

आयकर अपीलीय अधिकरण “C” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 5730/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2000-01)

Late Sh. Jhamu Sughand through legal heir Smt. Pushpa Jhamu Sughand, 17/6 Rama Krishna CHS Ltd., Juhu Mumbai - 400049	बनाम/ v.	Asst. Commissioner of Income Tax- Central Circle- 13 Mumbai.
स्थायी लेखा सं./ PAN : AAJPS0695L		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by :	Shri. R. Prasad Rao
Revenue by :	Shri Rajat Mittal

सुनवाई की तारीख / **Date of Hearing** : 31-07-2017

घोषणा की तारीख / **Date of Pronouncement** : 25 -09-2017

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 5730/Mum/2013, is directed against the appellate order dated 28th August, 2013 passed by learned Commissioner of Income Tax (Appeals)- 3, Mumbai (hereinafter called “the CIT(A)”) for assessment year 2000-01, appellate proceedings before learned CIT(A) has arisen from the penalty order dated 27.02.2006 passed by learned Assessing Officer (hereinafter called “the AO”) u/s 271(1)(c) of the Income-tax Act, 1961 (hereinafter called “the Act”) .

2. The grounds of appeal raised by the assessee in the memo of appeal filed along with revised form no 36 with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") on 07-07-2017 , read as under:-

"1. The Hon'ble CIT(A)- 3, Mumbai, seriously erred in law and on the facts and in the circumstances of the case, in not appreciating the merits of the case and in not deleting the impugned Penalty u/s. 271 (1)(c), arising out of an impugned Order dated 27/2/2006 passed u/s 271(1)(c) of the Act, by ACIT , CC-13 (PREVIOUS JURISDICTION : I.T.O. WARD 11(1)(2) MUMBAI, LATEST REVISED JURISDICTION I.T.O. WARD 16(1)(2)).

The entire impugned Penalty of Rs. 10,55,438/- be deleted."

3. During the course of assessment proceedings u/s. 143(3) read with 143 (2), the A.O observed from the Profit & Loss A/c that the assessee claimed loss on sale of flat of Rs.12,07,799/-. The cost of the flat was shown at Rs. 30,85,500/- and expenses relating to this flat of Rs.96,889/- were also debited to Profit and Loss account. The assessee on credit side of the Profit & Loss account had shown sale of flat at Rs. 19,74,590/-. Thus, there was a loss of Rs. 12,07,799/-. In assessment proceedings , the assessee was asked to furnish details about this transaction of purchase and sale of flat. The assessee submitted copy of agreement made between M/s. Ormonde Developers Pvt. Ltd.(a Bangalore based company) and Harish Luthria for sale of flat dated 30-4-1999, wherein name of assessee did not appear in this agreement for sale of flat. However , assessee produced confirmatory letter from Mayberry Properties Pvt. Ltd.,Mumbai addressed to Friends India (proprietary concern of the assessee) wherein it is mentioned that the amount of Rs. 19,74,590/- was payable to the assessee for sale of flat of 1870 square feet . The AO rejected the contentions of the assessee as the said letter in the opinion of AO is not sufficient proof to show that the assessee has purchased and sold property at Bangalore. The AO observed that for acquiring any

property and also for selling the property , sale deeds are required to be executed, which the assessee failed to submit . The AO treated the said transaction as non genuine and loss on the purchase and sale of the said flat of Rs. 12,09,799/- was disallowed by the AO in quantum assessment proceedings. The additions so made by the AO in the assessment order was upheld by learned CIT(A) against quantum proceedings as in the opinion of learned CIT(A) the said loss cannot be allowed as business loss or speculation loss. The matter went to ITAT wherein the assessee filed appeal against quantum proceedings which appeal of the assessee also stood dismissed by ITAT so far this issue was concerned as the assessee withdrew this ground of appeal before the ITAT in ITA no. 8083/Mum/2004 vide orders dated 23-06-2005 (reported in (2006) 99 ITD 1(Mum-trib.)) .

In the penalty proceeding before the AO u/s. 271 (1)(c) , the assessee did not produce any further documentary evidences in support of his contentions before the AO and the AO held assessee liable for penalty u/s 271(1)(c) for furnishing of inaccurate particulars of income , vide penalty order dated 27-02-2006 passed by the AO u/s 271(1)(c) wherein penalty of Rs. 10,55,438/- was levied against the assessee u/s 271(1)(c) , which penalty was later confirmed by learned CIT(A) vide appellate orders dated 28-08-2013. The assessee contended before learned CIT(A) in appellate proceedings w.r.t. penalty levied against the assessee that he was in business of financing real estate through Mayberry Properties Private Limited as evidenced by ITAT decision for assessment year 1999-00 and 2000-01.It was submitted that all the transactions were through banking channels. The assessee also placed reliance on appellate order of learned CIT(A) for assessment year 1999-00 wherein a similar disallowance had been allowed and the resultant loss was held to be speculative loss by learned CIT(A) . The learned CIT(A) for the impugned assessment year under consideration on perusal of documents placed on record being letter from Mayberry Properties Pvt. Ltd.,Mumbai

addressed to Friends India (proprietary concern of the assessee) wherein it is mentioned that the amount of Rs. 19,74,590/- was payable to the assessee for sale of flat of 1870 square feet rejected the contention of the assessee that it had purchased the property as the letter was held not to be evidence for transaction in the property. The assessee could not produce registered purchase deed and more so the said letter even did not contain the name of the assessee. The learned CIT(A) held that the assessee is liable to penalty u/s 271(1) for not only for concealment of particulars but also for furnishing of inaccurate particulars of income, within meaning of explanation 1 clause(B), to section 271(1)(c), which reads as under:

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

The penalty was also levied by the A.O with respect to the additional income of Rs. 51,00,000/- disclosed by the assessee against the film ‘Fire’ against which the assessee also had claimed an expenses of Rs.52,56,828/-. The A.O allowed expenses of Rs.31,09,500/- against the income of Rs. 51,00,000/- , while balance amount of Rs.19,90,500/- was added to the income of the assessee, vide assessment order dated 28-03-2003 passed by the AO u/s 143(3). The assessee did not preferred any appeal against the additions made on this ground by the A.O as no appeal on this ground was filed with learned CIT(A) against quantum assessment. Penalty proceedings were initiated by the AO u/s 271(1)(c). The AO observed that the assessee did not offer the said income in the return of income filed with the Revenue but furnished the details of this income during assessment proceedings after questionnaire was issued to the assessee by the AO. The AO observed that the assessee has claimed excess expenditure against the income offered subsequently and

hence the assessee has furnished inaccurate particulars of income within meaning of Section 271(1)(c) of the 1961 Act. Thus , the AO levied the penalty under the provision of section 271(1)(c) of the Act, vide penalty order dated 27-02-2006 passed u/s 271(1)(c).

During the course of appellate proceedings before learned CIT(A), the assessee submitted that against the additional revenue of Rs.51,00,000/-, a sum of Rs. 42,56,828/- was on account of interest on loan and Rs. 10,00,000/- was on account of excess income offered for the film 'Arth', by Friends India, proprietary concern of the assessee . It was submitted that this claim of interest was made on loans which are reflected in the Balance Sheet which were duly reconciled with the loan confirmations filed by the assessee during the course of assessment proceedings . It was submitted that the A.O. could have issued notices u/s. 133(6)/131 to verify the expenses which was not done by the AO and merely because the interest expenses were disallowed will not tantamount to concealment or furnishing of inaccurate particulars of income especially when confirmations were filed during assessment proceedings. The learned CIT(A) rejected the contention of the assessee and confirmed the penalty levied by the AO vide appellate orders dated 28-08-2013, by holding as under:-

“I have perused the facts in this matter. At the very outset, it needs to be pointed out that, the additional revenue of Rs. 51 lacs was disclosed by the appellant during the course of assessment proceedings; in response to a questionnaire issued by the A.O. Therefore, to that extent, the revenue disclosed by the appellant was not voluntary. Having disclosed the said receipt of RS.51 lacs. the appellant set off expenses of RS.52,56,828/-, against the said income, and claimed a resultant loss against the returned income. The AO was able to verify payment of interest to 3 parties, as

against 9 parties, to whom interest was shown payable. Now, it is the appellant's contention that confirmation of the remaining parties was filed before the AO and therefore, it is not known why the AO did not allow the interest. In this regard, the Assessee has filed a copy of his reply dated 17.03.2003. On perusal of this reply, it is seen that, with regard to these parties, the assessee has filed only reconciliation statements. Therefore, I am in disagreement with the appellant that confirmations were filed: a reconciliation statement is not the same as a confirmation. It is for this reason, that the AO did not allow the expenses. Even before me, the appellant has not filed copies of the confirmations and it is perhaps, for this reason that the appellant did not consider it appropriate to pursue the matter in appeal. For the same reasons, I am in agreement with the A.O that, this is a case of filing inaccurate particulars of income. This is more so because, the income has not been voluntarily disclosed, and even after disclosure, the same is not bona fide. The matter therefore, comes within the mischief of clause (A), to Explanation 1, to section 271 (1)(c), inasmuch as, during the course of penalty proceedings, the assessee failed to give any explanation. Therefore, even on this addition, the penalty is upheld."

4. Aggrieved by the appellate order dated 28-08-2013 passed by learned CIT(A), the assessee filed an appeal before the tribunal.

5. The Ld. Counsel for the assessee submitted that the assessee was in business of finance and he died on 26-05-2008 as pauper. Our attention was drawn to para 4 of the penalty order passed by the AO and it was submitted that there was a loss on sale of flat to the tune of Rs. 12,07,799/- which was disallowed by the A.O which was later confirmed by the CIT(A). It was submitted that the assessee did not press this issue

before ITAT and the tribunal was pleased to dismiss this ground of appeal in ITA no. 8083/Mum/2004 vide orders dated 23-06-2005 (reported in (2006) 99 ITD 1(Mum-trib.)) . Our attention was also drawn to para 5 of the penalty order passed by the AO and it was submitted that the assessee offered income of Rs 51,00,000/- during the assessment proceedings and against which there were also expenses of Rs. 52,56,828/- incurred by the assessee . The AO has disallowed expenses and owing to that income of Rs. 19,90,500/- was brought to tax as an additional income. It was submitted that the assessee did not contested the said addition before appellate authorities against quantum assessment. Our attention was drawn to page 81-86 wherein ITAT order in ITA no 8083/Mum/2004 dated 23-06-2005 is placed and attention was drawn to para 6 wherein the tribunal has dismissed as not pressed ground of appeal concerning claim of loss amounting to Rs.12,07,797/- on sale of flat. it was submitted that assessee had purchased and sold the flat on which there was a loss and document were produced from Mayberry Properties (P) Ltd. which is placed in paper book page no. 33 wherein complete details were given with regard to the sale and purchase of flat being second floor 3 bedroom apartment (No. A-3) in Mayfair Building in Bangalore wherein it is reflected that investment in 1870 sq flat was Rs. 30,85,500/- while net sale proceed is mentioned to be Rs. 19,74,590/- payable to Friends India and loss on this transactions for sale and purchase of flat is computed to be Rs.11,10,910/- . It was submitted that assessee made an investment in flat through Mayberry Properties (P) Ltd. which was booked with M/s. Ormonde Developers Pvt. Ltd and was sold to Harish Luthria on 30-04-1999 . It was submitted that the assessee sold the flat at a price lower than acquisition cost to reduce losses wherein advances were recalled. It was submitted that the builder/developer sold the flat to Harish Luthria to realize the proceeds by selling the flat to be paid back to assessee. It

