IN THE INCOME TAX APPELLATE TRIBUNAL
"J" Bench, Mumbai

Before Shri G.S.Pannu, Vice President
and Shri Ravish Sood, Judicial Member

ITA No. 1772/Mum/2017
(Assessment Year: 2012-13)

Solidity Developers Private Ltd., Maratha Mandir Marg, Babasaheb Gawde Chowk, Mumbai Central, Mumbai-400008 PAN – AAOCS0518G	Vs.	Dy. Commissioner of Income Tax -11(2)(2), Mumbai.
(Appellant)		**(Respondent)**

Appellant by: Shri Kamal Matalia, A.R
Respondent by: Shri Abdul Hakeem M., D.R

Date of Hearing: 29.08.2018
Date of Pronouncement: 31.10.2018

O R D E R

Per Ravish Sood, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A) 18, Mumbai, dated 09.12.2016 which in turn arises from the order passed by the A.O under Sec. 271(1)(c) of the Income Tax Act, 1961 (for short 'Act'), dated 31.08.2015 for Assessment Year 2012-13. The assessee assailing the order passed by the CIT(A) has raised before us the following grounds of appeal:

"1. On the facts and circumstances of the case and in law, the Learned CIT(A)-18 has erred in confirming levy of penalty on the following;

a. Disallowance of interest expense for non-payment of tax deducted at source u/s 40(a)(ia) of the Act, amounting to Rs.3,74,28,580/-.

b. Disallowance of Interest paid on delayed profession tax amounting to Rs.2, 500/-

c. Disallowance of interest paid on delayed payment of Tax Deducted at Source (TDS) amounting to Rs.37,909/-.

2. The order under appeal is not only bad in law and invalid, but also against the natural law of equity and justice.

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3. *That the appellant reserves its rights to amend, alter or raise any other additional grounds of appeal before or during the course of appellate proceedings.*

Additional grounds of appeal by way of fresh claim:

4. *That the LAO erred in levying penalty u/s 271(1)(c) of the Act and Ld. CIT(A) erred in confirming the same without specifying the offence whether concealment of income or of furnishing inaccurate particulars of income. Thus show cause notice is vitiated and penalty is liable to be cancelled simply on this ground as held by Hon'ble SC in the case of CIT Vs. SSA Emerald Meadows 73 taxmann.com 248 and in the case of Dilip shroff 291 ITR 519.*

5. *That the approval given by Ld. JCIT to LAO for levy of penalty was without application of mind and therefore penalty order is liable to be cancelled on this ground.*

6. *Prayer for interim order:*

It is prayed to issue direction to LAO not to initiate prosecution proceedings pending disposal of this appeal in view of the ratio of Hon'ble SC decision in the case of ITO v. M.K. Mohammad Kunhi [1969] 71 ITR 815 and Honble ITAT delhi bench decision in the case of Oracle India (P.) Ltd. v. Additional Commissioner of Income-tax, Range 13, New Delhi [2017] 88 taxmann.com 241 (Delhi - Trib.).

7. *The Ld. CIT(A) erred in confirming penalty when the LAO was not clear as to what the offence was, that is, Concealment of income or furnishing inaccurate particulars of income. He had issued notice for both and levied the same for both.*

8. *The penalty order is null and void as the Ld. JCIT had approved the penalty order without application of mind."*

2. Briefly stated, the assessee company which is engaged in the business as that of a property developer had e-filed its return of income for A.Y 2012-13 on 28.09.2012, declaring loss of Rs.3,76,24,237/-. The return of income was processed as such under Sec. 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2).

3. During the course of the assessment proceedings it was noticed by the A.O that the assessee had debited interest expenditure of Rs. 3,74,28,580/- in its profit & loss account. The said interest expenditure included interest of Rs. 3,74,28,580/- that was paid by the assessee to M/s Citygold Investment Pvt. Ltd. It was observed by the A.O, that the assessee had admittedly failed to deposit the TDS on the aforesaid interest paid to M/s Citygold Investment Pvt. Ltd till the date of filing of its return of income. In the backdrop of the fact that the assessee had failed to deposit the aforesaid statutory payment before the 'due date' of filing of the return of income, the

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interest expenditure of Rs. 3,74,28,580/- was disallowed by the A.O under Sec. 43B of the Act. Alternatively, the A.O observing that the assessee out of its interest bearing funds had utilised an amount of Rs. 37.05 crores for advancing of interest free funds, thus concluded that disallowance of the correlating interest expenditure of Rs. 3,74,28,580/- was also called for on the said count. Further, the A.O noticed that the assessee had claimed the interest on professional tax of Rs. 2,500/- and interest on delayed payment of TDS of Rs. 37,909/- as an expenditure in its 'Profit & loss a/c'. Being of the view, that the aforesaid expenses were inadmissible the A.O disallowed the same, and vide his order passed under Sec. 143(3), dated 10.02.2015 made the following additions/disallowance in the hands of the assessee:

Sr. No.	Particulars	Amount
1.	Disallowance under Sec. 43B	Rs.3,74,28,480/-
2.	Disallowance of interest of delayed payment f profession tax	Rs.2,500/-
3.	Disallowance of delayed interest on TDS	Rs. 37,909/-

On the basis of his aforesaid deliberations the loss of the assessee was assessed by the A.O at Rs. 1,55,351/-. The A.O while culminating the assessment also initiated penalty proceedings under Sec. 271(1)(c) of the Act and issued a 'Show cause' notice under Sec. 274 r.w.s. 271, dated 10.02.2015 to the assessee.

4. Subsequently, after culmination of the assessment proceedings the A.O issued another 'Show cause' notice, dated 10.08.2015, therein calling upon the assessee to explain as to why penalty under Sec. 271(1)(c) may not be imposed in respect of the aforesaid additions/disallowances made in its hands. Not being impressed with the explanation of the assessee that no penalty under Sec. 271(1)(c) was liable to be imposed in respect of the aforesaid additions/disallowances, the A.O declined to accept the same. The A.O was of the view that as the assessee had failed to deposit the tax deducted at source on the interest of Rs.3,74,28,280/- paid to M/s Citygold Investment Pvt. Ltd. in the government treasury, thus the same was liable to be disallowed. Further, the A.O was not persuaded to subscribe to the claim

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of the assessee that the debiting of the interest expenditure was backed by an inadvertent mistake on its part. Rather, the A.O rebutting the aforesaid claim of the assessee observed that as the assessee was assisted by a team of professionals, thus it was beyond comprehension that raising of an untenable claim in the 'return of income' would have gone unnoticed. The A.O observed that the assessee had came forth with the aforesaid submission of a bonafide mistake, only when it was confronted with the fact that its claim of interest expenditure was inadmissible for computing its income. It was observed by the A.O, that the assessee only on being cornered had offered that the impugned interest expenditure be disallowed and added back to its total income. On the basis of his aforesaid observations, the A.O was of the view that the assessee despite being in knowledge of having raised an inadmissible claim of interest expenditure, had not only failed to revise its return of income in order to withdraw the same, but rather allowed it to perpetuate till the time he was confronted with a specific query as regards the inadmissibility of the same. In the backdrop of his aforesaid observations, the A.O was of a strong conviction that neither the claim of the assessee that no inaccurate particulars of income were filed was acceptable, nor his contention that the aforesaid interest expenditure had inadvertently been debited in the profit and loss account, did merit acceptance. The A.O in order to drive home his view that the assessee had raised a false claim in respect of the interest expenditure, observed that the same could safely be gathered from the fact that the assessee had not deposited the TDS on the aforesaid interest expenditure, even till the date of passing of the penalty order. On the basis of his aforesaid deliberations, the A.O held a strong conviction that as the claim of inadvertence of the assessee was a mere hog-wash, and it stood proved beyond doubt that the assessee had claimed such huge expenditure of Rs.3,74,28,280/- despite being in full knowledge of the inadmissibility of the same, hence its bonafides stood clearly disproved. Being of the view, that the claim of interest expenditure raised by the assessee was wholly untenable in law, the A.O taking support of certain judicial pronouncements concluded that the assessee by raising such a claim had wilfully sought to reduce its

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incidence of tax. On the basis of his aforesaid observations, the A.O concluded that the assessee by claiming such inadmissible interest expenditure had furnished inaccurate particulars of its income and thereby sought to avoid incidence of taxation, which did tantamount to concealment of income. In the backdrop of his aforesaid observations, the A.O imposed penalty under Sec. 271(1)(c) on the disallowance of interest expenditure of Rs.3,74,28,580/-.

5. Further, it was observed by the A.O that the assessee while computing its income had debited "interest on delayed payment of professional tax" amounting to Rs.2,500/-, and "interest on delayed payment of TDS" amounting to Rs.37,909/-. Since, the assessee had debited the aforesaid expenses which were clearly inadmissible as per the provisions of Sec.37(1) of the Act, the same were disallowed and added back to the total income of the assessee. It was observed by the A.O that during the course of the penalty proceedings the assessee had not furnished any explanation as to why penalty under Sec.271(1)(c) may not be imposed in respect of the disallowance of the abovementioned expenses. Further, it was noticed by him that the assessee by not assailing the said additions/disallowance in further appeal, had thus accepted the same. It was observed by the A.O, that the interest on delayed payment of professional tax and TDS were not allowable as a deduction a per the provision of Sec. 37(1) of the Act, since, the same were not attributable to the normal course of the business of the assessee, but were borne by the assessee on account of not adhering to the prescribed time limit. On the basis of the aforesaid observations, the A.O being of the view that the assessee had by claiming the aforementioned inadmissible expenses not only filed inaccurate particulars, but had thereby concealed its income under Sec.271(1)(c) of the Act.

6. The A.O not being impressed with the conduct and the explanation tendered by the assessee as regards raising of the aforesaid untenable claim of interest expenditure in its return of income, thus imposed a penalty of Rs.1,21,56,814/- under Sec. 271(1)(c) of the Act.

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7. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the contentions advanced by the assessee, was however not persuaded to subscribe to the same and dismissed the appeal, observing as under :

> *"2.11 I have carefully considered the assessment order, submissions of the appellant and the facts of the case. Under this ground of appeal, the appellant is agitated levy of penalty u/s. 271(1)(c) of the Act amounting to Rs.1,21,56,814/- in respect of two items of additions/ disallowances. I have carefully considered the submissions of the appellant viz-a-viz the penalty order as well as the assessment order. On perusal of the same, I find that the Assessing Officer has disallowed Rs. 40,409/- on account of interest paid on delayed payment of TDS. The Assessing Officer also disallowed Rs.3,74,28,580/- u/s. 43B [40(a)(ia)]. I further find that the appellant did not contest the said disallowances made by the Assessing Officer vide order dated 10-02-2015. During the penalty proceedings, the Assessing Officer has afforded another opportunity to show cause as to why penalty should not be levied on the said two items of disallowances. Before me also, the appellant has filed written submissions which are not tenable as follows:*
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> *(i) As regards disallowance of interest on delayed payment of TDS, the only plea advanced by the appellant is that the same is an inadvertent mistake.*
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> *(ii) This plea of appellant is not acceptable because the appellant has agreed to the addition 'only' after the details were called for and 'enquiries' were made by the Assessing Officer. Had this scrutiny not been conducted, the said disallowance would have remained undetected and not subjected to any other proceedings. I am of the opinion that the appellant has filed inaccurate particulars by not disallowing the said interest on delayed payment of interest This is a case of agreeing to addition after detection by Assess ng Officer, therefore, liable to penalty u/s. 271(1)(c) of the Act.*
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> *(iii) As regards to disallowance of interest, it is seen that the appellant has advanced interest free loans given to two parties and claimed interest on the loans taken from two parties. I find that loan of Rs. 3.97 crores were given to Sri P.H. Ravi Kumar and Shri G.N. Vajpai. On the other hand, the appellant has paid huge interest of Rs. 3,74,67,177/- on the loans taken from Hubtown Ltd. and the Citygold Investment (P) Ltd. Even till penalty proceedings, the appellant has failed to produce the reasons for claiming huge interest even though no interest was charged on two loans of Rs. 37,05,00,000/-. Vide order sheet dated 10.02.20 15, the Assessing Officer afforded another opportunity to explain the reasons for diversion of interest bearing fund ten to granting of interest free loan. The appellant failed to furnish any explanation to justify the claim of huge interest as above said. Apart from this it is further seen that no TDS was admittedly deducted on interest amounting to Rs.3,74,67,177/-. I, therefore, find that the appellant had no justifiable grounds to rebut both contentions of Assessing Officer, viz. diversion of interest bearing fund and non deduction of TDS. It is, therefore, crystal clear that the appellant had no justifiable ground to support the claim of interest. I have, therefore, no hesitation in confirming the penalty on disallowance levied by the Assessing Officer on this count as well, I further find that the case laws relied upon by the appellant are entirely*

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on different ground and distinguishable on facts. On the contrary all those case laws are primarily emerging and of the claims which are debatable after the facts are established. However, in this case, the appellant has offered no explanation in spite of adequate opportunity and also accepted the disallowances and not availed opportunities to rebut the disallowances with any concrete explanations. This clearly establishes the fact that the appellant has filed inaccurate particulars for which, no corroborative evidence exist. Therefore, I confirm the penalty of Rs. 1,21,56,814/- pm both the counts. Accordingly, this ground of appeal is dismissed."

8. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') of the assessee took us through the orders of the lower authorities in context of the issue under consideration. The ld. A.R drawing our attention to the 'Show cause' notice, dated 10.02.2015 issued under Sec. 274 r.w.s. 271 of the Act, submitted that the A.O while calling upon the assessee to 'Show cause' as to why penalty under Sec.271(1)(c) may not be imposed on it, had failed to strike off the irrelevant default in the body of the notice. It was the contention of the ld. A.R, that as the assessee company was not put to notice as regards the default for which the penalty was sought to be imposed by the A.O under Sec 271(1)(c) of the Act, hence it had remained divested of an opportunity to defend its case and establish that no penalty under Sec. 271(1)(c) was called for in its hands. In support of his aforesaid contention, the ld. A.R relied on the judgment of the Hon'ble Supreme Court in the case of CIT Vs. SSA's Emerald Meadows (2016) 73 taxamann.com 248 (SC). On merits, the ld. A.R submitted that as the assessee had not furnished inaccurate particulars, thus the lower authorities merely on the basis of a simpliciter disallowance made under Sec.40(a)(ia), and disallowance of claim of expense raised by the assessee under a bonafide belief had wrongly imposed penalty under Sec. 271(1)(c). Further, it was submitted by the ld. A.R that the A.O misconceiving the facts of the case had wrongly observed that as the assessee had utilized the interest bearing funds for advancing of interest free advances, thus on the said count too the disallowance of the interest expenditure of Rs. 3,74,28,580/- was not sustainable in the hands of the assessee. It was the contention of the ld. A.R, that the borrowed funds were utilized by the assessee to give interest

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free loan to its subsidiary joint venture viz. Wellgroomed Venture, in which it had 95% share/stake. In the backdrop of the aforesaid facts, it was the contention of the ld. A.R that the assessee by advancing the interest free loan to its joint venture had thus got higher profit from the same. The ld. A.R averred that as the advancing of the interest free loan to the joint venture had resulted to return in the form of higher profit, thus the adverse inferences drawn by the A.O were not maintainable. It was further averred by the ld. A.R that as the assessee under mistaken belief of law did not file an appeal against the quantum addition, thus merely on the said count no adverse inferences could have been drawn in the course of the penalty proceedings.

9. Per contra, the ld. Departmental Representative (for short 'D.R') taking us through the order passed by the A.O under Sec. 271(1)(c), submitted that as the penalty was initiated and imposed for both the defaults, thus no infirmity did emerge from the order of the A.O imposing penalty under Sec. 271(1)(c) in the hands of the assessee. Further, it was submitted by the ld. D.R that the A.O remaining well withi his jurisdiction had imposed penalty under Sec. 271(1)(c), which thereafter was rightly upheld by the CIT(A). The ld. D.R further adverting to the merits of the case relied on the orders of the lower authorities. It was averred by the ld. D.R that the A.O after duly considering the facts of the case had rightly imposed penalty under Sec. 271(1)(c), which thereafter was upheld by the CIT(A).

10. We have heard the authorized representatives of both the parties, perused the orders of the lower authorities and the material available on record. We shall first advert to the validity of the jurisdiction assumed by the A.O under Sec.271(1)(c), as had been assailed by the assessee before us. We have perused the 'Show cause' notice issued by the A.O under Sec. 274 r.w. Sec. 271, dated 10.02.2015 (Page 4) of the assesses 'Paper book' (for short 'APB'), and are in agreement with the ld. A.R that the A.O had in the said notice failed to strike off the irrelevant default. However, a perusal of the order passed by the A.O under Sec.271(1)(c) reveals that he had issued another notice dated 10.08.2015, therein calling upon the assessee to show

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cause as to why penalty under Sec. 271(1)(c) may not be imposed on it. We find that the ld. A.R had not assailed the validity of the aforementioned 'Show cause' notice, dated 10.08.2015. In the backdrop of the aforesaid facts, it can safely be concluded that the validity of the jurisdiction assumed by the A.O under Sec. 271(1)(c) on the basis of the aforesaid 'Show cause' notice, dated 10.08.2015 is in order, and for the said reason had not been challenged before us. We thus, in the backdrop of the fact that the impugned 'Show cause' notice, dated 10.02.2015 was followed by another 'Show cause' notice, dated 10.08.2015, the validity of which as observed by us hereinabove has not been challenged by the assessee before us, therefore, refrain from proceeding with and adjudicating the validity of the jurisdiction assumed by the A.O for levying penalty under Sec. 271(1)(c),solely on the basis of the 'Show cause' notice, dated 10.02.2015. Hence, not being impressed with the challenge thrown by the assessee to the validity of the jurisdiction assumed by the A.O for imposing penalty in the hands of the assessee under Sec. 271(1)(c), reject the same. The additional ground of appeal No. 4 raised by the assessee is dismissed.

11. We shall now advert to the validity of the penalty imposed by the A.O under Sec. 271(1)(c) in the backdrop of the merits of the case. We may herein observe that though the A.O in the course of the quantum proceedings had drawn adverse inferences as regards the admissibility of the interest expenditure of Rs. 3,74,28,580/- on two grounds viz. (i). the same was not to be allowed as a deduction as the assessee had failed to deduct tax at source on the interest expenditure; and (ii). the assessee had diverted the interest bearing funds of Rs. 37.05 crores for giving interest free advances, however the penalty was imposed by the A.O by focusing only on the ground that the assessee despite failing to deposit tax deducted at source on the said interest expenditure, had however debited the same as an expenditure in its profit & loss account. We thus, in the backdrop of the observations of the A.O in the order passed by him under Sec. 271(1)(c), which for the said reasoning was upheld by the CIT(A), therefore, focus on the validity of the penalty imposed by the A.O under Sec. 271(1)(c) on the

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said ground. We find that as the assessee had failed to deposit the tax deducted at source on the interest expenditure of Rs.3,74,28,580/- paid to M/s Citygold Investment Pvt. Ltd, therefore, the claim of the same as an expenditure by the assessee was declined by the A.O. Rather, the A.O was of the view that the assessee despite being well conversant of the fact that the interest expenditure of Rs.3,74,28,580/- was not allowable in its hands, had however knowingly furnished inaccurate particulars and debited the same as an expense in its profit and loss account. Further, the A.O in the backdrop of the conduct of the assessee was dissuaded to accept the explanation tendered by it to prove the bonafides leading to the claim of the interest expenditure while computing its income. It was observed by the A.O, that the assessee on being confronted with the fact that its claim of interest expenditure was inadmissible, only on finding itself cornered, had claimed that the same was an inadvertent mistake on its part. We find that the A.O not being persuaded to accept the bonafides of the assessee, thus concluded that the latter had intentionally by raising a claim which was wholly untenable in law furnished inaccurate particulars of its income. Further, the A.O observing that the assessee had while computing its income debited "interest on delayed payment of professional tax" amounting to Rs.2,500/- and "interest on delayed payment of TDS" amounting to Rs.37,909/-, which were clearly inadmissible as per the provisions of Sec.37(1) of the Act, thus imposed penalty under Sec. 271(1)(c) as regards the said respective disallowances too. On appeal, the CIT(A) concurred with the view taken by the A.O and upheld the penalty imposed by him under Sec. 271(1)(c) as regards the disallowance of the interest expenditure of Rs. 3,74,28,580/- under Sec. 43B [40(a)(ia)]. In so far, the penalty imposed by the A.O under Sec. 271(1)(c) as regards the disallowance of the "interest on delayed payment of professional tax" amounting to Rs.2,500/- and "interest on delayed payment of TDS" amounting to Rs.37,909/-, the same too was also upheld by the CIT(A).

12. We have deliberated at length on the issue under consideration, and are unable to persuade ourselves to subscribe to the aforesaid view so

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arrived at by the lower authorities. We find that as is discernible from the orders of the lower authorities, no part of the claim of the assessee as regards incurring of the interest expenditure in context of M/s Citygold Investment Pvt. Ltd. is either found to be incorrect or inaccurate. Rather, on the contrary, the A.O had nowhere doubted the genuineness and veracity of the claim of the aforesaid interest expenditure by the assessee. However, as the assessee had failed to deposit the tax deducted at source on the interest expenditure of Rs.3,74,28,580/-, thus for the said reason the said expenditure was disallowed by the A.O while framing the assessment under Sec. 143(3) of the Act. We though are not oblivious of the fact that failure on the part of the assessee to deposit the amount of tax deducted at source in respect of the aforesaid interest expenditure of Rs. 3,74,28,580/- would justifiably lead to disallowance of the said expenditure under Sec. 40(a)(ia), and to the said extent are in agreement with the observation of the lower authorities. However, we are of the considered view that a simpliciter disallowance of the interest expenditure, for the reason that the assessee had failed to deposit the tax deducted at source on the same in the government treasury as required under Chapter XVIIB of the Act, *san* any infirmity emerging as regards the veracity of the incurring of the expenditure, cannot jus ifiably lead to levy of penalty under Sec.271(1)(c).

13. We may herein observe, that though a disallowance contemplated under Sec.40(a)(ia) has an overriding effect as regards the allowability of an expense which otherwise would be allowable as per Sec. 30 to Sec. 38 of the Act, however, a stand alone disallowance made under the said statutory provision cannot be stretched for characterising the same as furnishing of inaccurate particulars of income by the assessee within the meaning of Sec.271(1)(c) of the Act. It is not a case, where the assessee is found to have raised a bogus claim, which on the said count has been disallowed by the A.O. Rather, as observed by us hereinabove, the disallowance of the interest expenditure which had occasioned for failure on the part of the assessee to deposit the tax deducted at source, as regards the said expenditure, in no way dislodges the veracity of the claim of the assessee as regards incurring

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of the expenditure under consideration. Thus, to our considered view the failure of the assessee to deposit the amount of tax deducted at source on the aforesaid interest of Rs.3,74,28,580/- paid to M/s Citygold Investment Pvt. Ltd., would though justifiably lead to dislodging of the claim of allowability of the said interest expenditure in the hands of the assessee while computing its income, but the same cannot lead to levy of penalty under Sec. 271(1)(c). We are also not impressed with the observations of the lower authorities that as the assessee had continued to persist with claiming of the unsubstantiated and inadmissible claim of interest expenditure, thus it clearly proved that it had knowingly furnished inaccurate particulars and had raised an untenable claim of expenditure in its return of income. We are of the considered view that as observed by us hereinabove, as the genuineness of the incurring of the interest expenditure under consideration had at no stage been doubted by the lower authorities, thus a mere disallowance of the said expenditure under Sec. 40(a)(ia) cannot lead to drawing of an inference that the assessee had furnished inaccurate particulars of its income.

14. We find that our aforesaid view that no penalty under Sec.271(1)(c) is liable to be imposed on a mere disallowance of expense under Sec.40(a)(ia) is fortified by the view taken by the Hon'ble High Court of Punjab & Haryana in the case of PCIT Vs Torque Pharmaceuticals (2016) 389 ITR 46 (P&H). The High Court in its said order, had observed as under:

> *"4. The primary challenge in this appeal is to the cancellation of penalty on addition made on account of disallowance of expenditure under Section 40(a)(ia) of the Act. The assessee had made a claim of deduction in the return of income. No finding has been recorded by the authorities below that the claim made by the assessee is malafide. It has been categorically recorded by the Tribunal after examining the entire material on record that the CIT(A) had rightly cancelled the penalty against the assessee. It was further recorded that the assessee made a bonafide claim of deduction of the expenditure and even though it was not acceptable to the revenue would not lead to the conclusion that the assessee had concealed the particulars of income or filed inaccurate particulars of income. The relevant findings recorded by the Tribunal read thus:-*
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> > *"8. We have considered the rival submissions and material available on record. The issue involved in the appeal is regarding cancellation of*

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penalty on addition made on account of disallowance of expenditure under section 40(a)(ia) of the Act. The assessee has disclosed the entire facts before the authorities below without concealing any income. The assessee made a claim of deduction in the return of income and explained the facts but the same were not accepted by the authorities below and additions have been confirmed. Therefore, it is a case of mere disallowance of expenditure without bringing any adequate material against assessee to prove that assessee has concealed the particulars of income or has furnished inaccurate particulars of income. The appeal of the assessee on substantial question of law with regard to disallowance under the provision had been admitted by Hon'ble Punjab and Haryana High Court. The Hon'ble Punjab and Haryana High Court in the case of CIT vs. Haryana Warehousing Corporation 314 ITR 215 held as under:-

"Held. Dismissing the appeal that the deduction claimed by the assessee was legitimate and bonafide in terms of the conflicting determination of law on the proposition in question. The categorical finding at the hands of the Tribunal in its order was that the assessee had disclosed the entire facts without having concealed any income There was no allegation against the assessee that it had furnished inaccurate particulars of its income. The determination of the Tribunal had not been controverted even in the grounds raised in the appeal. The assessee was guilty of neither of the two conditions. Therefore, in the absence of two pre-requisites postulated under section 271(l)(c) it was not open to the revenue to inflict any penalty on the assessee."

9. The learned CIT (Appeals) considering the material on record correctly followed the decision of the Delhi Bench in the case of AT&T Communications Services (India) Pvt. Limited (supra) for cancelling the penalty against the assessee. The assessee made a bonafide claim of deduction of the expenditure even though it was not acceptable to the revenue, would not lead to inference that assessee has concealed the particulars of income or filed inaccurate particulars of income. Nothing is brought on record if claim of assessee was incorrect in law or was malafide. Therefore, decision relied upon by learned DR is not applicable to the facts of the case."

5. In CIT vs. Reliance Petroproducts (P) Limited, (2010) 322 ITR 158, the Apex Court was of the view that under section 271(l)(c) of the Act, there has to be concealment of income of the assessee or the assessee must have furnished inaccurate particulars of his income. In the present case, the claim made by the assessee has not been shown to be suffering from any of these conditions. In the absence of any finding recorded by the CIT(A) or the Tribunal with regard to the claim of the assessee that it was malafide, there is no error in cancelling the penalty imposed by the Assessing Officer.

6. Further, reliance of the revenue on the judgment of the Delhi High Court in CIT vs. Zoom Communication (P) Limited, (2010) 327 ITR 510 is of no help to them as therein the High Court was considering the question of levy of penalty under Section 271(l)(c) of the Act wherein it had concluded to be a case of furnishing of inaccurate particulars of income with malafide intention which is not the case herein.

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7. Thus, no substantial question of law arises. The appeal stands dismissed."

Still further, a similar view has also been taken by the Hon'ble High Court of Gujarat in Nayan C. Shah Vs. ITO (2016) 386 ITR 0304 (Guj). The Hon'ble High Court observing that a disallowance of expenditure under Sec. 40(a)(ia) would not call for levy of penalty under Sec. 271(1)(c), had observed as under:

"7. As noticed hereinabove, the Commissioner (Appeals) had deleted the penalty on the ground that the default being technical and venial in nature inasmuch as the entire amount of tax which was required to be deducted at source was deducted and deposited in the Government account. According to the Commissioner (Appeals) for a technical breach, levy of penalty was not warranted. Thus, the assessee while filing the return of income, did not make disallowance under section 40(a)(ia) of the Act in relation t the amounts paid on which it had not deducted the tax at source. It is the case of the assessee before the Assessing Officer as well as the authorities concerned that each and every particular of income was accurately furnished and there was a true disclosure of all particulars by it and that the disallowance was only on a technical ground, inasmuch as, though the disallowance was made in the assessment year 2006-07, the amount was allowed as a deduction in the subsequent assessment year.

8. At this juncture it may be apposite to refer to the decision of the Supreme Court in the case of Commissioner of Income Tax v. Reliance Petroproducts Pvt. Ltd., (2010) 322 ITR 158, wherein the court while interpreting the provisions of section 271(1)(c) of the Act, has held that a glance at the said provision would suggest that in order to be covered by it, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. In the facts of that case, the court found that it was not a case of concealment of the particulars of the income, nor was it the case of the revenue either. However, the counsel for the revenue suggested that by making an incorrect claim for the expenditure on interest, the assessee had furnished inaccurate particulars of income. The court observed that it had to only see as to whether in that case, as a matter of fact, the assessee had given inaccurate particulars. The court noted that as per Law Lexicon, the meaning of the word "particular" is a detail or details (in the plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particular" used in section 271(1)(c) would embrace the meaning of the details of the claim made. The court further observed that in Webster's Dictionary, the word "inaccurate" has been defined as: "not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript." The court observed that reading the words "inaccurate" and "particulars" in conjunction, they must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. The court noted that it was an admitted position that no information given in the return was found to be incorrect or inaccurate. It was not as if any statement made or any detail supplied was found to be factually incorrect and accordingly, held that, prima facie, the

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assessee could not be held guilty of furnishing inaccurate particulars. The court repelled the contention raised by the counsel for the revenue that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income". The court held that 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. Therefore, it is obvious that it must be shown that the conditions under section 271(1)(c) must exist before the penalty is imposed. The court further observed that 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.

9. Reverting to the facts of the present case, the Assessing Officer, in the penalty order, has observed that the addition/disallowance made on account of non-deduction of tax deducted at source and non-payment of the tax deducted at source into the Government account within the stipulated time as per the provisions of section 40(a)(ia) of the Act, are totally found out by the Assessing Officer only during the course of assessment proceedings and had not been disclosed by the assessee. He, accordingly, has formed the opinion that the assessee has furnished inaccurate particulars of income. However, he has not stated as to what are the inaccurate particulars of income in the return filed by the appellant.

10. From the facts as emerging from the record, it appears that the assessee has made a claim of expenditure in relation to the payments made, which he may not have been entitled to claim in view of the provisions of section 40(a)(ia) of the Act, as tax on part of such amount had not been deducted at source and deposited in the Government account before the due date for filing return income. However, as held by the Supreme Court in the above decision, merely submitting an incorrect claim in law for the expenditure would not amount to furnishing inaccurate particulars of income. The impugned order passed by the Tribunal, therefore cannot be sustained."

15. We further find that coordinate benches of the Tribunal i.e ITAT, Chandigarh in the case of M/s Kapsons Associates Vs. ACIT [ITA No. 1354/Chd/2017; dated 01.01.2018] and ITAT, Mumbai in DCIT Vs. Techno Electronics Ltd. [ITA No. 2338/Mum/2016; dated 18.12.2017](Mum), had also taken a view that no penalty under Sec. 271(1)(c) can be imposed in respect of a disallowance of an expense made under Sec. 40(a)(ia) of the Act. In this regard, we may herein observe that the fact that the assessee had deducted the TDS on the interest paid to M/s Citygold Investment Pvt. Ltd., and the same was not deposited with the government treasury would be clearly discernible from a perusal of the 'balance sheet' of the assessee for the year under consideration. In sum and substance, the complete details as regards incurring of the interest expenditure, deduction of the tax at source

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on the same, and the fact that the same was not deposited in the government treasury, were duly disclosed by the assessee and were discernible from its records for the year under consideration. We are also of the view, that merely because the assessee had claimed deduction of interest expenditure which has not been accepted by the revenue, penalty under section 271(1)(c) could not have been imposed. Rather, mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing of inaccurate particulars regarding the income of the assessee. In the backdrop of our aforesaid observations, we are of the considered view that as no part of the particulars filed by the assessee in respect of the interest expenditure which admittedly had been paid to M/s Citygold Investment Pvt. Limited are found to be incorrect, thus as per the judgment of the Hon'ble Supreme Court in the case of CIT Vs Reliance Petroproducts (P) Limited (2010) 322 ITR 158 (SC), no penalty under Sec. 271(1)(c) could have been validly imposed in the hands of the assessee. We thus in terms of our aforesaid observations, not being in agreement with the view taken by the lower authorities, thus delete the penalty imposed by the A.O under Sec. 271(1)(c) in respect of the disallowance of interest expenditure of Rs.3,74,28,580/-.

16. We shall now advert to the penalty imposed by the A.O under Sec.271(1)(c) as regards the disallowance of the delayed payment of professional tax amounting to Rs.2,500/- and interest on delayed payment of TDS amounting to Rs.37,909/-. We have deliberated at length on the issue under consideration, and are persuaded to subscribe to the view of the lower authorities that as the aforementioned interest expenditure was incurred by the assessee on account of not adhering to the prescribed time limit for the deposit of the respective amounts, the same was thus inadmissible as per the provision of Sec. 37(1) of the Act. However, we are of the considered view, that as no part of the claim of the assessee of having incurred the aforesaid interest expenditure is found to be incorrect, therefore, merely on the count that the view of the assessee that the said amounts were allowable as an expenditure did not find favour with the A.O,

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penalty under Sec.271(1)(c) could not have been validly imposed on the assessee. In this regard, we find that the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Reliance Petroproducts (P) Limited (2010) 322 ITR 158 (SC) clearly comes to the rescue of the assessee. We thus, in terms of our aforesaid observations set aside the order of the CIT(A) and delete the penalty imposed by the A.O as regards the disallowance of the delayed payment of professional tax amounting to Rs.2,500/- and interest on delayed payment of TDS amounting to Rs.37,909/-.

17. In terms of our aforesaid observations, the order of the CIT(A) is set aside and the penalty of Rs.1,21,56,814/- imposed by the A.O under Sec.271(1)(c) of the Act is deleted.

18. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

Order pronounced in the open court on 31 10.2018

Sd/-	Sd/-
(G.S.Pannu)	(Ravish Sood)
VICE PRESIDENT	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 31 10.2018
Ps. Rohit

आदेश की 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.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**

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