

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

**BEFORE HON’BLE JUSTICE P. P. BHATT, PRESIDENT &  
HON’BLE SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 6913/Mum/2012  
(निर्धारणवर्ष / Assessment Year: 2002-03)

Af-taab Investment Company Ltd. Corporate Centre, B-Block, 34, Sant Tukaram Road, Carnac Bun, Mumbai-400 009	<b>बनाम/ Vs.</b>	ACIT Circle -2(1), R. No. 561, Aayakar Bhavan, M. K. Road, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAACA4800H		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri P. J. Pardiwala & Ms. Zalak P. Shah, AR
प्रत्यर्थीकीओरसे/Respondent by	:	Shri Brajendra Kumar, DR

सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	18.01.2021
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	26.03.2021

आदेश / ORDER

**PER S. RIFAUR RAHMAN (ACCOUNTANT MEMBER):**

The present appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-4, in short ‘Ld. CIT(A)’, Mumbai, dated 05.09.2012 for AY 2002-03.

2. The brief facts of the case are, assessee is an investor and dealer in shares and securities. During assessment proceedings, AO observed from annual report for FY 2001-02 that some of the shares are held as long term investments while the others are stock-in-trade. The profit or loss on sale of long term investments is offered for tax under the head 'Capital gains' while the stock-in-trade is offered for tax under the head 'Business Income'. In the return of income, assessee declared the total income as under:-

	Rs.	Rs.
Business income	27,233,117	
Less: Brought forward business loss set off	27,233,117	NIL
Long term capital gains /(loss)	(8,037,863)	
Short term capital gains/(loss)	<u>(206)</u>	
Gross Total Income /Total Income	8,038,069	

3. Further AO observed that the positive business income which includes a loss from sale of shares held as stock-in-trade. The assessee's case was selected for scrutiny and AO held that loss incurred by the assessee from sale of shares held as stock-in-trade is a speculative loss as per the explanation to section 73 of the Act. AO observed that assessee has profit under the head 'business' and loss under the head 'capital gains'. Therefore, the

main income of the assessee is from profit and gains of business and the explanation of section 73 of the Act is applicable in assessee's case. Accordingly, the assessment was completed assessing the total income at Rs. NIL (after adjusting the brought forward losses). AO reclassified the business loss from sale of shares held as stock-in-trade as speculation loss.

4. Aggrieved with the above order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) has sustained the findings of AO. Even in second appeal, ITAT has sustained the order of Ld. CIT(A).

5. Pursuant to the order of Ld. CIT(A), notice u/s 274 r.w.s. 271(1)(c) was issued and served on the assessee. In response, assessee submitted the detailed submission objecting to the initiation of penalty proceedings. After considering the submission of the assessee, AO levied penalty.

6. Aggrieved with the above order, assessee preferred the appeal before CIT(A). Before him, assessee filed a detailed submission stating that explanation to section 73 is not applicable to the case of assessee, there is difference of opinion on the

interpretation of the explanation to section 73 of the Act. The provision of section 271(1)(c) cannot be invoked and assessee relied on several case law and further submitted that as per section 271(1)(c) (Clause-iii) states that there should be a evasion of tax by reason of concealment of particulars or furnishing of inaccurate particulars of income. It was submitted that in the given case, there is no evasion of tax since AO has not made any addition and merely reclassified the head of income.

7. After considering the submission of the assessee, Ld. CIT(A) sustained the penalty with the following observations:-

*4. I have considered the facts of the case and submissions of the assessee. The assessee has claimed that its income is mainly chargeable under the head capital gain and, therefore, the provisions of explanation to section 73 are not applicable, whereas, this is no more in dispute because the business loss on account of trading in shares has been confirmed as speculation loss by CIT(A) and Hon'ble ITAT in the quantum appeal and, therefore, to again argue in the penalty proceedings that provisions of explanation to section 73 are not applicable cannot help the assessee. The loss claimed by the assessee is a speculation loss*

*and, therefore, the issue arises whether the penalty is leviable or not. Assessee has relied on several case laws, but case laws are in favour and against penalty orders u/s. 271(l)(c), but the only issue is that if the assessee has filed inaccurate particulars and thereby concealed income then penalty is leviable otherwise not. Hence, it is to be examined whether the particulars filed by the assessee were inaccurate or not. Without dispute assessee claimed the loss in share trading as normal business loss and nowhere it was disclosed or indicated in any manner that explanation to section 73 is applicable to the case of the assessee and, therefore, such loss is speculation loss. Even it was not disclosed anywhere that assessee has claimed this as normal business loss because it is debatable issue. It was not disclosed or indicated in any manner that the facts are that the major income of the assessee is from dealing in shares and securities of other companies, whereas, assessee disagrees with the application of explanation to section 73 in any manner, therefore, it is clear that assessee had not disclosed complete correct facts and the fact that explanation to section 73 is applicable was concealed and, therefore, the facts which were filed were incomplete facts on the basis of which loss from dealing in shares was claimed as normal business loss and, therefore, clearly condition of section 271(l)(c) are fulfilled. Hence, penalty is leviable. In*

