

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"F" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member  
and Shri Sandeep Gosain , Judicial Member**

**ITA No. 2019/Mum/2015**  
(Assessment Year: 2010-11)

Dy. C.I.T. – 8(3)(2) Room No. 615, 6 <sup>th</sup> Floor Aayakar Bhavan, M.K. Road Mumbai 400020	Vs.	M/s. Vinamra Universal Traders Pvt. Ltd. Jai Centre, 1 <sup>st</sup> Floor 34, P. D'Mello Rd., Opp. Red Gate Mumbai 400009 PAN – AACCV5090J
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**Appellant**

**Respondent**

Appellant by:	Ms. S. Padmaja & Shri S.K. Podar
Respondent by:	Shri Vijaya Mehta & Shri Govind Javeri

Date of Hearing:	21.12.2016
Date of Pronouncement:	31.01.2017

**ORDER**

**Per Jason P. Boaz, A.M.**

This appeal by Revenue is directed against the order of the CIT(A)-14, Mumbai dated 23.12.2014 deleting the penalty levied by the Assessing Officer (AO) under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2010-11.

2. The facts of the case, briefly stated, are as under: -

2.1 The assessee company, engaged in the business of trading in shares, securities and derivatives filed its return of income for A.Y. 2010-11 on 09.10.2010 declaring loss of ₹53,17,58,095/- on account of trading in shares/securities and loss suffered in shares dealt, which is reflected as investments. The case was taken up for scrutiny and the assessment was completed under section 143(3) of the Act vide order dated 28.02.2013, wherein the assessed loss of the assessee was determined at ₹6,06,47,737/-, thereby reducing the returned loss by ₹47,11,10,358/-. Penalty proceedings under section 271(1)(c) of the Act were simultaneously initiated by the AO for furnishing of inaccurate particulars of income and concealment of income.

The assessee has not challenged the order of assessment dated 28.02.2013 for A.Y. 2010-11 and therefore the same has attained finality.

3. The AO then took up penalty proceedings under section 271(1)(c) of the Act and after rejecting the explanations put forth by the assessee, the AO vide order dated 30.08.2013 proceeded to levy penalty of ₹16,01,30,411/- under section 271(1)(c) of the Act for furnishing of inaccurate particulars of income. On appeal by the assessee, the learned CIT(A)-16, Mumbai vide the impugned order dated 22.12.2014 deleted the penalty levied under section 271(1)(c) of the Act by the AO for A.Y. 2010-11.

4.1 Aggrieved by the order of the CIT(A)-14, Mumbai dated 22.12.2014, deleting the penalty levied under section 271(1)(c) of the Act in the case on hand for A.Y. 2010-11, Revenue has preferred the appeal, raising the following grounds: -

*“1.(i) The Learned CIT(A) has erred on facts and in law in deleting the penalty u/s.271(1)(c) of the Income Tax Act, 1961 of Rs.16,01,30,411/- imposed by the Assessing Officer without properly appreciating the factual and legal matrix of the case as clearly brought out by the Assessing Officer in the Order imposing penalty.*

*(ii) The Learned CIT(A) has erred on facts and in law without appreciating the fact that if the case of the assessee had not been picked up for scrutiny the assessee would have not withdrawn the patently wrong claim of deduction and therefore ratio decendi of Supreme Court in case of Mak Data Pvt. Ltd. Vs. CIT 2013) 40 SCD 925 as reported in Civil appeal No.9772 of 2013 clearly applies.*

*(iii) The Ld. CIT appeal has erred in law and on facts in not appreciating that concealment is to be reckoned with reference to the returned income and the fact that the assessee had claimed income/loss in wrong head was irrelevant in this regard.*

*2. The Ld.CIT(A)'s order is contrary to law and on facts and deserves to be set aside and A.O 's order may be restored.*

*3. The appellant craves leave to amend or after any ground or add a new ground that may be necessary.”*

4.2 The learned D.R. for Revenue was heard in support of the grounds raised and submitted that the penalty levied by the AO under section 271(1)(c) of the Act is absolutely correct and the assessee has not

challenged the order of assessment for A.Y. 2010-11 in quantum material as it has admittedly made incorrect and incomplete claims.

4.3 Per contra, the learned A.R. of the assessee submitted that the learned CIT(A) in the impugned order had correctly deleted the penalty levied under section 271(1)(c) of the Act for A.Y. 2010-11, since this is not a case of either concealment of income or furnishing of inaccurate particulars of income justifying the levy of penalty us 271(1)(c) of the Act. The learned A.R. of the assessee submits that it is merely a case wherein the loss claimed by the assessee as capital loss has been assessed by the AO as speculation loss to be carried forward to the subsequent years for set off against speculation income, as the assessee made a full and complete disclosure of all facts/details in respect of the claim made by it. Therefore, the contention of the learned A.R. is that mere change of head of income does not constitute furnishing of inaccurate particulars of income or concealment of income for levying penalty us 271(1)(c) of the Act.

4.4.1 We have heard the rival contentions and perused and carefully considered the material on record. On a perusal of the record before us, it is see that the learned CIT(A) has deleted the penalty levied under section 271(1)(c) of the Act for A.Y. 2010-11, in the case on hand. She is of the view that in the given facts of the case this is not a case for levy of the said penalty, merely on the basis of income/loss changed due to mere change of head of income; holding as under in paras 3.4 to 3.6 thereof: -

*“3.4 I have gone through the facts and submissions . The undisputed facts in the case are, the assessee filed return of income reflecting loss of Rs. 53,17,58,095/- which were on account of trading in shares and securities and loss suffered in the shares dealt, which were reflected by the appellant as their investment. The A.O. has not accepted, the plea of the assessee that they were having two different baskets i.e. stocks as well as investment portfolio for dealing in shares and securities. For the reasons mentioned in the assessment order, the A.O. has concluded that actually the assessee did not have any investment but they were their stocks only and as a result thereof loss claimed as Long Term Capital Lose was considered as share trading loss. This has resulted into reduced business income of the assessee. The short term capital loss on account of non delivery of shares were considered as speculative loss and thus alongwith speculative loss already declared from such activity by the assessee, the same was assessed at a figure of Rs.500,90,344/-. Having*

considered these facts, penalty levied for the difference in income u/s 271(1)(c), thus in effect has remained only on account of change of heads, which as per assessee was returned as Capital Gain at Rs.3,93,69,620/-, as well Business Loss at Rs.21,27,95,300/- On the other hand as per A.O., the same has remained as Business Loss at Rs.21,27,95,300/- as speculation loss at Rs.47,16,53,686/-, which has been allowed to be carried forwarded also. This makes two things clear out of penalty order passed in the case that penalty was levied on account of the difference in the income so assessed and then it was levied on the basis of details available on record and disclosed by the appellant in the return of income. It is not the case of A.O. that any transaction done in any of these shares or/and securities were not reflected or there was any inaccuracy of figures given in return related to purchase and sales of these shares; or time of holding was not reflected and which was subsequently discovered by A.O. on his own during the course of assessment proceedings. It is also noteworthy that the appellant is in the business since F.Y. 2007-08 relevant to A.Y. 2008-09 and this being A.Y. 2010-11, this was effectively third year of business of the appellant, where consistently the activity under the basket of investment portfolio and trading have been reflected. Even if it is considered for a while that such maintenance of two different portfolio one for investment and other for trading, cannot be considered so, for the Long Term Capital loss as returned by appellant, even then what has actually been done by the A.O. is assessing the same loss under the head 'Business Loss' against the loss returned as LTCL under the head Capital Gain while taking a view that explanation to Sec 73, a deeming provision are applicable in case of assessee

3.5 On these given facts and under the circumstances when the activity and transactions were duly declared and complete details were accurately furnished in the return of income, merely because of change of head for assessing particular gain/loss for the reasons given by the A.O. in the assessment order, even if is upheld, it remains at the most change of character of income. It is well accepted a fact that assessment proceedings and penalty proceedings are two different and distinct proceedings and only because an income is assessed and finally admitted so, it automatically does not lead and attract levy of penalty u/s.271(1)(c). In the instant case. the amount of income/loss returned has not undergone any change and same has been assessed under a different head of income, by taking a view that provisions of sec. 3; a deeming one, are applicable in the case of appellant. Thus, I find ratio of decisions given in case of Miss Harron Mahmood Adam vs. ACIT-12 (3) , Mumbai (ITA No. 1636/Mum/2013), CIT vs. SPK Steels Pvt. Ltd (270 ITR 156 MP), Bharat R. Ruia cited and relied upon by the appellant are squarely applicable on the facts in case of appellant and hence it does not attract provisions of penalty u/s.271(1)(c) as neither there is a case of furnishing of wrong particulars nor inaccurate particulars and in fact the adequacy and details available and declared so in the return filed only, enabled the A.O. to work out the business loss and speculative loss to be

assessed for the A.Y. 2010-11. It also cannot be said to be a case of concealment of income as the income/loss were duly reflected and the change in quantum has happened on account of change of head of the said gain. The A. O. has relied upon decision given by Honble Supreme Court in [2008] 172 TAXMAN 386 (SC) Commissioner. of Income Tax, Ahmedabad vs Gold Coin Health Food (F) and (2012) 27 Taxmann.com 87 (SC) Supreme Court of India, commissioner of Income Tax v/s. Unipol Chemicals Intermediates Ltd. as reproduced in para 3.1 above. I have gone through the same. These decisions are on the issue whether penalty u/s. 271(1)(c) is leviable in case of assessed income being loss. I find here in the instant case, this issue is not disputed and is clear following the ratio of the decision given by the Hon'ble Supreme Court in the case of JCIT, Surat v/s. Saheli Leasing & Industries Ltd. (2010) [191 Taxmann 165 (SC)] also. The issue in the instant case is whether penalty y/s.271(1)(c) is leviable in a case where the loss returned under one head of income by tax payer is assessed under other head of income by the A.O.. It is noted that in the case of Reliance Petro Products reported in 322 ITR 158, the key argument before Hon'ble Court on behalf of Revenue was that submitting an incorrect claim in law for an expenditure, which can be a claim of loss as well, would amount to giving inaccurate particulars of such income. The Hon'ble Court did not concur with this simplistic view of the matter and observed:

"We do not think that such can be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. In CIT vs. Atul Mohan Bindal (2009) 225 CTR (SC) 248 : (2009) 28 DTR (SC) I : (2009) 9 SCC 589, where this Court was considering the same provision, the Court observed that the AO has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. This Court referred to another decision of this Court in Union of India vs. Dharamendra Textile Processors (2007) 212 CTR (SC) 432 (2008) 13 SCC 369, as also, the decision in Union of India vs. Rajasthan Spinning & Weaving Mills (2009) 224 CTR (SC) ; (2009) 23 DTR (SC) 158 (2009) 13 SCC 448 and reiterated in para 13 that:

It goes without saying that for applicability of s. 271(1)(c), conditions stated therein must exist,"

8. Therefore, it is obvious that it must be shown that the conditions under s. 271(1)(c) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the return filed 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. In *Dilip N. Shroff vs. Jt. CIT & Anr.* (2007) 210 CTR (SC) 228 : (2007) 6 SCC 329, this Court explained the terms "concealment of income" and "furnishing inaccurate particulars". The Court went on to hold therein that in order to attract the penalty under s. 271(1)(c), mens rea was necessary, as according to the Court, the word "inaccurate" signified a deliberate act or omission on behalf of the assessee. It went on to hold that cl. (iii) of s. 271(1) provided for a discretionary jurisdiction upon the assessing authority, in as much as the amount of penalty could not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of income, but it may not exceed three times thereof. It was pointed out that the term "inaccurate particulars" was not defined anywhere in the Act and, therefore, it was held that furnishing of an assessment of the value of the property may not by itself be furnishing inaccurate particulars. It was further held that the assessee must be found to have failed to prove that his explanation is not only not bona fide but all the facts relating to the same and material to the computation of his income were not disclosed by him. It was then held that the explanation must be preceded, by a finding as to how and in what manner, the assessee had furnished the particulars of his income. The Court ultimately went on to hold that the element of mens rea was essential. It was only on the point of mens rea that the judgment in *Dilip N. Shroff vs. Jt. CIT & Anr.* (supra) was upset. In *Union of India vs. Dharamendra Textile Processors* (cited supra), after quoting from s. 271 extensively and also considering s. 271(1)(c), the Court came to the conclusion that since s. 271(1)(c) indicated the element of strict liability on the assessee for the concealment or for giving inaccurate particulars while filing return, there was no necessity of mens rea. The Court went on to hold that the objective behind enactment of s. 271(1)(c) r/w Explanations indicated with the said section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, willful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under s. 276C of the Act. The basic reason why decision in *Dilip N. Shroff vs. Jt. CIT & Anr.* (cited supra) was overruled by this Court in *Union of India vs. Dharamendra Textile Processors* (cited supra), was that according to this Court the effect and difference between s. 271(1)(c) and s. 276C of the Act was lost sight of in case of *Dilip N. Shroff vs. Jt. CIT & Anr.* (cited supra). However, it must be pointed out that in *Union of India vs. Dharamendra Textile Processors* (cited supra), no fault was found with the reasoning in the decision in *Dilip N. Shroff vs. Jt. CIT & Anr.* (cited supra), where the Court explained the meaning of the terms "conceal" and "inaccurate". It was only the ultimate inference in *Dilip N. Shroff vs. Jt. CIT & Anr.* (cited

*supra) to the effect that mens rea was an essential ingredient for the penalty under s. 271(1)(c) that the decision in Dilip N. Shroff vs. Jt. CIT & Anr. (cited supra) was overruled."*

