आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एल' मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "L " BENCH, MUMBAI

सर्वश्री पी.एम.जगताप, ले.स. एवं श्री अमित शुक्ला, न्या.स. के समक्ष ।

BEFORE SHRI P.M.JAGTAP, AM & SHRI AMIT SHUKLA, JM

आयकर अपील सं./ **ITA No.851/Mum/2009**.

(**निर्धारण वर्ष /** Assessment Year: 2001-2002)

ADIT (IT) 2 (1), Mumbai	Vs.	R Liners Ltd., Mauritius through agents James Mackintosh & Co. P. Ltd. Darabshaw House, Shoorji Vallabhdas Marg, Ballard Estate, Mumbai-38.
स्थायी लेखा सं./जीआइआर सं./PAN No. AAACJS 0988 P		
(अपीलार्थी **/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

एवं/ AND

आयकर अपील सं./ **ITA No.210/Mum/2010**

(**निर्धारण वर्ष /** Assessment Year: 2000-2001)

Dy. DIT (IT) 2 (1), Mumbai	Vs.	James Mackintosh & Co. P. Ltd. Darabshaw House, Shoorji Vallabhdas Marg, Ballard Estate, Mumbai-38.
स्थायी लेखा सं./जीआइआर सं./PAN No. Not applicable.		
(अपीलार्थी **/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

एवं/ AND

आयकर अपील सं./ **ITA No.209/Mum/2010**

(**निर्धारण वर्ष /** Assessment Year: 2001-2002)

Dy. DIT (IT) 2 (1), Mumbai	Vs.	James Mackintosh & Co. P. Ltd. Darabshaw House, Shoorji Vallabhdas Marg, Ballard Estate, Mumbai-38.
स्थायी लेखा सं./जीआइआर सं./PAN No. Not applicable.		
(अपीलार्थी **/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी-राजस्व की ओर से / Appellant/Revenue by	:	Mr. Jitendra Yadav
प्रत्यर्थी-निर्धारिती की ओर से/ Respondent-Assessee by	:	Mr. M.B.Jaya Kumar

सुनवाई की तारीख **/ Date of Hearing :** 10th May 2012

घोषणा की तारीख /**Date of Pronouncement :** 27th June, 2012

आदेश / O R D E R

PER AMIT SHUKLA (J.M.) :

These are bunch of three appeals filed by the department relating to penalty proceedings under Section 271(1)(c) for the assessment year 2001-2002 & 2000-2001. Since the common issues are involved in all the three appeals, therefore, for the sake of convenience, all the three appeals are being disposed off by this consolidated order.

2. **ITA No.851/Mum/2009(AY2001-02) :-** Brief facts of the case are that the assessee "R Liners Limited (In short 'RL') is an offshore company incorporated and registered in Mauritius and is engaged in the business of operation of ship in international traffic and ship management. M/s James Mackintosh & Co. Pvt. Ltd. (in short 'JMCPL') was the only agent of RL in India. Being a tax resident of Mauritius, RL opted for Treaty benefit under Article 8 of the DTAA between India and Mauritius, under which the profits derived by a Mauritius enterprise from operation of ships in international traffic is taxable only in the country where place of effective management is situated. Based on the above provisions, the assessee through its agent, JMCPL, applied for the Annual Port Clearance Certificate u/s. 172 to the Assessing Officer, who as per the Board's Circular No.732, dated 20th December, 1995, granted the same on 9-6-2000, which was

valid upto 31-3-2001, i.e. upto Assessment Year 2001-2002, subject to undertaking of the assessee i.e. RL that no ship belonging to it, will be engaged in any traffic other than international traffic. Based on the above certificate, the RL through its agent JMCPL, filed its income tax return at 'Nil' income after claiming the tax relief under DTAA. This position continued in the assessment year 2000-2001 & 2001-2002. Later on, the Assessing Officer while examining the similar certificate for the subsequent year found on opinion that the Treaty benefit cannot be given to RL as the place of effective management of RL was not in Mauritius but was in India. In view of this, a notice under Section 148 was issued on 30-3-2004 for the assessment year 2001-2002 in the case of RL and similar notice under Section 148 was issued on 30-3-2004 in the case of agent, JMCPL. In pursuance of such proceedings, assessment order was passed under Section 143(3)/147 vide order dated 30-1-2005 determining the income of ₹.29,80,038/- after applying the provisions of Section 44B i.e. @ 7.5% of the gross receipts in the case of RL. On the same date, another order under Section 143 r.w.s. 147 was passed in the case of agent also, JMCPL on the same income and that to be on substantive basis. Thus, the same income was taxed in the hands of the principal and at the same time in the hands of the agent also. In the first appeal, filed by the RL, learned CIT(A) vide order dated 27-5-2005, upheld the assessment of income after following his predecessor's order for the

assessment year 1996-1997 and 1997-1998 and held that effective management of the RL is not in Mauritius but in India and accordingly it is not entitled for benefit of Article 8 of Indo-Mauritius DTAA. However, he held that levy of interest under Section 234B is not justified. The said order of the CIT(A) has been accepted by the RL and no appeal was preferred before the ITAT. The revenue was, however, aggrieved by the deletion of interest under Section 234B, preferred second appeal before the ITAT, wherein the Tribunal vide order dated 17-6-2008, passed in ITA No.5383/M/2005, dismissed the revenue's appeal by holding that interest under section 234B cannot be levied in the case of the assessee as the exemption certificate was valid upto 31-3-2001 and the assessee could validly assume that there is no tax liability in respect of interest earn upto 31-3-2001.

3. On this background, the Assessing Officer issued the show cause notice u/s 274 for levy of penalty under section 271(1)(c). In the case of RL the show cause notice though issued under the name of agent but simultaneously the Assessing Officer issued similar notice in the case of agent JMCPL also for levy of penalty. In the course of the penalty proceedings, the assessee submitted that all the particulars with respect to the income during the assessment year have been declared in the return of income that is, gross receipts from shipping business, net taxable income @ 7% and taxes thereof. It was solely based on certificate issued by Assessing Officer earlier that shipping

profits were claimed exempt from tax in India. It was also submitted that its plea for non-levy of interest under section 234B has also been accepted on the ground of similar bonafide belief that it was not liable to tax on shipping profits in India. The Assessing Officer, however, rejected the said contention of the assessee and levied the penalty of ₹.9,97,937/- in the case of the agent JMCPL vide order dated 26-9-2005 and also levied penalty for the same amount of ₹.9,97,938/- in the case of principal, RL.

4. Against the said penalty orders, both the assessees filed appal before the CIT(A). Before the CIT(A), preliminary objection was raised that two penalty orders cannot be passed one in the case of agent and other in the case of principal, for the same assessment year in respect of the same income. Without prejudice and purely as an alternative, it was submitted that if any penalty is levied, then it should be levied on the principal but not on the agent. Even in the penalty order, the Assessing Officer has very categorically held as under :-

> *"I have perused and considered all the submissions of the assessee. It is a fact that a penalty order u/s.271(1)(c) has been passed in the case of James Mackintosh & Co.,Pvt. Ltd., as agent of M/s R. Liners Ltd. for the same assessment year 2001-02m vide order dated 26-09-2005, levying a penalty of ₹.9,97,938/-. <u>However, I am of the opinion that the penalty if any, should be levied on the principal and not on the agent</u>. Accordingly, I proceed with the finalization of penalty u/s 271(1)(c) of the IT Act, in case of the principal, M/s R Liners Ltd., through its agent."*

5. On merits, it was submitted that the return of income and the assessed income were the same and it was only due to the tax relief

claimed under the DTAA which has been denied, therefore, the provisions of *Explanation* 1 to section 271(1)(c) cannot be invoked. The second aspect, which was submitted that, the assessee was always under a bonafide belief that there is no tax liability in India and this contention has been appreciated by the CIT(A) and the ITAT while deleting the levy of interest under Section 234B. Further the Assessing Officer had earlier accepted the assessee's claim of non-taxability in India at the time of issuance of DTR certificate. Learned CIT(A) duly appreciated the explanation and the submission given by the assessee and after giving detail reasoning and analyzing the various case laws, has held that penalty cannot be imposed in the case of RL as well as JMPCL. He, therefore, deleted the penalty by two separate orders dated 11-11-2008 in the case of RL and dated 22-10-2009 in the case of JMCPL.

6. Now, the revenue has come up in the appeal in the case of principal, RL, bearing ITA No.851/Mum/2009 and in the case of JMCPL bearing ITA No.209/Mum/2010. Learned Senior DR had filed written submission wherein various contentions and arguments have been put forth to justify the levy of penalty. The sum and substance of the revenue's arguments are as under :-

i) The contention the assessee that effective control and management of the company was in Mauritius has been found to be incorrect by the Assessing Officer,

wherein it was found that 50% of the share capital of the RL was held by JMCPL, which is an Indian company and the remaining share capital was held by two shareholders residents in UAE. The assessee also could not produce Minutes of Board Meeting held in Mauritius evidencing the decision making relating to important issues concerning the management of a shipping company. It also could not produce the passports of its directors to show that they travelled to Mauritius to attend Board Meeting.

ii) The assessee could not substantiate its explanation and, therefore, its case falls within the four corners of the *Explanation* 1 to sec. 271(1)(c) as its basic contention has been proved to be wrong.

iii) Regarding assessee's plea before the CIT(A), that the return income and the assessed income being the same, it has been contended by the learned DR that merely showing the freight receipts from India in the return of income, while at the same time claiming it to be exempt, will not amount to say, that return income and the assessed income are same. Moreover, there is no concept of "return income" in *Explanation* 4 to section 271(1)(c), but the term used is "assessed income".

iv) Regarding simultaneously assessment on principal and agent, it has been submitted that the liability of the agent is a nature of personal liability, hence, it was the agent's liability to pay the taxes and there is no prohibition under the law to proceed against both the parties i.e principal and the agent. The only limitation is with regard to recovery of taxes.

v) Finally, if the penalty is to be assessed, the same should be assessed in the hand of the agent.

vi) On difference of opinion and interpretation of law on debatable issue, it has been submitted by learned DR that no new evidence has been produced during the course of the penalty proceedings that effective place of control and management of the assessee company was in Mauritius. In the quantum proceeding, this finding has thus become final, where it has been held to be contrary to the stand of the assessee. Thus, there is no difference of opinion on any debatable point. Thus, the assessee has concealed material facts relating to computation of income.

vii) On the aspect of the reasonable cause, it has been submitted that the provisions of Section 273B does not apply to penalties imposed under Section 271(1)(c). Further there is no provision under the

Income Tax Act to issue such a certificate by the Assessing Officer as the same is subjective to the fulfilment of condition that the assessee files return of income in pursuance of the same. The Assessing Officer issuing the certificate could have formed any basis to conclude that the assessee will not be liable to tax during that period. The reliance placed by the assessee on the findings given on the issue relating to levy of interest under Section 234B is wholly misplaced.

viii) Lastly, the tax resident certificate of Mauritius filed by the assessee will not make any difference as the assessee has not been denied the benefit of India Mauritius Treaty under the Article 8 of the DTAA. In this case, exemption from tax has been denied because the assessee failed to fulfil the condition of the said Article. In support of all his contention, learned DR placed reliance on the decision of Delhi High Court in the case of **CIT Vs. Zoom Communication (P) Ltd., reported in 327 ITR 510**, that wrong claim of deduction amounts to concealment within the meaning of *Explanation* 1 to section 271(1)(c).

7. *Per Contra*, learned counsel on behalf of the assessee had also filed his counter submissions, wherein following contentions/ submissions have been made :-

i) Two penalty orders cannot be passed in respect of the same income, and, therefore, either of the two penalty orders required to be cancelled;

ii) Proceedings against JMCPL, agent, are not sustainable as the Assessing Officer himself in the penalty order has held that if penalty is to be levied, the same should be in the case of the principal and not the agent and, therefore, the penalty in the case of the agent should be straightaway deleted. In support of his contentions, reliance has been placed on the judgment of Hon'ble Supreme Court in the case of **Claggett Blachi Co. Ltd. Vs. CIT, reported in (1989) 177 ITR 409 (SC),** wherein it has been held that it is open to the Assessing Officer to either assess the non-resident assessee, or to assess the agent of such non-resident assessee and if the assessment is made on one, there can be no assessment on the other. It was further submitted that the stand of the Revenue at this stage that the penalty should be levied in the case of the agent, is wholly misplaced as the Learned DR cannot improve upon the case of the Assessing

Officer, who has given a categorical finding that penalty should be levied in the case of the principal only.

iii) Penalty order in the case RL is also invalid in law, since the show cause notice was issued in the name of the agent JMPCL and not RL. This contention is duly supported by the Assessing Officer's scrutiny report for the assessment year 2000-2001, wherein it has been stated that the validity of issuance of show cause notice under Section 274 r.w.s 271(1)(c), is questionable. This was one of the main reasons for not filing second appeal before the ITAT by the revenue for the assessment year 000-2001 in the case of the principal, RL.

iv) On merits of the case, the main contention of the assessee throughout has been that its claim was bonafide as the RL was the resident of Mauritius and, therefore, eligible to benefit of Article 8 of the India-Mauritius Tax Treaty, which provides exemption from income derived from international traffic from the levy of tax in India. This bonafide belief has been accepted by the CIT(A) while deleting the levy of interest under Section 234B, which now stands confirmed by the ITAT in the revenue's appeal in ITA No.5383, vide order dated 17-6-2008.

v) There was a difference of opinion among the two Assessing Officer with regard to the effective place of

management is situated in Mauritius or not. The Assessing Officer earlier after examining the residential status and also the effective place of management had issued DTR certificate to the assessee and it was on this bonafide belief that tax exemption was sought for. There is no concealment of particulars of income on furnishing of inaccurate particulars of income as all the details have duly been furnished in the return of income. The explanation given before the Assessing Officer during the course of the penalty proceedings was thus wholly bonafide. The reliance in this regard has been placed on the decision of Hon'ble Supreme Court in the case of **CIT Vs. Reliance Petro Product Limited, reported in 322 ITR 158**.

vi) It has been submitted that the assessment has been completed by invoking the provisions of Section 44B, which cannot be held to be applicable in the case of assessee as the Assessing Officer has held that the assessee is resident in India, under Section 6(3)(ii) and provision of section 44B is applicable for taxing non-residents on presumptive basis. Once the assessee is held to be resident in India, the assessment made by invoking the provisions of section 44B, itself contradicts

the stand of the Assessing Officer. Thus, there is a contradictory stand taken by the department in this case.

vii) Lastly, the learned AR relied upon the scrutiny report of the Assessing Officer on the order of the CIT(A) in the case of RL for the assessment year 2000-2001, wherein it has been admitted that there is no difference between the return of income and the assessed income, thus, there can be no concealment of income with reference to the said return of income and it is only the assessee's claim of double tax relief under Section 90, which is disputed.

8. We have carefully considered the rival submissions and perused the material placed on record. Here in this case, the assessment has been made on substantive basis in the case of principal as well as agent on the same income. Penalty has also been levied in both the cases for the same income. Thus, it is a case of double jeopardy. The principal, RL, which is engaged in the business of operation of ships in the International traffic is a resident of Mauritius, which is evident from tax residency certificate issued by Mauritius Government Authority. The JMCPL is the agent of RL and is resident of India. The return of income which was filed in response to notice under Section 148 on 9-4-2004 by RL through its agent JMCPL, total freight earned was shown at ₹.2,77,20,500/- and income at the rate of 7.5% was shown as per section 44B of ₹.20,79,038/-. The tax payable at the rate of

40% on such income was shown at ₹.9,97,938/-. Being a tax resident of Mauritius, the RL opted for treaty benefit under Article 8 of the DTAA between the India and Mauritius, by virtue of section 90 of Income Tax Act and for this purpose DTR certificate was applied which was also granted by the Additional Director of International Taxation. Based on this certificate, the tax payable at ₹.9,97,938/- was claimed as exempt and 'Nil' tax liability was shown in the return of income. In the assessment order passed under section 143(3)/147, such an income has been treated to be taxable on the ground that effective place of management under Article 8 of Indo-Mauritius DTAA is not found to be situated in Mauritius. Accordingly, the Assessing Officer applied the provisions of Section 44B and worked out the tax at ₹.9,97,938/-, i.e. the same amount which was claimed as exempt by the assessee in the return of income. Not only this, similar substantive assessment has been made in the case of the agent JMCPL also. This, action of the Assessing Officer in taxing the same income in the hands of the principal as well as the agent was legally not correct as the department can only tax in one hand either the principal or the agent. Section 160(1)(i) provides that in respect of income of the non-resident, the agent of such non-resident is to be treated as representative assessee. Thus, the assessment should have been either made in the case of the representative assessee i.e. the agent or to non-resident itself. The department cannot make the assessment

on both the persons on agent as well as principal. Similarly, the penalty under Section 271(1)(c) for the same income cannot be levied in the case of both the persons. From the perusal of the penalty order of RL, it is seen that the Assessing Officer himself has very categorically held that the penalty if any, should be levied in the hands of the principal and not on the agent, which is evident from the para 3 of the penalty order which has been reproduced by us in the foregoing para 4. Thus, on the preliminary ground, we hold that the penalty in the case of JMCPL, which is subject matter of appeal before us in ITA No.209/M/2010, is legally not sustainable and **accordingly, the penalty levied in the case of JMCPL i.e. the agent, is cancelled. In the result, appeal of the department in ITA No.209/m2010 is dismissed on the preliminary ground**.

9. Now, coming to the levy of penalty on merits in the case of principal i.e. RL, it is seen from the perusal of the assessment order dated 31-1-2005, the Assessing Officer has come to following conclusions :-

i) The benefit of Article 8 is not available to RL as effective place of management of the assessee is not in Mauritius.

ii) The RL is a company resident in India by virtue of Section 6(3)(ii) and has treated to be a tax resident of India under Article 4(3) of the Indo-Mauritius Treaty.

iii) Alternatively, the assessee has an agency PE in India and according to Article 7, income of the assessee is to be taxed as per domestic law.

From the conclusion drawn by the Assessing Officer, it is seen that the Assessing Officer has taken three different stands for taxing the income of RL in India. Even though such a taxing of income has become final in the quantum proceedings, however, such a finding in the assessment order is not a final word in the penalty proceedings upon the pleas which can be taken up at the penalty stage and whatsoever relevant and good the findings are given in the assessment proceedings, they are not conclusive so far as the penalty proceedings are concerned. In the penalty proceedings the matter has to be examined afresh and the Assessing Officer cannot be solely guided with the findings given in the quantum side. The assessee even though does not give additional evidence for producing any new material, he still may rely upon the existing material and facts and based on such material give explanation to prove that he is not guilty of concealment of income or furnishing of inaccurate particulars. The Assessing Officer has invoked the provisions of *Explanation* 1 and has levied the penalty on account of furnishing of inaccurate particulars. The presumption raised by the *Explanation* 1 is a rebuttable presumption and it can be rebutted by giving the explanation that

assessee was under a bonafide belief in not offering the income for tax.

9.1 From the facts of the case which have been elaborately discussed in the foregoing paragraphs, it is borne out that RL is a tax resident of Mauritius and in support of this, tax residency certificate has been furnished. This fact has also been accepted by the learned DR in the written submission. It is also undisputed fact that, based on this tax residency certificate, the RL has applied for exemption certificate for grant of 100% DIT relief, which was granted by the Assessing Officer vide certificate dated 9-6-2000 upto the period of 31-3-2001 i.e. upto AY 2001-2002 (copy of which has been placed in the assessee's paper book at page 5 filed on 8-11-2009). It was based on this certificate, that the assessee had sought tax relief in the return of income. For the purpose of penalty proceedings under Section 271(1)(c), one has to see what was stance and belief entertained by the assessee at the time of filing of the return, because that is a starting point from where it can be seen whether the assessee had furnished any inaccurate particulars or has concealed any particulars of income. In the return of income, the assessee had duly disclosed the freight receipts, the income from such freight receipts under presumptive provisions of Section 44B and also the tax payable on such income. Based on this, DIT relief certificate by the Assessing Officer in India and tax residency certificate by the authorities of

Mauritius, tax exemption has been sought in the return of income. This definitely constitutes a bonafide belief by the assessee at the time of filing of the return. It is settled law that primary burden of the proof even under the *Explanation* 1 is on the revenue to establish that *Explanation* of the assessee is false or is not bonafide which here in this case has not been discharged by the Assessing Officer in the penalty order. The entire finding in the assessment as well as penalty order is based on the fact that claim of the assessee (RL) that its income is exempt under Indo-Mauritius Treaty is not eligible as the effective place of management of the assessee was not proved to be in Mauritius by the assessee. Not proving the effective place of management in Mauritius by the assessee can be a subject of adverse inference in quantum proceedings, but there has to be some independent material or evidence before the department that the assessee's stand and explanation is false and is contrary to the record, for the purpose of bringing the assessee in the ambit of penal provision of section 271(1)(c). *Explanation* 1 to section 271(1)(c) also carves out 'preponderance of probabilities', which means in the circumstances whether there was a probability of assessee acting bonafidely or the explanation offered by him a possible view on the facts and circumstances prevailing at the time of filing of return. Nowhere it has been found that the assessee's e*xplanation* for the purpose of levy of penalty under Section 271(1)(c) is false or not bonafide or the certificate issued by the Assessing Officer was wrongly

given. Elsewhere the Assessing Officer has stated that DIT proceedings are provisional in nature. If the department itself on the one hand, gives certificate for 100% tax relief and on the other hand, treats the same to be provisional in nature, cannot frame the charge of concealment of income or furnishing of inaccurate particulars of income. Nowhere it has been found that the assessee was not acting bonafidely.

9.2 The penalty in this case has been levied on the ground that the assessee has 'furnished inaccurate particulars', which cannot be upheld on the ground **firstly**, the assessee has disclosed all the freight receipts in respect of its Indian operation in the return of income and has also shown the income at the rate of 7.5% as per the provision of Section 44B of ₹.20,79,038/- and also the tax payable at the rate of 42% at ₹.9,97,938/-, and **secondly**, no discrepancy has been found in such particulars. Thus, there cannot be a case of furnishing of inaccurate particulars in this case. Only the claim of the assessee has not been found to be acceptable to the Assessing Officer on the applicability of Article 8 of the Treaty. Thus, on these facts, the judgment of the Hon'ble Supreme Court in the case of **Reliance Petro Product Limited** (supra), squarely gets applicable, wherein their Lordships have observed and held as under :-

> *"A glance at this provision would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The present is not a*

case of concealment of the income. That is not the case of the Revenue either. However, the learned counsel for Revenue suggested that by making incorrect claim for the expenditure on interest, the assessee has furnished inaccurate particulars of the income. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense) ; the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in the section 271(1)(c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars. The learned counsel argued that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurateparticulars of such income". We do not think that such can be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. In CIT v. Atul Mohan Bindal [2009] 9 SCC 589, where this court was considering the same provision, the court observed that the Assessing Officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. This court referred to another decision of this court in Union of India v. Dharamendra Textile Processors [2008] 13 SCC 369** as also, the decision in Union of India v. Rajasthan Spg. & Wvg. Mills [2009] 13 SCC 448*** and reiterated in paragraph 13 that (page 13 of 317 ITR) :*

"13. It goes without saying that for applicability of section 271(1)(c), conditions stated therein must exist."