*view of the facts that inaccurate particulars were filed and correct facts were concealed, the cases cited by the assessee are not applicable to the case of the assessee. Therefore, penalty levied by the A.O. is confirmed and the grounds of appeal are rejected.*

8. Now before us, the assessee has preferred the appeal by raising the following grounds of appeal as under:-

*1. The learned CIT(A) erred in confirming the action of the Assessing Officer in levying penalty of Rs.60,99,780 under section 271(l)(c) of the Income-tax Act, 1961 ('the Act').*

*2. The learned CIT(A) erred in holding that assessee had not disclosed complete correct facts and the fact that explanation to section 73 is applicable was concealed and, therefore, the facts which were filed were incomplete facts on the basis of which loss from dealing in shares was claimed as normal business loss and, therefore, clearly conditions of section 271(l)(c) are fulfilled.*

*3. The learned CIT(A) erred in holding that inaccurate particulars were filed and correct facts were concealed, the cases cited by the assessee are not applicable to the case of the assessee.. .*

*The learned CIT(A) erred in not following the decision of the Delhi High Court decision in the case of CIT v. Auric Investment & Securities Ltd. (310 ITR 121), which is similar to the facts of the appellants case.*

*4. The learned CIT(A) erred in not appreciating that mere change of the head of income from "Business Income" to "Speculation Income" in the assessment order cannot automatically lead to penalty under section 271(l)(c) of the Act.*

*5. Each one of the above grounds of appeal is without prejudice to the other.*

*6. The appellant reserves the right to amend, alter or add to the above grounds of appeal.*

9. At the outset, Ld. AR appearing on behalf of the assessee brought to our notice brief facts of the case and submitted that AO has reclassified the head of income from business income to speculative income. There is a difference of opinion and assessee is of the view that the explanation to section 73 of the Act is not applicable to the case of assessee. However, Ld. CIT(A) and Hon'ble ITAT has rejected the contention of the assessee in quantum appeal. However, assessee has not challenged the

quantum appeal. Further, he brought to our notice page 1 of the paper book and submitted that there is no change in the gross total income of the assessee even after modifying the head of income. He further submitted that the case of the assessee will not fall under explanation to section 73 of the Act. He brought to our notice findings of AO and submitted that reclassification of the business loss to speculative loss has not made any difference to the carry forward of loss. Carry forward of business loss was replaced by carry forward of speculative loss. Therefore, it is only a reclassification of head of income for carry forward. He further brought to our notice penalty order in which the AO observed that assessee has furnished inaccurate particulars of income and concealed particulars of income by availing excess deduction not legally allowable to the assessee company. Thus, attracting the provision of section 271(1)(c) of the Act. He submitted that assessee has no benefit or taken any benefit as claimed by the AO. He further brought to our notice Explanation 4 (b) of section 271(1)(c) of the Act and submitted that there is no change in the taxable income of the assessee. Therefore, the

AO cannot invoke the penalty u/s 271(1)(c) of the Act. For that proposition, he relied on the following case law:-

i) CIT vrs. Aretic Investment Pvt. Ltd. (2010) 190 taxman 157 (Delhi)

ii) CIT vrs. Navinchandra & Co. (2014) 42 taxmann.com 28 (Guj)

iii) SRJ Securities Ltd. vrs. ITO (2011) 16 taxmann.com 90 (Del)

10. On merit, he relied on the decision of Hon'ble Bombay High Court in the case of CIT Vrs. Darshan Securities Pvt. Ltd (2012) 341 ITR 556(Bom), wherein it was held as under:-

*7. The submission which has been urged on behalf of the Revenue is that in computing the gross total income for the purpose of the explanation to Section 73, income under the heads of profits and gains of business or profession must be ignored. Alternatively, it has been urged that where the income from business includes a loss in the trading of shares, such a loss should not be allowed to be set off against the income from any other source under the head of profits and gains of business or profession.*

8. *In our view, the submission which has been urged on behalf of the Revenue cannot be accepted. Leaving aside for a moment, the exception, which is carved out by the explanation to Section 73, the explanation creates a deeming fiction by which a company is deemed to be carrying on a speculation business where any part of its business consists in the purchase and sale of shares of other companies. Now, the exception which is carved out applies to a situation where the gross total income of a company consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house property", "Capital gains" and "Income from other sources". Now, ordinarily income which arises from one source which falls under the head of profits and gains of business or profession can be set off against the loss which arises from another source under the same head. Sub Section (1) of Section 73 however sets up a bar to the setting off of a loss which arises in respect of speculation business against the profits and gains of any other business. Consequently, a loss which has arisen on account of speculation business can be set off only against the profits and gains of another speculation business. However, for Sub Section (1) of Section 73 to apply the loss must arise in relation to a speculation business. The explanation provides a deeming definition of when a company is deemed to be carrying*

*on a speculation business. If, the submission of the Revenue is accepted, it would lead to an incongruous situation, where in determining as to whether a company is carrying on a speculation business within the meaning of the explanation, sub section (1) of Section 73 is applied in the first instance. This would in our view not be permissible as a matter of statutory interpretation, because the explanation is designed to define a situation where a company is deemed to carry on speculation business. It is only thereafter that sub section (1) of section 73 can apply. Applying the provisions of Section 73(1) to determine whether a company is carrying on speculation business would reverse the order of application. That would be impermissible, nor, is it contemplated by Parliament. For, the ambit of Sub Section (1) of Section 73 is only to prohibit the setting off of a loss which has resulted from a speculation business, save and accept against the profits and gains of another speculation business. In order to determine whether the exception that is carved out by the explanation applies, the legislature has first mandated a computation of the gross total income of the Company. The words "consists mainly" are indicative of the fact that the legislature had in its contemplation that the gross total income consists predominantly of income from the four heads that are referred to therein. Obviously, in computing the gross*

*total income the normal provisions of the Act must be applied and it is only thereafter, that it has to be determined as to whether the gross total income so computed consists mainly of income which is chargeable under the heads referred to in the explanation.*

11. He brought to our notice page 49 to 53 of the paper book in which assessee has submitted the details of shares sold /purchase and profit on sale of investment during the year under consideration. He further brought to our notice page 54 to 59 of the paper book in which assessee vide letter dated 20<sup>th</sup> Dec 2004 to the AO has replied the reasons why share trading loss should not be treated as speculation loss. Therefore, he submitted that full details relating to this transactions were submitted before the AO and there is no chance of any concealment made by the assessee.

12. On the other hand, Ld. DR brought to our notice para 4 of Ld. CIT(A) and submitted that Ld. CIT(A) has given clear cut findings on the issue. Hence, he supported the orders passed by the revenue authorities.

13. Considered the rival submissions and material placed on record. We notice that assessee has incurred loss on sale of shares which was held as stock-in-trade. The assessee treated the same as part of business whereas AO treated the same as speculative loss by invoking explanation to section 73 of the Act. Assessee challenged the same before Id. CIT(A) and ITAT. At the same time, AO initiates penalty proceedings u/s 271(1)(c) and levies the penalty. We notice that in the similar case, Hon'ble Delhi High Court in the case of CIT vrs. Aretic Investment Pvt. Ltd. (2010) 190 taxman 157 (Del) held as under:-

*2. The Tribunal was of the view that the loss was suffered by the assessee in the said activity of purchase and sale of shares and having regard to the nature of the said transactions as well as the nature of its own business, the assessee-company was under a belief that the said transactions were forming part of its business and the loss suffered in the said transactions was its business loss and not speculative loss. Consequently, the assessee claimed the same as business loss against the other business income in the current year. The Tribunal came to the conclusion that the mere fact that the Assessment Officer had treated the business loss as speculative loss did not automatically result in the*

*inference of concealment of income justifying imposition of penalty under section 271(1)(c). Reliance was placed on CIT v. Auric Investment & Securities Ltd. (2007) 163 Taxman 533 (Delhi) and CIT v. V Excellent Commercial Enterprises & Investment Ltd. [2006] 282 ITR 423(Delhi).*

*After referring to the said decisions the Tribunal was of the view that the mere change of nature of the loss from business loss to speculative loss was not enough to impose penalty on the assessee. The Tribunal held that the assessee had claimed the loss as business loss under a bona fide belief that he was entitled to do so.*

*3. It is well-settled that assessment proceedings and penalty proceedings are distinct and independent of each other. No doubt, the findings in the assessment proceedings would have significance in the penalty proceedings also but they are not decisive or determinative. This position has been established in several decisions which include CIT v. Khoday Eswarsa & Sons [1972] 83 ITR 369 (SC) and CIT v. J.K. Synthetic Ltd. [1996] 219 ITR 267 (Delhi).*

*4. With respect to the fact that the assessee had accepted the view taken by the Assessing Officer that V the loss due to trading in shares was in the nature of a speculative loss, the assessee contended that in the*

*penalty proceedings, it can take up the plea that the claim made in the return was bona fide.*

*5. In view of the above, no substantial question of law arises for consideration. Accordingly, the appeal is dismissed.*

14. Considering the above decision, in our view, in the give case, assessee has challenged the findings of AO before Ld. CIT(A) and ITAT. However, the assessee had a bonafide belief that the loss suffered by it is business loss. The change of nature of loss from business loss to speculative loss was not enough to impose penalty on the assessee. Therefore, we are inclined to delete the penalty imposed in this case. Accordingly, grounds raised by the assessee are allowed.

15. In the net result, the appeal filed by the assessee stands **allowed.**

*Order pronounced in the open court on 26/03/2021.*

*Sd/-*  
(Justice P. P. Bhatt)  
President

*Sd/-*  
(S. Rifaur Rahman)  
Accountant Member

मुंबई Mumbai;दिनांक Dated : 26/03/2021  
*Sr.PS. Dhananjay*

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File  
आदेशानुसार/ BY ORDER,

**उप/सहायकपंजीकार (Dy./Asstt.Registrar)**  
**आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai**