

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AGRA BENCH: AGRA**

**BEFORE SHRI A. D. JAIN, JUDICIAL MEMBER AND  
DR. MITHA LAL MEENA, ACCOUNTANT MEMBER**

**I.T.A No. 141/Agra/2009  
Assessment Year: 1997-98**

Farrukhabad Investment (India) Ltd. C/o Hotel Hindustan, Barpur, Farrukhabad. PAN.AACCT0563G <b>(Assessee)</b>	<b>Vs.</b>	DCIT, Circle-2(1), Farrukhabad.  <b>(Revenue)</b>
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Revenue by	Shri Anurag Sinha, Adv. & Shri M.M. Agrawal, CA.
Assessee by	Shri Wassem Arshad, Sr. DR.

Date of Hearing	04.09.2018
Date of Pronouncement	11.09.2018

**ORDER**

**PER, A. D. JAIN, JUDICIAL MEMBER:**

In this case, the Id. Third Member has agreed with the order passed by the Id. Accountant Member, whereby the penalty imposed in respect of disallowance of interest and commission was deleted. In accordance with the said order passed by the Id. Third Member, the penalty order is held to be unsustainable.

2. In the result, the appeal filed by the assessee stands allowed.

**Order pronounced in the open court on 11/09/2018.**

Sd/-  
**(DR. MITHA LAL MEENA)**  
ACCOUNTANT MEMBER

Sd/-  
**(A.D. JAIN)**  
JUDICIAL MEMBER

\*AKV\*

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1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AGRA ('Third Member') BENCH: AGRA**

**BEFORE SHRI R. S. SYAL, VICE PRESIDENT**

I.T.A No. 141/Agra/2009  
Assessment Year : 1997-98)

Farrukhabad Investment  
(India) Ltd.  
C/o Hotel Hindustan, Barpur,  
Farrukhabad.  
PAN AACCT0563G

**Vs.** DCIT- Circle 2(1),  
Farrukhabad.

**(Appellant)**

**(Respondent)**

Assessee by Shri Anurag Sinha, Advocate &  
Shri M.M Agrawal, CA

Revenue by Shri InderJeet Singh CIT DR & Shri  
Waseem Arshad, Sr.DR

Date of Hearing : 03.08.2018

Date of Pronouncement : 09.08.2018

**ORDER**

The Hon'ble President has nominated me u/s 255(4) of the  
Income-tax Act, 1961 (hereinafter also called as 'the Act') to render

opinion on the difference between the Id. Members who initially heard the present appeal but differed in their respective opinions.

2. Before proceeding with the matter, it is relevant to note that both the learned Members, apart from differing on the conclusions, also could not be in unison in making reference u/s 255(4) of the Act. The Id. JM, being the senior Member, proposed the following questions for reference to the Third Member : -

(i). Whether, when the assessee failed to produce books of accounts, vouchers, documents before the A.O, and admitted that the identification of MIP depositors could not be made ascertainable, such fact is also confirmed in the audit report resulting payments of interest to such depositors could not be ascertainable, authorities below were justified in levying and confirming penalty under section 271(l)(c) of the I.T. Act on disallowance of interest payment as above ?

(ii). Whether, when the assessee failed to produce books of accounts, vouchers and documents before the A.O. regarding payment of commission which was also found excessive against guidelines issued by Reserve Bank of India, authorities below were justified in levying and confirming penalty under section 271(i)(c) of the I.T. Act on disallowance of commission payment as above ?



(iii). Whether, when the assessee acted illegally as "non-banking finance company" on rejection of application for the registration as NBFC by Reserve Bank of India on failure to satisfy conditions under RBI Act, authorities below were justified in levying and confirming the penalty under section 271(l)(c) of the I.T. Act on disallowance of interest and commission ?

(iv). Whether the Id. Accountant Member has distorted the facts in paragraph no.14 of his dissent order by taking the reply of the assessee before the A.O. as observations/findings of the A.O. regarding non-production of books of accounts and material before him ?

(v). Whether the Id. Accountant Member is justified in referring to retrospective effect of explanation-1 to section 271(l)(c) of the I.T. Act in the dissent order for deleting the penalty on commission because the A.O. initiated and levied the penalty for filing inaccurate particulars of income ?

(vi). Whether the Id. Accountant Member is above the law by not following the decisions of Jurisdictional Allahabad High Court and Madhya Pradesh High Court referred/relied upon in the proposed order of the Judicial Member ?

(vii). Whether, when the assessee did not offer any explanation and did not produce any fresh evidence or fresh circumstances on disallowance of interest and commission at assessment stage (ex-parte order under section 144) and at penalty proceedings stage, authorities below were justified in levying and confirming penalty under section 271(l)(c) of the I.T. Act ?

3. On the other hand, the ld. AM proposed the following questions:-

1. Whether or not, on the facts and circumstances of this case, the penalty imposed on the assessee under section 271(l)(c) of the Income Tax Act, 1961, in respect of partial disallowance of Rs 11,82,135, on estimate basis @ 10%, in respect of the deduction for interest, deserves to be confirmed or deleted.

2. Whether or not, on the facts and circumstances of this case, the penalty under section 271(l)(c) of the Income Tax Act, 1961, in respect of partial disallowance of commission of Rs.38,14,947/-, by invoking Explanation to Section 37(1) on the ground that the amount paid is in excess of the limits laid down by the Reserve Bank of India, {(a) particularly when Explanation to Section 37(1), though later inserted with retrospective effect, was not on the statute as on the relevant point of time, and (b) particularly in the light of the decision of Hon'ble Bombay High Court in the case of CIT Vs. Yahoo India Pvt. Ltd. [ now reported as (2013) 33 taxmann.com 332 (Bom) - which was duly cited at the bar and a copy of which was duly filed in the paper book], and in the absence of any decision contrary thereto by the Hon'ble jurisdictional High Court on any other Hon'ble High Court}, deserves to be confirmed or deleted.

4. I have gone through the relevant material on record and considered the rival submissions in so far as understanding the difference of opinion



between the two Members is concerned. In my considered view, as has also been conceded by both the sides, the instant difference of opinion gets properly reflected through following question: -

“Whether on the facts and in the circumstances of the case and as per law, the Id. CIT(A) was justified in upholding penalty under section 271(1)(c) of the Income-tax Act, 1961 in respect of interest and commission disallowances?”

5. I recapitulate the factual scenario of the case : The assessee, a Finance Company, filed its original return declaring Nil income on 25.11.1997. Notice u/s 148 of the Act was issued, in response to which the assessee submitted that its original return be treated as a return in compliance to such notice. The AO required the assessee to produce books of account and other relevant documents. In reply, the assessee submitted that after rejection of its application for registration as a Non banking Finance Company by the Reserve Bank of India, several persons including depositors ransacked the office of the company;



destroyed its properties; and took away the account books and documents from its office. The assessee filed copies of newspaper cuttings to support its assertion. The AO got the enquiry conducted from the Reserve Bank of India, which transpired that the assessee's application for registration as NBFC was rejected by the RBI. In such circumstances, the assessment was framed on the basis of material available on record, making additions, *inter alia*, on account of interest, commission and depreciation. Thereafter, the AO imposed penalty in respect of these three disallowances, which stood affirmed in the first appeal. When the matter came up for consideration before the Tribunal, both the Id. members agreed that no penalty was exigible in respect of disallowance of depreciation. However, they differed on the sustenance or otherwise of penalty on the remaining two disallowances. Whereas the Id. JM confirmed the penalty in respect of disallowance of interest and commission, the Id. A.M ordered to delete the same. This is how, this matter has come up for consideration before me as a Third Member.



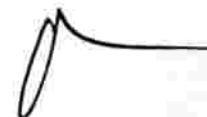


6. I have heard the rival submissions and perused the relevant material on record. At the outset, there is an important aspect of the matter, which warrants mention. The assessee filed its original return on 25.11.1997 declaring loss of Rs.4.76 crore, which was adopted in response to notice u/s 148 of as well. The AO in the body of the assessment order, passed u/s 147 of the Act, discussed four items of additions/disallowances, including, interest and commission. Though the sum total of such four additions/disallowances referred to in the order is Rs.3,47,56,592/-, the AO ignored such specific disallowances and computed total income at Rs. Nil, thereby disallowing the entire loss claimed by the assessee which is obviously more than the amount of the specific disallowances referred to in the assessment order. Thus, it is vivid that there are no specific disallowances of interest and commission in the computation of total income by the AO, in respect of which the extant penalty has been imposed.



7. Before proceedings with the matter further, I want to highlight that penalty proceedings are distinct from the assessment proceedings. Merely because an addition has been made and confirmed in quantum proceeding does not *ipso facto* lead to imposition of penalty. In order to bring a case within the purview of section 271(1)(c) of the Act, it is imperative to demonstrate that the assessee either concealed the particulars of his income or furnished inaccurate particulars of such income. If the assessee succeeds in proving in penalty proceedings that the addition so made and sustained was not as a result of any concealment of particulars of income or furnishing of inaccurate particulars of such income, then no penalty can be imposed and *vice-versa*.

8. Now I espouse the disallowance of interest on which penalty was levied by the AO. The factual panorama of this disallowance is that the assessee claimed interest expense of Rs.1,18,21,350/-. In absence of any



details of depositors to whom such interest was paid, the AO disallowed full amount of interest at Rs.1.18 crore. The Id. CIT(A), taking note of such disallowance for the preceding year, restricted it to 10% on estimate basis, namely, at Rs.11,82,135/-. The Tribunal confirmed sustenance of the disallowance at 10%. Such disallowance constituted the bedrock of penalty by the AO. The Id. CIT(A) confirmed the penalty.

9. It is an admitted position that the assessee is a Finance company which raised various deposits on which interest of Rs.1.18 crore was paid during the year in question. Though the AO observed that : 'the identification of MIP depositors could not be made because name and addresses of depositors were not available....In these circumstances, MIP deposits are not verifiable', but no addition was made in respect of such alleged unproved depositors. This exhibits that the AO eventually did not dispute the genuineness of deposits. It is only the interest paid on such deposits, which was disallowed by the AO at 100%, which got

reduced to 10% by the Id. CIT(A) and affirmed at such a reduced rate by the Tribunal. Under such circumstances, the moot question is whether the disallowance of interest in the instant case falls within the purview of section 271(1)(c) of the Act.

10. The AO has acknowledged that because of non-granting of license by the Reserve Bank of India, certain depositors attacked the office premises of the assessee and took away books of account and other documents. After accepting this position, the AO passed the assessment order 'on the basis of material available on record'. The assessee, admittedly, raised deposits from various persons, whose genuineness has not been eventually disputed by the AO. The assessee paid interest of Rs.1.18 crore on such deposits. The Appellate Authorities reduced 100% disallowance of interest made by the AO to 10% by noticing that it, in fact, paid interest on deposits raised and the disallowance was sustained because of the failure of the assessee to substantiate such payment. It is

further pertinent to note that the disallowance at 10% has been sustained on 'estimate basis' without referring to any specific amount of disallowance.

11. It is a trite law that no penalty can be imposed u/s 271(1)(c) of the Act on an estimated income/additions. In *CIT vs. Aero Traders (P.) Ltd. (2010) 322 ITR 316 (Del)*, the assessee filed return declaring loss of Rs. 83,64,468. A note was attached stating that it was impossible for them to substantiate its claim of loss by way of any evidence as the relevant records were lying seized with the police authorities. The AO, after being unable to obtain copies of the seized documents, based his assessment order on the limited documents provided and rejected the book results declared by the assessee. He estimated the income of the assessee at Rs.61,00,000/- as against the returned loss of Rs.83,64,468/-. The CIT(A) reduced the assessment to an estimated income of Rs.1,02,980/-. Thereafter, the AO imposed penalty, which got deleted



by the CIT(A) as well as the Tribunal on the reasoning that an addition made on the basis of guess work cannot be subjected to penalty for concealment of income. The Revenue preferred an appeal before the Hon'ble High Court, which found no perversity in the finding of Tribunal. The facts of this case are quite close to the present case. Here also, the assessee could not substantiate its claim of interest payment because presenting books of account were beyond its control. The AO made disallowance of interest at a higher level, which got reduced to a lower level on estimate basis in the appellate proceedings. In my view, there is no qualitative difference between the determination of income on 'estimate' basis and disallowance of expenses on 'estimate' basis in so far as imposition of penalty is concerned.

12. Similar view has been taken by the Hon'ble Gujarat High Court in *CIT vs. Subhash Trading Co. (1996) 221 ITR 110 (Guj)* holding that where income is assessed on estimate basis after rejecting book results,

penalty under s. 271(1)(c) cannot be imposed by mere application of Explanation thereof in the absence of any evidence to conclude a positive finding that there was concealment of income. The Hon'ble Punjab & Haryana High Court has reiterated this view in *Hari Gopal Singh vs. CIT (2002) 258 ITR 85 (P&H)*.

13. What follows from the above discussion is that where income is estimated or disallowance of expenses is made on estimate basis, there can be no penalty. The *raison d'être* for non-imposition of penalty in both the situations is that there is a lack of precision as to concealment of income or furnishing of inaccurate particulars of income. It is only an estimation shorn of any certainty or accuracy. Reverting to the facts of the instant case, it is clearly established that sustenance of disallowance of interest @ 10% of total interest payment is merely an estimation, which is devoid of any proper authentication. As such, it does not call for imposition of any penalty.



14. The Id. DR heavily relied on the judgment of the Hon'ble Supreme Court in *B.A Balasubramaniam and Bros Company vs. CIT (1999) 236 ITR 977 (SC)*, which is factually distinguishable. That case pertained to the A.Ys. 1967-68, 1968-69 and 1969-70, during which the relevant Explanation to section 271(1)(c) of the Act provided that where an assessee's returned income is less than 80 per cent of the income as ultimately assessed, he will be presumed to have concealed particulars of his income unless he establishes that the gap between his return and his assessment was not due to fraud or wilful neglect in filing of the return. The assessee in that case carried on business in tannery. As against export of tanned skins, the assessee received import licences which were based on a percentage value of the goods exported. The assessee, however, did not actually import the goods against the said import licences, but sold them as such. Since the assessee could not furnish the details of commodities covered by the licences at the time of the assessment, the ITO called for full details of the parties to whom the





licences were sold, the details of the commodities and the profit earned with reference to each of the import licences. In the absence of complete details furnished by the assessee, the ITO, estimated the income earned by the sale of licences based on the market quotations on premiums published in financial journals. The income determined by the ITO for each of the three years was reduced by the Tribunal. When the question of penalty u/s 271(1)(c) came up before the Hon'ble High Court, it noticed that the Explanation to section 271, material at that time, provided that in case where an assessee's returned income is less than 80% of the income as ultimately assessed, he will be presumed to have concealed particulars of his income unless he establishes that the hiatus between his return and his assessment was not due to fraud or wilful neglect in the filing of the return. It observed that even in cases where the Explanation initially applies because the returned income is less than 80% of the assessed income, if the assessee establishes that this gap is not due to any fraud or wilful neglect on his part, he could be taken to

have rebutted the presumption of concealment, and it is then for the Department to establish by cogent material that the assessee had concealed his income. The assessee failed to establish that the gap between the income returned and the income assessed was not due to any fraud or wilful neglect on its part, for, *it did not produce the requisite material even when called for*, for proving the correctness of the income returned. Non-production of the materials called for ascertaining the correctness of the income returned was held to be due to fraud or wilful neglect. This view was affirmed by the Hon'ble Apex Court.

15. It is manifest from the factual and legal position obtaining in that case that the assessee therein *did not produce the requisite material even when called for*. In contrast, the situation which is prevailing in the instant case is that the assessee could not produce the books of account and material because of reasons beyond its control as these were



admittedly taken away by the depositors, which position has been accepted by the AO also. So, in these facts, I am confronted with a situation, where the assessee was willing to produce the documents, but unable to do so and not that the assessee was not willing to produce the material which was available with him as was the case in *B.A Balasubramaniam (supra)*.

16. The Id. DR invoked Explanation 1 to section 271(1)(c) of the Act for buttressing his submission that penalty was rightly countenanced by the Id. CIT(A). In order to appreciate his view point, it is significant to reproduce Explanation 1, which runs as under: -

*“Explanation 1.—Where in respect of any facts material to the computation of the total income of any person under this Act,—*

*(A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner to be false, or*

*(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is *bona fide* and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,*



then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.”

17. This Explanation provides that the amount added or disallowed in computing the total income shall be deemed to represent income in respect of which particulars have been concealed if a case falls in clause (A) or (B). In other words, if an addition etc. is result of the applicability of any of these two clauses, then it gets covered within the mischief of section 271(1)(c) and *vice versa*.

18. Clause (B) of Explanation 1 provides that where an assessee offers an explanation which he is not able to substantiate and fails to prove that such explanation is *bona fide* and that all the facts relating to the same were disclosed by him, then, the amount added to the total income is deemed to represent the income in respect of the particulars were concealed. Testing the facts of the case on the touchstone of this clause,



it is seen that the assessee offered an explanation about the payment of interest to depositors but could not substantiate the same because of the non-availability of books and documents etc. Thus, failure to prove the payment of interest was on account of *bona fide* reasons beyond its control. It is further not disputed that all the facts relating to payment of interest were disclosed by the assessee. Hence the case of the assessee gets excluded from clause (B).

19. Now I turn to clause (A) of the Explanation, which mandates that where an assessee fails to offer explanation or the explanation is given, but is found by the AO to be false, then the amount added shall be deemed as concealment of income. Adverting to the facts of the instant case, it is found that the assessee did offer an explanation in respect of the payment of interest. Thus, the first component of Clause (A) is not satisfied. Even the second component of Clause (A) is not satisfied inasmuch as the explanation tendered by the assessee was not found to



be false. The assessee submitted explanation for the payment of interest to depositors, which it could not substantiate because of the non-availability of books of account and other relevant documents for the reasons discussed hereinabove. It is not a case that the explanation of the assessee for paying interest was found by the AO to be false. The fact that the assessee did pay interest has been found by the appellate authorities to be correct as 90% of the interest payment has been allowed as deduction. The disallowance is only 10% and that too, on *ad hoc* basis, which is again not because of finding the claim of the payment of interest as false, but because of the failure of the assessee to furnish necessary details for the reasons not within its control. At the most, it can be said that the explanation tendered by the assessee for 10% of total interest payment remained unproved but never got disproved by the AO. A line of distinction needs to be drawn between the unproved claims and disproved claims. Whereas *por una parte*, a disproved claim may call for penalty, *por otra parte*, an unproved claim does not warrant any

penalty. My view for this proposition is fortified by the judgment of the Hon'ble Gujarat High Court in *National Textile vs. CIT (2001) 249 ITR 125 (Guj)* in which it has been held that no penalty can be imposed if the assessee's explanation remains unproved but is not disproved. Similar view has been taken by the Hon'ble Calcutta High Court in *Durga Kamal Rice Mills vs. CIT (2004) 265 ITR 25 (Cal)*. In view of the above discussion, it is manifest that clause (A) of Explanation 1 to section 271(1)(c) is also not magnetized. *Ex consequenti*, it is graphically clear that the disallowance of interest @ 10% of total interest paid, cannot embrace an imposition of penalty u/s 271(1)(c) of the Act.

20. The Id. DR cited several reasons, which, in his opinion, justified imposition of penalty, such as, the RBI rejecting the application for registration of NBFC; names and addresses of the depositors not available; no books of account or vouchers available; a qualification by the auditors of the company; payment of interest not ascertainable; no

deduction of tax at source. These facts, in the opinion of the Id. DR, militate against the *bona fide* claim of the assessee. In my considered opinion, the factors as enumerated above simply show that the assessee could not substantiate the claim of payment of 10% of total interest which has been ultimately disallowed. By no standard, these factors eclipse the genuineness or *bona fide* of the transaction of interest payment. The mere fact that the Reserve Bank of India rejected the assessee's application or the books of account etc. could not be produced, cannot *per se* cast a shadow of doubt on the genuineness of payment of interest to the depositors. It is axiomatic that production of books of accounts and other related documents was an impossible task, as these were admittedly taken away by the depositors etc. The fact that the assessee, in fact, paid interest is proved from the deletion of addition to the extent of 90% of the interest by the Appellate Authorities. This confirms that the assessee, in fact, paid 100% interest but the addition of 10% was made simply because of the inability of the assessee to adduce





necessary evidence due to the non-availability of the books of account and other related documents. At the cost of repetition, it is stated that assessment proceedings are separate from penalty proceedings. The factors emphasized by the Id. DR are, of course, relevant in so far as the question of deduction of interest is concerned. But, when the matter concerns imposition of the penalty, such factors bear no significance as they simply demonstrate that the assessee failed to prove its claim of payment of interest and not that such a claim was false or got disproved at the hands of the AO. I therefore, hold that no penalty could have been imposed in respect of disallowance of interest.

21. The second component of penalty is disallowance of commission paid by the assessee for seeking deposits. The assessee paid total commission of Rs.58,11,221/-. This amount was partly in excess of the rate of commission prescribed by the RBI at 2% of deposits. This led to disallowance of excess commission at Rs.38,14,947/-.

22. Now the pertinent question is if any penalty is sustainable in respect of disallowance of commission payment over and above the prescribed rate of 2% of deposits. The fact that the assessee paid commission at the stated amount is not disputed. A case has been made out that the amount paid by the assessee over and above the rate prescribed by the RBI is in violation of Explanation 1 to section 37(1). Such Explanation provides that : 'For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure'. It is significant to note that Explanation 1 to section 37(1) was inserted by the Finance (No. 2) Act 1998 with retrospective effect from 1.4.1962. Prior to that, there were certain decisions allowing deduction of payments made in violation of law in respect of illegal business. The Hon'ble Supreme Court in *CIT vs. Piara Singh (1980) 124 ITR 40 (SC)*



was confronted with a situation in which the assessee was carrying on the business of smuggling. On the basis that such income was taxable, the question arose whether the confiscation of the currency notes entitled the assessee to the deduction claimed. The Hon'ble Summit Court held that the confiscation of the currency notes was a loss occasioned in pursuing the illegal business. The assessee was held entitled to the deduction of the confiscated amount from his income. Similar view was earlier canvassed in another decision in *CIT vs. S.C. Kothari (1971) 82 ITR 794 (SC)*. In order to get rid of such decisions, the legislature came out with Explanation 1 to section 37(1) by the Finance (No. 2) Act, 1998. What is relevant to note is the date of insertion of the Explanation, which is by the Finance (No.2) Act 1998. The assessment year under consideration is 1997-98 with the year ending on 31.03.1997. At the time when the assessee made payment of commission over and above the rate prescribed by the RBI, Explanation 1 to section 37(1) was not on the statute. Even though it came into being with retrospective effect

covering the year under consideration, but, such an Explanation was actually introduced not only much after making of commission payment by the assessee over and above the prescribed 2% limit, but also much after the close of the year. This deciphers that the payment of such commission over and above the prescribed rate was, at the material time, not hit by Explanation 1 to section 37(1). It is no doubt a good case for making disallowance because the Explanation has retrospective effect, but, it cannot amount to concealment of income or furnishing of inaccurate particulars of income. The Hon'ble Bombay High Court in *CIT vs. Yahoo India (P) Ltd. (2013) 33 taxmann.com 332 (Bom)* has held that where law is amended with retrospective effect, deletion of penalty levied u/s 271(1)(c) of the Act cannot be faulted. In my opinion, the imposition of penalty on the excess commission payment is not justified in the facts and circumstances of the instant case, which I hereby order to delete.



23. It is manifest from the facts recorded above that the penalty has been imposed with reference to disallowance of interest and commission expenses. It is not the case of the Revenue that the assessee did not pay such interest/commission and claimed deduction thereof. Merely because certain disallowance of expenses has been made, cannot itself justify imposition of penalty u/s 271(1)(c) of the Act. The Hon'ble Supreme Court in the case of *CIT vs. Reliance Petro Products (P) Ltd. (2010) 322 ITR 158 (SC)*, has held that a mere making of a claim which is not sustainable in law by itself, will not attract penalty under the section when the assessee has furnished all the particulars of income, which are not found to be inaccurate. It is up to the authorities to accept the claim of the assessee or not, but that cannot call for imposition of penalty. There are umpteen number of decisions in which it has been laid down that no concealment penalty can be imposed for disallowance of expenses on estimate basis. Such decisions include *CIT vs. Ajai Singh and Co. (2002) 253 ITR 630 (P & H)*; *Naranbhai Veerabhai and*



*Co. vs. CIT (1993) 203 ITR 1017 (Guj); and Addtl. CIT vs. Delhi Cloth and General Mills Co. Ltd. (1986) 157 ITR 822 (Del).* In view of the foregoing discussion, I am fully convinced that the penalty should not have been imposed in respect of the disallowances of interest and commission.

24. It is further observed that the AO initiated penalty proceedings by mentioning in the last line of the assessment order that : "Since the assessee company 'filed inaccurate particulars of income', notice under section 271(1)(c) is issued separately". However, the penalty order was passed by holding that:

*"The assessee has furnished inaccurate particulars/  
concealed the particulars of his income".*

25. Thus, it is apparent that the penalty was initiated on a specific charge of 'furnishing inaccurate particulars of income', but the penalty order was eventually passed with a vague and uncertain default of

'furnishing of inaccurate particulars/concealment of income'. Recently, it has been held in a Third Member decision dated 07.05.2018 of the Amritsar Bench of the Tribunal in *HPCL Mittal Energy Ltd. vs. Addl. CIT (ITA Nos.554 & 555/Asr/2014)* that the default must be conclusive at the time of passing of penalty order and not vague or uncertain. The Third Member Bench has held that where the satisfaction of the AO while initiating penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961, is with regard to alleged concealment of income by the assessee, whereas the imposition of the penalty is for 'concealment/furnishing inaccurate particulars of income', the levy of penalty cannot be sustained. As the facts and circumstances of the present case are *mutatis mutandis* similar to the Third Member Amritsar case in as much as the assessee in the instant case has been found guilty in the penalty order of a non-specific charge, no penalty u/s 271(1)(c) can be sustained.




26. The contention of the ld. DR that the concealment of income can be by way of furnishing of inaccurate particulars of such income and, hence, the extant penalty is sustainable, does not merit acceptance. The legislature has specifically provided two separate charges in the section, namely, concealment of particulars of income and furnishing of inaccurate particulars of income. Such expressions have different connotations. It is the escapement of income due to either concealment of particulars of income or furnishing of inaccurate particulars of such income *qua* a particular item of addition, which calls for penalty. This fine distinction between concealment of particulars of income and furnishing of inaccurate particulars of income has been appreciated by various Hon'ble Courts, who have found these two expressions as different in ambit from each other. This contention of the ld. DR is, therefore, devoid of any force. It is therefore, held that penalty order is not sustainable even on this technical issue.





27. In view of the foregoing discussion I answer the question referred to me as above in negative by holding that the Id. CIT(A) was not justified in confirming the penalty imposed in respect of disallowance of interest and commission. I therefore, agree with the view canvassed by the Id. AM in deleting the penalty. The Registry of the Tribunal is directed to list this matter before the Division Bench for passing an order in accordance with the majority view. Before parting with this order, I consider it as my duty to state that all the decisions cited by both the sides were properly taken into consideration. It is only for the sake of brevity that I desisted from referring to some of the decisions in my order, which are either not germane to the issue or are repetitive in nature.

**Order pronounced in the open court on 09/08/2018.**

  
**(R. S. SYAL)**  
**VICE-PRESIDENT**

**\*AKV\***

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3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR