IN THE INCOME TAX APPELATE TRIBUNAL

DELHI BENCH "C": NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No. 1469/Del/2019
A.Y. : 2015-16

HARISH KUMAR, (HUF), 5/21, SHANTI NIKETAN, NEW DELHI – 110 021 (PAN: AAAHH9496M)	Vs.	DCIT, CIRCLE 34(1), NEW DELHI ROOM NO. 804, 8TH FLOOR, E-2 BLOCK, PRATYAKASH KAR BHAWAN, CIVIC CENTRE, NEW DELHI – 110 002
(Appellant)		(Respondent)

Assessee by : Sh. Naveen ND Gupta, CA & Sh. Ashu Goel, CA
Department by : Sh. Amit Katoch, Sr. DR.

ORDER

PER H.S. SIDHU, JM

This appeal by the Assessee is directed against the Order dated 26.11.2018 of the Ld. Commissioner of Income Tax (Appeals)-12, New Delhi pertaining to assessment year 2015-16.

2. The grounds of appeal raised in the assessee's appeal read as under:-

i) That the Hon'ble CIT(A) has erred on facts and in law in confirming the penalty of Rs. 45,52,613/- u/s. 271(1)(c) of the Income Tax Act, 1961 imposed by the AO without appreciating the bonafide claim of inadvertent error of the appellant.

ii) That the Ld. CIT(A) has erred on facts and in law in confirming the finding of the AO that appellant had furnished inaccurate particulars of income in respect of its inadvertent omission of excluding the short term loss of Rs. 1,98,51,474/- u/s. 94(7) of the I.T. Act though the computation of income has promptly been revised during assessment proceedings before any detection of the same by the AO.

iii) That the appellant craves the right to add or amend or withdraw any ground of appeal at or before the time of hearing of appeal.

3. Assessee has also filed the additional ground of appeal under Rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963 in the present appeal and raised the ground no. 4 as additional ground of appeal and stated that the issue raised by the assessee in the said additional ground of appeal involved the question of law and hence, the same may be admitted in view of the judgment of the Hon'ble Supreme Court of India in the case of NTPC Ltd. 229 ITR 383 (SC). For the sake of convenience, the legal ground raised by the assessee as ground no. 4 is reproduced as under:-

"Ground No. 4

That the Ld. CIT(A) ought to have held that the Notice, Proceedings and Order imposing penalty u/s. 271(1)(c) are bad in law being contrary to facts, principles of natural justice, provisions of law and judgments of courts in India."

4. The brief facts relating to the issue in dispute are that the assessee filed its return of income declaring net taxable income at Rs. 35,29,470/- on 17.9.2015 for the assessment year 2015-16 which was processed on 29.7.2016 u/s. 143(1) of the Income Tax Act, 1961 (in short "Act"). The case of the assessee was selected for limited scrutiny through CASS with identified issues of 'Long Term Capital Gains', 'Business Loss', 'Derivative (futures) transaction', 'Refund Claim' and 'Securities Transaction' for examination. AO issued statutory notice u/s. 143(2) of the Act on 19.9.2016/27.9.2016 which was duly served upon the assessee. Subsequently, notice u/s. 142(1) of the Act alongwith questionnaire was issued. In response to the same, the AR of the assessee appeared and filed details as called for which have been examined and placed on record.

4.1 The assessee is engaged in the business of trading in shares and derivatives. During the year, the assessee has incurred a loss of Rs. 1,11,92,533/- from the business of trading in derivatives. Apart from that, the

assessee has adjusted Short Term Capital Loss of Rs. 31,15,27,183/- with Long Term Capital Gain of Rs. 32,58,81,104/- from the sale of equities and declared income of Rs. 1,45,53,921/- under the head 'Income from Capital Gains'. The assessee has also derived income of Rs. 3,68,077/- on account of Interest from Savings Bank account and FDR. The assessee had also claimed exemption of Rs. 19,24,70,893/- u/s. 10 of the Act. Accordingly, the total income was declared at Rs. 35,29,470/- (rounded off u/s. 288A) in the return of income.

4.2 On perusal of the ITS details, it was observed that the assessee was having a large value of share transactions and incurring high loss. Therefore, the assessee was asked to provide the complete details of all the unique equities (ISIN) traded alongwith details of all unique sales. The assessee was also asked to furnish the complete details of Short Term Capital Gain and Loss. In response to the same, the AR of the assessee furnished the requisite details in parts on different hearings. Further, on examination of the details of exempt income. The AO also observed that the assessee had received dividend from share of Rs. 19,24,70,893/- during the year. Therefore, in order to test the affairs of the assessee on the fulfillment of criteria as laid down in / touchstone of the provisions of section 94(7) of the Act, the assesee was issued notice u/s. 142(1) of the Act on 7.12.2017 to furnish the details of all dividend/ bonus earned by the assessee in a specified format which the AO has reproduced in the assessment order at page no. 2.

4.3 In response to the notice dated 7.12.2017 the AR of the assessee appeared and furnished all the details as filed in the original return of income and claimed Long Term Capital Gain. Again the AO asked to furnish the detail of dividend /bonus in the requisite format and in response to the same the AR of the assessee attended the hearing on 15.12.2017 and furnished the details vide letter dated 15.12.2017 which the AO has reproduced in para no. 4.2 at page no. 2 & 3 of the assessment order. On examination of the details filed by the assessee in the prescribed format given by the AO with the notice u/s. 142(1)

of the Act dated 7.12.2017, the AO was of the view that the share were accrued within the period of three months prior to record date and sold the securities within 3 months of the record date. Thus the loss of Rs. 1,98,51,874/- is liable to be ignored according to the provisions of section 94(7) of the I.T. Act. However, the AR of the assessee in his reply vide letter dated 15.12.2015 has himself acknowledged the mistake and offered for taxation duly filing the revised computation of income. Keeping in view of the admission by the assessee and filing the revised computation of income, the AO made the disallowance of Rs. 1,98,51,874/- as per the provisions of section 94(7) of the Act on account of dividend striping and completed the assessment u/s. 143(3) of the Act and also imposed the penalty of Rs. 45,52,613/- for furnishing of inaccurate particulars of income vide order dated 23.2.2018 passed u/s. 271(1)© of the Act. Against the penalty order dated 23.2.2018, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 26.11.2018 has dismissed the appeal of the assessee. Aggrieved with the impugned order dated 26.11.2018, assessee is in appeal before the Tribunal.

5. During the hearing, Ld. Counsel for the assessee stated that the legal issue raised, as reproduced above, by the assessee is purely question of law on facts and all facts are on record and no new facts are to be brought on record. He further submitted that this legal issue will go to the root of matter and is crucial for determining the penalty liability of the assessee. Hence, he requested that this additional legal ground may be admitted and may be decided first. On the legal ground raised by the assessee i.e. ground no. 4, Ld. Counsel for the assessee stated that the penalty in dispute has been imposed u/s. 271(1)© of the Act at page 8 para 6 of penalty order concluding that "the the assessee case is squarely covered by Explanation 1(B) to section 271(1) of the Act, since the assessee has failed to substantiate his explanation & has also failed to prove that its explanation as noted above is banafide and that all the facts relating to the same and material to the computation of its total income have been disclosed by it. Hence, the AO was satisfied that the

assessee has filed inaccurate particulars of income. He further stated where explanation 1(B) to section 271 (1) provides deeming provisions that where assessee failed to substantiate its explanation & has also failed to prove its explanation as noted above is bonafide and that all facts relating to same and material to computation of total income have been disclosed by it, then it would be deemed to represent income in respect of which particulars have been "concealed". He draw our attention towards Circular No. 204 dated 24.07.1976 para 61.8 which provides that "New Explanation 1 which provides that where in respect of any facts material the computation of his total income, an assessee fails to offer an explanation or is unable to substantiate an explanation offered by him or offers an explanation which is found to be false, the amount added or disallowed in computing the total income of such person as a result thereof will be treated as his concealed income". He further stated that Circular No. 204 dated 24.6.1976 is legally binding on the revenue and this legal binding character attaches to the circular even if they are found not accordance with the correct interpretation of the section. In support of this contention he cited the decision in the case of UCO Bank 104 Taxmann 547 (SC). He further stated that in view of the judgment of the Hon'ble Supreme Court of India in the case of T Ashok Pai 292 ITR 11 (SC) it has been observed that "concealment of income and furnishing inaccurate particulars of income carry different connotation". He further stated that as per the ratio of Nepa Limited 58 Taxmann.com 137 (Indore) it has been observed that in case of furnishing of inaccurate particulars of income, the onus is on the revenue to prove that assessee has furnished inaccurate particular. Ld. Counsel for the assessee finally argued that while levying penalty, AO relied upon Explanation 1 to section 271(1)© even though he levied penalty for furnishing inaccurate particulars of income. Therefore, the mandatory binding of Circular No. 204 dated 24.7.1976 specifying that explanation 1 to section 271(1)© is for "concealment of income". Since the AO had issued notice for furnishing of inaccurate particulars of income, it was AO who has to prove the onus that

assessee furnished inaccurate particulars whereas while invoking and relying upon Explanation 1 to section 271(1)©, the AO has wrongly shifted the onus on the assessee. Therefore, the AO is totally silent on the basis of the details as to what particulars of income are found inaccurate, since the AO moved on premises that since Explanation 1 is wrongly invoked therefore, it was assessee's onus to prove all particulars are accurate. In the end he stated that it is apparent from the provisions of section 271 (1)© that Explanation 1 is not applicable in the case of furnishing of inaccurate particulars of income. Therefore, the basis of penalty itself is not correct, in view of the decision in the case of NEPA Ltd. 58 taxmann.com 137 (Indore). He requested that the legal ground raised by the assessee may be allowed and the penalty in dispute may be cancelled.

5.1 On the merits of the case, Ld. Counsel for the assessee stated that assessee filed its return Income of Rs. 35,29,470/- with income from investments i.e. dividends, capital gains and interest. He stated that AO taken the return of for scrutiny u/s. 143(2) of the Act under CASS and not income escaping based on the information on section 94(7) of the Act disallowance on information based on AIR. He further stated as per page no. 9-11 of the paper book, the AO has issued various notices u/s 143(2)/142(1) of the Act at pages 9 to 11 & order sheet at pages 12 to 16 of the Paper Book, the AO has not made any enquiry for the disallowance in the case of the assessee u/s. 94(7) of the Act. It was further submitted that AO on the basis of the query for dividend income on 07.12.2017 issued a notice u/s. 142(1) and asked the assessee to file the detail of all dividend / bonus income earned by the assessee in a specified format. In compliance of the same on 13.12.2017 Ld. Counsel for the assessee appeared and took adjournment for 15.12.2017 and examined all details of dividend / bonus income and found that there is an inadvertent clerical error committed by the Chartered Accountant and on the advice of Senior Chartered Accountant, the assessee filed voluntary revised computation of income wherein a Long Term Capital Gain (LTCG) of Rs. 14353921 has been

increased to Rs. 34205795 due to the disallowance of Rs. 19851974 u/s. 94(7) of the Act at the first opportunity as soon as it came to the notice of the assesee. Assessee has committed this mistake of furnishing of inaccurate particulars in the return due to the inadvertent bonafide offer cited in the claim due to the one entry by the accounts staff posted at wrong date due to huge voluminous transactions and dividend coupons for dividend from same security punched at one voucher i.e. entry of two dividend received on same security (Rs. 1,98,51,874/- received on 28.1.2015 and Rs. 3,38,62,717/- received on 25.3.2015 made cumulatively on 26.3.2015 i.e. date of sale of investments (26.3.2015) and receipt date of second dividend. AO has completed the assessment on the basis of details furnished by the assessee. He further stated that under the circumstances assessee has not concealed or has not filed any inaccurate particulars of income. Assessee has paid voluntary paid taxes on disallowance u/s. 94(7) and not filed the appeal against the assessment order passed by the Assessing Officer. He further stated that assessee has not filed any false claim and has not concealed any particulars of income or furnished inaccurate particulars of income u/.s 271(1)© of the Act. He further stated that the term "Particulars" means 'Details'. Further it is held Terms "inaccurate particulars" and "inaccurate claim" are not same, as such it is not a case of furnishing inaccurate particulars since assessment finalized based on details furnished by assessee and no finding in penalty order by the AO or CIT(A) that any particulars furnished by assessee were wrong or particulars not furnished rather it is a case of inaccurate claim due to inadvertent human error. Therefore, he requested that penalty in dispute may be deleted in view of the judgment of the Hon'ble Supreme Court of India in the case of Reliance Petro Chemicals Ltd. 189 Taxman 322 (SC). In support of this contention assessee has filed two paper books and written synopsis and various case laws.

6. On the contrary, Ld. DR relied upon the orders of the authorities below and in support of his contention, he filed the 03 paper books containing

written submissions and gist of various case laws. For the sake of convenience the Written Submissions filed by the Ld. DR are reproduced as under:-

> *"Sub: Written Submission in the above case- reg.*
>
> *In the above case, it is humbly submitted that the following decisions may kindly be considered with regard to levy of penalty u/s 271 (1)(c) in light of decision of Karnataka High Court in CIT V. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565 (Para 4) and Hon'ble Supreme Court in case of CIT Vs SSA's Emerald Meadows [2016] 73 Taxmann.Com 248 (SC)/[2016] 242 Taxman 180 (SC):*
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> 1. *Sundaram Finance Ltd. Vs CIT [2018] 99 taxmann.com 152 (SC)*
>
>   *SLP dismissed against High Court ruling that where assessee claimed depreciation on non-existent assets, penalty under section 271 (1)(c) was to be levied for filing inaccurate particulars of income*
>
> 2. *Sundaram Finance Ltd. Vs CIT [2018] 93 taxmann.com 250 (Madras)/[2018] 403 ITR 407 (Madras)*
>
>   *Where Hon'ble Madras High Court held that where notice did not show nature of default, it was a question of fact. The assessee had understood purport and import of notice, and hence, no prejudice was caused to the assessee. It considered decision of Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565/218 Taxman 423/35 taxmann.com 250 (Kar.).*
>
> ***Relevant part of the order is reproduced below:***
>
> *"**15.** Before us, the assessee seeks to contend that the notices issued under Section 274 r/w. Section 271 of the Act are vitiated since it did not specifically state the grounds mentioned in Section 271(l)(c) of the Act.*
>
> ***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. That apart, this issue can never be a question of law in the assessee's case, as it is purely a question of fact. Apart from that, the assessee had at no earlier point of time raised the plea that on account of a defect in the notice, they were put to prejudice. All violations will not result in nullifying the orders passed by statutory authorities. If the case of the assessee is that they have been put to prejudice and principles of natural justice were violated on account of not being able to submit an effective reply, it would be a different matter. This was never the plea of the assessee either before the Assessing Officer or before the first Appellate Authority or before the Tribunal or before this Court when the Tax Case Appeals were filed and it was only after 10 years, when the appeals were listed for final hearing, this issue is sought to be raised. Thus on facts, we could safely conclude that even assuming that there was defect in the notice, it had caused no prejudice to the assessee and the assessee clearly understood what was the purport and import of notice issued under Section 274 r/w, Section 271 of the Act. Therefore, principles of natural justice cannot be read in abstract and the assessee, being a limited company, having wide network in various financial services, should definitely be precluded from raising such a plea at this belated stage.

