

**IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM**

I.T.A. No. 895/Mum/2015  
(Assessment Year: 2005-06)

Asst. CIT-11(3)(1), R. No. 427, Aayakar Bhavan, M. K. Road, Mumbai-400 020	Vs.	M/s. Total Lubricants India Ltd. (Now known as Total Oil India Pvt. Ltd.) 3 <sup>rd</sup> Floor, The Leela Gallerie, Andheri Kurla Road, Andheri (E), Mumbai-400 059
PAN/GIR No. AAACE 1877 C		
<b>(Appellant)</b>	:	<b>(Respondent)</b>
<b>Appellant by</b>	:	Shri V. Justin
<b>Respondent by</b>	:	Shri Niraj Sheth
<b>Date of Hearing</b>	:	01.05.2018
<b>Date of Pronouncement</b>	:	30.07.2018

ORDER

Per Shamim Yahya, A. M.:

This appeal by the Revenue is directed against the order of the Id. Commissioner of Income Tax (Appeals) dated 10.11.2014 and pertains to assessment year 2005-06.

2. The issue raised is that the Id. Commissioner of Income Tax (Appeals) erred in deleting the levy of penalty u/s. 271(1)(c) of the Act amounting to Rs.10,97,775/-.

3. Brief facts of the case leading to the levy of penalty in this case are as under:

In the assessment order passed by the Assessing Officer u/s 143(3), an amount of Rs.30,00,000/- was disallowed on account of provision for excise liability. Against the addition made on account of provision for excise liability expenses amounting to Rs.30,00,000/-, the assessee has filed appeal before the CIT(A)-18, Mumbai. The Id.

Commissioner of Income Tax (Appeals) allowed all the expenses except provision for excise liability, vide order dated 27-07-2011, has partly allowed the appeal of the assessee by holding that the payment of excise duty can only be availed/allowed u/s. 43B on actual payment. Subsequently, the Assessing Officer has issued notice to the assessee to explain as to why penalty u/s 271(1)(c) may not be levied. In response to this, the Id. Counsel of the assessee has submitted its reply. After considering the same, the Assessing Officer has observed that the assessee has debited provision for excise liability of Rs.30,00,000/- to the Profit & Loss Account but the assessee could not furnish any justification. The Assessing Officer has noted that the assessee had admitted that provision for excise liability of Rs.30,00,000/- had been reversed in F.Y.2006-07 and has already been taxed in A.Y.2007-08 and accordingly rejected the claim of the assessee by holding that the excise duty is governed by the provisions of section 43B of the Act and such expenses are allowed only on actual payments. The said addition was duly confirmed by the Id. Commissioner of Income Tax (Appeals). By placing reliance on the decision of the Hon'ble Supreme Court in the case of *CIT vs. Dharmendra Processors* [306 ITR 277], the Assessing Officer has held that the act of the assessee is not bonafide and hence it is a fit case to levy penalty u/s 271(1)(c) of the Act. Accordingly, it was held that the assessee has evaded tax in respect of a sum of Rs.30,00,000/- by concealment of providing inaccurate details of income. Hence, the penalty of Rs.10,97,775/- was levied @ 100% of tax sought to be evaded.

4. Upon the assessee's appeal, the Id. Commissioner of Income Tax (Appeals)

deleted the penalty holding as under:

It is clear from the facts of the present case that the appellant has made provision for excise liability expenses payable, the entry was reversed in F.Y.2006-07 and was taxed in A.Y.2007-08. Although the provision is not allowable expenditure, but it cannot be treated as concealment of income or submission of inaccurate particulars of income Because disallowance made u/s 43B of the Income-tax Act 1961, is purely a legal issue and no penalty is leviable on legal issues. The facts of the present case are squarely covered by the decision of the Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt. Ltd. 322 ITR 158 where it is held that mere making of a claim which is not sustainable in law, by itself, will not amount of furnishing of inaccurate claim or furnishing inaccurate particulars regarding the income of the assessee. The decision in the case of CIT vs. Varun Finstock Pvt. Ltd. [5 ITR (Trib) 271] is also applicable to the facts of the present case since the appellant has made claim of provision which was not accepted by the Assessing Officer and also confirmed in appeal is not a case of concealment of income. It is well established that assessment order and penalty order are two different proceedings and independent to each other merely because the addition is confirmed does not mean that penalty is automatically applicable. The Hon'ble Mumbai Tribunal in the case of ACIT vs. VIP Industries Ltd. (supra) relied upon by the AR of the appellant has distinguished the decision of the Hon'bie Supreme Court in the case of Dharmendra Textiles Processors relied on by the A.O. Keeping in view the facts and circumstances, it is held that the appellant has not concealed the particulars of income and also not submitted inaccurate particulars but only made claim of provision which was not accepted by the A.O. Thus, it is not a case of concealment of income and submitting inaccurate particulars as per the provisions of Section 271(1)(c). Hence, the penalty levied by the A.O. is deleted and the ground of appeal is allowed.

5. Against the order of the Id. Commissioner of Income Tax (Appeals), the Revenue is in appeal before us.

6. We have heard both the counsel and perused the records. Learned departmental representative relied upon the orders of the assessing officer.

7. Per Contra learned counsel of the assessee supported the order of the Id. Commissioner of Income Tax (Appeals). He submitted that assessee has disclosed all the relevant particulars in this case. He submitted that the disallowance of claim of assessee cannot lead to the levy of penalty under section 271(1)(c). In this regard, the learned counsel of the assessee placed reliance upon following case laws from the ITAT:

1. Envair Electrodyne Ltd. vs. Dy. CIT (in ITA No. 595/PN/2008 vide order dated 06.09.2010);
2. Patson Auto Products Pvt. Ltd. vs. Asst. CIT (in ITA No. 471/PN/07 vide order dated 30.11.2010);
3. Dy. CIT vs. Budge Budge Jute Ltd. (in ITA No. 979/Kol/2013 vide order dated 16.03.2016)

8. We have carefully considered the submissions and perused the records. We find that in this case penalty u/s. 271(1)(c) has been levied for the disallowance of provision for excise duty payable amounting to Rs.30,00,000/- by invocation of section 43B. In this connection, we find ourselves in agreement with the submission of the learned counsel of the assessee that all the necessary particulars were duly disclosed by the assessee. Hence, there is no case of concealment of income or furnishing of inaccurate particulars of income. In this regard, the case laws relied upon by the Id. Commissioner of Income Tax (Appeal) and as canvassed by the learned counsel of the assessee are germane and support the case of the assessee. Furthermore, as held by the Hon'ble Apex Court in the case of Reliance Petroproducts Pvt. Ltd. 322 ITR 158, the disallowance of a claim made by the assessee cannot itself give rise to levy of penalty under section 271(1)(c) of the Act. Accordingly, in the background of aforesaid discussion and precedent

we do not find any infirmity in the order of the Id. Commissioner of Income Tax (Appeals). Accordingly, we uphold the same.

9. In the result, this appeal filed by the Revenue stands dismissed.

*Order pronounced in the open court on 30.07.2018*

Sd/-  
(Ram Lal Negi)  
Judicial Member

Sd/-  
(Shamim Yahya)  
Accountant Member

Mumbai; Dated : 30.07.2018  
Roshani, Sr. PS

**Copy of the Order forwarded to :**

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

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai