31.07.2008 or before the due date of filing the return of income.

13. The brief facts of the issue are that the assessee had sold her entire shareholding of 25000 shares in M/s Span Consultants (P) Ltd. for Rs. 9,62,67,773/- during the year under consideration. In the revised computation of income filed before the Assessing Officer, the assessee reduced an amount of Rs. 44,44,328/-, the unrealized sale proceeds, from total sale consideration. The summary of computation of capital gain is as under:

	Amount (in Rs.)
Total Sale consideration	9,62,67,773/-
Less : Unrealised proceeds	44,44,328/-
Net Sale Proceeds	9,18,24,645/-
Less : Index cost of acquisition	32,79,429/-
Capital Gain	8,85,45,216/-
Less : Deduction u/s 54 F	5,00,53,249/-
Long term capital gain	3,84,91,967/-

14. Regarding unrealised sale proceeds of Rs. 44,44,328/-, the assessee had submitted that this amount was held in the shape of bank guarantee as per the terms of share purchase agreement and was received in the accounting year 2008-09 and was shown in the return of income of A.Y. 2009-10. The Assessing Officer was not satisfied with the explanation of the assessee and held that the assessee was to receive amount of Rs. 9,62,67,773/- as full and final payment and so it was to be taken as sale consideration.

15. The Assessing Officer analyzed the provisions of Section 54F of the Act and held that the said deduction was not available to the assessee for the following reasons:

> *"(a) The sale proceeds of shares were deposited in the capital gains scheme on 05.02.2009, which was beyond the date on which the appellant was supposed to have invested in the capital gains scheme i.e. 31.07.2008.*
>
> *(b) The Assessing Officer asked the appellant for details of properties and listed out the residential properties held by the appellant in para 1.20 of the assessment order as under :*
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> *(i) N- 163, Panchsheel Park, New Delhi*
> *(ii) Flat No. C-5, Second Floor, Brindavan Apartments, Hosur Road, Bangalore*
> *(iii) 92-C, Madangir Village (Laldora), New Delhi Shops*
>
> *In para 1.20 of the assessment order, the Assessing Officer has concluded that the appellant was not eligible for deduction u/s*

54F of the Act because she was holding three residential properties as on date of transfer of shares.

(c) The appellant had made investments of sale proceeds in the residential property - B-361, Defence Colony, New Delhi. As per Assessing Officer, the investment was not made within the time limit prescribed in section 54F of the Act."

16. The ld. CIT(Appeals), considering the submissions of the assessee and material on record, allowed this ground of appeal of the assessee partly. His findings in appellate order in paras 4.2 to 4.2.9 are reproduced as under :

"4.2 I have gone through the assessment order and the submissions filed by the appellant. It is seen that the Assessing Officer has mentioned in para 1.20 of the assessment order that as on the date of transfer of shares the appellant was having three properties, but the property - shops at 92-C, Madangir Village, New Delhi (Sr. No. (iii) of Para 4.1.2(b)] above is not a residential property. In fact, the Assessing Officer has himself mentioned that these are shops.

4.2.1 Regarding the property at Bangalore, the appellant has submitted that the property was_ rented out to M/s Span Consultants (P) Ltd. and it was never occupied for residential purposes. The appellant has also submitted that she got it converted to commercial property in the year 2002 and in support of her contention; she has filed a copy of an electricity bill issued by Bangalore Electricity Supply Company Ltd. The appellant has also submitted that this evidence could not be filed before the Assessing Officer because the said property at Bangalore was sold much before the scrutiny proceedings of the case. It has also been submitted that it was not possible to get this evidence easily and therefore this evidence should admitted under Rule 46A(l)(c) of the Income Tax Rules 1962. The said additional evidence was

forwarded to the Assessing Officer for comments and she has submitted that the impugned property is a residential property and commercial activities could not have been permitted from this property. The Assessing Officer has also submitted that no proof of commercial activity except electricity bill was filed and so it should not be accepted.

4.2.2 The appellant has explained as to why impugned evidence could not be filed before the Assessing Officer. As the appellant was prevented by sufficient cause from producing this evidence before the Assessing Officer, which is relevant to this ground of appeal, it has to be admitted. Moreover, this is an electricity bill issued by Electricity Supply Company and is a genuine document. The appellant had purchased the impugned property at Bangalore in June, 2002 and as per letter No. AEE/S2/AAO/1477/305 dated 02.06.2002 of Assistant Executive Engineer (Ele) of Bangalore Electricity Supply Company Ltd, the electricity tariff of this property was changed to commercial with effect from the year 2002. In fact, vide this letter, he has very clearly conveyed to the Deputy Commissioner of Income Tax, Circle-10(1), Bangalore, in response to his query as to whether the impugned property was a residential or commercial property, as under:

> *"Flat No. C-5, Brindavan Apartments, Bangalore is a commercial property. When the installation was first serviced on 03.02.2000, it was serviced under domestic tariff. Afterwards, on the request of the consumer, the tariff is changed to commercial from the year 2002."*

4.2.3 From the above, it is evident that the appellant had got changed the electricity tariff of this property to commercial, since the authorities would not have permitted carrying on of commercial activity from the residential premises. Thus, the property at Bangalore was though a flat, but was being used for commercial purposes and hence cannot be treated as a residential property. Accordingly, for the purposes of section 54F of the Act also, the property cannot be counted towards

residential property. Thus, as on the date of transfer of shares, the appellant was in possession of only one residential property as against three properties mentioned in para 1.20 of the assessment order.

4.2.4 The Assessing Officer has also mentioned in the assessment order that the appellant had not deposited the sale proceeds in the capital gains scheme before the due date mentioned in section 54F of the Act. The appellant has relied upon the decisions of Hon'ble Punjab and Haryana High Courts in the case of M/s Jagriti Aggarwal (245 CTR 629) and Hon'ble Karnataka High Court in the case of Fathima Bai (32 DTK 243). A perusal of these judgements reveals that Their Lordships have held that time limit for deposit in capital gains scheme is to be taken as due date of filing of return of income u/s 139(4) of the Act. In the instant case, the sale proceeds were deposited in the capital gains scheme on 05.02.2009 which is well before the date of filing of return u/s 139(4) of the Act and so the appellant has not violated this condition. Hence, it is held that the sale proceeds were deposited within time limit in the capital gain scheme.

4.2.5 The Assessing Officer has also mentioned in the assessment order that the residential property was not acquired within the time limit prescribed in section 54F of the Act. In the instant case, the shares were sold on 18.7.2007 and payments for purchase of new asset were made as under:

DATE	***Amount (in Rs.)***
19.06.2009	*50,00,000.00*
06.07.2009	*1,50,00,000.00*
06.07.2009	*2,00,00,000.00*
06.07.2009 (Stamp Duty)	*18,00,000.00*
05.02.2010	*25,00,000.00*
05.02.2010	*25,00,000.00*

4.2.6 The appellant has submitted that as the property was purchased within the stipulated period she was eligible for deduction u/s 54F of the Act. The appellant has relied upon the decisions of

Hon'ble Karnataka High Court in the case of Sambandam Udhay Kumar (206 Taxman 150) and of Hon'ble ITAT, Chandigarh in the case of Smt. Rajneet Sandhu [133 TTJ (UO) 64)]. It has been held in these judgements that the intention of the legislature is to encourage investment in the acquisition of residential house and completion of construction or occupation is not the requirement of law. It has also been held that after making the entire payment, merely because a registered sale deed had not been executed before the stipulated period, the benefit of deduction u/s 54 of the Act could not be denied.

4.2.7 In the instant case, the appellant had entered into an agreement to sell on 08.07.2009 for purchase of the impugned property i.e. First Floor of D-361, Defence Colony, New Delhi from four persons. The appellant had made payment of Rs. 4,00,00,000/- + Stamp Duty of Rs. 18,00,000/- within two years of the sale of shares and so she was entitled for benefit of Rs. 4,18,00,000/- under section 54F of the Act. The benefit of the payment made of Rs. 50,00,000/- on 05.02.2010 cannot be given to the appellant, since this payment is beyond two years from the sale of shares.

4.2.8 Regarding unrealised value of sale proceeds of Rs. 44,44,328/-, it has been submitted that this amount was retained by the purchaser and it has been offered for taxation in the next year and so is not taxable in this year, but this argument cannot be accepted because this amount is part of sale proceeds, income from which is taxable as capital gain. Since, capital gain is being assessed in this year and so these proceeds, even though unrealised, have to be taken into account in this year.

4.2.9 In view of the above, it is held that the appellant is eligible for deduction u/ s 54F in respect of investment in the residential house to the tune of Rs. 4,18,00,000/- only and the unrealised sale proceeds have to be included in the total sale proceeds of the shares. The Assessing Officer is directed to recompute deduction u/s 54F of the Act and tax capital gain

accordingly. Ground of appeal No. 3 is partly allowed..”

17. We have heard ld. Representatives of both the parties and perused the findings of authorities below. The ld. DR relied upon order of the Assessing Officer and submitted that properties at Mumbai (PB-8) are residential houses. Electricity bill for commercial property would not prove it to be commercial property. Capital gain amount was not deposited on time, allowed under section 139(1) of the Income Tax Act. On the other hand, ld. counsel for the assessee reiterated the submissions made before authorities below and submitted that Madangir village properties are shops and Assessing Officer has mentioned Mumbai flats as office flats in the assessment order. Bangalore property was commercial property which is proved from the electricity bill and report of the Executive Engineer. Additional evidences were admitted by ld. CIT(Appeals), copies of which are filed at PB-92 to 102. The ld. CIT(Appeals) was satisfied with explanation of the assessee. The sale proceeds were deposited in the capital gain scheme on 05.02.2009 which was well before the date of filing of the return under section 139(4) of the Act and relied upon decision of the Hon'ble Punjab & Haryana High Court in the case of CIT V Jagriti Aggarwal 339 ITR 610. He has also relied upon decision of the Hon'ble Punjab & Haryana High Court in the case of CIT Vs Jagtar Singh Chawla in ITA 71 of 2012 dated 20.03.2013 in which the departmental appeal was dismissed as the

assessee has proved the payment of substantial amount of sale consideration for purchase of residential property within the extended period of limitation for filing of the return.

18. We have considered rival submissions and do not find any merit in this ground of appeal of the revenue. The ld. CIT(Appeals) considered the entire factual things in his findings in which no infirmity has been pointed out by the ld. DR. The ld. DR submitted that Mumbai properties are residential houses, however, Assessing Officer in the assessment order has mentioned the Mumbai properties to be office flat and even no adverse view have been taken by the Assessing Officer in the assessment order. Therefore, whatever case is not made out by the Assessing Officer, could not be made out by the Departmental Representative. Further, in the ground of appeal, the revenue has challenged the findings of the ld. CIT(Appeals) only on the ground that assessee failed to produce evidence for the deposit made in the capital gain scheme account on or before 31.07.2008 or before due date of return. The assessee, however, has filed copies of the bank certificate and copy of the pass book in the Paper Book from pages 77 to 82 to show that investment in the capital gain scheme have been made as per the finding of ld. CIT(Appeals) on 05.02.2009 and Assessing Officer also noted same fact in para 1.16 of assessment order. The ld. CIT(Appeals) has rightly relied upon

decision of the jurisdictional Punjab & Haryana High Court in the case of Ms. Jagriti Aggarwal (supra) in which it was held that, *"Date of furnishing of the return for the purpose of claiming exemption on account of capital gain could be upto the date under section 139(4) of the Income Tax Act."* This issue is, therefore, covered in favour of the assessee and no interference is called for on this matter.

18(i) We may also note here that the ld. CIT(Appeals) admitted the additional evidence under Rule 46A of the IT Rules. The record revealed that ld. CIT(Appeals) referred the matter to the Assessing Officer for filing the remand report and only after giving opportunity of being heard to the Assessing Officer, admitted the additional evidence. The Assessing Officer also filed remand report before ld. CIT(Appeals). The finding of the ld. CIT(Appeals) have not been challenged in the ground of appeal by the revenue, therefore, admission of additional evidence by ld. CIT(Appeals) at appellate stage remained unchallenged and cannot be agitated now in the appeal. It may also be noted here that even though the findings given on merit have not been challenged by the revenue department in the present appeal, but we find that ld. CIT(Appeals) correctly noted that properties at Madangir village (Delhi) are shops and further the property at Bangalore was commercial property which is also certified by Assistant Executive Engineer, in his letter dated 02.06.2002. Since finding of facts recorded by the ld. CIT(Appeals) have not

been challenged through any evidence or material on record and no specific grounds of appeal have been raised to challenge the finding of fact recorded by ld. CIT(Appeals), no interference is called for in the matter. The ld. CIT(Appeals) has also considered and discussed with regard to purchase of the property within the time prescribed under the Act and found that part payments have been made within the stipulated period and as such, correctly given benefit of the same by relying upon decision of the Karnataka High Court and order of ITAT Chandigarh Bench. The decision of the Hon'ble Punjab & Haryana High Court in the case of Jagtar Singh Chawla (supra) also apply in the case of the assessee.

19. Considering the totality of the facts and circumstances, and finding of fact recorded by the ld. CIT(Appeals), we do not find any merit in this ground of appeal of the revenue, the same is accordingly dismissed.

20. In the result, departmental appeal is dismissed.

ITA 961/CHD/2014 (Departmental Appeal)

21. This appeal by revenue is directed against the order of ld. CIT(Appeals) Chandigarh dated 14.08.2014 for assessment year 2008-09 challenging the deletion of part penalty under section 271(1)(c) of the Income Tax Act.

22. The first item of deletion of the penalty is addition of Rs. 84,000/- on account of rental income. The assessee

had received rental income of Rs. 1,20,000/- from South Asia Distributors, which was not declared in the return of income. The explanation for not declaring this income was that the property was let out in this year only and no TDS had been deducted and so, the error took place. The Assessing Officer assessed the rental income at Rs. 84,000/- and initiated the penalty on this addition. The explanation of the assessee against levy of penalty was that the assessee is of 69 years of age and was filing the return through consultant and on realizing the mistake, she had agreed for the addition. The assessee had disclosed income more than Rs.2.80 crores and non disclosure of small amount should not be considered as intentional and malafide.

23. The ld. CIT(Appeals) considered the submission of the assessee and found that non-declaration of rental income was an inadvertent error which took place because property was let out in this year only and TDS was also not deducted. Therefore, explanation of the assessee is bonafide particularly keeping in view the fact that income of more than Rs. 2.80 crores has been declared. Therefore, non-declaration of Rs. 84,000/- cannot be considered as intentional or malafide and accordingly, cancelled the penalty on this addition.

24. We have heard ld. Representatives of both the parties and perused the material available on record. The ld. counsel for the assessee relied upon decision of the Gujrat

High Court in the case of Dahod Sahakari Kharid Vechan Sangh Ltd. Vs CIT 200 CTR 265 in which it was held as under :

> *"Assessee, a co-operative society, having directly credited the amount received from the insurance company, to gratuity fund account instead of P&L a/c and not included the same in the total income in the return due to oversight without any mala fide intention or mens rea, penalty under s. 271(l)(c) was not leviable."*

and also relied upon decision of the Gujrat High Court in the case of CIT Vs Union Electric Corporation 200 CTR 636 in which it was held as under :

> *"In view of undisputed finding of fact recorded by the Tribunal that the assessee itself had offered the wrongful claim for disallowance during the course of assessment proceedings before the AO had detected the same and that the bona fides of the assessee were evident, assessee was not liable for penalty under s. 271(l)(c)."*

25. Considering the explanation of the assessee, we do not find any merit in this ground of appeal of the revenue. The Assessing Officer in the assessment order recorded that at the assessment stage, it was found that assessee has not shown rental income of Rs. 1,20,000/- received from property No. 92C situated at Madangir. The rental income of Rs. 1,20,000/- is duly credited in the bank account of the assessee maintained with UCO Bank, copy of which is placed on record. It is, therefore, clear that rental income was received through banking channel and was credited in the bank account of the assessee in the

year under consideration. The explanation of the assessee was that while preparing Income Tax Return, due to inadvertent error, the same could not be included in the returned income. The assessee, therefore, offered the small rental amount for the purpose of tax at the assessment stage itself. Therefore, it could not be inferred that assessee has concealed the particulars of income or filed inaccurate particulars of income because the rent was received in the bank account of the assessee. The decisions relied upon by ld. counsel for the assessee squarely apply to the case of the assessee and as such, no interference is called for in the matter. This ground of appeal of the revenue is accordingly, dismissed.

26. The other item on which penalty was cancelled was the addition of unrealized sale proceeds amounting to Rs. 44,53,128/- . The assessee had sold her shares in M/s Span Consultants (P) Ltd. for a consideration of Rs. 9.62 Cr as per agreement dated 18.07.2007 but had shown sale consideration of Rs. 9.18 Cr only for computation of capital gain and the rest of the amount of Rs. 44,53,128/- was treated by assessee as unrealized sale proceeds and not taken into account for computation of capital gain. The assessee submitted before Assessing Officer that this amount of Rs. 44,53,128/- was received in the accounting year 2008-09 and was declared in the return of income in assessment year 2009-10. The Assessing Officer did not accept contention of the assessee and taxed this amount

also as capital gain in the assessment order under appeal i.e. 2008-09 and also levied the penalty under section 271(1)(c) of the Act.

