

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

**BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 1097/MUM/2018  
Assessment Year: 2012-2013**

M/s The Loot (India) Private Limited, 38, Maharshi Karve Marg, Shakuntala School, New Marine Lines, Mumbai - 400020 PAN: AAACU6382N	<b>Vs.</b>	The DCIT-8(3)(1), Room No. 615, Aayakar Bhavan, M.K. Marg, Mumbai - 400020
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by : Shri Raturaj Gurjar (AR)  
Revenue by : Shri Prakash Mane (DR)

Date of Hearing: 25/06/2019  
Date of Pronouncement: 29/08/2019

**ORDER**

**PER RAM LAL NEGI, JM**

This appeal has been filed by the assessee against the order dated 11.12.2017 passed by the Commissioner of Income Tax (Appeals)-14 (for short 'the CIT(A), Mumbai, for the assessment year 2012-13, whereby the Ld. CIT(A) has dismissed the appeal filed by the assessee against the penalty order passed u/s 271 (1) (c) of the Income Tax Act, 1961 (for short the 'Act').

2. In this case, the assessee filed its return of income for the assessment year under consideration declaring loss of Rs. 27,99,47,049/-. During the assessment proceedings, it was notice that the assessee had not deducted tax at source on various expenses amounting to Rs. 4,97,20,068/-. Accordingly, the AO disallowed these expenses as per the provisions of section 40(a)(ia) of the Act and added the said amount to the total income of the assessee.

Consequently, penalty proceedings u/s 271 (1) (c) of the Act was initiated and penalty of Rs. 4,97,20,068/- was imposed u/s 271 (1) (c) of the Act for filing inaccurate particulars of its income. In the first appeal, the Ld. CIT (A) confirmed the penalty imposed by the AO. The assessee is in appeal against the findings of the Ld. CIT (A).

3. The assessee has challenged the impugned order passed by the Ld.CIT (A) on the following effective ground:-

1. *“On facts, in circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) erred in confirming the penalty of Rs. 1,61,09,300/- levied by the Dy. CIT.”*

4. Before us, the Ld. counsel for the assessee submitted that the Ld.CIT (A) has wrongly confirmed the penalty imposed by the AO. The Ld. counsel further submitted that penalty u/s 271 (1) (c) of the Act can be imposed only if the Assessing Officer is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. In the present case, neither the assessee has concealed the particulars of income nor furnished inaccurate particulars of its income. The Ld. counsel further submitted that the legal fiction created by section 40(a)(ia) cannot be extended beyond the disallowance of expenditure, therefore the authorities below have wrongly invoked the provisions of section 271 (1) (c) of the Act. Further non-deduction of TDS by the assessee resulted in disallowance of expenditure u/s 40(a)(ia) and that itself cannot be construed as furnishing inaccurate particulars of income. The Ld. counsel relying on the decision of the Hon'ble Supreme Court in the case of *CIT vs. Reliance Petroproducts Pvt. Ltd.* 322 ITR 158 (SC) submitted that merely because the assessee has claimed the expenditure which was not accepted or was not acceptable to the revenue that by itself would not attract penalty u/s 271 (1) (c). By any stretch of imagination, making of incorrect claim cannot amount to furnishing of inaccurate particulars. The Ld. counsel further relied on the decisions of the

ITAT in the case of *Quikr India Pvt. Ltd. vs. DCIT, ITA NO. 1046/Mum/2017*, *Anil Kumar Raviraju vs. ITO ITA No. 2909/Mum/2017*, *ITO vs. M/s Atul Shamji Bharani (HUF) ITA No. 6380/Mum/2013*, *Mr. Ramkrishna Shetty vs. ACIT ITA No. 7142/Mum/2011* and *Tanushree Vasu vs. ACIT, ITA No. 2922/Mum/2012* to substantiate his contentions.

5. On the other hand, the Ld. Departmental Representative (DR) relying on the concurrent findings of the authorities below submitted that since the assessee has furnished inaccurate particulars of income in its return, the Ld. CIT (A) has rightly confirmed the penalty levied by the AO. The Ld. DR further submitted that since the Ld. CIT (A) has confirmed the penalty on the basis of the settled principles of law, there is no infirmity in the order passed by the Ld. CIT (A) to interfere with. The Ld. DR accordingly submitted that there is no merit in the appeal of the assessee.

6. We have heard the rival submissions of the parties and also gone through the material on record including the cases relied upon by the Ld. counsel for the assessee and the authorities below. As pointed out by the Ld. counsel for the assessee penalty u/s 271 (1) (c) can be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income. In the present case, the authorities below have levied penalty for furnishing inaccurate particulars of income. In order to adjudicate the issue in question, it is essential to ascertain as to whether non deduction of tax at source and the consequential disallowance comes within the purview of furnishing inaccurate particulars of income contemplated u/s 271 (1) (c) of the Act. As per the settled law, assessment and penalty proceedings are two different and distinct proceedings and the standard of proof required for making addition and imposition of fine are also different. Accordingly, addition in the assessment proceedings does not *ipso facto* make the assessee liable for penalty u/s 271 (1) (c) of the Act. So far as the addition on account of disallowance u/s 40(a)(ia) is concerned the coordinate Bench of the Tribunal in the case of *Tanushree Basu vs. ACIT (supra)* has deleted the penalty u/s 271

(1) (c) levied on the basis of addition made on account of disallowance u/s 40(a)(ia). The operative part of the order reads as under:-

*“6. We have considered submissions of ld representatives of parties and perused orders of authorities below. It is a fact that assessee has claimed expenses aggregating to Rs. 16,17,766/-and same were disallowed by the AO vide completing the assessment under section 143(3) of the Act on the ground that assessee failed to deduct TDS. We observe that the genuineness of the claim of the assessee has not been disputed by the Department. Therefore, it cannot be said that assessee has claimed expenses which are also not genuine. Assessee has furnished all the relevant facts concerning the claim made by it in the return filed. AO has levied penalty in respect of the said amount merely because said claim of the assessee was disallowed u/s 40(a)(ia) of the Act as assessee failed to deduct TDS thereon. The apex court in the case of Reliance Petroproducts Ltd(supra) has held that a mere making of the claim which is not sustainable in law, by itself will not amount to furnishing inaccurate particulars of income. In the present case, admittedly, assessee made a claim but the same was rejected and disallowed not for the reason that the claim was not genuine order was fabricated but in view of the provisions of law that the assessee did not deduct TDS thereon. We are of the considered view that the ratio judgment of Hon’ble Apex Court in the case of Reliance Petroproducts Ltd.(supra) securely applies to the facts of the case before us and, therefore levy of penalty is not justified. We also observe that similar issue has also been considered by the ITAT Ahmadabad in the case of Mazda Ltd (supra), wherein, levy of penalty u/s 271(1)(c) of the Act was cancelled which was levied on account of disallowance of claim for deduction of royalty and technological know-how as per section 40(a)(ia) of the Act, as the assessee failed to deduct TDS on of payments. The ratio of the said case also applies securely to the case before us.*

*7. In view of above, we hold that levy penalty, in the facts and circumstances of the case, is not in accordance with law and same is deleted by allowing ground of appeal taken by the assessee.”*

7. Similarly, in the case of *ITO vs. M/s Atul Shamji Bharani (HUF)* (supra), the coordinate Bench has upheld the findings of the Ld. CIT (A) whereby, the Ld. CIT (A) had deleted the penalty levied on the basis of addition made on account of disallowance made u/s 40(a)(ia). The operative part of the decision of the coordinate Bench reads as under:-

*“5. We have considered the arguments of the ld. DR and the orders passed by the law authorities. In our opinion, the CIT(A) made no mistake in deleting the penalty inasmuch as she has considered a categorical finding that there was no concealment or furnishing of inaccurate particulars of income though the claim of direction of expenditure of investment was otherwise found disallowable. According to the CIT(A), no particulars regarding the claim furnished by the assessee were found to be inaccurate or erroneous. Accordingly to the CIT(A), it is merely a case where the claim made by the assessee has not been denied and that too, on the basis of non-compliance with sec 40(a)(ia) of the Act, which was only a technical default by the assessee. The discussion made by CIT(A) clearly brings out that the attributes required for imposition of penalty u/s 271(1)(c) of the act in the present case are missing and, therefore the penalty has been rightly deleted by her. Accordingly, the order of CIT (A) is hereby affirmed and revenue fails in its appeal.*

8. Similarly, in the case of *Anil Kumar Raviraju vs. ITO* (supra), the coordinate Bench has upheld the findings of the CIT (A) deleting penalty levied by the AO u/s 271 (1) (c) of the Act on the basis of addition made on account of disallowance u/s 40(a)(ia) of the Act. In the case of *Mr. Ramakrishna Shetty vs. ACIT* (supra), the coordinate Bench of the Tribunal confirmed the findings of the Ld. CIT (A) vide which the Ld. CIT (A) has deleted the penalty levied by the AO u/s 271 (1)(c) of the Act on the basis of addition made by invoking the provisions of section 40(a)(ia) of the Act. The coordinate Bench has dismissed the appeal filed by the revenue holding as under:-

“12. In view of above and considering the facts that the assessee disclosed ll material facts with regard to the claim of payment(s) made to the sub-contractor(s)/rent paid without deducting TDS and consequently disallowance was made in both the assessment years under consideration as per the provisions of section 40(a)(ia) of the Act, when the genuineness of the payments are not disputed by the department, we hold that the levy of penalty by application of provisions of section 271 (1) (c) of the Act is neither justified nor the provisions of section 271 (1) (c) of the Act are applicable. Hence, we uphold the order of Ld. CIT (A) for the assessment year 2006-07 in cancelling the penalty levied by AO by dismissing the ground of appeal taken by department and whereas the order of ld. CIT (A) for assessment year 2007-08 is reversed by allowing the ground of appeal taken by assessee.”

9. The facts and the issue involved in the present case are similar to the facts and the issue involved in the cases discussed above. Since, the coordinate Benches of the Mumbai Tribunal have decided the similar issue in favour of the assessee and deleted the penalty levied u/s 271 (1) (c) of the Act holding that penalty cannot be imposed u/s 271 (1) (c) of the Act on the basis of addition made by the AO invoking the provisions of section 40(a)(ia) of the Act. Hence, respectfully following the decisions of the coordinate Bench discussed above, we set aside the findings of the Ld. CIT (A) and direct the AO to delete the penalty.

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

Order pronounced in the open court on 29<sup>th</sup> August, 2019.

Sd/-  
(RAJESH KUMAR)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 29/08/2019

Alindra, PS

Sd/-  
(RAM LAL NEGI)

JUDICIAL MEMBER

**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**