Income Tax Appellate Tribunal - Mumbai

Fidelity Mangaemtn & Research Co. ... vs Department Of Income Tax on 2 September, 6648

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI

BEFORE SHRI. R.V. EASWAR, PRESIDENT AND SHRI P.M. JAGTAP, AM

ITA No.6648/MUM/2009
Assessment Year : 2004-2005

A.D.I.T.(IT) 3(2) Scindia House, R.No.132, 1st Flr., N.M. Rd., Mumbai	Vs.	Fidelity Management & Research Co. A/C Fidelity Investment Trust - Fidelity Advisor Diversified International Fund, C/o BMR & Associates 3F Contractor Bldg., 41, R Kamani Rd., Ballard Estate, Mumbai - 400001. PAN : AAATF0621L
(Appellant)		(Respondent)

ITA No.6649/MUM/2009
Assessment Year : 2004-2005

A.D.I.T.(IT) 3(2) Scindia House, R.No.134, 1st Flr., N.M. Rd., Mumbai	Vs.	Fidelity Management & Research Co. A/C Fidelity Investment Trust - Fidelity Global Opportunities Funds, C/o BMR & Associates 3F Contractor Bldg., 41, R Kamani Rd., Ballard Estate, Mumbai - 400001. PAN : AAATF0825C
(Appellant)		(Respondent)

Appellant by : Shri Sumeet Kumar
Respondent by : Shri Jignesh Shah

ORDER

PER P.M.JAGTAP, A.M.

These two appeals are preferred by the Revenue against two separate orders passed by the learned CIT (A)-X, Mumbai dated ITA No.6649MUM/09 M/s Fidelity Mgt. and Research Co.

15.10.2009 whereby he cancelled the penalties imposed by the AO u/s 271(1)(c) on two assesses for assessment year 2004-05 .

2. The relevant facts of the case giving rise to these appeals are that both the assessees in the present cases are registered as trusts in foreign countries and are also tax residents of that countries. The assessees are registered as sub accounts of Funds which are registered with Securities Exchange Board of India (SEBI) as Foreign Institutional Investors (Flls). The assessees originally filed their returns of income for the year under consideration declaring the income earned from sale of securities in India under the head "Capital Gains" and also paid tax due thereon. The assessees had also earned dividend income on their investment which was claimed to be exempt from tax. Thereafter, relying on the AAR ruling in the case of XYZ/ABC Equity Fund, (2001) (250 ITR 194) (AAR) and Fidelity Advisors Series VIII, (2004)(271 ITR 1) (AAR), the assessees filed revised returns of income on showing taxable income at ` Nil, and claiming refund of taxes paid, on the ground that their income was in the nature of "business income" and in the absence of any PE in India, the same was not taxable in India in view of Article 7 read with Article 5 of DTAA. The Assessing Officer considered this stand of the assessees in the light of the scheme of Government of India under which the Fll's are allowed to operate in Indian Securities and special provisions of Indian Income-Tax dealing with taxability of Fll's. He held that Flls are permitted to invest in the capital market as investors and gains arising on purchase and sale of shares and stocks are to be assessed as "capital gains" u/s.115AD of I.T. Act, 1961 as specifically provided for under "Government of India Guidelines" which are part of SEBI Regulation. According to him, to say that Flls are entitled to carry out business of dealing in securities would be violative of the ITA No.6649MUM/09 M/s Fidelity Mgt. and Research Co.

clear mandate of SEBI Regulations, 1995 and would make the entire regulatory frame work redundant whereby Flls have been allowed Tribunal invest in the capital market in India. The Assessing Officer discussed the prospectus of the assessees and observed that the investment objective of the fund, being an Insurance Products Fund- O.P., is capital growth. The Assessing Officer also quoted the extracts of the Prospectus and observed that the assessees' Funds have been created for the purpose of investment in International securities market and in giving information to its own investors, the nature of income of the Fund has been stated as dividend or capital gains. The Assessing Officer also noted that the funds will be having income in the form of dividends and capital gains, which will be distributed or allowed to be accumulated. The funds are tax transparent entities in their countries and its beneficiaries are paying taxes on dividend income and capital gains. He, therefore, did not accept the assessees' contention that their income from Indian Securities market is 'business income' which is not chargeable to tax in India. Accordingly, the Assessing Officer completed the assessments order u/s.143(3) bringing to tax the income of the assessees under the head "capital gain". The penalty proceedings u/s. 271(1)(c) were also initiated for making false claim in the revised returns of income and since the explanation offered by the assessees in reply to the show cause notice was not found to be acceptable by him, the Assessing Officer proceeded to impose penalties u/s. 271(1)(c) of the Act.