Therefore, it is obvious that it must be shown that the conditions under section 271(1)(c) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the return filed because that is the only document, where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. In Dilip N. Shroff v. Joint CIT [2007] 6 SCC 329#, this court explained the terms "concealment of income" and "furnishing inaccurate particulars". The court went on to hold therein that in order to attract the penalty under section 271(1)(c), mens rea was necessary, as according to the court, the word "inaccurate" signified a deliberate act or omission on behalf of the assessee. It went on to hold that clause (iii) of section 271(1)(c) provided for a discretionary jurisdiction upon the assessing authority, inasmuch as the amount of penalty could not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of income, but it may not exceed three times thereof. It was pointed out that the term "inaccurate particulars" was not defined anywhere in the

Act and, therefore, it was held that furnishing of an assessment of the value of the property may not by itself be furnishing inaccurate particulars. It was further held that the Assessing Officer must be found to have failed to prove that his explanation is not only not bona fide but all the facts relating to the same and material to the computation of his income were not disclosed by him. It was then held that the explanation must be preceded by a finding as to how and in what manner, the assessee had furnished the particulars of his income. The court ultimately went on to hold that the element of mens rea was essential. It was only on the point of mens rea that the judgment in Dilip N. Shroff v. Joint CIT was upset. In Union of India v. Dharamendra Textile Processors**, after quoting from section 271 extensively and also considering section 271(1)(c), the court came to the conclusion that since section 271(1)(c) indicated the element of strict liability on the assessee for the concealment or for giving inaccurate particulars while filing return, there was no necessity of mens rea. The court went on to hold that the objective behind the enactment of section 271(1)(c) read with Explanations indicated with the said section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, wilful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under section 276C of the Act. The basic reason why decision in Dilip N. Shroff v. Joint CIT was overruled by this court in Union of India v. Dharamendra Textile Processors**, was that according to this court the effect and difference between section 271(1)(c) and section 276C of the Act was lost sight of in the case of Dilip N. Shroff v. Joint CIT*. However, it must be pointed out that in Union of India v. Dharamendra Textile Processors2, no fault was found with the reasoning in the decision in Dilip N. Shroff v. Joint CIT*, where the court explained the meaning of the terms "conceal" and "inaccurate". It was only the ultimate inference in Dilip N. Shroff v. Joint CIT* to the effect that mens rea was an essential ingredient for the penalty under section 271(1)(c) that the decision in Dilip N. Shroff v. Joint CIT* was overruled.*

We are not concerned in the present case with the mens rea. However, we have to only see as to whether in this case, as a matter of fact, the assessee has given inaccurate particulars. In Webster's Dictionary, the word "inaccurate" has been defined as :

"not accurate, not exact or correct ; not according to truth ; erroneous ; as an inaccurate statement, copy or transcript."

We have already seen the meaning of the word "particulars" in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under section 271(1)(c)

of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars."

10. The finding and the conclusion drawn by the CIT(A) that the assessment has been made on the basis of difference of opinion on the same sets of the facts which have been fairly disclosed by the assessee and therefore, not covered by *Explanation 1*, and further the assessee had made necessary disclosers by way of notes in the return of income that it is based on bonafide belief due to DIT relief certificate and tax residency certificate, does not amount to furnishing of inaccurate particulars, is legally and factually correct. We therefore, do not find any reason to deviate from such a finding. In view of the facts and circumstances of the case, deletion of penalty by the CIT(A) is upheld. **In the result, department's appeal in the case of RL in ITA No.851/2009 is dismissed**.

ITA No.210/mum/2010 (AY 2000-01)(By Department) :

11. Here in this case, the department has filed appeal in the case of agent for the Assessment Year 2000-2001. It is very important to note that in case of principal no appeal has been filed, even though the penalty orders were passed on the principal as well as the agent on the same quantum of income. In view of our findings given in ITA No.851/Mum/2009 and also in ITA No.209/Mum/2010, we hold that

penalty is not leviable and the learned CIT(A) is justified in deleting the penalty. Accordingly, the department's appeal is dismissed.

12. In the result, all the three appeals of the revenue are dismissed.

परिणामतः राजस्व की सभी तिन अपीलें खारिज की जाती है ।

Order pronounced in the open court on 27th June, 2012 .

आदेश की धोषणा खुले न्यायालय में दिनांकः27th June,2012को की गई ।

Sd/-	Sd/-
(पी.एम.जगताप)	(अमित शुक्ला)
(**P.M.JAGTAP)**	(**AMIT SHUKLA)**
लेखा सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 27/ June /2012

प्र.कु.मि/pkm.नि.स./PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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