*3.6 Thus, on these given facts, I am of the considered view that this is not a case where penalty levied u/s.271(1)(c) merely on the basis of figure of income/loss changed due to change of head of income, can be sustained and hence penalty levied for the amount of Rs.16,01,30,411/- is deleted herewith. The grounds taken by the appellant in ground nos.1 to 4 are allowed."*

4.4.2 On an appreciation of the facts on record, the undisputed facts are that the assessee has earned income of ₹30,89,48,730/- from share trading and has incurred capital loss of ₹25,88,58,386/- on sale of shares resulting in net income of ₹5,00,90,344/-; which has been treated as 'business income' by the AO. In addition thereto, the business loss of ₹21,27,95,300/- declared by the assessee and loss on sale of capital assets amounting to ₹25,88,58,386/- have been assessed as 'speculative loss' by the AO. In this factual matrix, it is evident that the said penalty under section 271(1)(c) of the Act was levied only on account of change of heads of income. In the order of assessment for A.Y. 2010-11 it is seen that the amount of business loss of ₹21,27,95,300/- declared by the assessee has remained unchanged, whereas the capital loss of ₹25,88,58,386/- declared by the assessee has also been considered as business loss by the AO, who went on to treat both these losses as 'loss from speculation business'. We find that the only difference between the returned income and assessed income for assessment year under consideration is that the loss on sale of capital asset amounting to ₹25,88,386/- declared by the assessee has been treated as speculation loss by the AO. In this factual matrix of the case on hand as discussed above, the question for our consideration is whether penalty under section 271(1)(c) of the Act can be levied when the declared income gets assessed under a different head than the head under which it was returned/declared?

4.4.3 It is certainly not the AO's case that the assessee concealed or hid some fact from the AO which the AO detected during the course of assessment proceedings. All the material disclosures pertaining to the above claims have been made by the assessee in its books of account and computation of total income. In these factual circumstances, we are of the

considered view that mere change of opinion on an issue leading to a change of head of the same income from one head to another cannot constitute concealment of income or furnishing of inaccurate particulars of income. In our view, the above issue is no longer res-intagra, as the similar issue has been decided by the Hon'ble Bombay High Court in the case of CIT vs. Bennett Coalman & Co. Ltd. (ITA NO. 2117 of 2012) wherein at para 3 thereof it has been held as under: -

*“3. So far as question (ii) is concerned, the respondent- assessee had claimed premium on redemption of debentures as income from capital gains. Whereas the assessing officer held that the redemption of debentures is revenue receipt assessable to tax under the head income from other sources. The CIT(A) confirmed the order of the assessing officer. The respondent- assessee did not file any further appeal on the quantum proceedings. Thereafter, the assessing officer levied penalty under Section 271(1)(c) of the Act on the respondent- assessee. The CIT(A) also confirmed the levy of penalty upon the respondent- assessee. On further appeal, the Tribunal held that there is no dispute with regard to the fact that the respondent- assessee had disclosed that the amount received as premium on redemption of debentures in its computation of income. Further, the Tribunal records that it is not the case of the department that the respondent- assessee had concealed any particulars of income or furnished inaccurate particulars of income by stating incorrect facts. The assessing officer considered the said premium received on redemption of debentures to be taxable under the head income from other sources while the respondent- assessee considered the same to be taxable under the head capital gains. In view of the fact that there is only a change of head of income and in the absence of any facts that the claim of the assessee was not bonafide, the Tribunal deleted the penalty imposed under Section 271(1)(c) of the Act. The revenue has not been able to point out that the finding of the Tribunal is perverse. In these circumstances, we see no reason to entertain the proposed question (ii).”*

4.4.4 In the factual matrix of the case as discussed above that there is only change in the head of income and in the absence of any facts that the claim of the assessee was not bona fide and respectfully following the decision of the Hon'ble Bombay High Court in the case of cit vs. Bennett Coleman & Co. Ltd. in ITA No. 2117 of 2012, we do not find any reason to interfere with or deviate from the view taken by the learned CIT(A) and therefore uphold the impugned order of the learned CIT(A) deleting the penalty levied under section 271(1)(c) of the Act for A.Y. 2010-11.

Consequently, grounds (i) to (iii), 2 & 3 raised by Revenue (supra) are dismissed.

5. In the result, Revenue's appeal for A.Y. 2010-11 is dismissed.

Order pronounced in the open court on 31<sup>st</sup> January, 2017.

Sd/-  
**(Sandeep Gosain)**  
**Judicial Member**

Sd/-  
**(Jason P. Boaz)**  
**Accountant Member**

Mumbai, Dated: 31<sup>st</sup> January, 2017

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -14, Mumbai*
4. *The CIT - 8, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

*By Order*

//True Copy//

*Assistant Registrar*  
*ITAT, Mumbai Benches, Mumbai*

n.p.