

IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH : AMRITSAR

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
(AS THIRD MEMBER)

ITA Nos.554 & 555/Asr/2014
Assessment Years : 2008-09 & 2009-10

HPCL Mittal Energy Ltd., Vs. The Addl. Commissioner of
Village: Phulokhari, Income Tax,
Tehsil: Talwandi Sabo, Circle-1,
Dist. Bathinda, Bathinda.
Punjab – 151301.

ITA Nos.510 & 556/Asr/2014
Assessment Years : 2008-09 & 2009-10

HPCL Mittal Pipeline Ltd., Vs. The Addl. Commissioner of
Village: Phulokhari, Income Tax,
Tehsil: Talwandi Sabo, Circle-1,
Dist. Bathinda, Bathinda.
Punjab – 151301.

(Appellant)

(Respondent)

Assessee by : Shri Gaurav Jain, Advocate
Department by : Smt. Prabhjot Kaur, CIT, DR

Date of Hearing : 03.05.2018
Date of Pronouncement : 07.05.2018

ORDER

The following point of difference has been referred to me by the Hon'ble President under section 255(4) of the Income-tax Act, 1961 (hereinafter also called as 'the Act') :

“Whether, in case where the satisfaction of the AO while initiating penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 is with regard to alleged concealment of income by the assessee, whereas the imposition of the penalty is for ‘concealment/furnishing inaccurate particulars of income’, the levy of penalty is not sustainable?”

2. The difference of opinion has arisen in four appeals of two different but connected assessees relating to the assessment years 2008-09 and 2009-10. A glimpse into the facts, relevant for my purpose, is necessary to appreciate the core of the controversy. The Assessing Officer (AO) imposed penalty u/s 271(1)(c) of the Act, with reference to the second revised return, for the assessment year 2008-09 in the case of HPCL Mittal Energy Ltd. on three counts, viz., disallowance of business loss of Rs.5.68 crore; non-declaration of interest income of Rs.23.61 crore from deposits with banks and HPCL; and non-declaration of interest income of Rs.73 lac on FDRs as security given to the Trial court. These disallowance/additions were made in the assessment order, after recording due satisfaction, which were confirmed in quantum appeal by the Id. CIT(A) and also stood countenanced by the Tribunal. Penalty notice u/s 274 of the Act was issued by stating that the assessee ‘concealed the particulars of income’ *qua* the above three disallowance/additions. However, the penalty order was passed holding that ‘the assessee concealed the particulars of his income/furnished inaccurate particulars of such income.’ Penalty in the case of

HPCL Mittal Pipelines Ltd. was initiated by the AO for the A.Y. 2008-09 by means of notice u/s 274 with reference to the second revised return on the charge of 'concealment of particulars of income' on three items, viz., disallowance of business loss; non-declaration of interest income from deposits with banks and HPCL; and non-declaration of interest income on FDRs as security given to the Trial court. The assessee was found guilty in the penalty order of having 'concealed the particulars of his income/furnished inaccurate particulars of such income'. Penalties in the case of HPCL Mittal Energy Ltd. and HPCL Mittal Pipelines Ltd. for the A.Y. 2009-10 were initiated by the AO by means of notices u/s 274 with reference to the second revised return on the charges of 'concealment of particulars of income' on two items, viz., non-declaration of interest income from deposits with banks and HPCL; and non-declaration of interest income on FDRs as security given to the Trial court. However, the assessees were eventually found guilty in the penalty orders of having 'concealed the particulars of his income/furnished inaccurate particulars of such income.' All the penalty orders stood affirmed in the first appeals.

3. It was contended in the appeals before the Tribunal that the penalty was not sustainable, *inter alia*, on the ground that the AO leveled charge of 'concealment of income' in all the assessment orders and also issued penalty

notices on the same charge, but found the assesses guilty in the penalty orders on a different and vague default of 'concealment of the particulars of income/furnishing of inaccurate particulars of income.' The Id. JM concurred with the submissions advanced on behalf of the assessee on this preliminary legal ground and ordered deletion of penalty in his proposed common order for all the four appeals. In striking down the penalty on this score, the Id. JM relied on the judgments in the case of *New Sorathia Engineering Co. vs. CIT (2006) 282 ITR 642 (Guj)* and *Padma Ram Bharati vs. CIT (1977) 110 ITR 54 (Gau.)*. In view of the deletion of penalties on this legal issue, he did not delve into the merits of the appeals. On the other hand, the Id. AM passed assessee-wise two separate orders sustaining the penalty on merits. He noticed in para 7 of his proposed order in the case of HPCL Mittal Energy Ltd. that: 'the Id. Assessing Officer rightly initiated the penalty proceedings for concealment of particulars of income. However, in penalty order, the Id. Assessing Officer has held that the assessee had intentionally and deliberately concealed/furnished inaccurate particulars of income.....'. Thereafter, he referred to the provisions of section 271(1B) of the Act inserted by the Finance Act, 2008 w.r.e.f. 01.04.1989 and held that the assessee's case was covered under this provision. He did not elaborately discuss the consequences of initiating penalty by the AO on the

ground of `concealment of particulars of income', but ultimately imposing penalty on `concealment of particulars of income/furnishing inaccurate particulars of such income'. Thereafter, difference in the opinions was formulated and signed by both the Members in terms of the above question. Since the Id. AM has also signed the above extracted solitary question referred to me in the capacity of Third Member, it has to be necessarily inferred that the recordings made by him in para 7 of his proposed order express his dissent with the Id. JM on the issue of deletion of penalty on the preliminary legal issue as discussed hereinabove.

4. The referred question restricts my domain only to deciding if penalty u/s 271(1)(c) of the Act can be sustained when the assessment order is passed and penalty is initiated with regard to the charge of `concealment of particulars of income', but, is eventually imposed by finding the assessee guilty of `concealment of particulars of income/furnishing inaccurate particulars of such income'. In that view of the matter, I am not supposed to travel beyond such question and decide on the sustainability or otherwise of penalty on merits.

5. Coming back to the facts relating to four appeals under consideration, it is seen that the assessment orders were passed recording satisfaction and containing direction that the assessees concealed the particulars of their income;

penalty notices also recorded similar charge of concealment of particulars of income; but penalty orders found the assesses guilty of concealment of particulars of income/furnishing of inaccurate particulars of such income.

6. At this juncture and before espousing the main question, it would be befitting to first decide as to whether the three items constituting bedrock of penalty, viz., disallowance of business loss; non-declaration of interest income from deposits with banks and HPCL; and non-declaration of interest income on FDRs as security given to the Trial court, fall under the expression 'concealment of the particulars of income' or 'furnishing of inaccurate particulars of such income'. The Hon'ble Supreme Court in *CIT vs. U.P. State Forest Corporation (1998) 230 ITR 945 (SC)* has held that if the meaning of a word is not found in the relevant statute, then its meaning should be found out from the General Clauses Act and if it is not defined in that Act as well, then its popular meaning should be considered. Admittedly, the above two expressions have neither been defined under the Act nor the General Clauses Act. In such a scenario, their popular meanings have to be seen and understood. In common parlance, the word 'conceal' means 'to hide' and the word 'particulars' is understood as 'details'. Accordingly, the expression 'concealment of particulars of income' means 'hiding the details of income'. Concealing the particulars of income or

hiding details of income, ergo, pre-supposes the *existence of some income*, which has been hidden or not been shown by the assessee. It may include not reporting transaction of sale of property and consequently hiding capital gain. It may also include making sales outside the books of account and, resultantly, hiding profit earned from such sales. It may also include earning of some interest income but hiding it by not declaring it. The second expression is 'furnishing of inaccurate particulars of such income.' 'Inaccurate' means not accurate or correct. 'Inaccurate particulars' of income means the 'details of income which are not correct'. This would embrace situations where the total income goes under-reported because of the assessee furnishing wrong details. It may include claiming certain deductions of expenses which are not legitimately due to the assessee. It may also include claiming certain exemptions of income which are otherwise not available as per law. Both the expressions, viz., 'concealment of particulars of income' and 'furnishing of inaccurate particulars of such income' ultimately lead to under-reporting of income. Whereas the former connotes under-declaration by directly hiding the details of some items of income, the latter encompasses under-declaration of income indirectly, that is, by furnishing details in such a way which ultimately results in not reporting correct income, but such under-reporting is otherwise than by means of direct

hiding. The nitty-gritty of the matter is that whereas 'concealment of particulars of income' implies not at all declaring a particular income, which eventually results in under-declaration of income, 'furnishing of inaccurate particulars of income' implies giving details of some items of income/expenses, but, claiming them exempt/deductible, fully or partly, which is actually not the case and such action of the assessee results in under-declaration of total income. With the above understanding of the ambit of the two expressions, I will now proceed to examine the true nature of three disallowance/additions, *in seriatim*, which form the basis of penalty in the four appeals under consideration.

7. First is the disallowance of business loss. Facts of this issue for the A.Y. 2008-09 in HPCL Mittal Energy Ltd. are that the assessee incurred certain expenses and computed business loss of Rs.5.68 crore, which was carried forward for set off in the succeeding year. The AO observed that the business of the assessee had not commenced during the year and, hence, the loss was not eligible for determination and carry forward. The view taken by the AO has been eventually upheld up to the Tribunal. It is apparent that the assessee computed business loss at Rs.5.68 crore by incurring certain expenses. Instead of capitalizing such expenses because of the business not having been set up during the year, the assessee sought to carry it forward for set off in subsequent

years. It is manifest that in this disallowance of business loss, there is no income which was sought to be directly hidden by the assessee by not offering its particulars. In fact, it represents certain expenses which the assessee sought to carry forward in the shape of business loss for set off against the income of the succeeding year. By no standard, the action of the assessee in such carry forward of business loss can be characterized as 'concealment of particulars of income'. Rather, this disallowance of business loss falls within the purview of the expression 'furnishing of inaccurate particulars of income.' Facts of HPCL Mittal Pipeline Ltd. are similar for the A.Y. 2008-09.

8. The second item in the case of HPCL Mittal Energy Ltd. is interest income of Rs.23.61 crore earned on term deposits with banks and HPCL during the period relevant to the A.Y. 2008-09. The third item is interest income of Rs.72.99 lac which was earned on fixed deposits in bank as security given to the Trial court. The AO made out a case that the assessee did not offer these two items of interest income, totaling to Rs.24.34 crore. On the other hand, the correct position in this regard is that during the year under consideration, the assessee was in the process of setting up of a refinery and the commercial operations had not started. It is discernible from the Annual accounts of the assessee for the relevant year that under the head of 'Fixed assets', the assessee

declared an amount of Rs.81.59 crore under the sub-head 'Expenditure during construction period (pending capitalization).' Detail of such expenditure capitalized in the balance sheet is available as per schedule 5 to the Balance sheet. Copy of schedule 5 is on page 87 of the paper book. It is perceptible that the assessee computed the amount of Rs.81.59 crore under this sub-head after explicitly reducing the amount of 'Interest on bank deposits' to the tune of Rs.24.34 crore. It was done on the premise that the interest earned on FDRs pertaining to the period of setting up of refinery was liable to be reduced from the costs incurred for capitalization. The assessee reduced such amount of interest of Rs.24.34 crore on the face of schedule 5 forming part of Annual accounts, which deciphers that there was no concealment of particulars of income inasmuch as no amount of income was sought to be hidden by the assessee. Rather, it is a case of showing the interest income separately in books of accounts and then categorically reducing it from the expenditure incurred during the construction period, while finalizing the Annual accounts, and that too, on the face of the schedule to the balance sheet. Thus, it is vivid that interest earned on term deposits with banks and HPCL and also on deposits in banks as security given to the Trial court falls in the category of 'furnishing of inaccurate particulars of income.' The facts concerning such interest income in other three

appeals are *mutatis mutandis* similar inasmuch as the assessee reduced the amount of similar interest from the 'Expenditure during construction period' by specifically reducing it from the costs incurred and showing such treatment on the face of the balance sheets. The action of the assesses in reducing the amount of interest from the expenditure during construction period can't be characterized as 'concealment of particulars of income'. Rather, it falls within the purview of the expression 'furnishing of inaccurate particulars of income.'

9. On an analysis of the factual matrix narrated above, it is manifested that the AO recorded satisfaction *qua* the three items of disallowance/additions leading to penalty, as 'concealment of income' in all the assessment orders ; initiated penalty in all the four cases by treating them as covered under the expression 'concealment of particulars of income'; and then finally passed penalty orders on the assesses finding them guilty of 'concealment of particulars of income/furnishing inaccurate particulars of such income'. As against that, the actual position is that all the three items of disallowance/additions fall only under the category of 'furnishing of inaccurate particulars of income'. Now the question arises if the penalty is sustainable in such circumstances?

10. At this juncture, it is pertinent to note that penalty proceedings are distinct from the assessment proceedings. Merely because an addition has been made or

confirmed in the assessment, does not, *per se*, lead to imposition of penalty u/s 271(1)(c). Penalty proceedings are separately initiated on conclusion of the assessment, in which the assessee is given an opportunity to explain his position *qua* the imposition of penalty on the additions/disallowances made in the assessment. The AO considers the explanation of the assessee and then decides if the penalty is imposable or not. Further, the opinion of the AO as to concealment of particulars of income or furnishing of inaccurate particulars of such income has to be seen with reference to the day on which he initiates/imposes penalty. Later events, like confirmation or deletion of additions/disallowances in quantum appeals, are irrelevant in this context.

11. It transpires from the above discussion that, in so far as the issue before me is concerned, there are broadly two different stages having bearing on the imposition of penalty, namely, assessment and penalty. At the assessment stage, the AO has to record a satisfaction in the assessment order as to whether the additions/disallowances, on which penalty is likely to be imposed, represent concealment of particulars of income or furnishing of inaccurate particulars of income. There can be two sub-stages in penalty proceedings requiring the AO to record such satisfaction, viz., at the time of initiating the penalty proceedings

and at the time of passing the penalty order. I will deal with such two stages in the present context.

a) Recording of satisfaction at the assessment stage.

12. It has been noticed hereinabove that the first stage of imposition of penalty is recording of satisfaction by the AO in the assessment order as to whether the assessee concealed the particulars of income or furnished inaccurate particulars of income. There was a lot of litigation on this point. The assessees were contending before the appellate courts that the AO had not recorded proper satisfaction in the assessment order and hence the penalty should be deleted. On the other hand, the Department was contending that the satisfaction was properly recorded. Considering the magnitude of litigation on the point, the Finance Act, 2008, inserted sub-section (1B) to section 271, w.r.e.f. 1.4.1989, which runs as under : -

‘Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and the said order contains a direction for initiation of penalty proceedings under clause (c) of sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c).’

13. The effect of this insertion is that when an amount is added or disallowed in an assessment and the order contains a direction for initiation of penalty proceedings u/s 271(1)(c), it shall be deemed to constitute satisfaction of the AO for initiation of the penalty proceedings. Crux of the new provision is that a mere direction in the assessment order to initiate penalty proceedings under clause (c) is sufficient to conclude that the AO recorded proper satisfaction as to whether the additions/disallowances are 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income' or both. It is incorrect to argue that even after the insertion of sub-section (1B), the AO still needs to specifically record as to whether each item of addition/disallowance is a case of concealment of particulars of income or furnishing of inaccurate particulars of income. Deeming 'satisfaction' under clause (c) in terms of sub-section (1B) means deeming 'proper satisfaction' and 'proper satisfaction' means getting satisfied as to whether it is a case of concealment of particulars of income or furnishing of inaccurate particulars of such income. It cannot be conceived that a direction to initiate penalty proceedings in the assessment order is only 'satisfaction' and not 'proper satisfaction'. This contention, if taken to a logical conclusion, would mean that after such a direction in the assessment order constituting his satisfaction, the AO should once again specifically record

satisfaction with reference to each addition or disallowance as to whether it is a case of concealment or furnishing of inaccurate particulars. It is obviously an absurd proposition and goes against the unambiguous language of the provision. Thus, it is overt that after insertion of sub-section (1B) to section 271, invariably, the AO should be deemed to have recorded proper satisfaction with reference to each addition/disallowance as to concealment or furnishing of inaccurate particulars, once a direction is contained in the assessment order to initiate penalty u/s 271(1)(c) of the Act. Requiring the recording of separate satisfaction, once again, by the AO would militate against the deeming provision contained in sub-section (1B). Admittedly, in all the four appeals under consideration, the AO directed to initiate penalty u/s 271(1)(c) of the Act in the assessment orders. Thus, the Revenue can be safely considered to have successfully passed out the first stage.

b) Recording of satisfaction at the penalty stage

14. It has been noted above that penalty proceedings are separate from assessment proceedings, which get kicked with the issue of notice u/s 274 and culminate in the penalty order u/s 271(1)(c) of the Act. Many a times, penalty initiated in the assessment order on one or more counts by means of notice u/s 274, is not eventually imposed by the AO on getting satisfied with the

explanation tendered by the assessee in the penalty proceedings. In any case, confronting the assessee with the charge against him is *sine qua non* for any valid penalty proceedings. It is only when the assessee is made aware of such a charge against him that he can present his side. Thus prescribing the charge in the penalty notice and penalty order is must. Absence of a charge in the penalty notice or not finding the assessee guilty of a clear offence in the penalty order, vitiates the penalty order.

15. The moot question is that what should be the nature of specification of a charge by the AO at the stage of initiation of penalty proceedings and at the time of passing the penalty order. Is the AO required to specify in the penalty notice/order as to whether it is a case of 'concealment of particulars of income'; or 'furnishing of inaccurate particulars of income'; or both of them, which can be expressed by using the word 'and' between the two expressions. When the AO is satisfied that it is a *clear-cut* case of concealment of particulars of income, he must specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. The AO cannot initiate penalty on the charge of 'concealment of particulars of income', but ultimately find the assessee guilty in the penalty order of 'furnishing inaccurate particulars of income'. In the same manner, he cannot be uncertain in the penalty order as to concealment or

furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a *clear-cut* case of `furnishing of inaccurate particulars of income', he must again specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. After initiating penalty on the charge of `furnishing of inaccurate particulars of income', he cannot impose penalty by finding the assessee guilty of `concealment of particulars of income'. Again, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a *clear-cut* case of imposition of penalty u/s 271(1)(c) of the Act on two or more additions/disallowances, one or more falling under the expression `concealment of particulars of income' and the other under the `furnishing of inaccurate particulars of income', he must specify it so by using the word `and' between the two expressions in the notice at the time of initiation of penalty proceedings. If he remains convinced in the penalty proceedings that the penalty was rightly initiated on such counts and imposes penalty accordingly, he must specifically find the assessee guilty of `concealment of particulars of income' and also `furnishing of inaccurate particulars of income' in the penalty order. If the charge is not levied in the above manner in all the three *clear-cut* situations

discussed above in the penalty notice and also in the penalty order, the penalty order becomes unsustainable in law.

16. The Hon'ble Karnataka High Court in *Manjunatha Cotton and Ginning Factory 359 ITR 565 (Kar)* has held that a person who is accused of the conditions mentioned in section 271 should be made known about the grounds on which they intend imposing penalty on him as section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in section 271(1)(c) do not exist as such he is not liable to pay penalty. The Hon'ble High Court went on to hold that : `Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income.... But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law. Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid'.

17. In *CIT vs. Manu Engineering Works (1980) 122 ITR 306 (Guj)* penalty was imposed by noting : `that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income'. Striking down the penalty, the Hon'ble High Court held that : `it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down.'

18. In *Padma Ram Bharali vs. CIT (1977) 110 ITR 0054 (Gau)*, the Hon'ble High Court did not sustain penalty levied u/s 271(1)(c) when : `the initiation of the penalty proceeding was for concealment of the particulars of income. But the Tribunal finally held that the assessee would be deemed to have concealed the particulars of income or to have furnished inaccurate particulars of such income.'

19. Thus it is evident that when the AO is satisfied at the stage of initiation of penalty proceedings of a *clear-cut* charge against the assessee in any of the three situations discussed above (say, concealment of particulars of income), but

imposes penalty by holding the assessee as guilty of the other charge (say, furnishing of inaccurate particulars of income) or an uncertain charge (concealment of particulars of income/furnishing of inaccurate particulars of income), the penalty cannot be sustained.

20. Another crucial factor to be kept in mind is that that the satisfaction of the AO as to a *clear-cut* charge leveled by him in the penalty notice or the penalty order must concur with the actual default. If the clear-cut charge in the penalty notice or the penalty order is that of `concealment of particulars of income', but it turns out to be a case of `furnishing of inaccurate particulars of such income' or *vice-versa*, then also the penalty order cannot legally stand.

21. Apart from the above three situations in which the AO has *clear-cut* satisfaction, there can be another fourth situation as well. It may be when it is definitely a case of under-reporting of income by the assessee for which an addition/disallowance has been made, but the AO is not sure at the stage of initiation of penalty proceedings of the precise charge as to `concealment of particulars of income' or `furnishing of inaccurate particulars of income'. In such circumstances, he may use slash between the two expressions at the time of initiation of penalty proceedings. However, during the penalty proceedings, he must get decisive, which should be reflected in the penalty order, as to whether

the assessee is guilty of 'concealment of particulars of income' or 'furnishing of inaccurate particulars of such income'. Uncertain charge at the time of initiation of penalty, must necessarily be substituted with a conclusive default at the time of passing the penalty order. If the penalty is initiated with doubt and also concluded with a doubt as to the concealment of particulars of income or furnishing of inaccurate particulars of such income etc., the penalty order is vitiated. If on the other hand, if the penalty is initiated with an uncertain charge of 'concealment of particulars of income/furnishing of inaccurate particulars of income' etc., but the assessee is ultimately found to be guilty of a specific charge of either 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income', then no fault can be found in the penalty order.

22. In *Manu Engineering Works (supra)*, the Hon'ble Gujarat High Court noticed that the charge at the stage of initiation of penalty proceedings as well in the penalty order was uncertain and the expression used at both the stages was concealment of particulars of income and/or furnishing of inaccurate particulars of such income. It struck down the penalty by holding that the assessee must have been found to be guilty of a certain charge in the penalty order. It, however, did not find anything amiss with the initiation of penalty on such uncertain charge, which is vivid from the following observations : -

‘We find from the order of the IAC, in the penalty proceedings, that is, the final conclusion as expressed in para. 4 of the order : "I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income". *Now, the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee.*’

23. It is thus evident that uncertain charge at the stage of initiation of penalty proceedings can be made good with a clear-cut charge in the penalty order. In any case, existence of a *clear-cut* charge in penalty order is a must so as to validate any penalty order.

24. Coming back to the factual position obtaining in these cases, it is seen that the penalty orders have been vitiated on two counts. First, the AO initiated penalty with a specific and *clear-cut* charge of ‘concealment of particulars of income’ in all the penalty notices, however, the assessees have been found guilty in all the penalty orders on the uncertain and vague default of ‘concealment

/furnishing of inaccurate particulars of income'. Second, the *clear-cut* or certain charge of 'concealment of particulars of income' levied in all the penalty notices is wrong. The actual default is 'furnishing of inaccurate particular of such income', which also renders the penalty orders invalid.

25. The ld. DR contended that the use of a particular grammatical sign '/' is not determinative of the charge. It cannot invalidate penalty proceedings. She further submitted that the penalty orders are in substance and effect in conformity with or according to the intent and purpose of the Act. Use of '/' by the AO is a case of imperfect drafting arising from the fact that 'penalty u/s 271(1)(c)' is often written/mentioned as 'penalty for concealment/furnishing of inaccurate particulars of income'. She further submitted that the two phrases are often interchangeable. She also invoked the provisions of section 464 of the Code of Criminal Procedure, 1973, to contend that no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder..... of the charges unless, in the opinion of court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby'. She also referred to section 292B of the Act for the same proposition.

26. The sum and substance of her submissions is that the penalty orders cannot be declared invalid on a wrong mentioning of the charge either in the penalty notices or penalty orders, since such a wrong mentioning is nothing but a mere procedural irregularity. In my considered opinion, the view canvassed by the Id. DR cannot be countenanced because the action of the AO, as discussed above, is not a mere procedural error. These defaults go to the root of the matter. All the Hon'ble High courts are *consensus ad idem* in their opinion on the above issue. Not even a single contrary judgment has been brought on record by the Id. DR. Insofar as invoking section 292B of the Act is concerned, in my view, the same has no applicability, as it is triggered only when there is some mistake, defect or omission in a notice or an order etc., which is otherwise in substance and effect in conformity with or according to the intent and purpose of this Act. The extant defaults in the penalty notices/orders are so fundamental that they cannot be construed as elementary or basic mistakes etc. so as to leave them in substance and effect in conformity with the intent and purpose of the Act.

27. In view of the foregoing discussion, I am satisfied that the penalty was wrongly imposed and confirmed in all the four appeals under consideration. I, ergo, agree with the Id. JM. in striking down all the penalty orders. The question posed is, therefore, answered in affirmative to the effect that where the

satisfaction of the AO while initiating penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 is with regard to alleged concealment of income by the assessee, whereas the imposition of the penalty is for 'concealment/furnishing inaccurate particulars of income', the levy of penalty is not sustainable.

28. The Registry of the Tribunal is directed to list these appeals before the Division Bench for passing an order in accordance with the majority view.

Sd/-

[R.S. SYAL]
VICE PRESIDENT

Dated, 07th May, 2018.

dk

Copy forwarded to:

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

AR, ITAT, NEW DELHI.