

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI**

BEFORE SHRI G.S. PANNU (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 2630/MUM/2017
Assessment Year: 2012-13**

Sh. Chandrakant R. Madhani, 2A/11, Tejmanjul, Tejpal Road, Vile Parle (E), Mumbai - 400057 PAN: AAOPM0449D	Vs.	The ITO 25(2) (2), Mumbai
(Appellant)		(Respondent)

Assessee by : None

Revenue by : Shri Saurabh Deshpande (DR)

Date of Hearing: 05/09/2017

Date of Pronouncement: 04/12/2017

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against order dated 19/01/2017 passed by the Ld. Commissioner of Income Tax (Appeals)-37, Mumbai, for the assessment year 2012-13, whereby the Ld. CIT (A) has dismissed the appeal filed by the assessee against penalty order passed u/s 271 (c) of the Income Tax Act, 1961 (for short 'the Act').

2. Brief facts of the case are that the assessee filed its return of income for the assessment year under consideration declaring the total income of Rs. 1,40,860/-. The assessment was completed and order u/s 143 (3) was passed determining the total income of Rs.7,89,263/- after making an addition of Rs. 6,48,403/- u/s 40(a)(ia) of the Act. During the penalty proceedings, the assessee failed to produce documentary evidence in respect of unsecured loans taken and interest paid to the parties. Since, the assessee failed to deduct TDS on payment of interest to the parties from whom unsecured loans were taken,

AO levied penalty of Rs. 2,20,573/- u/s 271 (1)(c) for concealing the particulars of income. During appellate proceedings, the assessee contended that there is no concealment on the part of the assessee. The assessee has claimed certain expenditure is not eligible in view of the provisions of section 40 (a) (ia) of the Act and for that reason expenditure was disallowed. However, the Ld. CIT (A) rejecting the contention of the assessee confirmed the penalty levied by the AO.

3. Aggrieved by the order of Ld. CIT (Appeals), the assessee has preferred this appeal before the Tribunal on the following effective grounds:-

1. *“The learned Assessing Officer erred in levy of Penalty u/s 271 (1) (C) of the Act for concealment of Income on account of non deduction of tax at source invoking provision of Section 40 (a) (ia).*
2. *The assessee is an individual, not liable to tax Audit u/s 44 AB during the Assessment Year 2011-12 and hence provision of Section 40 (a) (ia) are not applicable.*
3. *Without prejudice to above, the learned Assessing Officer erred in calculating “tax sought to be evaded” at Rs. 220573/- against the correct amount of Rs. 85340/- being the tax payable”.*

4. Before us, the Ld. counsel for the assessee submitted that the Ld. CIT(A) has wrongly confirmed the penalty levied by the AO. The Ld. counsel reiterated the submissions made before the authorities below that the assessee being an individual was not liable to tax audit u/s 44AB during the assessment year 2011-12, therefore the provisions of section 40(a)(ia) was not applicable. Moreover, the sales turnover of the assessee for the assessment year 2011-12 and 2012-13 was Rs. 14,76,927/- and 15,55,836/- respectively. Since, the turnover of the assessee was below specified limits, the assessee's was not liable to deduct the tax at source.

5. On the other hand, the Ld. departmental representative (DR) relying on the findings of the authorities below, submitted that since, the assessee had furnished the incorrect particulars of its income, the Ld. CIT(A) has rightly confirmed the penalty.

6. We have heard the rival contentions and carefully gone through the material on record. Section 40(a)(ia) of the Act contemplates that no deduction is to be allowed in the computation of income, if tax is not deducted at source as referred to under the provisions of Chapter-XVII-B or in case the tax is not paid after deduction. A perusal of Sub-Clause (ia) makes it clear that disallowance is attracted only when tax is deductible at source under Chapter-XVII-B and it is not deducted or not paid to the government account. In order to ascertain as to whether the assessee was liable to deduct tax at source, it is necessary to have a look on the provisions under section 194A of the Act. Section 194A of the Act read as under:-

“(1). Any person, not being an individual or a Hindu undivided family, who is responsible for paying to the resident any income by way of interest other than income by way of interest of securities, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rate in force:

Provided that an individual or a Hindu undivided family whose total sales, gross receipts or turnover from the business or profession carried on by him exceeds the monetary limits specified under clause (a) or clause (b) of section 44 AB during the financial year immediately preceding the financial year in which such interest is credited or paid shall be liable to deduct income tax under this section.”

7. We have also noticed that the income of the assessee during the financial year immediately preceding the financial year in which such interest was credited or paid, is not exceeding the monetary limits specified under clause (a) or clause (b) of section 44AB of the Act.

8. In view of the aforesaid provisions of law, the assessee was not required to deduct tax at source, therefore, the Ld. CIT (A) has wrongly confirmed the order imposing penalty u/s 271 (1) (c) of the Act. Moreover, the penalty is levied for concealment of income or for furnishing inaccurate particulars of income. But in the present case, neither the assessee has concealed his income nor has furnished inaccurate particulars of income. Even if the disallowance is made u/s 40 (a) (ia) no penalty can be levied u/s 271 (1) (c) of the Act as the wrong claim made by the assessee does not ipso facto make the assessee liable u/s 271 (1) (c) of the Act. The impugned order is therefore apparently erroneous and liable to be set aside. We accordingly set aside the impugned order and allow the first ground of appeal of the assessee. The second ground raised by the assessee does not require any adjudication being taken without prejudice to the first ground.

In the result, appeal filed by the assessee for assessment year 2012-2013 is allowed.

Order pronounced in the open court on 4th December, 2017.

Sd/-

(G.S. PANNU)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 04/12/2017

Sd/-

(RAM LAL NEGI)
JUDICIAL MEMBER

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**