

# THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 22.01.2013

+ ITA No.415/2012

CIT ... Appellant

versus

MAK DATA LTD ... Respondent

**Advocates who appeared in this case:**

For the Petitioner : Mr Sanjeev Sabharwal, Adv.

For the Respondent : None

**CORAM:-**

**HON'BLE MR JUSTICE BADAR DURREZ AHMED**

**HON'BLE MR JUSTICE R.V.EASWAR**

**JUDGMENT**

**R.V.EASWAR, J**

The following substantial question of law was framed by this Court on 11<sup>th</sup> October, 2012:-

*“Whether the Tribunal fell into error in setting aside the order of penalty imposed by the AO and upheld by the CIT (A)?”*

2. This is an appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act' for short) and it pertains to the assessment year 2004-05. An assessment was completed upon the assessee under Section 143(3) of the Act in which an addition of ₹40,74,700/- was made

in the following circumstances. There was a survey under Section 133A on 16<sup>th</sup> December, 2003 in the course of which some documents pertaining to the assessee were found and were impounded. These documents consisted of blank transfer deeds for shares duly signed, affidavits, share application forms, copies of bank accounts, income tax returns and assessment orders of certain other companies. Those documents were forwarded to the AO assessing the present assessee who called upon the assessee to explain the contents of the documents and the genuineness of the transactions represented by them. It appears that the documents belonged to certain entities who had applied for shares in the assessee company. What the AO wanted the assessee to do was to prove the nature and source of the monies received as share capital, the creditworthiness of the applicants and the genuineness of the transactions.

3. In response to the above notice which was issued on 26<sup>th</sup> October, 2006, the assessee stated as under:-

*“It has been stated that the company had received share application money from different entities aggregating to a sum of ₹239 lacs during the past 3 years as:*

<u>Assessment Year</u>	<u>Amount</u>
2002 – 2003	12,00,000

2003 – 2004	1,06,50,000
2004 – 2005	<u>1,20,50,000</u>
	2,39,00,000

*The company with a view to avoid litigation and buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the Income Tax Department offers to surrender a sum of ₹56.49 lacs as income from other sources.*

*In this context we also wish to bring on record the fact that Sh. V. K. Aggarwal, Promoter Director of the company had offered a sum of ₹1,82,51,000/- for taxation as “income from other sources” in the hands of the partnership firm M/s. Marketing Services. Sh. V.K. Aggarwal is the partner of M/s. Marketing Services and the firm is being assessed with the CIT XI, New Delhi, this income of ₹1,82,51,000/- was duly subjected to tax by CIT XI in the following manner:*

<u>Assessment Year</u>	<u>Amount</u>
2001 – 2002	₹48,97,000/-
2002 – 2003	₹40,68,000/-
2003 – 2004	<u>₹92,86,000/-</u>
	₹1,82,51,000/-

*It has also been stated that Sh. V.K. Aggarwal, Promoter-Director of the assessee company has utilized this offered sum of ₹1,82.51 lacs for inducting funds into the books of the assessee company as share application money. It has been stated further that the additional fund flow to the extent of ₹56.49 lacs (239 lacs – 182.51 lacs) which remain unexplained is now being offered for taxation by the company*

*as its income from other sources. Subject to the condition that the offer of the surrender is by way of voluntary disclosure without admitting any concealment whatsoever or any intention to conceal and subject to non initiation of penalty proceedings and prosecution.”*

It appears that thereafter the assessee filed an application before the Addl. Commissioner of Income Tax under Section 144A soliciting directions for expediting the assessment proceedings and therein it indicated its willingness to be assessed on an amount of ₹56.49 lacs as its income under the head “income from other sources”. It may be noticed that this figure represents the difference between the amount of ₹239 lacs and ₹1,82,51,000/-. After certain correspondence between the AO and the Addl.CIT, a letter was issued on 27<sup>th</sup> December, 2006 containing the directions of the Addl.CIT. The entire directions are reproduced in the assessment order and is, therefore, not reproduced here for the sake of brevity. It suffices to note that before the Add. CIT the assessee would appear to have scaled down the offer from ₹56.49 lacs to ₹40.74 lacs on the ground that the peak investment should be taken at ₹2,19,50,000/- instead of ₹239 lacs as calculated earlier. The AO, on the basis of the directions of the Addl. CIT called upon the assessee to furnish the

relevant documents and information regarding the fresh offer of ₹40,74,000/-. The purpose appears to be merely to verify the reconciliation between the earlier offer of ₹56.49 lacs and the revised offer of ₹40.74 lacs. After having carried out the verification the amount of ₹40.74 lacs was added as “income from other sources” with the following narration “As per direction of the Addl. CIT Range-6 and further discussion with the assessee’s A.R. a sum of ₹40,74,000/- is treated as income from other sources”

4. There was no appeal against the aforesaid addition by the assessee. The addition of ₹40,74,000/- thus became final.

5. Subsequently the AO initiated penalty proceedings for furnishing inaccurate particulars of its income under Section 271(1)(c) of the Act. The gist of the assessee’s reply was that the amount was offered as income only to buy peace and avoid protracted litigation and with the condition that no penalty or prosecution proceedings would be launched. It was further stated that the offer was made before any investigation was carried out into the matter and, therefore, was voluntary. Several authorities were relied upon in support of the submission. However, the submissions were rejected by the AO who, by the order dated 23.4.2007,

imposed the minimum penalty of ₹14,16,600/- for furnishing inaccurate particulars of income to the extent of ₹40,74,000/-. The ultimate findings of the AO on the basis of which the penalty was imposed were as follows:-

*“23. The reply furnished by the assessee has been considered & found to be unsatisfactory because of the following: -*

- a) In the return filed by the assessee the assessee has not offered the amount of ₹40.74 lacs for taxation voluntarily.*
- b) The assessee has surrendered the above amount of ₹40.74 lacs during course of assessment proceeding when the impounded material was confronted to the assessee which was impounded during course of survey u/s 133A of the IT Act, 1961 on 16.12.2003 at the business premise of Marketing Services.*
- c) The assessee has furnished inaccurate particulars of its income in the return of income filed on 27.10.2004 for the year under consideration.*
- d) The satisfaction was recorded at the time completing assessment proceedings u/s 143(3) of the I.T. Act, 1961.*
- e) The assessee has itself surrendered for tax, the addition sum of ₹40,74,000/- which it was asked to explain the source of share application money. Moreover, admitted facts need not to be proved by the Assessing Officer, as in this case, the assessee itself*

*admitted the concealment of income to the extent of ₹40,74,000/- by offering the amount for tax.*

*In view of the above facts and circumstances of the case, I am satisfied that it is a fit case for imposition of penalty u/s 271(1)(c) read with section 274 of the IT Act, 1961.”*

6. The assessee preferred an appeal to the CIT(Appeals) who rejected the submissions of the assessee and confirmed the penalty. A further appeal was preferred by the assessee to the Income Tax Appellate Tribunal ('Tribunal' for short) in ITA No.1896/Del/2010. The levy of the penalty was opposed on the ground that the surrender of income was made *suo moto* before any investigation, that there was no other evidence in the possession of the income tax authorities except the surrender, and that the levy of penalty without recording any finding on the merits of the assessee's plea was untenable. The Tribunal on examination of the facts and the rival contentions cancelled the penalty recording the following findings:-

- (a) It was only after the directions of the Addl.CIT issued under Section 144A that the assessee's offer was accepted and the assessment was finalized;

- (b) There was no material against the assessee to show any concealment and this fact has been admitted by the AO himself; there is not even any indication in the penalty order as to the particular credit in respect of which the penalty was being imposed;
- (c) The fact that the assessee surrendered the income only when it was confronted with the documents found in the survey does not adversely affect its case.
- (d) The assessee did not admit that it had concealed the income to the extent of ₹40,74,000/-; it had made it clear in the letter dated 22.11.2006 that the surrender was made without any admission of concealment or intention to conceal.
- (e) The offer was made in a spirit of settlement of the dispute with the revenue and no investigation was carried out by the AO to prove concealment.

In support of the aforesaid findings the Tribunal referred to several authorities.

7. The contention of the revenue before us is that the Tribunal failed to appreciate the provisions of Explanation-1 to Section 271(1)(c) of the



Act. We think that there is force in the contention. Section 271(1)(c) provides for levy of penalty for concealing the particulars of income or furnishing inaccurate particulars of the income. Explanation-1 is as below:-

*“Explanation 1.--Where in respect of any facts material to the computation of the total income of any person under this Act,--*

- (A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Commissioner to be false, or*
- (B) Such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him], then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.”*

In the case before us the revenue is right in contending that there was absolutely no explanation from the assessee in respect of the amount of ₹40,74,000/-; when the AO called upon the assessee to produce the evidence as to the nature and source of the amount received as share capital, the creditworthiness of the applicants and the genuineness of the

transactions the assessee simply folded up and surrendered a sum of ₹56.49 lacs in its hands initially, which was later scaled down to ₹40,74,000/-. The assessee merely stated that with a view to avoid litigation and buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department, it surrendered the income under the head “income from other sources”. In the absence of any explanation in respect of the surrendered income, the first part of clause (A) of Explanation 1 is attracted. It cannot be denied that the nature and source of the amount surrendered are facts material to the computation of the total income of the assessee. The Revenue is entitled to know the same and if the nature and source of the amount are not explained, it is entitled to draw the inference that the amount represents the assessee’s taxable income. Though this principle was originally confined to the assessment proceedings, the Explanation has extended it to penalty proceedings also, presumably on the assumption that the furnishing of an explanation regarding the nature and source would have compromised the assessee’s position. It is the assessee who has received the monies and is in the knowledge of all the facts relevant and material in relation to the receipt.

Therefore, it should be in a position to offer an explanation and disclose the material facts regarding the same. The absence of any explanation is statutorily considered as amounting to concealment of income. In the absence of any explanation regarding the receipt of the money, which is in the exclusive knowledge of the assessee, an adverse inference is sought to be drawn against the assessee under the first part of clause (A) of the said Explanation. This appears to be somewhat in the lines of Section 106 of the Evidence Act, the principle behind which has been extended to the provisions of Section 271(1)(c) of the Act.

8. We are satisfied that the Tribunal fell into error in setting aside the penalty imposed by the AO and upheld by the CIT(Appeals). We accordingly answer the substantial question of law in the affirmative, against the assessee and in favour of the revenue. The appeal of the revenue is allowed with no order as to costs.

**R.V.EASWAR, J**

**BADAR DURREZ AHMED, J**

**JANUARY 22, 2013**

Bisht

IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH "E" DELHI)

BEFORE SHRI G.D. AGARWAL, HON'BLE VICE PRESIDENT  
AND SHRI A.D. JAIN, JUDICIAL MEMBER

ITA NO. 1896(Del)2010  
Assessment year: 2004-05

M/s. Mak Data Limited, Income Tax Officer,  
E-58, Greater Kailash Part I, New Delhi. V. Ward 6(2), New Delhi.

(Appellant)

(Respondent)

Appellant by: Shri Ved Jain & Mrs. Rano Jain, CAs  
Respondent by: Shri R.S. Negi, Sr. DR

ORDER

PER A.D. JAIN, J.M.

This is assessee's appeal for the assessment year 2004-05 against the order dated 17.2.2010 passed by the learned Commissioner of Income Tax(Appeals), IX, New Delhi, confirming the penalty of ` 14,61,547/-, imposed on the assessee u/s 271(1) (c) of the Income Tax Act. The following grounds have been taken:-

1. *"On the facts and circumstances of the case, the order passed by the ld. CIT(A) is bad, both in the eye of law and on facts.*

2. *On the facts and circumstances of the case, the ld. CIT(A) has erred, both on facts and in law, in ignoring the contention of the appellant that no penalty is leviable as the appellant has surrendered the income suo-motto and as such there is neither concealment nor furnishing inaccurate particulars of income.*
  3. *On the facts and circumstances of the case, the ld. CIT(A) has erred, both on facts and in law, in confirming the penalty as the additions was made only on the basis of surrender made by the assessee and not with reference to any documentary evidence.*
  4. *On the facts and circumstances of the case, the ld. CIT(A) has erred, both on facts and in law, in rejecting the contention of the assessee that the levy of penalty is untenable no finding has been given on merit regarding concealment in the penalty order passed by the AO.*
  5. *On the facts and circumstances of the case, the ld. CIT(A) has erred, both on facts and in law, in rejecting the contention of the appellant that the order passed by the AO levying penalty is untenable in the eye of law as no satisfaction, as required under the law, has been recorded by the AO in the assessment order.”*
2. The facts are that the assessee company is engaged in the business of earning commission from sale of Heavy Machines and running of Hotel. During the year, it showed total receipts of ` 84,81,498/- as against ` 45,22,539/- of the immediately preceding assessment year. It declared net profit of ` 32,11,376/- against that of ` 9,59,880/- of the immediately preceding assessment year. A survey was conducted on 16.12.2003, in the

case of Marketing Services, New Delhi. Some documents pertaining to the assessee company were found and impounded. These documents comprised of signed blank transfer deeds, MOA of companies, affidavits, share application forms, copy of bank account, copies of Income Tax returns and assessment orders. etc. These documents were forwarded to the AO of the assessee company. The AO found that the documents belonged to some companies/firms/individuals, who had applied for the shares in the assessee company. The assessee was asked to explain as to why these documents had been lying with them and to prove the genuineness of the transactions and the credit worthiness of the persons and the source of the investment, by producing the persons. The assessee filed reply dated 22.11.2006. Therein, it was stated that the assessee had received share application money from different entities, amounting to ` 2,39,00,000/- during the past three years, as follows:-

<u>Assessment year</u>	<u>Amount</u>
2002-03	12,00,000/-
2003-04	1,06,50,000/-
2004-05	1,20,50,000/-
	-----
Total:	2,39,00,000/-
	=====

3. The assessee company offered to surrender a sum of ` 56.49 lakhs as income from other sources, statedly with a view to avoid litigation and to buy peace and to channelise the energy and resources towards productive work and to make amicable settlement with the Department. It was further stated that Shri V.K. Aggarwal, Promoter Director of the company had offered a sum of ` 1,82,51,000/- for taxation as income from other sources in the hands of the partnership firm, M/s. Marketing Services, which was being assessed with the CIT, XI, New Delhi; that this income of ` 1,82,51,000/- had been duly subjected to tax by the CIT,XI, as follows:-

<u>Assessment year</u>	<u>Amount</u>
2001-02	48,97,000/-
2002-03	40,68,000/-
2003-04	92,86,000/-
	-----
Total:	1,82,51,000/-
	=====

4. It was further stated that Shri V.K. Aggarwal had utilized this offered sum of ` 1,82,51,000/- for inducting funds into the books of the assessee company as share application money; that the additional fund flow to the extent of ` 56,49,000/-, i.e., the difference between ` 2,39,00,000/- and `

1,82,51,000/-, which remained unexplained was, at that stage, being offered for taxation by the company as its income from other sources, subject to the condition that offer of the surrender was by way of voluntary disclosure without admitting any concealment or any intention to conceal and subject to non-initiation of penalty proceedings and prosecution.

5. Later, the assessee filed a petition u/s 144 A of the I.T. Act before the ACIT, for expediting the assessment proceedings. A copy thereof was forwarded to the AO. In the said petition, the assessee company showed its willingness to be taxed of ` 56,49,000/-, as the company's income from other sources.

6. Vide letter dated 27.11.2006 the ACIT called for some documents and information from the assessee. The Addl. CIT asked the AO of Marketing Services to submit a detailed report thereon. The AO was asked to supply the following documents:-

- a) Photocopy of all the statements recorded during the course of Survey operation.
- b) Copy of any communication reference regarding utilization of the offered sum.
- c) Copies of all the returns along with Balance Sheet, P&L A/c, Partners capital A/c and other annexure in respect of



M/s Marketing Services along with copies of returns of the partners for the assessment year 2001-02 to A.Y. 2006-07.

- d) Copies of the assessment orders passed for the above assessment years and penalty order if any.
  - e) Copies of any other documents/evidence/record which might be useful for the purpose of framing assessment in the case of that assessee.
7. The AO of Marketing Services supplied the documents only partially, i.e., copies of return along with annexures and copies of assessment orders for the period from assessment year 2002-03 to 2004-05. He stated in his letter dated 13.12.2006, that his office did not have any statement recorded during the survey operations; that no other communication regarding utilization of the offered sum was available; and that further, he did not have any documents/evidence/records which might be useful for the purpose of framing assessment in respect of the assessee.
8. The assessee offered to surrender additional income to the tune of ` 14,24,00,000/-. Shri V.K. Aggarwal filed an affidavit stating that neither he nor the other partners of the firm had taken benefit of the surrendered amount during the survey in the case of Marketing Services. Directions dated 27.12.2006 were issued u/s 144A of the Act. Therein, it was, inter alia, observed that the surrendered amount of ` 1,82,51,000/-, which had

been subjected to tax in the hands of M/s. Marketing Services in the assessment years 2001-02 to 2003-04, had not been introduced in the books of account of the firm in the years in which it had offered for tax or thereafter; that there was also no document/information/detail to suggest that this surrendered amount had been invested elsewhere; that Shri V.K. Aggarwal had filed an affidavit to the effect that the amounts surrendered in the hands of M/s. Marketing Services had been utilized by him as share application money and no-where else; that it had also been explained that the funds of ` 1,82,51,000/- inducted in the books of the assessee company as share application money in different years, actually belonged to M/s. Marketing Services, in which, Shri V.K. Aggarwal, the Promoter Director of the assessee company was a partner and this amount had later on offered for tax by him in the hands of M/s. Marketing Services in different assessment years and the same had been also subjected to tax in the hands of the firm; that it had also been explained that since the funds to the extent of ` 1,82,51,000/- stood already inducted in the books of the company as share application money before it was offered to tax in the hands of M/s. Marketing Services, there could not be any occasion to again introduce the same amount in the books of the firm, M/s. Marketing Services; that in the said facts and circumstances of the case and in view of the fact that no

adverse inference was possible to be drawn against the assessee company against the induction of share application money to the extent of ` 1,82,51,000/-, the source of the share application money to the said extent may be treated as explained; that more-over, the share application money to the extent of ` 1,82,51,000/- had already been subjected to tax in the hands of M/s. Marketing Services and it could not be taxed again in the hands of the recipient; that the AO was, as such, being requested to accept the assessee's explanation regarding the source of the share application money to the extent of ` 1,82,51,000/-, subject to ensuring again that the surrendered amount had been invested or utilized elsewhere, except as stated by the assessee; that as regards the balance amount of share application money of ` 40,24,000/-, the assessee had itself stated it as unexplained and had voluntarily shown its willingness to offer to surrender a further sum of ` 40,24,000/-, for tax; and that the AO may accept the assessee's offer subject to verification as suggested and bring the said amount to tax.

9. The AO, on verification, recalculated the surrendered amount to ` 40,74,000/-. The income of the assessee was assessed at ` 57,56,700/-.

10. In the penalty proceedings, it was the stand of the assessee that the penalty proceedings were not maintainable for the reason that the AO had

not recorded his satisfaction of there being either concealment of income or furnishing of any inaccurate particulars of its income by the assessee; that the surrender had been made subject to the condition that no penalty be imposed, the offer to surrender the income having been made before any investigation into the matter; and that it could not be said that the surrender had been made only after concealment of income had been deducted by the Department.

11. The stand taken by the assessee was rejected by the AO, observing that the assessee had not offered the amount of ` 40,74,000/- for taxation voluntarily; that the surrender had come about during the assessment proceedings, when the impounded material had been confronted to the assessee; that the assessee had furnished inaccurate particulars of its income in the return of income filed; that the satisfaction had been recorded at the time of completion of assessment proceedings u/s 143(3) of the Act; that the assessee had surrendered additional sum of ` 40,74,000/- only when it was asked to explain the source of the share application money; and that by offering the amount for tax, the assessee had admitted the concealment of income to the extent of ` 40,74,000/-. In this manner, the AO imposed penalty of ` 14,61,600/- on the assessee company u/s 271(1)(c) of the I.T. Act.

12. By virtue of the impugned order, the Id. CIT(A) confirmed the penalty imposed, observing, inter alia, that the facts and circumstances of the assessee's case clearly established that the offer of surrender followed investigation made by the AO regarding share application money received by the assessee; that no case had been made out that the income had been offered for tax by the assessee of its own volition/investigation by the Department; and that also, the penalty proceedings had been duly initiated by the AO in the assessment order.

13. Before us, the learned counsel for the assessee has argued that the Id. CIT(A) has erred in confirming the penalty wrongly levied; that the Id. CIT(A) has erred in ignoring the assessee's contention that no penalty was leviable as the assessee had suo motu surrendered the income and that as such, there was neither any concealment of income, nor any furnishing of inaccurate particulars thereof by the assessee; that the Id. CIT(A) has failed to take into consideration the fact that the additions had been made only on the basis of surrender made by the assessee, without any reference to any documentary evidence; that the Id. CIT(A) has further failed to consider the assessee's contention that no finding having been recorded on merit regarding concealment in the penalty order, the levy of penalty is unsustainable; that the Id. CIT(A) has also erred in failing to accept the

assessee's contention that the penalty order is untenable in law even because no satisfaction has required under the law has been recorded by the AO in the assessment order; that the Id. CIT(A) has also wrongly ignored the fact that the observation in the penalty order to the effect that the assessee had itself admitted the concealment of income to the extent of ` 40,74,000/- was factually incorrect, inasmuch as, in the assessment order, the AO had quoted the assessee's letter, wherein it had been specifically stated that the offer of surrender was without admitting any concealment whatsoever or any intention to conceal and that the surrender was being offered with a view to avoid litigation and to buy peace and to channelise energy and resource towards productive work and to make amicable settlement with the Income Tax Department; that it has also erroneously not been taken into consideration that the AO did not carry out any investigation, much less brought on record any material or evidence proving concealment on the part of the assessee; and that further the Id. CIT(A) has also remained oblivious of the fact that under exactly similar facts and circumstances, no penalty was imposed in the case of M/s. Marketing Services. Attention has been drawn to the assessee's letter dated 22.11.2006 containing offer to surrender (pages 1 to 3 of its paper book, "APB" for short). Reliance has been placed on the following decisions:-

1. "CIT v. Baroda Tin Works", 221 ITR 661(Guj);
2. "CIT v. Suresh Chandra Mittal", 241 ITR 124(MP); and
3. "CIT v. Suresh Chandra Mittal", 251 ITR 9(SC).

14. The ld. DR, on the other hand, has placed strong reliance on the impugned order. It has been contended that it is squarely established on record, has rightly noted by the ld. CIT(A), that the offer of surrender was made only post investigation by the AO regarding the receipt of share application money of the assessee; that therefore, the offer to surrender again at all be said to have been made by the assessee voluntarily before investigation into the matter by the Department; that the penalty proceedings were duly initiated by the AO in the assessment order, as is amply clear from a perusal of the assessment order; that apropos the contention that no penalty was imposed in the case of Marketing Services, the facts in both the cases are entirely different; that therein income was revised voluntarily, after the survey was carried out, which is not the case herein; that also, in this case, the offer of surrender had been made only after the material was confronted to the assessee; and that apropos the reference to the material against the assessee (assessment order page 3, para 12), it is a subsequent development, when it already taken possession of the seized documents.

15. We have heard the parties and have perused the material on record. This material on record shows that the offer of surrender was only to settle

the dispute and that while doing so, the assessee did not admit any concealment income. This is evident from the assessee's letter dated 22.11.06 (APB 1 to 3). Therein, it has been stated, inter alia, as follows:-

*“The company with a view to avoid litigation and buy peace and to channelise the energy and resources towards productive work and to make amicable settlement with the Income Tax Department offered to surrender a sum of `56,49,000/- as income from other sources.”*

16. The said amount of ` 56,49,000/- subsequently got reduced to ` 40,74,000/-, when peak was worked out at ` 219.5 lakhs.

17. The aforesaid offer of surrender was accepted only subsequent to it having been examined on a petition filed u/s 144A of the Act and on examining the records of the case. It is pertinent to mention here, as noted herein above, that vide letter dated 13.12.06, the ACIT, Circular 32(1), New Delhi, i.e., the AO of M/s. Marketing Services, had stated that his office did not have any statement recorded during the course of survey operation; that no other communication regarding utilization of the offered sum was available; and that further, he did not have any document/record/reference which may be useful for the purpose of framing assessment in respect of the firm.

18. In the order dated 27.12.06, issued directions u/s 144A of the Act, the ACIT observed, inter alia, as follows:-



*“On the basis of above stated facts and circumstances of the case and most particularly in view of the fact that no adverse inference is possible to be drawn against the assessee company regarding induction of share application money to the extent of ` 182.51 lacs, the source of share application money to the extent of ` 182.51 lacs, the source of share application money to the extent may be treated as explained. Moreover, the share application money to the extent of ` 182.51 lacs has already been subjected to tax in the hands of M/s Marketing Services and it can not be taxed again in the hands of the recipient. The AO is, therefore, requested to accept the assessee’s explanation regarding source of share application money to the extent of ` 182.51 lacs. However, it may be ensured again that the surrendered amount has nowhere been invested or utilized except as stated by the assessee. As regard the balance amount of share application money to the extent of ` 56.49 lacs (revised to ` 40.24 lacs vide letter dated 14.12.2006), the assessee has itself treated the balance share application money as unexplained and voluntarily shown its willingness to offer to surrender a further sum of ` 56.49 lacs (Revised to ` 40.24 lacs vide letter dated 14.12.2006) for tax. The AO may accept the assessee’s offer subject to verifications as suggested above and bring this amount to tax. Before accepting the revised offer, necessary verification made by the AO about its correctness. He should also ensure that the assessee has paid the taxes along with interest on the additional surrendered amount of ` 56.49 lacs (revised to ` 40.24 lacs vide letter dated 14.12.2006). As regards giving direction to the AO that this additional surrendered amount should not be treated as concealed income and giving further direction to the AO regarding non-initiation of penalty prosecution proceedings. I decline to give any direction to the AO in this regard as the assessee company itself has treated the balance amount of share application money as its unexplained money and offering it for tax. Moreover, no such direction in my opinion for non initiation of penalty proceedings can be issued to the AO as before initiating penalty proceedings, he has to satisfy himself and come to a definite conclusion that whether the assessee company has concealed the*

*particulars of income or filed inaccurate particulars of income. All the powers regarding initiation of penalty proceedings are vested in the AO and I cannot step into the shoes of AO. In view of these facts, I decline to give any direction in respect of initiation of penalty proceedings. As regard initiation of prosecution proceedings, I again decline to give any direction as the initiation of prosecution proceedings are at the instance of Chief Commissioner/Commissioner of Income Tax.”*

19. It was only there-after that the offer had been accepted by the AO and the assessment had been finalized.

20. It is evident from the above obtaining facts that there was entirely no material on record against the assessee to show any concealment on its part. Moreover, this fact was also admitted by the AO himself in the assessment order (page 3, para 12 of the assessment order). So much so that there is no indication in the penalty order as to the credit in respect of which the penalty was being imposed. The only material fact remaining, thus, was that the assessee had offered the amount for taxation to buy peace and there was no material on record implicating the assessee for concealment.

21. Further, the observation, in the penalty order, to the effect that the surrender was made only when the assessee was confronted with the documents found in the survey, does not adversely affect the case of the assessee at all, these documents, being in respect of share capital ways. Still further, the observation in the penalty order to the effect that the assessee had itself admitted the concealment of income to the extent of ` 40,74,000/- ,

is found to be factually incorrect. The assessee's letter dated 22.11.06 (supra) clearly mentions that "the offer of the surrender is without admitting any concealment whatsoever or any intention to conceal". It amply stands made out from the facts on record that the amount of ₹ 40,74,000/- was surrendered to settle the dispute with the Department. It did not, in any way, represent any concealment on the part of the assessee. Otherwise too, the AO did not carry out any investigation, nor was any material brought on record to prove concealment on the assessee's part. Then, no penalty was imposed on M/s. Marketing Security, under a similar set of circumstances.

22. In "CIT v. Baroda Tin Works", 221 ITR 661(Guj) (supra), it has been held that the fiction created u/s 68 of the I.T. Act, by itself, cannot be extended to penalty proceedings to raise a presumption about concealment of such income.

23. In "CIT v. Suresh Chandra Mittal", 241 ITR 124(MP)(supra), it has been held as follows:-

*"Though it is true that the assessee had not surrendered at all and that he had done so on the persistent queries made by the AO but once the revised assessment was regularized by the Revenue and once the assessing authority had failed to take any objection in the matter the declaration of income made by the assessee in his revised returns and his explanation that he had done so to buy peace with the Department and to come*

*out of vexed litigation could be treated as bona fide in the facts and circumstances of the case.”*

24. “CIT v. Suresh Chandra Mittal”, 241 ITR 124(MP) (supra), has been affirmed by the Hon’ble Supreme Court in “CIT v. Suresh Chandra Mittal”, 251 ITR 9(SC)(supra).

25. In “Chikkam Subharao v. C.S. Rao, AIR 1971 SC 1542, it has been held that before penalty can be levied, the implication of the statement made must be clear and conclusive; and that there should not be any doubt or ambiguity about the alleged admission.

26. In “CIT v. Mining Co.” 102 ITR 830(AP) and in “Sir Shadilal Sugar & General Mills Ltd. V. CIT”, 168 ITR 705(SC), it has been held to the effect that the mere fact that the assessee has agreed to higher income is not a proof of admission of concealment by the assessee.

27. Further, in the following cases, it has been held that where the assessee, for one reason or the other agrees or surrenders certain amount for assessment, the imposition of penalty solely on the basis of assessee’s surrender is not called for:-

1. “CIT v. M. George & Bros.”, 160 ITR 511(Ker);
2. “CIT v. Narang & Co.”, 98 ITR 426(Del);
3. “Krishan Lal Shiv Chand Rai v. CIT”, 88 ITR 293(P&H).

28. In view of the above, the grievance raised by the assessee is found to be justified and is accepted as such. The order under appeal is, therefore, cancelled and the penalty imposed is deleted.

29. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 18.11.2011.

Sd/-  
(G.D. Agarwal)  
Vice President

sd/-  
(A.D. Jain)  
Judicial Member

Dated: 18.11.2011

\*RM

Copy forwarded to:

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

True copy

By order

Assistant Registrar