27. The assessee's explanation before ld. CIT(Appeals) was that the assessee was under bonafide belief that capital gain is to be computed on the basis of consideration actually received and that is why capital gain was disclosed in two years. It was also contended that return of income for subsequent assessment year 2009-10 was filed on 29.07.2009 i.e. much before the case was selected for scrutiny for year under consideration. It would prove that the intention of the assessee was not malafide. The ld. CIT(Appeals) accepted the contention of the assessee because the assessee believed that incidence of tax liability under capital gain arises on actual receipts of sale proceeds. However, in fact the liability to pay the tax under the head 'capital gain' arises on the date of transfer of the asset. The assessee had declared the un-realized sale proceeds in subsequent assessment year, therefore, it was found that it is not a fit case of levy of penalty and accordingly, cancelled the penalty.

28. We have considered rival submissions and perused the material on record. The ld. counsel for the assessee relied upon decision of the Hon'ble Punjab & Haryana High Court in the case of CIT V Tek Ram (HUF)14 DTR 0065 in which it was held as under :

> *"When the matter relating to enhanced compensation receivable by the assessee was still in dispute and the assessee did not offer the amount of enhanced compensation and interest thereof for tax claiming that it was not taxable in the relevant assessment year, the claim was bona fide and based on one possible view and, therefore, levy of penalty under s. 271(1)(c) was not justified."*

Decision of Hon'ble Punjab & Haryana High Court in the case of CIT Vs SSP (P) Ltd. 219 CTR 486 in which it was held as under :

> *"Tribunal having found on consideration of material on record and law applicable that assessee had not filed inaccurate particulars of income or concealed its income, in claiming a deduction and in not including a particular item in taxable turnover, was justified in deleting penalty and no substantial question of law arose out of the order of the Tribunal."*

Judgement of Karnataka High Court in the case of CIT & Anr Vs N.Nagaraj Ballal 33 DTR 156, in which it was held as under :

> "Assessee *having offered an explanation as to why the impugned contract receipts could not be included in the relevant assessment year which is supported by an affidavit of his chartered accountant as well as auditor's report in Form No. 3CD, CIT(A) and the Tribunal were justified in accepting the same and setting aside the penalty under s. 271(l)(c)."*

29. On the other hand, ld. DR relied upon order of the Assessing Officer.

30. Considering the rival submissions, we do not find any merit in this ground of appeal of the revenue. The assessee has received the sale consideration in two years and accordingly, assessee has offered the same for the

purpose of capital gains in assessment year under appeal as well as in subsequent assessment year 2009-10. The return for subsequent year was filed before the case was taken up for scrutiny in assessment year under appeal. It would prove that assessee never wanted to conceal the particulars of income to the revenue department. All particulars were disclosed to the revenue department. It was a bonafide error on the part of the assessee that part of the capital gain would be taxable in subsequent year. Since, it was a difference of opinion between Assessing Officer and the assessee with regard to taxability of the capital gain in the year under consideration or subsequent year, therefore, it is not a fit case of levy of the penalty or concealment of income or filing inaccurate particulars of income.

31. Considering the above discussion, we do not find merit in this ground of appeal of the revenue, same is accordingly, dismissed.

32. In the result, departmental appeal is dismissed.

ITA 882/CHD/2014 (Assessee's Appeal)

33. In this appeal, assessee challenged the same order of the ld. CIT(Appeals) in sustaining part penalty under section 271(1)(c) of the Act with regard to addition of Rs. 82,54,249/-.

34. Briefly the facts of the case are that the assessee had claimed deduction of Rs. 5,00,53,249/- under section 54F of the Income Tax Act out of the capital gain declared on sale of shares of M/s Span Consultants (P) Ltd. The deduction under section 54F of the Act was claimed on account of purchase of first floor (under construction) of property No. D-361, Defence Colony, New Delhi. However, in appeal, deduction under section 54F of Rs.4.18 Cr was allowed which was amount actually paid within two years of the sale of shares. The Assessing Officer had initiated penalty proceedings for concealment in respect of disallowance of deduction under section 54F of the Act. The penalty for concealment has been levied in respect of excess deduction claimed of Rs. 82,53,249/- (Rs. 5,00,53,249/- - Rs. 4,18,00,000).

35. It was submitted before ld. CIT(Appeals) that all the facts relating to claim under section 54F of the Act were disclosed in the revised return, therefore no penalty should be imposed for concealment.

35(i) The ld. CIT(Appeals), considering the facts of the case found that assessee has claimed deduction under section 54F even in respect of payments made beyond two years and sale of shares. There were no reasons for the assessee to claim deduction in respect of payments which were made beyond two years. The ld. CIT(Appeals) also relied upon decision of Delhi High Court in the case of M/s Zoom Communications Pvt. Ltd. 327 ITR 510 and

found that assessee has made incorrect claim and accordingly concealed the particulars of income and confirmed levy of the penalty under section 271(1)(c) of the Act.

36. The ld. counsel for the assessee reiterated the submissions made before authorities below and referred to receipts and agreement filed in the Paper Book to show that 'agreements to sell' were executed within time and since some works were done in the property, therefore, receipts have been obtained in this regard and also relied upon order of ITAT Delhi Bench in the case of Veejay Service Station V ACIT 22 DTR 527 in which it was held as under :

> *"Assessee having disclosed complete facts regarding goodwill on introduction of a new partner, it cannot be said that the assessee has furnished inaccurate particulars merely because there was a difference of opinion between the AO and the assessee regarding computation of capital gains and, therefore, levy of penalty under s. 271(l)(c) was not justified."*

37. On the other hand, ld. DR relied upon orders of the authorities below.

38. We have considered rival submissions. It is not in dispute that assessee declared all the facts with regard to long term capital gain in the return of income as well as before Assessing Officer at the assessment stage. The Hon'ble Delhi High Court in the case of CIT Vs Nath Bros

Exim International Ltd. 288 ITR 670 held as under :

> *"The assessee had claimed dividend income as his business income and according to the assessee it was entitled to a deduction under clause (baa) of the* Explanation *to section 80HHC(4C) of the Income-tax Act, 1961. The Assessing Officer disallowed the claim and imposed penalty. The Tribunal came to the conclusion that the assessee had disclosed all the facts, and therefore, even though it had made an erroneous claim which could not be justified in law, that by itself did not attract the penal provisions of the Act. On appeal to the High Court :*
>
> *Held, dismissing the appeal, that there was full disclosure of all relevant material. It could not be said that the conduct of the assessee attracted the provisions of section 271(l)(c). The cancellation of penalty was justified."*

38(i) The Hon'ble Supreme Court in the case of CIT Reliance Petroproducts Pvt. Ltd. 322 ITR 158 held as under :

> *"A glance at the provisions of Section 271(1)(c) of the Income-tax Act,1961 suggests that in order to be covered by it, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The meaning of the word 'particulars' used in Section 271(1)(c) would embrace the details of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless the case is strictly covered by the provisions, the penalty provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the assessee, because that is the only document where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, not according to the truth or erroneous.*

Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty u/s 271(1)(c). A mere making of a claim which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars."

39. The issue of claim of deduction under section 54F was an issue before the authorities below. The assessee has claimed deduction of approximately Rs. 5 crores under section 54F of the Act and also explained various issues with regard to properties held by assessee and investment made in purchase of property as well as deposit of the amount in the capital gain scheme. However, in appeal, the deduction under section 54F of Rs. 4.18 Cr was allowed. The dispute was with regard to whether claim of deduction under section 54F could be allowed in respect of payments made beyond two years of sale of shares. In the opinion of the assessee, assessee was entitled for deduction of the entire amount but Assessing Officer did not allow the same and in appeal, substantial relief have been granted to the assessee. Therefore, assessee has disclosed all the relevant fact with regard to claim of deduction under section 54F. Therefore, mere making a claim which is not sustainable in law, by itself will not amount to furnishing inaccurate particulars of income. The decision cited above clearly support the claim of assessee that even if quantum addition has been maintained and not challenged by the

assessee, would clearly prove that it is not a fit case for levy of penalty under section 271(1)(c) of the Act for concealment of income or filing inaccurate particulars of income.

40. Considering the totality of facts and circumstances, we do not find justification to sustain the penalty on this issue. We, accordingly, set aside the orders of authorities below and cancel the penalty. In the result, appeal of the assessee is allowed.

41. In the result, both departmental appeals are dismissed and appeal of the assessee is allowed.

Order pronounced in the Open Court on 10th Sept,2015.

Sd/-	Sd/-
(ANNAPURNA MEHROTRA)	(BHAVNESH SAINI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 10th Sept.,2015.

'Poonam'

Copy to:

The Appellant, The Respondent, The CIT(A), The CIT,DR

Assistant Registrar, ITAT
Chandigarh