3. The penalties imposed by the AO were challenged by the assessees in an appeal filed before the learned CIT(A). During the course of penalty proceedings, it was submitted on assessees' behalf that

in the assessment orders it was only stated that the income of assessees from Indian operations is of the nature of capital gains as ITA No.6649MUM/09 M/s Fidelity Mgt. and Research Co.

against business income on the basis of a different view adopted by him. The Assessing Officer has also not indicated whether such penalty proceedings were initiated on concealment of income or due to furnishing inaccurate particulars. It was submitted that assessees had filed their original returns reporting income from sale of securities in the nature of capital gains. It was however ruled by AAR in XYZ/ABC and FAS VIII (supra), sister concern that income of these Flls from purchase and sale of securities in India is business income. Relying on the said ruling, the assessees revised their returns of income and made a claim for the benefit under treaty and to claim exemption from income tax India. The assessees also filed an application for advance ruling to the AAR in the year 2006 on the issue as to whether their income from the sale of portfolio investment in India would be categorized as business income. The assessees argued before the learned CIT(A) that it is well established principle that no penalty can be levied where a subsequent judgment has been delivered which establishes a point of law/principle contrary as to the position taken by taxpayer.

4. It was also submitted on behalf of the assessees that along with the revised returns of income, the entire basis on which the revised returns have been field, was duly explained and all the information and explanations were also truly and fully furnished. It was submitted that the Assessing Officer himself in the assessment orders has discussed the issue as to whether the income should be assessed under the head "business income" or under the head "capital gains". It was contended that in these facts and circumstances of the case, the question of coming to a conclusion that the assessees have concealed the particulars of income or have furnished inaccurate particulars of income so as to enable the levy of penalty u/s. 271(1)(c) does not ITA No.6649MUM/09 M/s Fidelity Mgt. and Research Co.

arise. The assessees brought it to the notice of the learned CIT(A) that a letter dated 25.03.2005 was filed alongwith the revised returns of income giving all the relevant information as under:

> "We refer the Return of Income ('ROI') in Form No.3 for the Assessment Year under consideration, filed with your office on 27.02.2004, bearing acknowledgment no.1153. A copy of the acknowledgment ROI is enclosed herewith as Annexure A for your ready reference.
>
> The Fund had, in the original ROI, offered to tax the income earned on sale of securities in India as Capital Gains and paid taxes thereon. However, as the Fund has been carrying on business as an investment trust, the shares and securities were held by the Fund as business assets, the profits from the object of the Fund as seen from its charter documents, the registration with Securities & Exchange Board of India (SEBI) as a foreign Institutional Investor and the enormity and frequency of transactions of purchase and sale of shares and securities by the Fund. Further, in the view of the provisions of the Double Taxation Avoidance Agreement ('DTAA') between India and USA, the business profits could be taxed in India only if there is a Permanent Establishment ('PE') IN India. As the Fund does not have an office, a

place of business or a dependent agent in India, it does not have a PE in India and therefore, the business income on sale of securities would not be taxable in India.

With regards to our claim that the income earned by the fund is in the nature of business income we would like to place reliance on a recent ruling delivered by the Authority of Advance rulings ('AAR') in respect of one of our sister funds, namely, 'Fidelity Advisor Series VIII reported in (2004) 271(1)(c) ITR 0001 (AAR) the facts of the which are similar to our case. The ruling delivered by the AAR is enclosed herewith as Annexure B. In this case the AAR after perusing certain parameters such as the objects for which the applicant was established, the frequency of trade, etc. held that the income earned by Fidelity Advisor Series VIII was in the nature business income. The AAR also considered whether the presence of the custodian in India would tantamount to the Fidelity Advisor Series VIII having a PE in India, and in this regard rules in the negative. The AAR ruled that the income earned by Fidelity Advisor series VIII was in the nature of business income. The AAR also considered whether the presence of the custodian in India would tantamount to the Fidelity Advisor Series VIII having a PE in India, and in this regard ruled in the negative. The AAR ruled that the income earned by Fidelity Advisor Series VIII was in the nature of business income and in the absence of PE in India its income from sale of securities was not taxable in India. The AAR has taken a similar view in the case of XYZ/ABC Equity Fund (2001) 250 ITR 194 (AAR).

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In view of the above, the fund wishes to offer is income as business income and accordingly revised the ROI for the above mentioned Assessment Year. The revised ROI in Form No.2 along with the computation of income is attached with the letter.

5. In view of the above information submitted along with it's revised returns of income, it was contended on assessees' behalf that there is no case of furnishing of any inaccurate particulars of income so as to attract penalty u/s 271(1)(c). In support of this contention, reliance was placed by the assessees on the following case laws :

CIT vs. Carborandum Universal Ltd. 215 ITR 376 (Mad.) CIT vs. Ganesh Prasad badri Prasad 231 ITR 951 (MP) CIT vs. Subramanian Chettiar 110 ITR 602 (Ker.) CIT vs. Raj Trading 217 ITR 208 (Raj) ACIT vs. Porrits and Spencers (A) Ltd. 22 SOT 231 (Del.) CIT vs. Ganesh Builders 299 ITR 403 (Mad.) The assessees also relied on the decision of the ITAT, Mumbai in the case of M/s. Variable Products Funds, Overseas Portfolio (ITA No.559 & 584/Mum/2009 dt. 07.05.2009) wherein penalty imposed u/s 271(1)(c) in the similar facts and circumstances was cancelled by the Tribunal.

6. The CIT(A) found merit in the submissions made on behalf of the assessees for the following reasons given in his impugned orders:

> "I have considered the facts and gone through the penalty order passed by the Assessing Officer and also the submissions made by the assessee before me. I find that the assessee has filed original return of income showing income under the head of "capital gain". However, it was revised on the basis of Advance Ruling in the case of XYZ/ABC Equity Fund, (2001) (250 ITR 194) (AAR) and Fidelity Advisors Series VIII, (2004) (271 ITR 1) (AAR), wherein same set of facts the income was held to be assessable as business income. The assessee filed a revised return of income on 31.03.2005 showing taxable income at `.Nil, and claiming refund of taxes paid, on the ground that its income was in the nature of "business income" and since the assessee has not having PE ITA No.6649MUM/09 M/s Fidelity Mgt. and Research Co.

its income is not taxable in India in view of Article 7 read with Article 5 of DTAA. This revised return of income was filed with covering letter dated 25.03.2005 explaining the reasons thereof. However, the Assessing Officer has assessed it's a income form capital gains only. There is no allegation or observation of the Assessing Officer in the assessment order that any fact material to the computation of income was either not disclosed or was found to be wrong. The assessment has been made on the basis of facts disclosed by the assessee in the return of income and also during the course of assessment proceedings as and when demanded by the Assessing Officer. Assessment has been made by the Assessing Officer having a different opinion form the point of view of the assessee. Thus there is no question of concealing any facts. The revised claim was based on legal ruling. Thus there was no concealment whatsoever, nor has the assessee has committed an act of furnishing inaccurate particulars of his income. The entire facts and claim has been explained in the letter while filing the revised return of income and same was based on judicial ruling. A perusal of the penalty order reveals that the Assessing Officer has rejected the contentions on the basis that ignorance of law does not extinguish the liability to obey the law. The Assessing Officer observed that assessee has tried his luck to be in two boats at the same time with guilty mind, but at the same time claiming his assertion to be contention arisen out of bonafide belief, which does not hold water. This view of learned Assessing Officer manifests that there was bonafide belief on the part of assessee and at the same time it was based on judicial ruling in same type of fund that the its income could be assessed as business income. The assessee filed revised returns of income along with a letter which explaining the reasons for filing the return of income.

It is evident from the return filed by the assessee that full disclosure of the claim that its business income is not taxable in India in view of article 7 read with Article 5 of DTAA. The Assessing Officer has, however, taken a different view that the amount is taxable. It is trite law that penalty proceedings are distinct and separate proceedings for assessment proceedings. The finding recorded in the assessment order is not conclusive for deciding the imposition of penalty. It only has a persuasive value. Any finding recorded in the assessment order does not mean that the penalty has to be imposed automatically. Explanation 1 to section 271(1)(c) provides that the penalty would be deemed to attract where in respect of a fact material to the computation of income either no explanation is offered, or explanation offered is found to be false. Assessee has offered explanation which was not found to be false and accordingly its case is not covered by Clauses (A) of Explanation 1. Clause (B) of Explanation 1 provides that where the assessee is not bale to substantiate its

explanation and fails to prove that such explanation is bonafide and all the facts relating to the same have been disclosed, penalty is leviable. I find that the ITA No.6649MUM/09 M/s Fidelity Mgt. and Research Co.

assessee had made disclosure first in the original return, later in the revised return enclosing a letter therewith and thereafter during assessment proceedings on the basis of judicial rulings relied upon. Just because assessee explanation was not found acceptable by the Assessing Officer, it does not follow that the assessee was unable to substantiate his explanation by providing various evidences and judicial opinions. I am, therefore, of the view that the assessment has been made on the basis of difference f opinion on the same set of facts which have been fully disclosed by the assessee. The case of the assessee is, therefore, not covered by Explanation 1. Based on the facts of the case, I note that the assessee had made all the necessary disclosures by way of notes to the return of income and submitted required information, documents and explanations to the Assessing Officer during the assessment proceedings."

7. The CIT(A) also discussed and analyzed the following case laws which were found to be relevant in the context:

> * The Hon'ble ITAT, Mumbai Bench in the case of Roborant Investments (P) Ltd. (7 SOT 181) * The Hon'ble Supreme Court in the case of K.C. Builders, 265 ITR 562 (Supreme Court) * The Hon'ble Jurisdictional Mumbai Tribunal in the case of Telebuild Construction (P) Ltd. vs. ACIT (13 SOT 218) * The Hon'ble Delhi High Court in the case of Bacardi Martin India Ltd.
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> (288 ITR 585) (Delhi) * In the case of DCIT vs. Ms. Aishwarya Rai (12 SOT 114) (Mum) * The Hon'ble Delhi High Court in the case of CIT vs. Nath Bros. Exim International (288 ITR 670) (Del) * The Hon'ble Jurisdictional ITAT in the case of Variable Insurance Fund Overseas Portfolio vs. ADIT (IT) 2(2) Mumbai (ITA No.559/M/2009) (Assessment Year 2004-05) (dtd 07.05.2009)

8. In the light of the legal position emanating from the above judicial pronouncement and taking into consideration the relevant facts of the assesses' cases noted by him, the learned CIT(A) finally cancelled the penalties imposed by the AO by observing as under:

> "In view of the above, I am of the view that the assessee has made its claims under a bonafide belief and based on judicial ruling. The contentions of the assessee that it does not have a PE in India and its income could be considered as business income as per article 7 of DTAA hence its income is not taxable in India is backed by various judicial precedents. When there ITA No.6649MUM/09 M/s Fidelity Mgt. and Research Co.
>
> are two views possible and the assessee has taken one view based on a bonafide belief, which is not agreeable to the Assessing Officer/higher appellate authorities it will not automatically lead to a case for penalty u/s. 271(1)(c) of the I.T. Act, 1961.

> Considering my aforesaid conclusions as well as case laws as discussed above and respectfully following the decision of jurisdictional Tribunal in the case of M/s. Variable Product funds; Overseas Portfolio vs. ADIT (IT) 2(2) (ITA No.559/m/09)(Assessment Year 2004-05)(dtd.07.05.09) which is another Fidelity sub account like assessee and which is fully applicable to the facts of the assessee, it is held that no penalty u/s. 271(1)(c) for the year under consideration is leviable in case of assessee. I am therefore satisfied that the Assessing Officer has wrongly imposed penalty. Penalty imposed by the Assessing Officer is deleted. Accordingly, the Assessing Officer is directed to delete the entire penalty of `.3,06,40,490/-."

Aggrieved by the orders of the learned CIT(A) cancelling the penalties imposed by the AO in the cases of both the assessees, the Revenue has preferred these appeals before the Tribunal.

9. We have heard the arguments of both the sides and also perused the relevant material on record. It is observed that in the returns of income originally filed, both the assessees had declared the profit on sale of securities as capital gains. Subsequently, on the basis of the order passed by AAR in the case of XYZ/ABC Equity Fund (250 ITR

194) and Fidelity Advisors Series VIII (271 ITR 1), the assessees felt that the said profits may constitute their business profits and as the assessees did not have any Permanent establishment in India, the same would not be taxable in India. Accordingly, they filed revised returns claiming the income as exempt and appending a note explaining the reason for the same. This claim of the assessees, however, was not accepted by the AO and the income of the assessees was held to be chargeable to tax as capital gain by him in the assessments. He also imposed penalties u/s 271(1)(c) holding that there was concealment on the part of the assessees in the revised returns filed by them. As demonstrated by the assessees before the ITA No.6649MUM/09 M/s Fidelity Mgt. and Research Co.

learned CIT(A) on the basis of a note appended to the revised returns, there was however no case of furnishing of any inaccurate particulars by the assessses. The said note has already been extracted by us above from the impugned order of the learned CIT(A) and a perusal of the same shows that the reason for claiming exemption of its income on the basis of AAR ruling was duly explained by the assessees which is sufficient to show that the said claim was made bona-fide and in good faith. Moreover, all the material particulars relevant to the said claim were fully and truly furnished by the assessees alongwith their revised returns. Even the AO has not pointed out any falsity in the said particulars either in the assessment order or in the penalty order.

10. In its recent judgment delivered in the case of CIT vs Reliance Petro Products (P) Ltd. (322 ITR 158), Hon'ble Supreme Court has held that S. 271 (1) (c) applies where the assessee "has concealed the particulars of his income or furnished inaccurate particulars of such income". As regards the furnishing of inaccurate particulars, it was found by the Hon'ble Supreme Court that no information given in the Return was found to be incorrect or inaccurate. It was held that the words "inaccurate particulars" mean that the details supplied in the Return are not accurate, not exact or correct, not according to truth or erroneous and in the absence of a finding by the AO that any details supplied

by the assessee in its Return were found to be incorrect or erroneous or false, there would be no question of inviting penalty u/s 271(1)(c). The argument of the revenue raised in this regard that "submitting an incorrect claim for expenditure would amount to giving inaccurate particulars of such income" was not found to be acceptable by the Hon'ble Apex Court observing that by no stretch of imagination can the making of an incorrect claim in law tantamount to furnishing inaccurate particulars. It was held that a mere making of the claim, ITA No.6649MUM/09 M/s Fidelity Mgt. and Research Co.

which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee and if the contention of the Revenue to this effect is accepted then in case of every Return where the claim made is not accepted by the AO for any reason, the assessee will invite penalty u/s 271(1)(c) which is clearly not the intendment of the Legislature. It is observed that applying this ratio of the decision of Hon'ble Supreme Court in the case of Reliance Petro Products (P) Ltd. (supra), the penalties imposed by the AO u/s 271(1)(c) in the cases of Fidelity Management & Research Co. A/C Fidelity Focus Technology Fund and Fidelity Management & Research Co. A/C Fidelity Investment Canada involving identical facts and circumstances have been held to be not sustainable by the Tribunal vide its order dated 30th September, 2010 in ITA Nos. 14 & 15/MUM/2010. Respectfully following the said judicial pronouncement, we uphold the impugned orders of the learned CIT(A) cancelling the penalties imposed by the AO and dismiss these appeals filed by the Revenue.

12. In the result, the appeals of the Revenue are dismissed.

Order pronounced on this 31st day of January, 2011.

Sd/-	Sd/-
(R.V. EASWAR)	(P.M. JAGTAP)
PRESIDENT	ACCOUNTANT MEMBER

Mumbai, Dated 31st January, 2010.

ITA No.6649MUM/09
M/s Fidelity Mgt. and Research Co.

Copy to:
1. The appellant
2. The respondent

3. Commissioner of Income Tax (Appeals)- 10, Mumbai

4. DIT (International Taxation), Mumbai

5. Departmental Representative, Bench 'F', Mumbai

6. Master File //TRUE COPY// BY ORDER ASSTT. REGISTRAR, ITAT, MUMBAI ITA No.6649MUM/09 M/s Fidelity Mgt. and Research Co.

		Date	Initials	
1	Draft dictated on	28.1.11		Sr. PS
2	Draft placed before the Author	31.1.11		Sr. PS
3	Draft placed before the second Member			
4	Approved draft comes to the Sr. PS			Sr. PS
5	Kept for pronouncement on			Sr. PS
6	File sent to the Bench Clerk			Sr. PS
7	Date on which file goes to the Head Clerk			
8	Date on which file goes to the AR			
9	Date of dispatch of order			