***17**. Thus, for the above reasons, Substantial Questions of law Nos. 1 and 2 are answered against the assessee and in avour of the revenue. The additional substantial question of law, which was framed is rejected on the ground that on facts the said question does not arise for consideration as well as for the reasons set out by us in the preceding paragraphs.*

In the result, Tax Case Appeals are dismissed. No costs.

3. ***CIT Vs Smt. Kaushalya [1994] 75 Taxman 549 (Bombay)/[1995] 216 ITR 660 (Bombay)***

In the above case, lAC had issued show-cause notice dated 28-3-1972 under section 274(2). Assessee had no knowledge

of exact Charge against him. Not only word 'or' had been used between two groups of charges but there was use of word 'deliberately' also. lAC imposed penalty of Rs. 13,000 for assessment year 1967-68 and ITO imposed penalty of Rs. 22,000 and Rs. 10,000 for assessment years 1968-69 and 1969-70, respectively. Tribunal quashed penalties and held that there was absence of reasonable opportunity of hearing because three show-cause notices were ambiguous and defeated very purpose of giving reasonable opportunity of hearing as contemplated under section 274 and two orders of ITO were without jurisdiction. It was held that mere mistake in language used or mere non-striking off of inaccurate portion cannot by itself invalidate notice under section 274. Penalty orders passed by ITO for assessment years 1968-69 to 1969-70 were perfectly valid and there was no justification for quashing same on ground of absence of jurisdiction.

4. ***Trimurti Engineering Works Vs ITO [2012] 25 taxmann.com 363 (Delhi)/[2012] 138 ITD 189 (Delhi)/[2012] 150 TTJ 195 (Delhi)***

where Hon'ble IT AT Delhi held that it was apparent from combined reading of notice and assessment order that impugned notice had been issued in respect of concealment of particulars of income.

Relevant part of the order is reproduced below:

*"**5.2** It is also submitted that the notice is vague. We have already seen that in the notice one of the alternatives, i.e., concealment of particulars of income or furnishing of inaccurate particulars of income has not struck off. In the case af Gujarat Credit Corpn. Ltd. v. Asstt. CIT [2008J 113 ITO 133 (Ahd.) (58), relied upon by the Id. Counsel, the AD had initiated penalty proceedings for disallowance of loss as capital loss. This ground was not accepted by the CIT*

(Appeals) as correct. It was held that in view of the finding of the CIT (Appeals), the foundation an which penalty was initiated has fallen down. Therefore, the penalty on that ground cannot fructify. The CIT (Appeals), however, upheld the disallowance on a totally different ground. In such a situation, the penalty could have been initiated by the CIT (Appeals) but that will not give jurisdiction to the AD to levy the penalty. We have given serious consideration that this issue also. This decision may have some implication on the levy of penalty in respect of first addition regarding the cash shortage. At the same time, it is also true that the assessee must be appraised of the charge in the notice for which he is sought to be penalized. The whole issue has to be decided on the basis of the facts of each case. When we go through the assessment order, it is seen that the AD has examined the cash book in a great detail and various entries therein between 01.07.2004 to 31.3.2005 have been reproduced on page nos. 14 to 27. Similarly, the receipts by way of advances from Trimurti Engineering Works, having implication on the second addition, have been reproduced in the assessment order on page nos. 27 to 29. The finding of the AD in respect of the first addition is that cash flow statement filed by the assessee is nothing but an afterthought and a colourable devise to avoid tax. This cash flow statement was sought to be supported by cash flow statement in respect of two partners, Shri N.S. Pan war and Shri Y.S. Panwar. These statements were also examined and various defects were noticed. Coming to advances for job work, it is inter-alia mentioned that most of the entries are above Rs. 20,000/-, but in the reconciliation statement the entries have been bifurcated so that each one of them is less than Rs. 20,000/-, which seems to have been done to avoid penalties under sections 2710 and 271E of the Act. The assessee has not done any job work and no income has been shown although an amount of Rs. 16.25 lakh is stated to have been taken from a single party on a number of occasions. Finally, it has been recorded in respect of both the additions that the amount is treated as income from undisclosed sources. All these observations made by the AO show that it was his case that particulars of income have been concealed. It is not a case where any disallowance has been made but a case

where the assessee was found in possession of certain unaccounted money which was utilized in the course of business without paying tax thereon. Therefore, when we see the notice and the contents of assessment order, it is clear that the notice was issued for concealing particulars of income. The notice is not a stand alone document. It is based on the assessment order. Without finding regarding one or the other charge, the notice cannot be issued. However, if two are read together, it is clear that the notice has been issued in respect of concealment of particulars of income. In view of these observations, it is held that the notice is not vague."

5. ***Hybrid Rice International Pvt.Ltd. Vs elT (ITA no. 285/De1/2007)***

where Hon'ble ITAT Delhi held that it was apparent from combined reading of notice and assessment order that impugned notice had been issued in respect of concealment of particulars of income.

Relevant part of the order is reproduced below:

6.7. We now deal with the case laws cited by the Ld. Counsel for the Assessee.

(i) CIT vs. Manjunatha Cotton and Ginning Factory and others (2013) 359 ITR 565 (Kar.): The Hon'ble Karnataka High Court was considering the case where there was no proof of concealment of income. It was a case where the Hon'ble High Court held that the Explanation given by the assessee was bonafide and merely because the assessee agreed to the addition and the assessment order was passed on the basis of this admission, in the absence of any material on record to show concealment of income, no penalty can be levied. The facts of the case on hand are entirely different. Our finding of fact is that the assessee has not voluntarily offered the income to tax. In fact the explanation given is in our opinion not bonafide ...

(ii) The Hon'ble Delhi High Court in the case of Ms.Madhushree Gupta vs. UOI and another (2009) reported in 317 ITR 107 has laid down that prima facie satisfaction of the AO that the case may be served imposition of penalty should be discernible from the order passed during the course of the proceedings. In the case on hand the prima

facie satisfaction of the AO is discernible from the assessment order. At para 36, page 128 of this order the Hon'ble Court has observed as follows.

"A bare reading of section 271(l)(c) would show that to initiate penalty proceedings following pre- requisites should obtain.

(i) The Assessing Officer should be satisfied that:-

a)The assessee has either concealed particulars of his income; or

b)furnished inaccurate particulars of his income; or

c)infracted both (a) and (b) above

(ii) This satisfaction should be arrived at during the course of any proceedings. These could be

assessment, reassessment or rectification proceedings, but not penalty proceedings.

(iii) If ingredients contained in (i) and (ii) ore present a notice to show cause under Section 274 of the Act shall issue setting out therein the infraction the assessee is said to have committed. The notice under Section 274 of the Act can be issued both during or after the completion of assessment proceedings, however, the satisfaction of the Assessing Officer that there has been an infraction of clause (c) of sub-section (1) of Section 271 should precede conclusion of the proceedings pending before the Assessing Officer.

(iv) The order imposing penalty can be passed only after assessment proceedings are completed. The time frame for passing the order is contained in Section 275 of the Act. To summarize: the Supreme Court held that the satisfaction which the Assessing Officer was required to arrive at during the course of assessment proceedings for initiation of penalty proceedings was prima facie in nature as against a final conclusion that the assessee had committed an act of omission or commission which would bring him within the ambit of the provisions of clause (c) of subsection (1) of Section 271. The notice under Section 274 was to follow. What was important was that satisfaction had to be arrived at during the course of assessment proceedings and not issuance of notice under Section 274 of the Act. (See D.M. Manasvi (1972) 86 ITR 557 and and S. V. AngidiChettiar (1962) 44 ITR 739.

A bare reading of the aforesaid extract from Rampur Engineering (supra) would show that the Full Bench:

(i) applied the law, as it ought to, as declared in D.M. Manasvi (supra) and S. V. AngidiChettiar (supra)WP(C) No. 5059-2008 Page 49 of 64

(ii) a fortiori the principle for initiation of penalty proceedings

being the prima facie satisfaction of the Assessing Officer during the course of assessment proceedings being discernible from the record, was reiterated.
(iii) the irrelevance of - the Assessing Officer having to say so in so many words that I am satisfied' was highlighted.
(iv) the judgment of the Division Bench in Ram Commercial was affirmed which enunciated that: Firstly satisfaction should be that of Assessing Officer.
Secondly, the assessment order should reflect such satisfaction.
In our opinion the impugned provision only provides that an order initiating penalty cannot be declared bad in law only because it states that penalty proceedings are initiated, if otherwise it is discernible from the record, that the Assessing Officer has arrived at prima facie satisfaction for initiation penalty proceedings. The issue is of discernibility of the satisfaction arrived at by the Assessing Officer during the course of proceeding before him. In the result our conclusion are as follows:
(i) Section 271(lB) of the Act is not violative of Article 14 of the Constitution.
(ii) The position of law both pre and post amendment is similar, in as much, the Assessing Officer will have to arrive at a prima facie satisfaction during the course of proceedings with regard to the assessee having concealed particulars of income or furnished inaccurate particulars, before he initiates penalty proceedings.
(iii)Prima facie' satisfaction of the Assessing Officer that the case may deserve the imposition of penalty should be discernible from the order passed during the course of the proceedings. Obviously, the Assessing Officer would arrive at a decision, i.e.. a final conclusion only after hearing the assessee.
(iv) At the stage of initiation of penalty proceeding the order passed by the Assessing Officer need not reflect satisfaction vis-a-vis each and every item of addition or disallowance if overall sense gathered from the order is that a further prognosis is called for.

(v) However, this would not debar an assessee from furnishing evidence to rebut the prima facie satisfaction of the Assessing Officer,' since penalty proceeding are not a continuation of assessment proceedings. [See Jain Brothers v. Union of India (1970) 77 ITR 107(SC)]
(vi) Due compliance would be required to be made in respect of the provisions of Section 274 and 275 of the Act.

(vii) the proceedings for initiation of penalty proceeding cannot be set aside only on the ground that the assessment order states penalty proceedings are initiated separately' if otherwise, it conforms to the parameters set out hereinabove are met."

***6.8**. Applying the propositions laid down to the facts of the case, we are of the considered opinion that the penalty proceedings were rightly initiated in this case and that the penalty was rightly confirmed by the Ld.CIT(A).*

6. ***Earthmoving Equipment Service Corporation Vs DCIT [2017] 84 taxmann.com 51 (Mumbai- Trib.)/[2017] 166 ITD 113 (Mumbai - Trib.)/[2017] 187 TT J 233 (Mumbai - Trib.)*** *where Hon'ble ITAT Mumbai held as follows:*

***"6**. We have heard the rival contentions and perused the relevant material on record including cited case laws. So far as the legal grounds are concerned, a perusal of quantum order reveals that the penalty was initiated for furnishing of inaccurate particulars and finally the same was levied on the same ground. We find that the assessee was issued two show cause notices- one in the standard printed form u/s 274 dated 04/03/2013 as placed on Page No.-86 of the paper book and another dated 27/08/2013 by way of letter as placed in Page No.92 of the paper book. We find that in the first notice, the relevant clause has not been ticked off and the second notice is simply a show cause notice. However, in the quantum order Ld. AO, after due deliberations, clearly initiated the penalty proceedings for furnishing of inaccurate particulars which shows due application of mind qua penalty proceedings. The penalty was finally levied on the same ground as well. Therefore, mere marking of relevant clause, in our opinion, on the facts of the case, has not caused any prejudice to the assessee particularly when the assessee voluntarily offered certain additions in the quantum proceedings with a specific request to AO for not initiating the penalty against the same. The assessee very well knew the charges / grounds for which he was being penalized and he actively contested the penalty before the Ld. AO. At this juncture, we find that the provisions of Section 292B comes to the rescue of the revenue which cures minor defect in the various notices issued provided such notice in substance and effect was in conformity with the intent and purpose of the act. On overall facts and circumstances, we find that such condition was fulfilled in the instant case. We find that the revenue's Special Leave Petition [SLP] dismissed by the Apex court in SSA'S*

Emerald Meadows (supra) confirmed the decision of Hon'ble High court, which in turn, relied upon the judgment rendered in Manjunatha Cotton & Ginning Factory (supra). The decision rendered by Hon'ble Bombay High court in Samson Perinchery (supra) also placed the reliance on this judgment. After perusing the ratio of the judgment rendered in Manjunatha Cotton & Ginning Factory (supra), we find that the assessee's appeal was allowed by Hon'ble High court after considering the multiple factors and not solely on the basis of defect in notice u/s 274. Therefore, we are of the opinion that the penalty could not be deleted merely on the basis of defect pointed by the Ld. AR in the notice and therefore, the legal grounds raised are rejected."

7. ***DCIT Vs Shah Rukh Khan [2018] 93 taxmann.com 320 (Mumbai - Trib.)*** *where Hon'ble ITAT Mumbai held as follows:*

13. The Id. A.R further to support his contention that because of the failure on the part of the A.O to strike off the irrelevant default in the body of the 'SCN', the assessee had remained divested of any opportunity of putting forth its case before the A.O that no penalty under the aforesaid statutory provision was liable to be imposed in his hands, relied upon the following judicial pronouncements:-

(I) CIT v. Manjunatha Cotton & Ginning Factory (2013) 359 ITR 565 (Kar.)

(ii) Dilip N. Shroffv. JCIT (2007) 291 ITR 519 (SC)

(iil) Commissioner of Income-tax v. Samson Pernchery (2017) 98 CCH 0039 (Bom.).

(iv) CIT v. SSA's Emerald Meadows 73 Taxman.com 241 (Kar.)

(v) SSA's Emerald Meadows v. CIT 242 Taxman 180 (SC)

Per contra, the Id. D.R submitted that the contentions advanced by the Id. A.R as regards the validity of the penalty proceedings not being maintainable, thus may not be admitted. The Id. D.R submitted that though the assessee was at a liberty to raise an objection, but however, the same had to be strictly confined as per Rule 27 of the Appellate Tribunal Rules, 1963. It was submitted by the Id. D.R that raising of an objection for the very first time by the Id. A.R during the course of the hearing of the appeal, and that too orally, without

putting the revenue to notice in advance, could not be admitted. The Id. D.R to support his aforesaid contentions relied on the following judicial pronouncements:

(I) CIT, Central-II v. Divine Infracon Pvt. Ltd. (ITA No. 771/Mum/20 13.08.2018, (High Court of Delhi)

(ii) CIT-4 v. JamunadasVirji Shares and Stock Brokers Pvt. Ltd. (2013) 458 (Bom.)

(iii) DCIT v. Sandip M. Patel (2012) 137 ITD 104 (Ahmedabad)

(iv) CIT v. Jindal Ployster Ltd. (2017) 397 ITR 282 (All.)

(v) Add/. CIT v. Gurjargravures (P.) Ltd. (1978) 111 ITR 1 (SC)

(VI) CIT v. EdwertKeventer (Successors) P. Ltd. (1980) 123 ITR 200 (Delhi)

(vii) Ultra tech Cement Ltd. v. Addl. CIT, Range-2(2) (2017) 298 CTR 437 (Bom.)

(viii) Self Knitting Works v. CIT (2014) 227 taxman 253 (P & H)

The Id. D.R relying on the aforesaid judicial pronouncements, submitted that as per the settled position of law, the objection raised by the Id. A.R during the course of hearing of the appeal as regards the validity of the jurisdiction assumed by the AO for imposingg penalty 271(1)(c) was not admissible and thus no cognizance of the same may be drawn. Alternatively, and without prejudice to the objection raised to the admission of the challenge thrown by the Id. A.R to the validity of the assumption of jurisdiction by the A.a for imposing penalty under See. 271(1)(c), it was averred by the Id. D.R that even otherwise the failure on the part of the AO to strike off the irrelevant default did not in any way affected the validity of the penalty imposed by the A.a under See. 271(1)(c). The Ld. D.R. in support of his said contention relied on the following judicial pronouncements:-

(I) M/s. Maharaj Garage & Company v. The Commissioner of Inc Nagpur (Income tax reference No. 21 of 2008, dated 22.08.2017.

(il) Commissioner of Income tax v. Smt. Kaushalya&

Others (1995) 211 (Bom.).

(iii) Earthmoving Equipment Service Corporation v. DCIT 22(2), Mur No.6617/Mum/2014, dated 02.05.2017).

(iv) Dhevel K. Jain v. ITa. Ward 16(3)(1), Mumbai (ITA No. 996/N dated 30.09.2016).

19 ... We are of the considered view that in the backdrop of the aforesaid judgment of the Hon'ble High Court of Jurisdiction, allowing the assessee respondent to proceed with his objection which was for the very first time orally raised during the course of hearing of the appeal before us, undoubtedly would be nothing short of proceeding with the hearing of the appeal, without affording an opportunity of being heard to the appellant revenue in context of the issue under consideration.

8. ***Dhanraj Mills Pvt. ltd. Vs ACIT ITA NOs.3830 & 3833/Mum/2009***

Where Hon'ble ITAT held as follows:

"2.16. We have considered the rival contention and gone through the various decisions relied by them. We have also gone through the order of penalty passed by Assessing Officer and the order passed by Ld. Commissioner of Income Tax (Appeal). We are conscious that any of the party may raise legal issue at this stage, if the same can be emanated from the record of the case. The Hon'ble jurisdictional High Court in CIT Vs Smt. Kaushalya (supra) while dealing with the similar ground about the limb of charge, whether mere mistake in language used or mere not striking off of inaccurate portion cannot by itself invalidate notice issued under section 274 of the Act. The language of the section does not speak about the issuance of notice. All that is required is that the assessee be given an opportunity of show cause. The issuance of notice is an administrative device for informing the assessee about the proposal of levy of penalty in order to enable him to explain why it should not be levied against him. If it is taken for the sake of argument that mere mistake in the language in the notice for non-striking off

of 'inaccurate particular' or marking on 'concealment of income' portion cannot by itself invalidate the notice. Entire facts and backgrounds thereof are to be kept in mind. Every concealment of fact may ultimately result in filing of or furnishing inaccurate particular. It was further argued that no statutory notice has been prescribed in this behalf in the Income tax Act. 2.17. The Hon'ble Karnataka High Court in CIT Versus Manjunatha Cotton & Ginning Factory (supra) held that notice under section 274 of the act should specifically state the grounds mentioned in section 271 (l)(c) that is, whether it is for concealment of income or for furnishing of inaccurate particular of income, sending printed form where all the grounds mentioned in the section 271 are mentioned would not specify the requirement of law, the assessee should know the grounds which he has to meet specifically. Otherwise, the Principles of Natural Justice are offended. On the basis of such proceedings, no penalty could be imposed on the assessee. Taking up the penalty proceeding on one limb and finding the assessee guilty on another limp is also bad in law. Though the penalty proceeding emanate from proceeding of assessment, they are independent and separate aspect of proceeding. All the other decisions relied by the Ld counsel for the assessee is based on the decision of CIT Vs Manjunatha Cotton & Ginning Factory (supra), wherein the decision of CIT Vs Kaushlya (supra) was not brought in the notice of coordinate bench of Mumbai Tribunal.

2.18. The Hon'ble Karnataka High Court in CIT Versus SSA'S Emerald Meadows in ITA No. 380 of 2015 order dated 23/11/2015, while dismissing the appeal of Revenuefollowed the decision of CIT Versus Manjunatha Cotton & Ginning Factory (supra). Against the judgment of Karnataka High Court the Revenue filed Special Leave Petition before the Hon'ble Apex Court and the same was dismissed vide SLP (CC No. 11485/2016) on 05/08/2016. There is no dispute to the settled proposition of law that dismissal of the Special Leave Petition in limineby Hon'ble Apex Court does not mean that the reasoning of the judgment of the High Court against which the Special Leave Petition has been filed before this Court stands affirmed or the judgment and order impugned merges with such order of this Court on dismissal of the petition. It simply means that Apex Court did not consider the

case for worth examining for the reason, which may be other than merit of the case. Nor such an order of Apex Court operates as res-judicata. An order rejecting the Special Leave Petition at the threshold without detailed reasons therefore does not constitute any declaration of law or a binding precedent. And the similar view was expressed in various judgments, viz,

A. The Workmen of Cochin Port Trust Vs The Board of Trustees of the Cochiti Port Trust &Anr AIR 1978 SC 1283;

B. Ahmedabad Manufacturing & Calico Printing Co Ltd Vs The Workmen &Anr AIR 1981 SC 960;

C. *Indian Oil Corporation Ltd. Vs. State of Bihar &Ors. AIR 1986 SC 1780;*

D. *Supreme Court Employees' Welfare Association Vs. Union of India &Ors. AIR 1990 SC 334;*

E. *Yogendra Narayan Chowdhury &Ors Vs. Union of India &Ors AIR 1996 SC 751;*

F. *Union of India &Anr. Vs Sher Singh &Ors, AIR 1997 SC 1796;*

G. *V.M. Salgaocar& Bros. {P} Ltd. Vs. Commissioner of Income Tax AIR 2000 SC 1623;*

H. *Saurashtra Oil Mills Association Gujrat Vs. State of Gujrat &Anr. AIR 2002 SC 1130;*

I. *Union of India &Ors Vs. Jaipal Singh {2004} 1 SCC 121; and*

J. *Y. Satyanarayan Reddy Vs Mandai Revenue Officer, Andhra Pradesh {2009} 9 SCC 447.*

2.19. *The Hon'ble Apex Court in Kunhayammed&Ors Vs State of Kerala &Anr. AIR 2000 SC 2587, considered the similar issue and some of the earlier judgments and came to the conclusion that dismissal of special leave petition in limineby a non-speaking order may not be a bar for further reconsideration of the case for the reason that the Court might not have been inclined to exercise its discretion under:*

Article 136 of the Constitution of India. The declaration of law will be governed by Article 141 where the matter has been decided on merit by a speaking judgment as in that case doctrine of merger would come into play. This Court laid down the following principles:

"i} Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or

affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a nonspeaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to

saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res-judicata in subsequent proceedings between the parties. /I

2.20. As there is no declaration of law which may be governed by Article 141 of the Constitution of India in the case of CIT Versus SSA'S Emerald Meadows dismissed by Hon'ble Apex Court, vide SLP (CC No. 11485/2016) on 05/08/2016. The judgment of Hon'ble Jurisdictional High Court in CIT Vs Kaushalya (supra) is still having a binding force on us. Thus, with utmost regards to the judgment of Karnataka High Court in CIT Vs Manjunatha Cotton & Ginning Factory (supra) we are bound to follow the judgment of jurisdictional High Court in CIT Vs Kaushalya (supra). Our view also find support from a decision of the Mumbai Bench of the Tribunal in the case of Dhawal K. Jain vs Income Tax Officer (ITA No.996/Mum/2014) order dated 30/09/2016. With these observations, the argument of Id. counsel of the assessee on the legal/technical ground is rejected. Thus, all these four appeals are, therefore, dismissed and the stand of the Ld. Commissioner of Income Tax (Appeal) is affirmed."

9. ***ITO Internatinal Taxation 2(1) Chennai. Vs RajanKalimuthu ITA No.2900/CHNY /2018 (copy enclosed)***

Wherein the Hon'ble ITAT held that the Ld.CIT(A) ought not have deleted the penalty based on e decision of Manjunatha Cotton and Ginning Factory, and hence, remanded the matter back to the CIT(A) for fresh adjudication on merits."

"Sub: Written Submission in the above case- reg.

In the above case, it is humbly submitted that the following decisions may kindly be considered with regard to levy of penalty u/s 271 (1)(c) of I.T.Act:

1. ***Union of India v. Dharamendra Textile Processors***

[(2007) 295 ITR 244] (CopyEnclosed)

Where Hon'ble Supreme Court held that Penalty under section 271 (1)(c) is a civil liability for which willful concealment is not an essential ingredient for attracting the civil liability as is the case in the matter of proceedings under section 276C

2. ***CIT Vs Zoom Communication (P.) Ltd. [191 Taxman 179 (Delhi)/[2010] 327 ITR 510 (Delhi)/[2010] 233 CTR 465]***

where Hon'ble Delhi High Court held that If assessee makes a claim which is not only incorrect in law, but is also wholly without any basis and explanation furnished by him for making such a claim is not found to be bona fide, Explanation 1 to section 271 (1)(c) would come into play and assessee will be liable to penalty

3. ***MAK Data P. Ltd vs. cn [38 taxmann.com 448 (SC)/[2013] 358 ITR 593 (SC)/[2013] 263 CTR 1]***

Where Hon'ble Supreme Court held that Under Explanation 1 to s. 271 (1)(c), voluntary disclosure of concealed income does not absolve assessee of s. 271 (1)(c) penalty if the assessee fails to offer an explanation which is bona fide and proves that all the material facts have been disclosed

"9. *We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AD in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that thesurrender of income was voluntary. AO during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer deeds duly signed, have been impounded in the course of survey proceedings under Section 133A conducted on 16.12.2003, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the*

assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The AO, in our view, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under Section 271 read with Section 274 of the Income Tax Act, 1961."

4. ***Khandelwal Steel And Tube Traders Vs ITO[2018] 95 taxmann.com 15 (Madras)*** *where Hon'ble Madras High Court held that explanation as to why there was an omission or wrong statement in original return must be due to bona fide inadvertence or bona fide mistake on part of assessee and even if assessee agreed to addition with a condition that penalty could not be imposed, department is not precluded from initiating penalty proceedings.*
5. ***B.A. Balasubramaniam& Bros. Co Vs CIT[116 Taxman 842, 236 ITR 977, 157 CTR 556]***
   where Hon'ble Supreme Court held that difference between income assessed and income returned being more than 20 per cent, Explanation to section 271 (1)(c) became applicable and assessee having failed to discharge onus being cast on assessee by virtue of said Explanation, Assessing Officer was justified in imposing penalty.
6. ***CIT vs Gates Foam & Rubber Co [91 ITR 467] CIT vs India Seafood [105 ITR 708]***
   where Hon'ble Kerala High Court held that Claiming excessive deduction also amounts to concealment of income.

7. ***Steel Ingots Ltd vs. CIT* [296 ITR 228]**

where Hon'ble Madhya Pradesh High Court held that in case of concealment of true income chargeable to tax by making bogus claim, levy of penalty u/s 271 (1)(c) read with Explanation 1 is justified.

8. ***CIT Vs Escorts Finance Ltd* [183 Taxman 453 (Delhi)/[2010] 328 ITR 44 (Delhi)/[2009] 226 CTR 105]**

where Hon'ble Delhi High Court held that if claim made in return of income appears to be ex facie bogus, it would be treated as a case of concealment or furnishing of inaccurate particulars and penalty proceeding would be justified.

9. ***CIT Vs R.M.P. Plasto (P.) Ltd* [184 Taxman 372 (SC)/[2009] 313 ITR 397 (SC)/[2009] 227 CTR 635]**

where Hon'ble Supreme Court held that Confirmed penalty upon assessee for concealment of income under section 271 (1)(c) because positive income of assessee was reduced to nil after allowing set-off of carried forward losses of earlier years.

10. ***K.P. Madhusudhanan VsCIT* [[2001] 118 Taxman 324 (SC)/[2001] 251 ITR 99 (SC)/[2001] 169 CTR 489 (SC)]**

where Hon'ble Supreme Court held that where assessee was unable to furnish evidence for loans and it offered amount of transaction as additional income, Assessing Officer was justified in imposing penalty u/s271 (1)(c) after finding the explanation to be unacceptable and applying Explanation 1 (B) of the section."

"The brief facts of the case for your kind consideration are as follows:-

I the case for your kind consideration are as follows:

- *The case of the assessee was selected for limited scrutiny through CASS with identified issues of 'Long term capital gain', 'business*

loss', 'derivative (futures) transaction', 'refund claim' and 'STT' for examination.

- *The assessee submitted details in parts on different hearings.*
- *On examination of the details of exempt income, it was also observed that the assessee had received dividend from shares of Rs. 19,24,70,893/- during the year.*
- *Therefore, in order to test the affairs of the assessee on the fulfillment of criteria as laid down in/touchstone of the provisions of section 94(7) of the IT Act, the assessee was issued notice u/s 142(1) on 7.12.2017 to furnish the details of all dividend/bonus income earned by the assessee in a specified format as provided by the Assessing Officer.*
- *In response to the same, the AR of the assessee appeared on 13.12.2017 and furnished all the details except the details of dividend/bonus as had been asked in notice u/s 142(1).*
- *Vide order sheet dated 13.12.2017, the AR was again asked to furnish the details of dividend/bonus in the required format.*
- *Thereafter, the AR, on 15.12.2017, furnished a reply stating that while filing return, the assessee had not considered dividend income for the purposes of section 94(7) of the Act, and accordingly had decided to revise the return of income by increasing the LTCG disallowance.*
- *The reasoning for furnishing the inaccurate particulars by the assessee was attributed to the claim that the assessee had himself filed the IT Return and he had committed the bonafide mistake inadvertently.*
- *The AO, in para 4.7 of his assessment has made the following remarks:*

> *"It is clear that the assessee acknowledged his mistake only when specifically asked 10 furnish the details of dividend/bonus in the required format. Had the case not been selected for scrutiny, the assessee would have gotten away with this wrongful claim and tax would have been evaded. Therefore, having regard to the nature of disallowance as discussed above, **I** am satisfied that **the assessee has furnished inaccurate particulars of such income**, and hence, rendering itself liable for initiation of penal proceedings **under section 271(1)(c), read with section 274 o[the IT Act, 1961**.The same is being initiated separately. " (Emphasis supplied)*

The penalty has been imposed subsequently by the AO also "(or furnishing of inaccurate particulars ofincome within the meaning o[the provisions of clause (c) of sub-section (1) of section 271 of the Act." (emphasis supplied)

The assessee has now taken an additional ground of appeal before the Hori'ble ITAT which had not been taken by it at any time either before the AO during the penalty proceedings, nor before the Ld. CIT(A) during the first appellate proceedings and was also not part of the grounds of appeal before the Hon'ble ITAT. The said ground reads as follows:

'That the Ld CIT(A) ought to have held that the notice, proceedings and order imposing penalty u/s 271 (l)(c) are bad in law being contrary tofacts, principles of natural justice, provisions of law and judgments of courts in India. '

This is based on the claim by the appellant that penalty show cause notice dated 26.12.2018 read as follows:

"It is, however, considered necessary to state that in the assessment order passed on 26.12.2017 for A Y 2015-16 u/s 143(3) of the IT Act, 1961, ***the satisfaction recorded by the undersigned within the meaning of section 271(1) (c) read with section 271(1B) o[the IT Act was unambiguously for furnishing inaccurate particulars of income****. However, in the show cause notice u/s 274(I) read with section 271(1)(c) of the IT Act, 1961 dated 26.12.2017, the portion "concealed the particulars of your income" was not struck off inadvertently. Hence,* ***in order to bring in sync the above referred show cause notice with the satisfaction recorded in this regard in the assessment order as discussed above, the undersigned gives fresh opportunity to the assessee to show cause as to why penalty u/s 271(1)(c) of the IT Act, 1961 may not be imposed upon the assessee for furnishing inaccurate particulars of income****."*

Subsequently the penalty was imposed vide order dated 23.02.2018 ***for furnishing of inaccurate particulars of income*** *within the meaning of provisions of clause (c) of sub-*

section (I) of section 271 of the Act.

With regard to this additional ground, the following submissions are made for the kind consideration of the Hon'ble Bench:

The ground raised by the appellant itself deserves not to be admitted for the following reasons: I) The said ground has not been raised by the appellant either at the stage of penalty proceedings or subsequently at any time during the appellate proceedings before the Ld. CIT(A).

2.) The ground impugns the order of the Id. CIT(A) claiming that "the Ld CIT(A) ought to have held that the notice, proceedings and order imposing penalty u/s 271 (J)(c) are bad in law being contrary to facts, principles of natural justice, provisions of law and judgments of courts in India. ".

This ground invites the question as to how can the order of the Ld. CIT be impugned when the mentioned relief was never asked from him at any stage of the appellate proceedings. The said issue did not even remotely emanate from the assessment proceedings or the penalty proceedings as there was not a single mention by the assessee of the said issue or any facet of it before the Assessing Officer. Under these circumstances, the ground itself does not deserve to be admitted and adjudicated upon by the Hon'ble Bench.

3.) Even otherwise, this is a general ground and does not in any terms whatsoever specify the particular relief that the assessee is asking for. It would only be presumptious to assume that anyone reading the said ground could reasonable infer with any degree of certainty as to what is being asked of the Hon 'ble Bench.

Coming to the merits of the matter, the following submissions may kindly be considered by the Hon'ble Bench:

In the relevant case law submission being made alongside to the Hon'ble Bench. A perusal of these case laws and several others on the issue of correct limb, etc, there is one fundamental issue that determines the validity of the penalty proceedings - the fundamental issue is that whether the assessee has understood the charge against it so as to properly defend itself from levy of penalty. If the charges communicated to it that it could not have

found itself in a position to effectively defend itself, such penalty charge and consequent order cannot survive. However, if the assessment order and the penalty notice is clear enough for the assessee to appreciate the charges against it without ambiguity, the charge shall survive and will have to be met on merits.

*In **Sundaram Finance Ltd., 403 ITR 407**, it was held by the Hon'ble High Court that where notice did not show the nature of default, it was a question of fact. The assessee had understood the purport and import of notice, and hence, no prejudice was caused to the assessee.*

*In **Trimurti Engineering Works vs. ITO 138 ITD 189 (Delhi)**, the Hon'ble Delhi ITAT has held that it was apparent from a combined reading of the notice and assessment order that impugned notice had been issued in respect of concealment of income.*

*Similar view has been taken by the Hon'ble Delhi ITAT in **Hybrid Rice International Pvt Ltd** vs. **CIT** (ITA No. 285/Del/2007).*

The Mumbai Bench of ITA T has very deftly dealt with the issue in Earthmoving Equipment Service Corporation vs. DCIT 166 ITD 113 (Mumbai) holding that 'so far as the legal grounds are concerned a perusal of the quantum order reveals that the penalty was initiated for furnishing of inaccurate particulars and finally the same was levied on the same ground .... However, in the quantum order Ld AO, after due deliberations, clearly initiated the penalty proceedings for furnishing of inaccurate particulars which shows due application of mind qua penalty proceedings ... "

Even the decisions of Manjunatha Cotton and others are based on one fundamental determination that whether the assessee has been prevented from clearly understanding the charge against it and thereby prejudiced against availing adequate defence for the charge.

Hence, any decision of an quasi judicial or judicial authority has to be seen in light of this basis premise. Needless to say, the same principle ought to apply also to the present case.

As stated above, the AO in his assessment order,

*unambiguously recorded that the penalty was being initiated for furnishing inaccurate particulars of income. The penalty show cause notice dated 26.12.2018, even while mentioning section 271 (I)(c), also mentioned (I)(B) of the section, which if the entire notice is perused in its totality, does not at all take away from the fact that the penalty was being sought to be imposed for furnishing inaccurate particulars of income. This is clear from the contents of the notice wherein the AO says" ...the undersigned gives fresh opportunity to the assessee to show cause as to why penalty uls 271(1)(c) of the IT Act, 1961 may not be imposed upon the assessee for furnishing inaccurate partic**ulars of income."***

A bare perusal of the above shows that it is not possible at all that any assessee could have been left in any doubt as regards the nature of the charge upon a reading of the assessment order and the penalty notice together, both of have been available with the assessee at all stages of the proceedings before the AO as well as the CIT(A).

How unwarranted and baseless is the claim of the assessee as regards this additional ground is proven beyond doubt on a bare perusal of the reply dated 31.01.2018 of the assessee itself [Page 38 of PB filed by the assessee]which was filed in response to the penalty notice in which the assessee is attempting to create holes in. A simple reading of the first para of the reply itself shows that the assessee has completely, unambiguously and with absolute clarity understood the nature, scope and basis of the charge against it.

*The para reads - "**This has reference to your letter dated 24.01.2018 asking the assessee to show cause why penalty u1s271(1)(c) should not be levied for furnishing inaccurate particulars of income with respect to disallowance of Rs. 1,98,51,874/- u/s 94(7)** .... "*

All the above facts together go on to show that no prejudice whatsoever was caused to the assessee at any stage of the proceedings. The assessee had clearly understood that the charge was for furnishing inaccurate particulars of income, and had replied to the charge on merits. It is only when the assessee lost the case even at the

stage of CIT(A), and having already filed the appeal before the Hon 'ble ITA T on merits, that it came up with a belated plea of the charge not being clear on account of discrepancy in the notices. Any discrepancy has been set right by the AO within reasonable time before the assessee filed its reply, the assessment order is unambiguously clear regarding nature of charge, the reply of the assessee before the AO also clearly shows that the assessee has understood the charge against it and replied only regarding that particular charge- which is furnishing of inaccurate particulars of income.

It may also be mentioned that section 292B also provides clarity in this regard. A detailed discussion on its applicability in such situations has been dealt with by the Chennai Bench of the Hon'ble ITAT in the recent decision of ***ITO International Taxation 2(1) Chennai. Vs RajanKalimuthu ITA No.2900/CHNY /2018 (copy enclosed)***

In this judgment, the Hon'ble Bench has, inter alia, given a finding on the following aspects:

i) How section 292B is applicable to situations where assessee claims lack of clarity in notice even though it has vehemently represented on merits during proceedings which clearly show that it has understood the charges against it no prejudice has been caused to it.

ii) Why Manjunatha Cotton case cannot be a refuge to such assessee in light of the subsequent decision of ***Hon'ble Karnataka High Court in CIT vs. Sri Durga Enterprises (2014) 44 taxmann.com 442 (Kar). [copy enclosed]***

iii) That the Bangalore Bench ofITAT in the case of P.M. Abdulla vs ITO (in ITA Nos. 1223 & 1224/Bangalore/2012 dated 17.10.2016) had held that this cannot be a valid reason for deleting the penalty u/s271 (I)(c).

The above submissions, along with submission of applicable case laws on both validity of notice as well as merits of the case may kindly be considered and made part of the order so that the facts and law points find complete expression in the matter."

7. We have heard both the counsel and perused the relevant records especially the orders passed by the Revenue authorities as well as the Paper Books filed by both the parties and the case laws relied by them therein. On the merits of the case, we find that assessee filed its return Income of Rs. 35,29,470/- with income from investments i.e. dividends, capital gains and interest and AO taken the return for scrutiny u/s. 143(2) of the Act under CASS and no income escaping based on the information on section 94(7) of the Act disallowance on information based on AIR. We further note that AO has issued various notices u/s 143(2)/142(1) of the Act, but has not made any enquiry for the disallowance in the case of the assessee u/s. 94(7) of the Act. AO on the basis of the query for dividend income on 07.12.2017 issued a notice u/s. 142(1) and asked the assessee to file the detail of all dividend / bonus income earned by the assessee in a specified format and filed all the details in the original return of income. In compliance of the same on 13.12.2017 Ld. Counsel for the assessee appeared and took adjournment for 15.12.2017 and examined all details of dividend / bonus income and found that there is an inadvertent clerical error committed by the Chartered Accountant and on the advice of Senior Chartered Accountant, the assessee filed voluntary revised computation of income wherein a Long Term Capital Gain (LTCG) of Rs. 1,43,53,921/- has been increased to Rs. 3,42,05,795/- due to the disallowance of Rs. 1,98,51,874/- u/s. 94(7) of the Act at the first opportunity as soon as it came to the notice of the assesee. We note that Assessee has committed this mistake for furnishing of inaccurate particulars in the return due to the inadvertent bonafide error in the claim due to one entry by the accounts staff posted at wrong date due to huge voluminous transactions and dividend coupons for dividend from same security punched at one voucher i.e. entry of two dividend received on same security (Rs. 1,98,51,874/- received on 28.1.2015 and Rs. 3,38,62,717/- received on 25.3.2015 made cumulatively on 26.3.2015 i.e. date of sale of investments (26.3.2015) and receipt date of second dividend. We further note that AO has completed the assessment on

the basis of details furnished by the assessee, hence, under the circumstances assessee has not furnished inaccurate particulars of income. It is noted that Assessee has paid voluntary taxes on disallowance u/s. 94(7) of the Act and not filed the appeal against the assessment order passed by the Assessing Officer. It is an admitted fact that assessee has not filed any false claim. We further note that the assessee fully disclosed all the information asked for and has nowhere furnished any inaccurate particulars. We find that there is no conclusive proof that the assessee has furnished inaccurate particulars of income. The AO has not brought enough incriminating material for furnishing of inaccurate particulars and there is no material for establishing the same and therefore in the given facts and circumstances of the penalty is not leviable, because all the documents submitted by the assessee were neither rejected by the AO as false or incorrect facts nor AO had clinched any further evidence for furnishing of inaccurate particulars of income. We also find that section 271(1)(c) postulates imposition of penalty for furnishing of inaccurate particulars and concealment of income. On the facts and circumstances of this case the assessee's conduct cannot be said to be contumacious so as to warrant levy of penalty.

7.2 In this regard, we find that assessee's counsel reliance from the Hon'ble Apex Court decision in the case of ***CIT vs. Reliance Petro Products Ltd. in Civil Appeal No. 2463 of 2010*** is squarely applicable in the present case of the assessee. In this case vide order dated 17.3.2010 it has been held that the law laid down in the Dilip Sheroff case 291 ITR 519 (SC) as to the meaning of word 'concealment' and 'inaccurate' continues to be a good law because what was overruled in the Dharmender Textile case was only that part in Dilip Sheroff case where it was held that mensrea was a essential requirement of penalty u/s 271(1)(c). The Hon'ble Apex Court also observed that if the contention of the revenue is accepted then in case of every return where the claim is not accepted by the Assessing Officer for any reason, the assessee will

invite the penalty u/s 271(1)(c). This is clearly not the intendment of legislature.

7.3 We further place reliance from the Apex Court decision rendered by a larger Bench comprising of three of their Lordships in the case of ***Hindustan Steel vs. State of Orissa in 83 ITR 26*** wherein it was held that *"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act, or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute."*

7.4 We further note that the case laws cited by the Ld. DR are on distinguished facts, hence, does not support the case of the Revenue.

8. In the background of the aforesaid discussions and respectfully following the precedents, as aforesaid, we find that the levy of penalty in this case is not

justified. Accordingly, we set aside the orders of the authorities below and delete the levy of penalty in dispute. Since we have deleted the penalty in dispute on the merits of the case, there is no need to adjudicate the legal ground raised by the Assessee, hence, the same is dismissed as such.

9. In the result, the appeal filed by the Assessee stands partly allowed.

Order pronounced on 19/08/2019.

Sd/- **Sd/-**

[DR. B.R.R. KUMAR]
ACCOUNTANT MEMBER

[H.S. SIDHU]
JUDICIAL MEMBER

Date: 19/08/2019

"SRB"

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1. Appellant 2. Respondent 3. CIT 4.CIT (A) 5. DR, ITAT

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By Order,

Assistant Registrar, ITAT, Delhi Benches