was submitted that there was no need for entering the name of assessee in the said registered document which is placed in paper book page no. 34 to 43 as it was sold by builder directly to the buyer and the assessee was only investor for the said flat . It was submitted that intention was to invest in the flat for earning profits and because of losses it was decided to sell the flat to minimize losses. It was submitted that the entire transaction was through banking channel. It was submitted that assessee neither entered into purchase agreement nor sale agreement was enter into by the assessee. It was submitted that in the preceding year , the assessee undertook identical transaction which was disallowed by the AO . Our attention was drawn to the page no. 52 of the paper book wherein CIT(A) appellate order dated 24-01-2003 for assessment year 1999-2000 is placed and it was contended by the assessee that the CIT(A) has allowed the said loss as speculative loss. Our attention was drawn to page no. 44 to 48/paper book where the bank statement is placed and various payments made to Mayberry Properties Private Limited are reflected. Our attention was also drawn to page no 28/paper book where in the schedule of the investment as on 31-03-2000 being part of audited account is placed and investment in flats as 31st March, 2000 of Rs.63,09,800/- is reflected . The assessee also placed reliance on tribunal decision in ITA no. 1017/Mum/2013 dated 22/06/2016 in the case of Lenient Finvest Pvt. Ltd. v. ITO where in the penalty was deleted by the tribunal in the case where purchase and sale of share were held to be speculative loss instead of business loss as claimed by the taxpayer and penalty was held not exigible in that case. With regard to the second issue on which penalty was levied u/s 271(1)(c) it was submitted that the assessee has filed all loan confirmation and the assessee did not earlier claimed interest paid by it. The additional income of Rs. 51,00,000/- was offered during assessment proceedings as against which the expenses of Rs.52,56,828/- was claimed including interest of

Rs. 42,56,828/- and excess income of Rs. 10 lacs towards film 'Earth'. The AO disallowed certain expenses which led to addition of Rs.19,90,500/- . Our attention was drawn to profit and loss account for the year 31st March 2000 which is placed in paper book / page no. 23 wherein interest on loans of Rs.1,60,21,133/- was claimed as an expenses which was allowed by Revenue.It was submitted that third party confirmation were filed for interest expenses claimed during assessment proceedings against additional income offered . It was submitted that portion of interest expenses were allowed while the balance interest expenses was disallowed. It was submitted that no notices 133(6) or summons u/s 131 were issued by the A.O . It was submitted that the AO has disallowed the expenses without confronting the assessee. It was submitted that income has been accepted but portion of expenses were disallowed without even confronting assessee. It was submitted that penalty is not exigible on the said disallowance. Our attention was drawn to tribunal order in ITA no. 7803/Mum/2011 for assessment year 2006-07 vide orders dated 29-08-2012 and submitted that these advances were written back by the legal heirs of the assessee which is recorded by the tribunal in para 6 and also write off of loans advanced by the assessee which were allowed by ITAT and it was accepted by ITAT that these were related to business of the assessee. It was submitted that revenue has accepted the credits(income) and brought the same to tax but the debit(expenses) were disallowed. It was submitted that assessee had already died and assessee incurred losses and was pauper at the time of death. Thus, it was prayed that the penalty levied by the AO as confirmed by learned CIT(A) be deleted.

6. The ld. D.R submitted that there is no evidences as to the booking of flat and there was no agreement between assessee and Mayberry Properties Pvt. Ltd. with respect to the said flat and/or with Ormonde

Developers Private Limited. Thus, it was submitted that there is no evidences on record wherein it could be said that the assessee has any right, title and interest in the said and merely one letter dated 27-03-2000 from Mayberry Properties Private Limited is produced along with agreement dated 30-04-1999 between Ormonde Developers Private Limited and Harish Luthria w.r.t. the purchase and sale of said flat. It was submitted that the AO was justified in making additions and also AO was justified in levying penalty u/s 271(1)(c) . It was admitted by Ld. DR that no notice u/s 133(6) or summons u/s 131 were issued by the AO to Mayberry Properties Pvt. Ltd.. With respect to the second issue it was submitted by learned D.R that no confirmations were filed by the assessee while only reconciliation statement were filed by the assessee which is being described as the confirmations by the assessee. He drew our attention to appellate order of learned CIT(A) at para 3.2 wherein categorically learned CIT(A) recorded that the assessee did not file any confirmations but merely filed reconciliation statements. It was submitted that no confirmations were filed during assessment as well penalty proceedings.

The learned counsel for the assessee submitted in rejoinder that so far as first issue is concerned , the assessee only filed confirmation letter from Mayberry Properties Private Limited along with agreement of Harish Luthria with the Ormonde Developers Private Limited as well bank statements to evidence payments to Mayberry Properties Private Limited, while with respect to the second issue it was submitted that a confirmations were filed on 26th, February 2003 . He produced a letter which was filed with the Revenue on 26th Feb 2003 wherein confirmations of loans were enclosed , which is placed in file. It was submitted that another set of loan confirmations were filed on 17th March

2003 which are part of paper book / page 6 and it was submitted that loan confirmations were filed twice before the authorities below.

7. We have heard rival contentions and have perused the material on record including case laws cited before us. We have observed that assessee is engaged in the business of production , distributor and exporters of feature films. The assessee has a proprietary concern namely Friends India . We have observed that assessee claimed that he booked a flat through Mayberry Properties Pvt. Ltd with Ormonade Developer Pvt. Ltd. being second floor 3 bedroom apartment (No. A-3) in Mayfair Building in Bangalore wherein it is stated that investment in 1870 sq flat was Rs. 30,85,500/- and further expenses were incurred to the tune of Rs. 96,889/- towards sales of flat which are reflected in the audited Profit and Loss Account of the assessee (pb/page23), while net sale proceed of the flat is mentioned to be Rs. 19,74,590/- in the credit side of audited Profit and loss account (pb/page 23), which translated into loss of Rs.12,07,799/- which was claimed by the assessee as business loss in his return of income filed with the Revenue. To substantiate the same, the assessee produced letter dated 27-03-2000 from Mayberry Properties (P) Ltd., Mumbai which is placed in paper book / page no. 33 wherein details were given by Mayberry Properties Private Limited with regard to the sale and purchase of the said flat being second floor 3 bedroom apartment (No. A-3) in Mayfair Building in Bangalore , wherein it is reflected that investment in 1870 sq flat was Rs. 30,85,500/- while net sale proceed is mentioned to be Rs. 19,74,590/- payable to Friends India (proprietary concern of the assessee) and loss on this transactions for sale and purchase of flat is computed to be Rs.11,10,910/- by Mayberry Properties Private Limited to the assessee's account . There were further expenses of Rs. 96,889/- which was claimed by the assessee in audited Profit and Loss Account towards sale

of flat, which makes total loss to be Rs. 12,07,799/- on sale of said flat which was claimed as business loss. The assessee also claimed that the said flat booked was with M/s. Ormonde Developers Pvt. Ltd through Mayberry Properties Private Limited , which was ultimately sold by said Ormonde Developers Pvt. Ltd to Harish Luthria on 30-04-1999 vide registered agreement (pb/page 34-43) on the instructions of the assessee in order to reduce losses arising from investment in flat. The assessee has also produced his bank statements of proprietary concern Friends India (pb /page 44-48) to substantiate that various payments were made from time to time to Mayberry Properties Pvt. Ltd for booking in flats. The said amounts for purchase and sale of flat were shown in audited Profit and Loss account(page 23/pb). The investments made by the assessee in flats as at 31-03-2000 were reflected in audited accounts to be Rs. 63,09,800/- under schedule of investments as 'Investment in Flats A/c' . The said loss claimed by the assessee were disallowed by the A.O. mainly on the grounds that the assessee did not produce any registered agreement for purchase and sale of the said flat in the name of the assessee and the AO disbelieved the genuineness of the transaction for sale and purchase of flat. The assessee carried the matter in first appeal before the learned CIT(A) in quantum assessment wherein learned CIT(A) rejected the contention of the assessee and dismissed the appeal of the assessee for the impugned assessment year 2000-01 . The assessee carried the matter further in appeal before ITAT but the assessee did not press the said ground which was accordingly dismissed by ITAT in ITA No. 8083/Mum/2004 vide orders dated 23/06/2005. The said order of ITAT is placed in paper book at page 81 to 86 . Similar disallowance was made for the assessment year 1999-2000 which losses were allowed by the CIT(A) under similar circumstances to be as speculative losses . The said appellate orders are placed in file. The assessee has also relied upon the decision of the tribunal in the case of

Lenient Finvest Pvt. Ltd. v ITO in ITA no. 1017/Mum/2013 dated 22/06/2016 where in the tribunal has deleted the penalty u/s 271(1)(c) where the business loss was assessed as speculative loss instead of returned as business loss, the operative portion of the order of the tribunal is reproduced here under:

“We find from the above facts that the AO did not agree with the claim of the assessee that the loss claimed by the assessee as trading loss is actually speculation loss in view of application of Explanation to Section 73 of the Act and this loss of Rs.50,12,977/- is allowed to be carried forward for set off of speculation profits in any subsequent year. We find that all the facts and figures are available on record and the disallowance of loss is due to wrong interpretation of Explanation to Section 73 of the Act by virtue of which the same is treated as speculation loss. We are of the view that merely treating the business loss as speculation loss by the AO does not automatically warrant inference of concealment of income or furnishing of inaccurate particulars of income, particularly when the assessee has furnished full details of purchase and sales of shares. Even otherwise, we are of the view that the AO himself is not sure of the charge for levy of penalty whether the same is for concealment of income or for furnishing of inaccurate particulars of income. In view of the above, we set aside the orders of the authorities below and delete the penalty imposed on the assessee.”

We have also observed that the assessee in the instant case has placed all the facts before the AO with respect to its claim of business loss from purchase and sale of flat which did not found favour with the AO and the

claim of the assessee for business loss was disallowed by the AO mainly because the assessee name was not found mentioned in the registered agreement which was between Ormonde Developers Pvt. Ltd and Harish Luthria dated 30-04-1999 and the authorities below disbelieved the genuineness of the sale and purchase transaction of flat. The assessee has claimed that he was investor in the flat and once he realized that the real estate is going at losses , he instructed Mayberry Properties Private Limited to sell this flat and hence it is claimed that Ormonde Developers Pvt. Ltd sold the flat on 30-04-1999 at the instructions of the assessee to realize investment and hence it is not required that the name of the assessee did found mentioned in the registered agreements as it was directly transferred by developer namely Ormonde Developers Pvt. Ltd to Harish Luthria. The A.O. has , however, not issued any notice u/s. 133(6) or summons u/s 131 to Mayberry Properties Pvt. Ltd and/or to Ormonde Developers Pvt. Ltd to verify and enquire about the truthfulness of the contentions of the assessee but the same were rejected merely on the grounds that no registered agreement in favour of the assessee for the said flat for purchase and sale has been brought on record. In any case , in the preceding year the learned CIT(A) has allowed the loss to be speculative loss on sale of flat through Mayberry Properties Private Limited which was again booked through Ormonde Developers Private Limited. The assessee has produced confirmatory letter from Mayberry Properties Private Limited supported by his bank statements to reflect payments made from time to time to Mayberry Properties Private Limited through banking channel. The initial onus that lay on the assessee to come out of clutches of penalty provisions u/s 271(1)(c) stood discharged as the assessee has come out with a bonafide explanations to support its claim and it was for the AO to have made enquiries to disprove the contentions of the assessee and to have proved that these whole transaction of sale and purchase of flat was sham , bogus and

colorable device to defraud revenue and to evade taxes which unfortunately no enquiry was made by the AO and nothing incriminating is on record against the assessee. Merely because registered agreement for sale and purchase of flats are not entered in the name of the assessee in our considered view is not sufficient to saddle assessee with liability to pay penalty u/s 271(1)(c) . The assessee has duly come out with a bonafide explanation to support the transactions for sale and purchase of flat which is supported by its books of accounts, bank statements and confirmatory letter from Mayberry Properties Private Limited which takes him out of clutches of penal provisions as are contained in Section 271(1)(c) unless Revenue brings on record cogent and positive material to show that the whole transaction for purchase and sale of flat was a bogus , sham and colorable device to defraud revenue and evade taxes. . Hence we order deletion of penalty levied on this ground w.r.t. loss on sale of flats as levied u/s 271(1)(c) as apart from the case of Lenient Finvest Private Limited (supra) which supports the stand of the assessee, decision of Hon'ble Supreme Court in the case of CIT v. Reliance Petroproducts Private Limited (2010) 322 ITR 158(SC) also supports stand of the assessee that merely because claim of the assessee is disallowed by the AO in quantum assessment will not lead to levying of penalty automatically so far as penalty proceedings are concerned. We order accordingly.

With respect to levy of penalty on second ground of additional income offered during assessment proceedings to the tune of Rs.19,90,500/- , we are again of the considered view after going through the entire material on record that the assessee has during the course of assessment proceedings offered additional income of Rs. 51,00,000/- from film 'Fire' which was not declared earlier while at the same time the assessee has not claim expenditure of Rs. 52,56,828/- which has been claimed

during assessment proceedings . The assessee has claimed to have paid interest on loans to the tune of Rs. 42,56,828/-and Rs. 10,00,000/- was excess income offered for the film 'Earth'. The AO disallowed certain interest expenses so claimed during assessment proceedings and net income to the tune of Rs.19,90,500/- was added as an additional income offered for taxation. We have observed that the assessee has submitted all the confirmations of loans for which assessee produced evidences vide letter dated 26-02-2003 filed with the AO which is placed in file as also letter dated 17-03-2003 which is placed in paper book / page no. 6 . The assessee vide its return of income claimed interest expenses to the tune of Rs. 1,60,21,134/- which was debited in profit and loss (pb/page 23) which was fully allowed by the AO. The A.O did not issue any summons u/s 131 to these parties against whom interest expenses to the tune of Rs. 42,56,828/- was claimed nor any notices u/s 133(6) were issued to these parties to seek confirmations from these parties to whom interest of Rs. 42,56,828/- were claimed to have been incurred . Thus, the AO did not made any enquiry rather disallowance has been made despite assessee bringing on record details of said interest expenses incurred by the assessee. The assessee has discharged its onus as it lay under penalty provision u/s 271(1)(c) as the assessee has come out with bonafide explanation and it was for the AO to have brought on record cogent and positive material to disprove the claim of the assessee. Thus, it is a case where the assessee made a claim of expenditure which did not found favour with the AO and merely because it was not accepted by the AO does not warrant levy of penalty automatically u/s 271(1)(c) . No such positive incriminating material is brought on record to disprove the claim of the assessee by authorities below. In-fact the tribunal vide its order in ITA no. 7803/Mum/2011 for assessment year 2006-07 dated 29-08-2012 in assessee's own case accepted that these loans and advances were related to business of the assessee as these advances

were written back by the legal heirs of the assessee which is recorded by the tribunal in para 6 to be related to business and also write off of loans advanced by the assessee were held to be related to business of the assessee , which were allowed by ITAT vide its orders dated 29-08-2012 for assessment year 2006-07. The case of the assessee gets support from the decision of Hon'ble Supreme Court in the case of CIT v. Reliance Petroproducts Private Limited(supra) as in the instant case of the assessee , the assessee made a claim of expenses which did not found favour with Revenue and merely because claim of expenses is not accepted by Revenue, the penalty u/s 271(1)(c) is not automatic. We hereby order deletion of penalty on this ground also , as levied by the AO and as confirmed by learned CIT(A). The assessee succeeds in this appeal. We order accordingly.

8. In the Result appeal of the assessee in ITA no. 5730/Mum/2013 is allowed.

Order pronounced in the open court on 25th September, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक: 25.09.2017 को की गई ।

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 25.09.2017

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

व.नि.स./ N.V, Sr. PS

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)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "I" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai