INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2191& 2006/Del/2017
(Assessment Year: 2010-11)

Quippo Telecom Infrastructure Pvt. Ltd, D-2, 5th Floor, Sourthern Park, Saket Place, New Delhi PAN: AAACQ1279N	Vs.	The Assistant Commissioner of Income Tax , Circle-19(1), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Ajay Vohra, Sr. Adv Shri Divyan Mittal, CA
Revenue by:	Smt Sulekha Verma, CIT DR
Date of Hearing	13/12/2019
Date of pronouncement	06/03/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are two appeals filed by the assessee for the same assessment year. First one in ITA No 2006/Del/2017 against the order of the ld CIT(A) -7, New Delhi dated 20.01.2017 for the Assessment Year 2010-11 wherein dismissing the appeal of the assessee against various disallowances/additions made by the learned The Deputy Commissioner Of Income Tax, Circle – 14 (1), New Delhi are confirmed. Second in ITA No 2191/DEL/2017 against the order of the learned Commissioner Of Income Tax Appeals – 7, New Delhi dated 25/1/2017 wherein the penalty levied u/s 271(1) (c) of the Act by the ld AO of ₹ 1250000000/– is confirmed.
2. The assessee has raised following grounds of appeal in ITA No. 2006/Del/2017 for the Assessment Year 2010-11 against the order of the CIT – A [7] , New Delhi dated 20/1/2017 wherein the assessee preferred an appeal against the order of The Deputy Commissioner of Income tax , Circle 14 (1) , New Delhi [The learned assessing officer/ AO] passed under section 143 (3) of The Income Tax Act 1961 [The Act] on 15 March 2013

wherein the returned loss of assessee of Rs. 2258653756/– as per return dated 8/10/2010 was assessed at Rs. 2054110/–:-

"1.0 That on the facts and circumstances of the case, the Ld. CIT(Appeals) was not justified & grossly erred in confirming disallowance of expenditure incurred towards professional fee of Rs. 2,50,00,000/- in computing total income of the appellant.

2.0 That on the facts and circumstances of the case, the Ld. CIT(Appeals) was not justified & grossly erred in confirming the disallowance of interest expenses of Rs. 2,23,03,31,321/- in computing total income of the appellant.

3.0 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified & grossly erred in holding that no business activity was carried out by the appellant without considering the fact that transaction of purchase of shares was carried out in the normal course of business.

4(a). That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified & grossly erred in treating the "Services Revenue" of Rs. 15,28,000/- earned by the appellant during the normal course of carrying on its business activities, including renting of space for ATMs as 'Income from House Property'.

4(b). That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred in ignoring the appellant's claim with regard to deduction allowable under the Act while computing the Income under the head "Profit & Gains of Business or Profession".

5.0 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified & grossly erred in treating interest income from FDRs amounting to Rs. 29,82,000/- as 'Income from Other Sources'."

3. The brief facts as put in narrow compass shows that appellant is a company engaged in the business of providing passive infrastructure and automated teller machine sites to Telecom and banking industry.

4. It filed its return of income on 8/10/2010 showing total income under the normal provisions of the act other than section 115JB at a loss of Rs. 2258653796/– and book profit under section 115JB of loss of Rs. 2252818809/–. The return of income [ROI] was subsequently revised on 26/9/2011 and 30/9/2011 where the income under the normal computation as well as u/s 115 JB of the Act remains unchanged.

5. The learned assessing officer passed an order under section 143 (3) of the act on 15/3/2013 determining total income under the provisions of the act at ₹ 2054110/– and the book profit was assessed at the returned book loss. The learned assessing officer made following disallowances.

i. Disallowance of professional fees of Rs. 2,50,00,000/– as assessee does not carry on any business
ii. income from services of Rental of ATM is taxed under the head income from house property of ₹ 1528000/– where as the assessee offered it as business income
iii. interest income on fixed deposit receipts are assessed under the head income from other sources amounting to Rs. 2982000/– which was offered by assessee under the head ' Profits and gains of Business or profession
iv. Disallowance of interest expenditure under section 36 (1) (iii) of the act of Rs. 2230331321/– holding that assessee does not carry on any business
v. adjustment of brought forward unabsorbed of Rs. 437968/–

6. Assessee preferred appeal before the learned CIT – A. He held that the expenditure claimed as professional charges for investment advisory services of Rs 25000000/– is not allowable as no business is carried on by the assessee. Similarly, he also confirmed disallowance of deduction of expenditure of interest of Rs. 2230331321/–. He held that interest paid in respect of capital borrowed is not for the purposes of the business. He also dismissed the claim of the assessee that income of ₹ 1528000/– is not business income but income assessable under the head income from house property, as before him the appellant is stated to have received the rental income from Punjab National Bank for provision of ATM machines and except the agreement, no other evidences were furnished. He further held that interest income of Rs. 2982000/- being interest on fixed deposit receipt is chargeable to tax as income from other sources and not as profits and gains of business as claimed by the assessee. However he directed the learned assessing officer to verify the allowability of the brought forward depreciation of Rs. 437968/–. Thus, he dismissed the appeal filed by the assessee and therefore assessee is in appeal before us.

7. The first, second and third ground of appeal are on the issue whether the assessee is carrying on any business or not. First ground of appeal is with respect to the disallowance confirmed by the learned CIT – A of expenditure incurred towards professional fees of ₹ 2 5000000. The learned assessing

officer noted that assessee has shown income from rent of ATM building and interest only. The assessee has paid professional fees in the profit and loss account of Rs. 2.50 crores. This amount also did not match with the figures mentioned in the TDS certificates. Therefore, learned assessing officer asked the assessee to explain the allowability of the above sum. Assessee did not furnish any reply and therefore the learned assessing officer held that assessee did not earn any income from business during the year except for rental income, therefore, Professional services fees paid by the assessee is not allowable under section 37[1] of The Act as assessee did not carry out any business activity during the previous year for even a single day. However, out of the sum of Rs. 27575000/– which included service tax payable, the learned assessing officer made the net disallowance of Rs. 25000000/– as these expenses are not allowable under section 37 (1) of the act. On appeal before the learned CIT – A, he also held that assessee is not carrying on any business and therefore these expenses are not allowable. Against this, assessee is in appeal before us. The second ground of appeal is against confirmation of disallowance of interest expenditure of rupees 2230331321/– for the reason that these interest expenditure is not with respect to capital borrowed by the assessee for the purpose of the business of the assessee.

8. The learned authorised representative vehemently submitted that assessee is carrying on the business therefore, the professional fees as well as the interest is deductible as business expenditure. To substantiate his argument, he referred to page number [4] of the paper book which is the balance sheet of the assessee company for the year ended on 31st of March 2010, stating that there is a secured loan amounting to Rs 3 500000000/– and unsecured loan of Rs. 1000000000. He also correlated the same with the schedule [3] pertaining to secured loan and schedule pertaining to unsecured loan in the form of debentures. He also referred to profit and loss account of the company placed at page number [5] of the paper book and referred administrative and other expenditure of ₹ 25025000 has been incurred by the assessee, which are listed at schedule [15]. He further referred to schedule [15] of the profit and loss account wherein the total expenditure of Rs 2 5025000 has been shown as administrative and other

expenditure. He further referred to schedule [6] of the balance sheet wherein the securities of Rs 13873081/– has been held to be as 'current assets' of the company. He further referred to schedule [6] to show that assessee has invested in unquoted equity shares of Wireless TT Info services Ltd being 75596524 shares at the face value of ₹ 10/- each. He further referred to notes on account placed at page number 12 to show that the nature of the business of the company is of setting up ATM sites for the banks and providing complete infrastructure in terms of space, power supply, security, ATM machines, air-conditioners and interiors as specified by the bank. He further stated that the stocks acquired by the company are shown as stock in trade. He further referred to schedule [16] wherein other income is tabulated to show that assessee is deriving also income on sale of investments. Therefore, he submitted that assessee is engaged in the business of dealing in securities. He also referred to agreement entered into between the assessee and one Mr. Rishi Sahai to show that the company was interested in raising equity in shares etc to the tune of Rs. 900 crores for its business. He further referred to page number 41 which is scheme of arrangement between assessee and Wireless TT Info services Ltd under section 391 – 394 of The Companies Act wherein it at number 1.9 the 'remaining business' means and includes the business of making investments in the securities of the companies, mutual funds and any other tradable or non-convertible instruments. He further referred to page number 45, which is part of share purchase agreement dated 29 July 2009 between assessee and other parties to show that it has purchased shares from TATA Tele services Ltd. He further referred to page number 52 that is also a share purchase agreement between assessee, Tata Sons Ltd and Wireless TT Info services Ltd dated 29 July 2009 to show that assessee is engaged in the business of buying of shares. He further referred to page number 62 of the paper book, which is a statement of sale of shares of Wireless TT Info services India Ltd during the assessment year to SBI and other companies and submitted that it is accepted as business income of the assessee in subsequent Ay. He further referred to page number 69 of the paper book which is a computation of total income for assessment year 2011 – 12 (subsequent year) wherein the assessee has shown profit on sale

of shares as its income and which has been accepted toward sale of the securities of the assessee as business income. At page number 71 he referred to the assessment order passed by the assessing officer for assessment year 2011 – 12 wherein such sale of shares was accepted under the head business income. He further referred to page number 82 of the paper book, which is remand report of the assessing officer dated 29/3/2016 filed before The Commissioner of Income Tax Appeals wherein detailed note of business carried on by the assessee during the year was mentioned. Thus, he submitted that assessee was engaged in the carrying on of the business activity, which is accepted by the revenue in the subsequent year on sale of shares. Therefore, he was of the view that the learned assessing officer could not have stated that assessee is not carrying on the business. Therefore, he submitted that assessee is carrying on the business and therefore the professional fees paid as well as the interest expenditure incurred should have been allowed to the assessee. Thus, the order of the learned assessing officer as well as the order of the learned Commissioner of Income Tax Appeals holding that assessee is not carrying on the business cannot be sustained. He further referred to circular number 6 of 2016 dated 29/2/2016 placed at page number 91 of the paper book wherein it has been stated that wherein the assessee itself, irrespective the period of holding the listed shares and securities, opts to treat it as stock in trade, the income arising from transfer of shares / securities would be treated as its business income. He therefore submitted that the assessee itself treated the stocks/shares invested by the assessee company are stock in trade and therefore the income arising there from is a business income. Thus, the assessee is engaged in the business. With respect to the claim of deduction of borrowed funds he referred to the decision of the honourable Bombay High Court placed at page number 92 – 94 of the paper book in 2018-TIOL-2515-HC-MUM-IT in case of principal Commissioner of income tax versus Hardik Bharatbhai Patel, covers the issue in favour of the assessee. He also referred to the decision of the honourable Gujarat High Court in 410 ITR 540 in principle Commissioner of income tax versus Ramniwas Ramjivan Kasat for the proposition. He also referred to the decision of the honourable Delhi High Court in 378 ITR 28 in Eicher

GoodEarth Ltd versus CIT wherein it has been held that interest paid on amount borrowed to subscribe write issue of another company in order to retain control on it has to be allowed under section 36 (1) (iii) of the act.

9. The learned departmental representative, CIT DR vehemently referred to the order of the learned assessing officer as well as the learned CIT – A and stated that assessee is not carrying on any business and therefore it is not entitled to claim of deduction of interest expenditure as well as the professional fees. She submitted that all the arguments of the assessee have been considered by them and they are clearly held that assessee is not carrying on any business. She further referred to the information available on the website regarding the appellant as well as the information available in the scheme of arrangement. See submitted that the merger took place as per the order dated 20 May 2010. She stated that the assessee purchased the shares by the share purchase agreement dated December 24, 2008 and same were sold in 2010. Therefore, there was no business being carried on by the assessee. She therefore submitted that the lower authorities of correctly denied the deduction of the professional fees as well as the interest expenditure in absence of any business carried on by the assessee.

10. We have carefully considered the rival contention and perused the orders of the lower authorities. Thus, the core issue involved in this appeal is whether the assessee company is engaged in the business of purchase and sale of shares making it eligible for deduction of expenditure of professional fees as well as interest. In case, if assessee is found to be carrying on the business, it is entitled to the deduction of professional fees as well as the interest expenditure. However, the fact shows that As per resolution passed by the Board of Directors on 11/6/2008 the assessee company was authorised to acquire 49% on sticky in one of the companies of Tata Tele Info services Ltd namely WT TIL engaged in the business of erecting and installation of towers. It entered into an agreement based on which success based fees was payable to one Mr. Sahai for organizing investors to fund the purchase of the shares. As the company was interested in raising its equity or any other means of finance up to ₹ 900 crores from potential financial investors or private equity funds for organic growth for acquisition of 49% stake in that the demerged tower business of assessee, the services of Mr. Sahai who is

an investment advisor, were obtained. The investment advisor was to provide investment advisory services to the assessee for finding of probable investor and assessee was to pay a fee in accordance with the terms and conditions of that agreement. Thus, it is clear that appellant company was to acquire 49-percentage stake in that the demerged tower business of Tata tally services Ltd. As per share purchase agreement dated 24/12/2008, it decided to purchase 46449516 shares of that company from Tata Sons Ltd. In the same agreements, reference was also made for share purchase agreement executed between the assessee and Tata tally services Ltd for purchases of 91451000 shares of WTTIL. This agreement was neither made available to the assessing officer or the learned CIT – A. Thus, it is apparent that Assessee Company was acquiring the shares of WT TIL from various companies of the Tata group as a part of business reorganization. The disclosure of those shares as stock in trade does not help the case of the assessee to show that it is engaged in the business of sale and purchase of securities as the above transaction of the purchase of the shares was for acquisition of a company. The main intention in the whole transaction was to acquire a stake in WTTIL. It is neither a regular transaction of purchase of securities nor it is with the intention to earn profit thereon. This is also fortified by the fact that appellant company demerged its passive telecom infrastructure business to WT TIL as per the scheme of arrangement sanctioned by Andhra Pradesh and Delhi High Courts. Thus, it is a clear-cut scheme of business arrangement wherein the assessee was to acquire shares of another company. By virtue of the scheme, the business of telecom of the appellant company which was the main business of the appellant was demerged into another company and assessee hold 49% stake in that company. Thus, it is a clear-cut transaction having a character of transaction of acquisition of stake in WTTIL in which the telecom business of the appellant company was demerged. This is the only transaction of purchase of shares during the year. Subsequent sale of those shares to other entities to the shareholders of the assessee only cannot by any stretch of imagination considered as the fact that assessee is carrying on any business of purchase and sale of securities. As per the notes to the accounts, it is clear that the passive telecom infrastructure of the company

including all its assets and liabilities are demerged into Wireless TT info services Ltd as a going concern. This itself proves that assessee does not have any business now. Further, in view of the demerged entity, the assessee got the shares of the demerged company. Thus, the acquisition of the shares of WT TIL is merely a strategic arrangement of business reorganization; it is not a transaction of purchase and sale of securities, which can result into carrying on of the activities of purchase, and sale of securities as a business. The above facts have been exhaustively considered by the lower authorities. The learned CIT – A has considered these facts in para number 4.4 to para number 4.13 of his order. It is further important to note that reference to page number five being profit and loss account of the assessee wherein in schedule number 15 administrative and other expenditure to the extent of Rs. 25025000 are considered and claimed that it shows that assessee was carrying on the business is devoid of any merit because the expenditure of Rs. 25,000 000 is the fees involved for arranging the finance which has been disallowed by the learned assessing officer and confirmed by the learned CIT – A which is for raising of the fund in the merger scheme for acquisition of shares. Thus, it is part of the business reorganization scheme of the assessee. It is the answer with respect to the secured loan and unsecured loan obtained by the assessee. Thus, reference to them does not help to show that assessee was carrying on any business activities. The notes at serial number 19 (1) (a) read together with (b) clearly shows that assessee has demerged its business of passive telecom infrastructure and now is really left with the business of renting of ATM sites for the banks. Merely when the assessee has shown the equity shares in Wireless TT info services Ltd as securities held, as stock in trade does not show that assessee is carrying on any business because these shares were acquired in business organization process of restructuring business of the assessee. Reference to clause C – Other Objects in the memorandum of Association of the company which allows as per clause 45 for carrying on the business as share and stock brokers and to buy sale and deal in shares and stocks et cetera is merely the part of the other object whereas the main objects to be pursued by the company on its incorporation does not have any such activity. Therefore, if any object

mentioned in other object without having any reference in the main objects of memorandum of Association, it cannot be said that assessee is carrying on business of that activity. Even otherwise If a Company want to carry on business mentioned in Other object of Company then; As per provisions of sub section 2A of Section 149 of Companies Act, 1956 if An existing company which proposes to take up a new business, which is covered in the "other objects" of the Memorandum, can do so only after the proposal is approved by the members by a special resolution. No such compliance with the law was shown to us. Thus, reference to memorandum of Association does not help the case of the assessee. With respect to the reference to article 1.9 of the approved scheme of arrangement where there is a reference of 'remaining business' of the demerged company clearly shows that there is no sale of shares during the year. Therefore, this argument also does not support the case of the assessee that it is carrying on any business of purchase and sale of shares. As per schedule 19 (b) it is important to note that as on 25 April 2009 Board of Directors of the company resolved that pursuant to the provisions of section 3912394 of the companies act 1956 the passive in telecom infrastructure undertaking of the company including all assets and liabilities (whether movable, immovable, tangible or intangible) pertaining to passive infrastructure business of the company be demerged into Wireless TT info services Ltd as a going concern. This itself shows that the business of the assessee has been transferred and no other business remains with the assessee. Further, on 28 August 2009 the company along with Wireless TT info services Ltd filed a scheme of arrangement in accordance with the above sections of The Companies Act, which was sanctioned by the honourable Delhi High Court as per order dated 29 May 2010 and honourable Andhra Pradesh High Court per order dated 28 June 2010. The effective date of the scheme is 1 April 2009 as the appointed date. Further, on looking at schedule [5] of fixed assets, the assessee has transferred all its assets except few related to renting of ATMs were left with the assessee company. The company did not have any of the debtors left on transfer of the above business. It is important to note that even the company does not have any cash or balances with the bank, except in deposit account as margin money. All its

loans and advances also were transferred. With respect to the current liabilities, it has only the advances received and other petty liabilities. Thus, on verification of the balance sheet also it does not show that assessee is carrying on any business. It has only acquisition of the shares of WTTL in which now company is holding 49% shares on account of above demerger. Reliance placed on circular issued of the CBDT also does not help as it was with respect to the dispute, which continued to exist wherein it is difficult to prove the intention in acquiring the shares and securities in case of the assessee, and whether they should be taxed under the head business income or under the head capital gains. The relevant decisions cited before us are also not applicable to the facts of the case. The decision relied upon of honourable Delhi High Court in 378 ITR 28 where the issue was whether the interest expenditure is allowable to the assessee under section 57 of the income tax act or under section 36 (1) (iii) of the act. It was held that in that case if the expenditure is incurred for the purpose of promotion of business, more specifically as in the facts of that case to retain control or as part of the strategic investment of the assessee company, such expenses by way of interest outgo would have to be treated under section 36 (1) (iii) and not under section 57. Here the basic challenges are that assessee is not carrying on any business of purchase and sale of securities. Therefore, the facts of that decision do not apply to the facts of case before us. The decision of the honourable Bombay High Court relied upon by the assessee reported in 2018 – TIOIL – 2515 – HC wherein it has been held that the profit arising on the frequent and voluminous transactions initiated with the borrowed funds in shares can be taxed as long-term capital gain or business income. The honourable court held that in view of the circular number [6] the issue stands covered in favour of the assessee. In the present case, the only solitary transaction is demerger of business of the assessee against which the shares have been allotted in the demerged entity. There is neither frequency nor volumes. Therefore, it does not also apply. Thus, we do not find any reason upset the finding of the lower authorities. Hence, we are also of the view that assessee is not carrying on any business during the year and therefore the learned assessing officer as well as the learned CIT – A has rightly disallowed professional fees paid by the assessee as well as

interest expenditure incurred. In the result, ground number 1, 2 and 3 of the appeal are dismissed.

11. The fourth ground is with respect to treating the revenue of ₹ 1528000 earned because of renting of space of ATM. The lower authorities have concurrently held that appellant is in receipt of rental income from Punjab National Bank for provision of ATM. Except for agreement with the Punjab National Bank, no other details were furnished before the lower authorities as to how the above business can be assessed as a business income. Therefore, we conquer with the findings of the lower authorities and dismiss ground number four of the appeal.

12. Ground number five of the appeal of treating the interest income from fixed deposit receipts of Rs. 2982000/- as income from other sources, we also do not find any infirmity in the order of the lower authorities as assessee has merely placed fixed deposits with the banks and it has not been shown that how the earning of the bank's deposit receipt interest can be said to be interest income chargeable to tax under the head business income. Thus, ground number five of the appeal is also dismissed.

13. In the result, ITA number 2006/del/2017 filed by the assessee for assessment year 2010 – 11 is dismissed.

14. ITA number 2191/ Del/2017 assessment year 2010 – 11 is filed by the assessee against the order of the learned Commissioner Of Income Tax (Appeals) – 7, New Delhi dated 25/1/2017 wherein penalty levied by the learned assessing officer as per order dated 21/6/2013 under section 271 (1) (C) of the act is confirmed .

15. The assessee has raised following ground of appeal in ITA No. 2191/Del/2017 for the Assessment Year 2010-11:-

"1.0 That on the facts and in the circumstances of the case, confirmation of imposition of penalty by the Ld. Commissioner of Income Tax (Appeals) [here-in-after referred to as Ld. CIT(Appeals)] is grossly erroneous, unjustified and is therefore liable to be quashed.

2.0 That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) grossly erred in confirming levy of penalty u/s 271(l)(c) amounting to Rs. 1,25,00,00,000/-, (representing 163% of the tax alleged to be sought to have been evaded by the appellant) inspite of the fact that the appellant had neither concealed particulars of income nor furnished inaccurate particulars of income.

3.0 That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in confirming levy of penalty without considering the fact that penalty was levied by the AO relying solely on the reasoning given in the order u/s 143(3), without independently establishing that the appellant has knowingly and willfully made any wrong claim.

4.0 That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in confirming levy of penalty without considering the fact that claims lodged were clearly visible from the audited accounts and/or allied details and documents and there was complete and full disclosure both in the return of income and documents filed therein as well as during the course of assessment proceedings.

5.0 That on the facts and in the circumstances of the case the Ld. CIT (Appeals) was not justified in confirming the penalty levied by A.O based on the Original assessment order which contained factual errors duly admitted by the A.O in his Remand Report submitted to the Ld. CIT (Appeals) during the course of proceeding before the Ld. CIT(Appeals).

6.0 That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in imposing penalty on the disallowance of expenditure incurred towards professional fees amounting to Rs. 2,50,00,000/-.

7.0 That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in imposing penalty on the disallowance of interest expenses of Rs. 2,23,03,31,321/- incurred for the purpose of business of the appellant.

8.0 That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in upholding the penalty levied by the AO, inspite of the fact that in the original notice u/s 274 r.w.s 271(l)(c), the AO did not specify as to whether the penalty proceedings was intiated for 'furnishing inaccurate particulars of income' or 'concealing particulars of income'."

16. The fact shows that the learned assessing officer has disallowed professional service expenditure claimed by the assessee under section 37(1) of the act holding that assessee is not carrying on any business as well as disallowed interest expenditure under section 36 (1) (iii) of the act claimed by the assessee holding that it is carrying on business and therefore same is allowable.

17. The learned assessing officer as well as the learned CIT – A held that assessee is not carrying on any business. Hence, disallowance was confirmed. Therefore on the above sum the learned assessing officer

initiated penalty under section 271 (1) (C) of the act on holding that assessee has furnished inaccurate particulars of its income. Such satisfaction is recorded in the assessment order at paragraph number 6.2 with respect to the disallowance of the professional fees as well as in para number 7.4 with respect to the disallowance of interest expenditure.

18. Before the assessing officer assessee submitted a written reply on 15/4/2013, stating that as the appeal is pending before the learned CIT A, the penalty proceedings should be kept in abeyance. Assessee also contested that the fact that certain amounts claimed by the assessee have been disallowed and treated as income does not necessarily lead to the levy of penalty. Assessee also referred to notice under section 274 of the income tax act which has been issued to the assessee along with the assessment order and submitted that the penalty cannot be ordinary imposed unless the party either acted or deliberately in defiance of law. The assessee also relied upon the decision of the honourable Supreme Court in case of 322 ITR 158 and host of other decisions.

19. The learned assessing officer considered the explanation of the assessee and relying upon certain decisions levied the penalty as per para number [4] of its order stated that in the considered opinion of the assessing officer it is a fit case for imposing penalty under section 271 (1)(C) for **concealing the particulars of income.** However, in para number [5] the learned assessing officer further stated that he is of the considered opinion that Assessee Company has **furnished inaccurate particulars of income** to the tune of Rs. 2255331321/- for the assessment year 2010 – 11 and failed to disclose true particulars of the income. Thus the learned assessing officer passed an order under section 271 (1) (c) of the act on 21/6/2013 levying penalty of ₹ 1 250000000/–.

20. Aggrieved with that order, assessee preferred an appeal before the learned CIT – A who also confirmed the penalty as per order dated 25/1/2017. The learned CIT – A in para number 4.4 of his order reproduced his own order in quantum appeal, wherein he held that the disallowance has been correctly made by the assessing officer.

21. Before him the assessee also raised an additional ground of appeal on 13/1/2017 at paragraph number [2] of the order of the learned CIT – A

wherein assessee challenged that in notice under section 274 the assessing officer did not specify under which Limb of section 271 (1) (C) of the act the penalty proceedings have been initiated and thus the penalty order is liable to be quashed. The learned CIT – A in para number 4.6 of the order held that the learned assessing officer has clearly recorded his satisfaction in the assessment order for furnishing inaccurate particulars of income; hence, he dismissed this ground of appeal. Thereafter relying upon the decision of the honourable Delhi High Court in CIT V Zoom Communications Limited 327 ITR 510 and CIT V Escorts Finance Limited 188 taxman 87, he confirmed the penalty levied by the AO. Therefore, assessee is in appeal before us.

22. The learned authorised representative vehemently submitted that

a. Penalty cannot be levied for a different reason than for which it was initiated. He referred to the notice dated 15/3/2013 issued under section 274 of the income tax act wherein the assessing officer has mentioned that assessee has concealed the particulars of income or furnished inaccurate particulars of such income in terms of explanation one, two, three, four and five. He therefore submitted that the penalty notice does not specify for which limb the penalty has been levied. He referred to the decision of the honourable Karnataka High Court in 73 taxman.com 241 as well as the decision of the honourable Supreme Court dismissing the special leave petition against that order of the Karnataka High Court. Thus he submitted that issue is squarely covered in favour of the assessee by the decision of the honourable Karnataka High Court as well as decision of that e High Court in case of 359 ITR 565. He also referred to the decision of the honourable Bombay High Court in 392 ITR 4 wherein the honourable High Court deleted the penalty wherein in para number three the honourable High Court considered the fact that the tribunal also noted in that case that notice issued under section 274 of the act is in a standard proforma without having strikeout relevant clauses therein indicates non-application of mind on the part of the assessing officer while issuing the penalty notice. He further referred to the several decision of the coordinate benches wherein on identical facts and circumstances on the issue of non-striking out one of the limb in

notice under section 274 has invalidated the penalty under section 271 (1) (C) of the act.

b. He further stated that assessee has made a claim before the assessing officer that assessee is carrying on the business and therefore the professional fees as well as the interest expenditure is allowable to the assessee as a deduction under the head profits and gains of the business. He submitted that the learned assessing officer as well as the learned CIT – A has reached at a conclusion that assessee is not carrying on any business and therefore the penalty has been levied. He further submitted that the complete information has been furnished by the assessee. Based on the information furnished he submitted that the claim of the assessee that assessee is carrying on business cannot be denied. However even otherwise if it is denied, it cannot result into penalty. He stated that mere making of the claim, which is disallowed, could not be a ground to levy penalty. He relied upon the decision of the honourable Supreme Court in 322 ITR 158 as well as the decision of the honourable Delhi High Court in 275 CTR 291.

c. He further submitted that where the assessee has made a complete disclosure of all material facts before the lower authorities it cannot result into penalty stating that assessee has furnished inaccurate particulars of income. He submitted that penalty cannot be levied were disclosure of all material facts were made by the assessee before the lower authorities. For this proposition, he relied upon the decision of the honourable Delhi High Court in 52 taxman.com 80 and 48 DTR 19.

d. He further submitted that the meaning of concealment of income and furnishing of inaccurate particulars of income carry two different connotations. Referring to the fact that there is a direction in the assessment order, he submitted that merely direction in the assessment order could not be the basis to determine the basis of charge in penalty proceedings if there is no strike off in the notice under section 274 of the income tax act.

e. In the end, he submitted that because of the loss claimed by the assessee, the penalty has been levied. He submitted that such losses have lapsed and assessee does not have any benefit because of claim of the above expenditure as business expenditure. It was also submitted that in the subsequent year when those shares were sold the assessment was made under section 143 (3) by the assessing officer for assessment year 2011 – 12 wherein the assessee has shown the profit arising on the sale of those shares as business income wherein the AO accepted it without changing its character from business loss/profit and accepted it, therefore, it is apparent that the revenue in the subsequent year has accepted the claim of the assessee of profit on sale of shares as business income thus, even the assessing officer is not certain and has changing stands. Therefore, also, the issue is debatable which can be shown from the two assessment orders of the assessee and definitely, it cannot result into penalty. He submitted that no penalty could be levied when there is no benefit availed by the assessee and entire addition made is revenue neutral.

Therefore, it is submitted that the penalty levied by the learned assessing officer and confirmed by the learned CIT – A deserves to be deleted.

23. The learned DR, Commissioner of Income Tax vehemently opposed the arguments of the assessee and defended the orders of the lower authorities. She submitted that the main intention of the notice under section 274 of the income tax act is to put assessee aware about the default. Referring to the decision of the honourable Supreme Court in the case of 384 ITR 200 wherein considering the provisions of section 263 of the income tax act, it has been held that section 263 of the act only contemplates extending opportunity of hearing to the assessee. She therefore submitted that the provisions of section 274 by issuing the notice is only intended to make assessee aware about the default. She further submitted that the learned assessing officer has correctly mentioned in the assessment order the reason for initiating the penalty proceedings being furnishing of inaccurate particulars by the assessee. He therefore submitted that assessee has been put to the notice about the alleged default. Therefore, she submitted that

non- striking out of the irrelevant limb of the notice issued under section 274 of the act would not invalidate the penalty proceedings, as long as the notice was duly served on the assessee and sufficient and reasonable opportunity of being heard was provided to the assessee. She further submitted that the LD AO has correctly recorded finding in the assessment order. For this proposition she relied on the decision of the honourable madras High Court in 403 ITR 407 as well as the decision of the coordinate bench in 150 TTJ 195 wherein it has been held that from combined reading of notice and assessment order, it is inferred that for what default the assessee has been put to notice for levy of penalty. Thus, she submitted that the assessee has been correctly informed about the violation of the law in the assessment order itself and hence non striking of one of the limb cannot invalidate the penalty. On the merit, she submitted that the claim of the assessee was found to be false and such expenditure is not deductible, as assessee was not carrying on any business.

24. We have carefully considered the rival contention and perused the orders of the lower authorities. One of the issues involved in this appeal is whether the AO without striking out one of the limb i.e. furnishing of inaccurate particulars of income or concealment of income can levy penalty under section 271 (1) (c) of the act. The honourable Delhi High Court in ITA number 475/2019 along with other appeals in case of Sahara India life insurance Co Ltd in order dated 2 August 2019 has considered the identical issue as under:-

> "21. The Respondent had challenged the upholding of the penalty imposed under Section 271(1) (c) of the Act, which was accepted by the ITAT. It followed the decision of the Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory 359 ITR 565 (Kar) and observed that the notice issued by the AO would be bad in law if it did not specify which limb of Section 271(1) (c) the penalty proceedings had been initiated under i.e. whether for concealment of particulars of income or for furnishing of inaccurate particulars of income. The Karnataka High Court had followed the above judgment in the subsequent order in Commissioner of Income Tax v. SSA's

Emerald Meadows (2016) 73 Taxman.com 241 (Kar), the appeal against which was dismissed by the Supreme Court of India in SLP No.11485 of 2016 by order dated 5th August, 2016.

22. On this issue again this Court is unable to find any error having been committed by the ITAT. No substantial question of law arises."

25. Thus, the jurisdictional High Court covers the issue squarely in favour of the assessee wherein relying upon the decision of the honourable Karnataka High Court the penalty was deleted holding that penalty imposed under section 271 (1) (C) of the act levied by the AO would be bad in law if it did not specify which limb of section 271 (1) (C) the penalty proceedings had been initiated. In the present case the penalty notice placed at page number [1] of the paper book, dated 15/3/2013 also suffers from the same infirmity. Therefore, we do not have any hesitation in holding that penalty levied by the learned assessing officer is not sustainable in law.

In this case the decision relied up on by the ld CIT DR of 150 TTJ 195 does not help the case of revenue in view of the decision of Honourable Delhi High court rendered after that. Further in case of decision of 403 ITR 407 as per para no 16 of that decision shows that

> **"16.** We have perused the notices and we find that the relevant columns have been marked, more particularly, when the case against the assessee is that they have concealed particulars of income and furnished inaccurate particulars of income. Therefore, the contention raised by the assessee is liable to be rejected on facts."

In that case, assessee was held to be liable for penalty for concealment of income as well as for furnishing inaccurate particulars of income. Further, in that case, even assuming that there is a defect in notices, for delay and latches, the argument of assessee was rejected. In case of the assessee, he is charged with only furnishing inaccurate particulars of income, therefore the AO should have strike off the Concealment of income limb in the notice. Further, the issue was raised before the LD CIT (A) as an additional ground but was dismissed as CIT A held that LD AO has recorded correct satisfaction.

26. Even otherwise, the claim of the assessee is that assessee is carrying on business of sale and purchase of securities. Such claim assessee tried to substantiate with the annual audited accounts of the assessee. It also supported the same with the other objects mentioned in the memorandum of Association along with share purchase agreements and the relevant scheme of demerger. On careful perusal of the assessment order for assessment year 2011 – 12 where the assessee has shown the sale of shares and resultant gain or loss from under the head business income, the learned assessing officer has not disturbed it but has disallowed the loss booked on sale of such shares holding that it is much below the market price and transaction is not executed at arm's length. Therefore, it is apparent that that the claim of the assessee though ultimately not accepted by the concurrent authorities but it cannot be denied that issue raised is not debatable. Further, when the issue itself is debatable, it cannot result into penalty. Based on our discussion also in the quantum appellate proceedings before us covered in this order, it cannot be denied that claim of the assessee is not debatable.

27. Further, the assessee has furnished all the particulars related to its claim. None of the evidences filed by the assessee was incorrect. It may be an altogether different thing that in spite of those evidences, the issue is decided against the assessee. However, merely because the issue is decided against the assessee confirming the disallowance it cannot result into levy of penalty for furnishing of inaccurate particulars. The assessee also get support from the decision of the honourable Delhi High Court in 63 DTR 87 wherein it has been held that where assessee has submitted the full details with respect to the claim of the assessee and further in subsequent year the loss has lapsed coupled with the fact that the explanation given by the assessee was not held to be not bona fide, the penalty cannot be sustained. Therefore, even on the merits, the orders of the lower authorities with respect to the penalty levied on the assessee under section 271 (1) (C) of the act cannot be sustained.

28. In the result, the appeal of the assessee in ITA number 2191/del/2017 for assessment year 2010 – 11 is allowed.

29. In the result, appeal of the assessee in ITA number 2006/Del/2017 is dismissed and ITA number 2191/Del/2017 for assessment year 2010 – 11 is allowed.

Order pronounced in the open court on 06/03/2020.

-Sd/-	-Sd/-
(AMIT SHUKLA)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 06/03/2020
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi