

IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH . KOLKATA

Before S/Shri Rajpal Yadav, JM & B.P. Jain, AM.

ITA Nos. 1832 to 1834/Kol/2014
Asst. Years 2007-08 to 2009-10

.KPC Medical College & Hospital, 1-F, Raja S. C. Mullick Road, Jadavpur, Kolkata-700 032.	Vs	.Dy. CIT, CC-XXIV, Kolkata.
(Appellant)		(Respondent)
PA No.AAAJK 0534 H		

ITA No.1835/Kol/2014
Asst. Year 2011-12

Kali Pradip Chaudhuri Foundation, 1-F, Raja S. C. Mullick Road, Jadavpur, Kolkata-700 032.	Vs	.Dy. CIT, CC-XXIV, Kolkata.
(Appellant)		(Respondent)
PA No.AAATK 6357L		

Appellant by	Shri N. K. Poddar, Sr.Advocate & A.K. Tibrewal, Advocate, Priti Agarwal. FCA, Amit Agarwal, Advocate & M. Choudhury,FCA..
Respondent by	Shri Vijay Kumar, Pri. CIT, DR

Date of hearing: 07/05/2015
Date of pronouncement: 24/06/2015

O R D E R

PER Shri Rajpal Yadav, Judicial Member.

ITA Nos.1832 to 1834 are directed by KPC Medical College & Hospital against the common order of Id. CIT(A) dated 31st July, 2014 passed for AYs 2007-08 to 2009-10, whereas ITA No.1835 has

been directed by the assessee, Kali Pradip Chaudhary Foundation against the order of Id. CIT(A) dated 31st July, 2014 passed for AY 2011-12. The common issues are involved in all these appeals, therefore, we heard them together and deem it appropriate to dispose of them of by this common order. The grounds of appeals taken by the assessee in all the four appeals are not in consonance with Rule-8 of the I.T.A.T. Rules, 1963. They are descriptive and argumentative in nature. In brief, the grievance of the assessee is that Id. CIT(A) has erred in confirming the levy of penalty imposed under section 271(1)(c) of the I.T. Act, 1961 (herein after the Act).

2. First we take three appeals in the case of KPC Medical College & Hospital. Brief facts of the case are that the assessee is an institute running medical health care educational centre consisting of medical college, nursing college, nursing school and school of nutrition. It is a registered charitable trust under section 12AA of the Act with effect from 1.4.2004. The registration is granted by the Id. D,I,T, (Exemption) vide order dated 25th February, 2005 whose copy has been placed on page 73 of the Paper Book Volume -1. The assessee had filed its return of income on 29.10.2007, 30th September, 2008 and 31st March, 2010 declaring a loss of Rs.17,74,325, Rs.12,59,29,557 and Rs.21,99,09,834 in AYs 2007-08 to AY 2009-10 respectively. A search action under section 132 of the Act was carried out in the case of one Shri Bhaskar Ghosh on 12th July, 2010. During the search at his residence, a cash of Rs.35,10,400 was found. When Mr. Ghosh was confronted with regard to the recovery of cash, then, in his statement recorded under section 132(4) of the Act, he

disclosed that the cash belonged to the assessee/assessee's group. The search team seized a cash of Rs.35 lacs out of the cash found at the time of search. Simultaneously a survey under section 133A of the Act was carried out on the office premises of the assessee on 12th July, 2010. During the course of survey and in post survey enquiry, it came to the notice of the Revenue department that 5 companies had given a loan totaling to Rs. 33.21 crores to Shri Kali Pradip Chaudhari Foundation Trust, who on the same day had given that loan to the assessee. Later on, these loans were converted into donations and according to the assessee it was a corpus donation. The AO had harbored an opinion that the assessee/its group entities were indulging in routing of its funds of suspicious origin via some five private companies. The modus operandi of the assessee, according to the department was that multiple bank entries were undertaken and ultimately the money reached to the assessee by way of donation. This fact had revealed to the Revenue while DDIT (Inv) Unit-1(3), Kolkata had examined one of the common directors of these 5 companies namely Kamala Shankar Pandey under section 131. His statement was recorded on 30th August, 2010. In his statement, he has disclosed the modus operandi of giving these donations to the assessee. The Id. first appellate authority has reproduced the copies of the resolution passed by the Board of Directors of all these 5 companies whereby it was resolved that a donation to KPC Foundation of Kolkata which is to be further forwarded towards the corpus of medical colleges were passed. These resolutions have also been reproduced by the Id. first appellate authority in the impugned order in pages 6 to 10. During the course of

assessment proceedings Shri Uttam Chakraborty, Director (Finance) of KPC Group came forward with a disclosure statement dated 6th September, 2010. This disclosure was produced before the AO on 8.9.2010. The brief statement of Shri Uttam Chakraborty was also recorded by the AO.

3. On 10th October, 2011 a notice under section 153C was issued to the assessee for AY 2007-08 to 2009-10 requiring it to furnish the returns of income within 30 days. The assessee sought further time to furnish the returns by another 20 days. Ultimately on 20th December, 2011 the assessee has furnished the returns. Exemption under section 12AA was claimed and the returns were showing losses. The Id. first appellate authority has noticed the income/losses declared by the assessee in original returns vis-à-vis in the returns filed in response to notice under section 153C of the Act. It reads as under :-

AY	Original return of income	Return filed in response to notice u/s 153C
2007-08	(-) 17,74,325/-	(-) 17,74,325/-
2008-09	(-)12,59,29,557/-	(-) 15,47,21,356/-
2009-10	(-) 21,99,09,834/-	Nil

It also emerges out that when the limitation for making the assessments orders under 153C was expiring in the month of March, 2013, the assessee in response to certain queries of the AO came forward with another disclosure offering the donations for taxation. This letter was submitted by assessee on 2nd March 2013 whereby an enhanced amount of donation amounting to Rs.33.21 crores for all

the three years has been offered. The Id. first appellate authority has reproduced this disclosure on pages 21 to 22 of the impugned order. According to the AO, assessee had filed self-styled revised returns on 6th February, 2013 offering the donation for taxation. However, in the computation, the depreciation and business losses were set off. These are hereunder :-

AY	Original return of income u/s 139(1)/139(4)	Return filed in response to notice u/s 153C	Self-styled revised return
2007-08	(-)17,74,325	(-)17,74,325	2,59,19,793
2008-09	(-)12,59,29,557	(-)15,47,21,356	4,50,60,443
2009-10	(-)21,99,09,834	Nil	Nil

The AO has passed assessment orders on 31st March, 2013 under section 153C read with section 143(3) in all the three Assessment Years. He initiated the penalty proceedings under section 271(1)(c). The AO thereafter issued show cause notice under section 274 read with section 271(1)(c) inviting the explanation of the assessee as to why penalty be not imposed for concealing the particulars of income.

3.1 After hearing the assessee, the Id. AO imposed the penalty u/s 271(1)(c) of the Act amounting to Rs.98,57,100/-, Rs.58,11,950/- and Rs.4,49,00,790/- In AYs 2007-08 to 2009-10 respectively.

3.2 Appeal to the CIT(A) did not bring any relief to the assessee.

4. With the assistance of Id. representatives we have gone through the record carefully. Before we embark upon an enquiry as to

whether assessee deserves to be visited with penalty under section 271(1)(c) or not ?, in the given facts and circumstances, we think it appropriate to bear in mind certain basic principles flowing from construction of relevant part of section 271(1)(c) along with explanation-1; it is pertinent to take note of the relevant provision -

"271. Failure to furnish returns, comply with notices, concealment of income, etc.

(1) The Assessing Officer or the Commissioner (Appeals) or the CIT in the course of any proceedings under this Act, is satisfied that any person

(a) and (b)** **

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income.

He may direct that such person shall pay by way of penalty.

(i) and (Income-tax Officer)** **

(iii) in the cases referred to in Clause (c) or Clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefit the furnishing of inaccurate particulars of such income or fringe benefits:

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 CIT 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 or such person as a result thereof shall, for the purposes of Clause (c) of this subsection, be deemed to represent the income in respect of which particulars have been concealed.+

5. A bare perusal of this section would reveal that for visiting any assessee with the penalty, the Assessing Officer or the Learned CIT(Appeals) during the course of any proceedings before them should be satisfied, that the assessee has; (i) concealed his income or furnished inaccurate particulars of income. As far as the quantification of the penalty is concerned, the penalty imposed under this section can range in between 100% to 300% of the tax sought to be evaded by the assessee, as a result of such concealment of income or furnishing inaccurate particulars. The other most important features of this section is deeming provisions regarding concealment of income. The section not only covered the situation in which the assessee has concealed the income or furnished inaccurate particulars, in certain situation, even without there being anything to indicate so, statutory deeming fiction for concealment of income comes into play. This deeming fiction, by way of Explanation I to section 271(1)(c) postulates two situations; (a) first whether in respect of any facts material to the computation of the total income under the provisions of the Act, the assessee fails to offer an explanation or the

explanation offered by the assessee is found to be false by the Assessing Officer or Learned CIT(Appeal); and, (b) where in respect of any fact, material to the computation of total income under the provisions of the Act, the assessee is not able to substantiate the explanation and the assessee fails, to prove that such explanation is bona fide and that the assessee had disclosed all the facts relating to the same and material to the computation of the total income. Under first situation, the deeming fiction would come to play if the assessee failed to give any explanation with respect to any fact material to the computation of total income or by action of the Assessing Officer or the Learned CIT(Appeals) by giving a categorical finding to the effect that explanation given by the assessee is false. In the second situation, the deeming fiction would come to play by the failure of the assessee to substantiate his explanation in respect of any fact material to the computation of total income and in addition to this the assessee is not able to prove that such explanation was given bona fide and all the facts relating to the same and material to the computation of the total income have been disclosed by the assessee. These two situations provided in Explanation 1 appended to section 271(1)(c) makes it clear that that when this deeming fiction comes into play in the above two situations then the related addition or disallowance in computing the total income of the assessee for the purpose of section 271(1)(c) would be deemed to be representing the income in respect of which inaccurate particulars have been furnished.

6. Shri Poddar has apprised us the meaning of expression ~~concealment~~ employed in section 271(1)(c). He made reference to a large number of cases, more particularly the decision of Honble Supreme Court in the case of Dilip N. Shroff vs. JCIT, 291 ITR 519, Ashok Pai vs. CIT 292 ITR page 11. The observation of Honble Supreme Court in the case of Ashok Pai read as under :-

'16. In Dilip N. Shroff vs. JCIT (civil appeal arising out of SLP © No.26831/2004 delivered today', this court observed :-

"The expression "conceal is of great importance. According to Law Lexicon, the word 'conceal' means :

"to hide or keep secrete. The word "conceal" is con+celare which implies to bide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of; to withhold knowledge of. The offence of concealment is, thus, a direct attempt to hide an item of income or a portion thereof from the knowledge of the Income-tax authorities."

In Webster's Dictionary, "inaccurate" has been defined as :

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

17. *It signifies a deliberate act or omission on the part of the assessee. Such deliberate act must be either for the purpose of concealment of income or furnishing of inaccurate particulars.*

18. *The term "inaccurate particulars" is not defined. Furnishing of an assessment of value of the property may not by itself be furnishing of inaccurate particulars. Even if the explanations are taken recourse to, a finding has to be arrived at having regard to clause (A) of Explanation 1 that the Assessing Officer is required to arrive at a finding that the explanation offered by an assessee, in the event he*

offers one was false. He must be found to have failed to prove that such explanation is not only not bona fide but all the facts relating to the same and material to the income were not disclosed by him. Thus, apart from his explanation being not bona fide, it should have been found as of fact that he has not disclosed all the facts which were material to the computation of his income.

19. The explanation having regard to the decisions of this court, must be preceded by a finding as to how and in what manner he furnished the particulars of his income. It is beyond any doubt or dispute that for the said purpose the Income-tax Officer must arrive at his satisfaction in this behalf. (See CIT vs. Ram Commercial Enterprises Ltd. (2000) 246 ITR 568 (Delhi) and Diwan Enterprises vs. CIT (2000) 246 ITR 571 (Delhi).”

7. In the light of above, let us examine the multi-fold submissions raised by the Id. representatives. Shri N. K. Poddar, Id. Sr. Advocate appearing on behalf of the assessee would submit in his first fold submission that penalty proceedings is an independent proceedings than the assessment proceedings. It is not the continuation of assessment proceedings. If an assessee had not objected for initiation of an assessment proceedings by issuance of a notice under section 153C during the course of assessment proceedings, then, it does not mean that the assessee has been denuded from his rights to challenge the validity of notice issued under section 153C of the Act. The assessee can challenge the validity of notice served upon him under section 153C and if it is established that the conditions enumerated under section 153C are not in existence then, the initiation of the assessment proceedings would be termed as illegal even without specifically declaring the assessment order null and void, because of assessee's non-challenging of that notice in

assessment proceedings. But for the purpose of absolving the assessing from visiting the penalty, it is to be tested that penalty proceedings is being initiated from a invalid assessment proceedings. The jurisdiction in the AO would flow from service of a valid notice under section 153C. The jurisdiction in the AO cannot be infused by consent i.e., that assessee has not challenged the service of notice under section 153C in the regular assessment proceedings, therefore, assessee has given a deemed consent for taking up proceedings against him under section 153C and, therefore, assessee is precluded from raising any such plea. For buttressing his contentions on his multiple submissions, he filed six compilations of case laws, whereby he placed on record 106 decisions of the Honble Supreme Court, Honble High Courts and I.T.A.T. However, these are settled principles of law. We do not have any hesitation in accepting the contentions of Shri Poddar on this issue. We do not feel necessity of fortifying ourselves by reciting and recapitulating all the decisions including that of Honble Gujarat High Court in the case of P. V. Doshi 113 ITR 22. The basic reason is that if, we recite and recapitulate the proposition laid down in all these case laws which are running into 984 pages in the six compilations that will make the order repetitive and bulky. It is by and large settled that penalty proceedings is an independent proceedings. The assessee is at liberty to raise any defence for exonerating itself from the vigorous of the penalty provisions. It is also settled that consent would not be infused jurisdiction in a statutory authority. The jurisdiction will flow in the AO by virtue of the provisions of the Act.

7.1. The second limb of this first fold of submissions is that a notice under section 153C was issued to the assessee for AYs. 2007-08, 2008-09 & 2009-10 on 10.10.2011. Section 153C provides that wherever AO of the searched person is satisfied that any money, bullion, jewellery, books of account, or other documents etc. belonging to a person other than the person searched, then such documents or assets etc. shall be handed over to the AO of the other person, and the latter AO shall proceed to assess or re-assess his income. A bare perusal of the provisions would indicate that before handing over such documents etc. to the AO of other person, a satisfaction has to be recorded by the AO of the searched person demonstrating that money, bullion or jewellery found from the person searched belonged to the other person. Only when such satisfaction is recorded by the AO of the searched person and such documents or assets seized, etc., are handed over to the AO of the other person then, the latter AO acquires jurisdiction to make assessment or re-assessment of the other person. According to the Id. counsel for the assessee, it is clear from the scheme of the provisions that the AO of the other person can acquire jurisdiction to assessee or re-assess income of the other person only when the AO of the person searched records satisfaction in his case before handing over money, bullion, jewellery etc. to him. Thus the recording of satisfaction of the AO of the searched person is a condition precedent for the AO of the other person to acquire jurisdiction. Unless such jurisdictional condition is satisfied there can be no question of making assessment or re-assessment of the other person. Shri Poddar in order to buttress his contention took us through the judgement of Honble Supreme Court

in the case of Manish Maheshwari vs. ACIT 289 ITR 341, in the case of Pepsi Foods Pvt. Ltd. vs. ACIT 367 ITR 112. He also relied upon the judgment in the case of CIT vs. Calcutta Knitwears 362 ITR 673.

8. Shri Poddar, after appraising us to the mandatory conditions for initiating a valid proceedings under section 153C of the Act, contended that required facts are not available on the record which may justify the action against the assessee under section 153C of the Act. In his stride to persuade us that satisfaction note is not based on any cogent material, he drew our attention towards page 74 of the Paper Book volume-1, wherein alleged satisfaction note is available. Impugning this note he contended that the AO has made a reference to the statement of Shri Bhaskar Ghosh and Shri Uttam Chakraborty.

In this so-called satisfaction note, on the basis of statement of Shri Bhaskar Ghosh, an inference was drawn that a sum of Rs.35,10,400 found at his residential premises were belonging to the assessee. However, the disclosure made on the date of search has been retracted by this person. He has surrendered this amount and assessment order has been passed in his case whereby this amount has been assessed in his hands. Thus the date, when the AO has recorded the alleged satisfaction, Shri Bhaskar Ghosh has already retracted the disclosure made during the course of search. He had already surrendered the amount as his income. The department has acted on that surrendered amount and assessed the amount in his

hand. Therefore, it is to be construed that no evidence was found during the course of search which can authorize the AO of the searched person to harbor a belief that money belonged to a third person unearthed during the course of a search which are to be assessed in the hands of other person.

With regard to the statement of Shri Uttam Chakraborty, Id. counsel for the assessee contended that the copy of the statement is available on page 171 of the Paper Book. He has nowhere alleged that the amount found during the course of search at the residence of Shri Bhaskar Ghosh was withdrawn from the account of KPC Medical College & Hospital, SBI, Jadavpur Branch, Kolkata. In the light of this statement, it cannot be assumed that money, bullion, jewellery, assets, etc., belonging to the assessee were found at the premises of the searched person during the course of search. If that be so, then, there cannot be any satisfaction for initiating proceedings against the assessee under section 153C of the Act. If there cannot be any proceedings then there cannot be any penalty proceedings.

9. The Id. DR on the other hand relied on the order of CIT(A).

10. Shri Poddar in his second limb of arguments on this fold of submission contended that satisfaction was not recorded by the AO of the searched person. The satisfaction ought to have been recorded by the AO of the searched person and copy of such satisfaction should be available in the record of searched person. He emphasized that record of Shri Bhaskar Ghosh was called upon by the Tribunal

and he has inspected the record in the office of the CIT, DR. The record does not contain any satisfaction. Therefore, the initiation of assessment proceedings under section 153C is bad in law.

11. The Id. DR on the other hand contended that the AO of the searched person as well as of the assessee is a common authority. The same AO has jurisdiction over both the assessees. He has recorded the satisfaction for satisfying himself that money belonged to the assessee was found at the premises of the assessee.

12. At this stage, it is pertinent to take note of the satisfaction note recorded by the AO which reads as under :-

"KPC Medical College & Hospital, 1F, Raja F. C . Mullick Road, Jadavpur.

10/10/2011

A search & seizure operation u/s 132 of the I.T. Act, 1961 was conducted on Shri Bhaskar Ghosh on 12/07/2010. Cash Rs.35,10,400/- was found in his residence situated at P-169, Regent Estate, 2nd Floor, Kolkata-92. In the statement under oath, Shri Bhaskar Ghosh stated that the money belonged to the KPC Group of Companies. M/s KPC Medical College & Hospital is the main organization of the group. A survey u/s 133A of the I.T. Act, 1961 was also conducted in the premises of M/s KPC Medical College & Hospital on the same day i.e. 12/07/2010.

In the statement given on that day, Shri Uttam Chakraborty, (Director, Finance) of KPC Medical College & Hospital has stated that the cash amount found (and subsequently seized) with Mr. Bhaskar Ghosh was withdrawn from the account of M/s KPC Medical College & Hospital, S.B.I., Jadavpur Branch.

So, in view of above, it is seen that the money seized during the search conducted in the premises of Shri Bhaskar Ghosh belongs to M/s KPC Medical College & Hospital. It satisfies the condition of section 153C of the I.T. Act, 1961.

In view of above, I am satisfied about the grounds of issuance of Notice u/s 153C of the I.T. Act, 1961 in this case.

*Sd/-
Sailen Samadder
Dy. CIT, CC –XXIV, Kolkata*

*Sd/-
Dhrubajyoti Ray
A.C.I.T., CC-XXIV, Kolkata “*

13. Section 153C has direct bearing, therefore, it is pertinent to take note of this section which reads as under :-

“153C. Assessment of income of any other person –(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 163, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person referred to in section 153A, then the books of account or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue such other person notice and assessee or reassess income of such other person in accordance with the provisions of section 153A.”

14. At this stage it is apt worthy to make reference to section 158BD which is a predecessor of section 153C and most of the authoritative pronouncement brought to our notice for explaining the meaning and requirement of section 153C are based in relation to

construction of section 158BD. Thus it is pertinent to take note of section 158BD which reads as under :-

“158BD Undisclosed income of any other person – Where the Assessing Officer is satisfied that any undisclosed income belongs to any person, other than the person with respect to whom search was made under section 132 or whose books of account or other documents or any assets were requisitioned under section 132A, then the books of account, other documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed under section 158BC against such other person and the provisions of this Chapter shall apply accordingly.”

A bare perusal of these two sections would reveal that where the AO of the searched person is satisfied that any money, bullion, jewellery, books of account or other documents, etc., belong to a person other than the person searched, then, such documents or assets shall be handed over to the AO of other person and the latter AO shall proceed against such other person to assess or reassess his income. However, before handing over these documents and assets, the AO of the searched person would record his satisfaction that the assets and documents belong to some other person than the searched person. The AO of such other person would acquire jurisdiction to make assessment or reassessment of the other person only when satisfaction was recorded by the AO of the searched person exhibiting that documents and assets belonging to other persons so found and it is transmitted to the AO of the other person having jurisdiction over such other person. The Hon^{ble} Supreme Court recently in the case of CIT vs. Calcutta Knitwears (supra) has

silenced the controversy even about the stage at which satisfaction has to be recorded. Following conclusions are worth to note :-

Having said that, let us revert to discussion of section 158BD of the Act. The said provision is a machinery provision and inserted in the statute book for the purpose of carrying out assessments of a person other than the searched person under section 132 or section 132A of the Act. Under section 158BD of the Act, if an officer is satisfied that there exists any undisclosed income which may belong to a other person other than the searched person under section 132 or section 132A of the Act, after recording such satisfaction, may transmit the records/documents/chits/papers etc. to the Assessing Officer having jurisdiction over such other person. After receipt of the aforesaid satisfaction and upon examination of the said other documents relating to such other person, the jurisdictional Assessing Officer may proceed to issue a notice for the purpose of completion of the assessments under section 158BD of the Act, the other provisions of Chapter XIV-B shall apply.¶

15. Now in the present case, the Id. AO happens to be the common AO of the searched person as well as another person, money, documents belonging to such other person were found with the searched person. He is seized of the matter. He has recorded the satisfaction extracted supra. His action is being challenged that he has recorded the satisfaction while taking cases of the present assessee i.e. when he took cases of such other persons, whereas he should have recorded satisfaction in the capacity of AO of searched person. In the second limb Id. counsel for the assessee submitted that no cogent material was found at the time of search and, therefore, no satisfaction is to be termed.

16. There is built-in fallacy in the arguments of the Id. counsel for the assessee. The fallacy became evident if the argument is tested by envisioning to the facts of the present case. There is no dispute that notice under section 153C was issued by the AO after recording the satisfaction extracted supra. The AO is the same AO who has jurisdiction over the searched person as well as the other person i.e. the assessee. Let us take a situation, the AO was examining the file of Shri Bhaskar Ghosh. On perusal of his statement recorded under section 132(4) coupled with the fact of cash found during the course of search and buttressed by the Managing Director (Finance) of the KPC Group of companies, visualized that cash belonged to the assessee, he immediately took a piece of paper and recorded his satisfaction that the money belongs to the assessee, therefore notice under section 153C is to be issued in the case of assessee. The question is, where this paper was placed by him? Whether in the order sheet entries of Shri Bhaskar Ghosh's assessment proceedings; in a separate file or in cupboard available in his room. There is no dispute raised by the Id. representatives that this satisfaction was not recorded within the stages contemplated by the Hon'ble Supreme Court in the case of CIT vs. Calcutta Knitweaves (extracted supra). The attempt at the end of Id. counsel for the assessee is that there should be a straight jacket system, whereby the satisfaction recorded even by the same AO then, that should be placed in the file of searched person and if it is placed in some other cupboard in his room by the AO then, there cannot be any satisfaction, we fail to appreciate that technical approach at the end of assessee. The law does not require the manner and the procedure

of keeping the files. The section only requires that a satisfaction be recorded and it should be during the period propounded by Honble S.C. in Calcutta Knitwears, that has been recorded in the present case. It is available on page 74 of the Paper Book. The second scenario can also happen that seized material of KPC group might be kept in a common bundle, wrapped in a cloth where all the files are emanating from search and survey are being placed. If the above satisfaction note was found to be tagged with other file would it be held that no satisfaction was recorded. In our understanding the reply will be that satisfaction was recorded.

17. In the next limb of argument on this issue, it was contended that there was no cogent material with the AO to record satisfaction. There is no dispute that at the time of search cash of Rs.35,10,400/- was found at the premises of Shri Bhaskar Ghosh. His statement was recorded on 12/07/2010. A copy of the statement is available on the record. We have perused the statement. In question no.2, occupation of Shri Bhaskar Ghosh was asked. His reply was ~~am~~ I am Company Executive, C.E.O. of KPC Karma Co.(P) Ltd. I am drawing salary from the same.¶

18. He further disclosed his bank accounts and also deposed that he is not associated with any other company. He was director with M/s S. R. Cable (P) Ltd. but did not draw any remuneration from there. Question No.6 relates to the cash found at the time of search. This question reads as under :-

Q. No.6 : During the course of search operation u/s 132 of the I.T. Act, 1961, cash of Rs.35,10,400 was found from your residence at P-169, Regent Estate, second floor. Please state the source of the said cash.

Ans.: I have received the cash of Rs.35,10,400/- from the KPC group of companies for making some forthcoming expenditure. I am holding it as a custodian of the KPC group of companies.

19. In the next question, it was asked when he received this money. His reply was that it was received in last two months. This statement was endorsed by the Finance Director of the assessee Shri Uttam Chakraborty. The challenge of the Id. counsel for the assessee to this evidence was that statement of Shri Bhaskar Ghosh was not supplied to the assessee. Shri Bhaskar Ghosh has ultimately retracted this statement and surrendered this amount for taxation in his hands. Therefore, this evidence is to be excluded from consideration. With regard to Shri Uttam Chakraborty, . he drew our attention towards page 171 of the Paper Book, where copy of his statement has been placed on record. It was emphasized that he has nowhere deposed that this amount was withdrawn from the account of KPC Mecial College and Hospital. We do not find any merit in this contention of the Id. counsel for the assessee. Because when AO was recording his satisfaction, he was not supposed to draw firm conclusion. He has to make a prima facie opinion. There should be a nexus between the material available with him vis-à-vis the formation of his opinion which satisfy that the money belongs to a person other

than the searched person. As far as the statement of Shri Uttaam Chakraborty referred by the Id. counsel for the assessee is concerned, this statement has not been referred to by the AO in the satisfaction note. The statement is dated 8th September, 2010. It was recorded under section 131 of the Act whereas the statement referred to by the AO in the satisfaction note is the statement recorded on the date of search, when we confronted Shri Poddar with regard to this discrepancy during the course of argument, he was unable to explain as to why he drew the attention of the Bench towards the statement dated 8th September, 2010. He simply said, this is the only statement supplied to the assessee. The statement of Shri Uttam Chakraborty (Director, Finance) of KPC Medical College, dated 12/7/2010 is available on the record. He had disclosed handing over of Rs.50 lacs to Bhaskar Ghosh. This statement was recorded u/s 131 on oath. Question No.7 to 11 and their reply are relevant. They read as under :-

Q. 7 Are there any other cash transaction made with Mr. Bhaskar Ghosh from any of the concerns as mentioned in answer of Q. No.2?

Ans. Yes.

Q.8 When did you give that money and source of fund.

Ans: It was withdrawn from the SBI, Jadavpur (College) Branch of Rs.50,00,000/- and it was paid by cash to Mr. Bhaskar Ghosh.

Q.9 However, as per your cash book there was no reflection of payment of Rs.50,00,000/- to Mr. Bhaskar Ghosh. Moreover, please explain why you have given Rs.50,00,000/- by cash to Mr. Ghosh instead of a/c payee cheque.

Ans: Mr. Ghosh has been entrusted to look after the construction of all the group entities including KPC Medical College & Hospital Society, Jadavpur. In order to meet the requirement of cost of construction and payment to sundry parties he has been provided with the fund as custodian.

Q.10 Do you have any documentary evidence i.e. any proof of payment ?

Ans. No. But, it was paid in the presence of Shri S. Chattopadhyay, HOD(F &A) and Shri Arun Chatterjee, Deputy Manager, Accounts.

Q.11 Whether Mr. Ghosh an employee of KPC Medical College & Hospital Society, Jadavpur. If not, in what capacity the society KPC Medical College & Hospital has paid Rs.50,00,000/- by cash?

Ans: No. He is not an employee, but being the COO of KPC Karma (P) Ltd. the company formed recently with the purpose of coordinating monitoring and supervising of all the construction of the group he has been paid this money, by cash incidently, we are yet to open any bank account in the name of KPC Karma (P) Ltd.

What ultimately happened to that Rs.35 lacs is not the question when proceedings were initiated. There can be so many reasons for assessing in the hands of Shri Bhaskar Ghosh. The assessee also filed so called revised return and offered the sum of Rs.33.21 crores for taxation, did not challenge issuance of notice u/s 153C. Therefore, in our opinion the AO has the material collected during the course of search exhibiting that money belonging to the assessee was found at the premises of the searched person. Therefore, the material

exhibiting the recovery of money along with fact that information about the money and the money was handed over to the AO who has jurisdiction over the assessee. A satisfaction was recorded for initiating proceedings under section 153C of the Act. It was recorded as per procedure provided in the section and a notice u/s 153C was rightly issued upon the assessee. The assessee failed to bring on record any flaw.

20. As far as the judgments relied upon by the Id. counsel for the assessee are concerned, we have considered them and they are distinguishable on facts. The emphasis of the Id. counsel for the assessee was on the decision of ITAT in the case of Tanvir Collections (P) Ltd. vs. ACIT 54 taxmann.com 379 (Delhi-Trib). In this case the ITAT has dealt with a similar situation, where the AO was happened to be a common AO. The argument of the Id. Departmental Representative was that if AO of the searched person and the assessee is the same it does not make any difference whether satisfaction is recorded in the case of the searched person or the other person. The ITAT had arrived at a conclusion that satisfaction was recorded while taking up the cases of other person. This conclusion has been drawn on the basis of material supplied under query made as per RTI Act. It is a factual issue. We are conscious of this fact but we have dealt with the facts in the present case and observed that satisfaction was recorded by the AO while scrutinizing the papers of the searched person. It is very difficult to create a distinction to find out when such satisfaction was recorded when files of both the assessees are lying open upon the table of A.O. The

ITAT, Delhi Bench had drawn inference on the basis of facts available in that case. It had not interpreted any provision. We have considered this aspect under the fore going paragraph. Therefore, we do not find any merit in the first fold of submission made by the Id. counsel of the assessee.

21. In the next fold of submissions Shri Poddar contended that in order to prove that assessee has concealed its income, the only evidence possessed by the department is the statement of Shri Kamala Shankar Pandey recorded on 30th August, 2010 which has been relied upon by the Id. Commissioner also in the impugned order. He made reference to page no.11 of the CIT(A)'s order. He pointed out that this statement was given to the assessee in the month of September, 2013 i.e. after the penalty order and after the assessment order. No opportunity was provided by the AO to cross-examine this person. According to the AO this person has highlighted the modus operandi of the alleged 5 companies and for giving loan to KPC Foundation and then converted the loan into donation. In the absence of providing an opportunity to cross-examine, if this statement is excluded then no evidence would remain with the AO. The assessee has voluntarily disclosed the alleged donation amount as its income and paid the taxes. The AO did not make any addition over and above the disclosed amount. The alleged amount of donation was received through account payee cheque from KPC Foundation. The KPC Foundation also received the cheque from these five companies. The AO has not simply accepted the disclosure made by the assessee rather he continued the enquiry and issued summons to

one of the directors happened to be a common director in these five donor companies. Shri Prabir Banerjee son of late Nityananda Banerjee appeared before the AO and his statement was recorded on 15th March, 2013. He has confirmed the donation to the Foundation. Thus the assessee has discharged its onus and the department has failed to bring any evidence on record demonstrating any concealment at the end of assessee. For buttressing his contention that statement of Shri Kamala Shankar Pandey ought not to be relied upon being not put for cross-examination, he relied upon the decision of Hon^{ble} Supreme Court in the case of Kishan Chand Chelaram 125 ITR 713. He drew our attention towards page 331 to 333 and 339 of the Paper Book Volume-2. He also made references to pages 144 to 148, 156 to 170, 86 to 103 of Volume -1.

22. On the other hand, the Id. DR submitted that 5 paper companies in a concerted manner passed resolution to convert the companies advances to KPC Foundation as corpus donation to KPC Medical College & Hospital. The assessee has created internationally multiple entities mainly as puppets in the hands of puppeteer and tried to show that the transactions are independent having PAN. Shri Bhaskar Ghosh was receiving income from KPC group to set up the medical colleges and was the visible face of KPC Group for getting various clearances. He also drew our attention towards FIR No.RCO!)@!)A0017 dated 21st May, 2010 registered by CBI, Kolkata. On the strength of this FIR, it was contended that KPC Group was involved in so many irregularities for taking sanction from the Government for admitting the students. He further relied upon the

order of CIT(A) wherein every material has been taken into consideration.

23. We have duly considered the rival contentions and gone through the record carefully. As stated earlier, the Id. counsel for the assessee has referred 106 judgments running into more than 1000 pages, his efforts were to indulge the Bench in an academic debate instead of focusing on the particular incriminating materials. Much energy was devoted towards apprising the Bench as to how a statement recorded from the back of an assessee is to be appreciated and if the deposer was not subjected to cross-examination then his statement is of no use for the prosecution. There is no dispute with regard to the proposition that a statement should not be used against the interest of any person unless that person was provided an opportunity to cross-examination of the deposer. Primarily, we are also not putting the reliance upon the statement of Shri Kamala Shankar Pandey, but it is such a piece of evidence which highlights the modus operandi of the group as a whole. The statement of Shri Kamala Shankar Pandey was recorded on 30th August, 2010. He was stated to be died on 10th of January, 2013. This fact was brought to the notice of the AO by other director in the alleged 5 donor companies who placed on record the death certificate of Shri Kamala Shankar Pandey. The assessment order has been passed on 31st March, 2013. The penalty proceeding has also been initiated on this date. It is pertinent that assessee has filed alleged revised return on 6th of March, 2013, by that time Shri Kamala Shankar Pandey was no more. Therefore, there cannot be any

question to cross-examine this person. His disclosure made in an independent enquiry by the DDIT is to be appreciated with this limitation that he was not subjected to cross-examination. As observed earlier, there is no dispute that if, deposer was not put to cross examination then his deposition cannot be used against the interest of any one, except the deposer. But in the present case Id. AO had issued notice u/s 142(1) on 3/10/2012 and called for details of donation with confirmation, PAN, and nature of donation. Now the assessee had offered the donation for taxation. The question of cross-examining Shri Kamala Shankar Pandey would have arisen, had assessee justified genuineness of its donations. Probably opportunity to cross examine could have been granted. But, when the penalty proceeding was initiated, by that time, Shri Pandey had died. Thus assessee, itself, by its conduct never indicated that this statement was false. In this back ground this statement may not be solely sufficient to charge the assessee with a liability but it will not lose its credibility of a corroborative information. There is no strict rule of law against its admissionability, but its only a rule of prudence, that nobody should be charged with liability on the basis of statement of third person unless opportunity of cross examination is given Thus we take this statement as an information with the AO, which is required to be substantiated. We will refer the evidence on the record in the later part.

24. The contention of Id. counsel for the assessee was that there is no evidence with the revenue demonstrating the fact that assessee has concealed the particulars of income. In theory, the plea taken by

Shri Poddar appears to be tempting but when it is to be tested on hard facts, then, it springs different colours. The copies of the petitions bearing no.78 to 82 filed by the alleged 5 companies for voluntary winding up are being placed on record. The Id. first appellate authority has reproduced the resolutions passed by these companies as well as their balance sheet exhibiting the funds and various capital assets available with these companies. A perusal of the balance sheet annexed with winding up of petitions in all five companies would indicate that these companies had never conducted any business. For example M/s Sunview Properties Pvt. Ltd. was incorporated on 5th March, 2007. Its main object was to carry on the business to acquire assets by purchase, lease, exchange etc. Its authorized capital was of Rs.50 lacs divided into 50000 equity shares of Rs.10/- and paid up capital was of Rs.43,90,000/-. It has total value of assets is of Rs.95,747/-. This company gave a huge donation of Rs.50 lacs in AY 2007-08, Rs.3.35 crores in AY 2008-09 and Rs.2.15 crores in AY 2009-10. Similar is the position with regard to other companies. Perusal of their statement of affairs do indicate that these companies were enacted on paper. They had never done any business, according to their Memorandum of Association. It is highly improbable that some-body would subscribe shares of these companies for Rs.33 crores. These companies would make donation of entire share capital to the assessee. During the course of hearing we have directed the Id. counsel for the assessee to give us the details of common persons who are managing the affairs of KPC Foundation as well as the KPC Medical College & Hospital but no such details were submitted by the assessee. The facts on the record

do speak themselves, the alleged argument of the Id. counsel for the assessee that money was received through account payee cheques. The assessee has filed confirmation from those companies and also produced their directors, therefore, it discharged its onus of proving the identity, genuineness of the transaction and creditworthiness of the donors, in our opinion, on papers, the assessee might have fulfilled the proforma but on reality check, all these companies are apparently bogus. We could appreciate the contention of the Id. counsel that some donation was flowing to the assessee from a very renowned Medical College or a big industrial house. The unknown private limited companies not doing any business, do not have asset of more than 1 lakcs, all of a sudden gave a donation of Rs.33 crores is quite unbelievable. These are the hard facts flowing from the accounts of 5 companies. They do not require corroborative support from the statement of Shri Kamala Shankar Pandey.

25. Let us test on different analogy also. The Explanation-1 appended to section 271(1)(c), create a deeming fiction, which postulates two situations; (a) where in respect of any facts, material to the computation of total income under the provisions of the Act, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the AO, & (b) where in respect of any fact material to the computation of total income under the provision of the Act, the assessee is not able to substantiate the explanation and failed to prove that such explanation is bona fide and the assessee has disclosed all the facts relating to the same and material to the computation of the total income. It is pertinent to

mention that in the resolution passed by these companies it was resolved that though the money is being given to Foundation but it will be forwarded to the assessee . For this reason we have asked the Id. counsel for the assessee to show us the list of management who are managing the affairs of Foundation as well as the KPC Medical College & Hospital, because the common manager must have knowledge of these factual issues. A sum of Rs.33 crores is not a small amount. The assessee must have complete knowledge about the nature and the source. In our opinion a brazen attempt was being made by the assessee in introducing its dubious money in this clandestine manner via some 5 private limited companies; in a layering manner and then tried to justify the stand with the help of alleged proforma documents. The alleged disclosure petition moved by the assessee during the course of assessment proceedings also indicate that Shri Rajat Roy as trustee of the KPC Medical College & Hospital was aware about the statements of various persons and the documentary evidence collected by the Revenue against the assessee. Had the assessee not disclosed income, the AO would have specifically controverted the assessee with this material.

26. At the cost of repetition we would like to observe that the other most important features of section 271(1)(c) is deeming provisions regarding concealment of income. The section not only covered the situation in which the assessee has concealed the income or furnished inaccurate particulars, in certain situation, even without there being anything to indicate so, statutory deeming fiction for concealment of income comes into play. This deeming fiction, by way

of Explanation I to section 271(1)(c) postulates two situations; (a) first whether in respect of any facts material to the computation of the total income under the provisions of the Act, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the Assessing Officer or Learned CIT(Appeal); and, (b) where in respect of any fact, material to the computation of total income under the provisions of the Act, the assessee is not able to substantiate the explanation and the assessee fails, to prove that such explanation is bona fide and that the assessee had disclosed all the facts relating to the same and material to the computation of the total income. Under first situation, the deeming fiction would come to play if the assessee failed to give any explanation with respect to any fact material to the computation of total income or by action of the Assessing Officer or the Learned CIT(Appeals) by giving a categorical finding to the effect that explanation given by the assessee is false. In the second situation, the deeming fiction would come to play by the failure of the assessee to substantiate his explanation in respect of any fact material to the computation of total income and in addition to this the assessee is not able to prove that such explanation was given bona fide and all the facts relating to the same and material to the computation of the total income have been disclosed by the assessee. These two situations provided in Explanation 1 appended to section 271(1)(c) makes it clear that that when this deeming fiction comes into play in the above two situations then the related addition or disallowance in computing the total income of the assessee for the purpose of section 271(1)(c) would be deemed to be representing the income in respect of which

inaccurate particulars have been furnished. On examination of the facts, we find that firstly, there is no explanation at the end of assessee, why it has not disclosed these donations in the original return(s)? There is no bona fide in the alleged explanation of the assessee that it had received the money through account payee cheque and, therefore, harbored a belief that donations are genuine. This explanation is wholly for the sake of explanation. The assessee failed to spell out specific facts and circumstances or reason which operated in the minds of its managing director, finance while preparing the return and treating these donations as genuine. Looking to the facts of these five donors, no prudentman would, however, harbor a belief that such companies can give donation. It is pertinent to note that it cannot be a co-incidence or a chance that five companies managed by a common director, having assets of less than Rs.1 lac, not done any business but would give donations of Rs.33 crores. These circumstances in itself suggest a well designed scheme at the behest of the assessee, because it is the assessee who is ultimately getting the benefit. Therefore, there was no explanation at the end of assessee for not showing these donations as its income in the original return(s) or in the return(s) filed in response to notice under section 153C. The Id. Commissioner has rightly confirmed the penalty upon the assessee. We do not find merit in the contentions of the Id. counsel for the assessee.

27. In the next fold of submissions, the Id. counsel for the assessee has contended that CIT(A) has issued directions to the AO for exploring to make addition of these unexplained donations under

section 115BBC of the I.T. Act. Section 115BBC provides that if an assessee being educational institution, hospital, or any trust or institution referred to in section 11 receives unanimous donation and fail to produce evidence exhibiting the maintenance of record of the identity including name and address of the donor then, such unanimous donation will be taxed according to the procedure provided in sub-section (1) of section 115BBC.

28. The Id. counsel for the assessee while pointing out, what aspects the Id. Commissioner could take in an appeal ? drew our attention towards section 251 of the I.T. Act. Sub-section (1) provides that in disposing of an appeal the Commissioner shall have the following powers. Sub-clause (b) of section 251(1) is relevant for our purpose which reads as under :-

- (b) in an appeal against an order imposing a penalty he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty.

A perusal of the above would indicate that powers of the Commissioner while dealing with penalty appeal are restricted to the penalty proceedings only. He may confirm or cancel the imposition of penalty. He may enhance or reduce the penalty. He cannot give direction to the AO for exploring the additions in an assessment. Direction given by the Id. Commissioner in paragraph 6.3 to 6.7 are contrary to the provisions of law and, therefore, this finding of the Id. CIT(A) is quashed. The penalty imposed by the AO in the cases of

KPC Medical College & Hospital is confirmed in all the three years. The appeals are treated as partly allowed for statistical purpose.

29. Now we take **ITA No.1835/Kolkata/2014** . In this case, the assessee did not file the return within the due date provided under section 139(1) of the I.T. Act. The assessee has filed the return under section 139(4) of the Act on 14.10.2011 which is a belated return because the due date for filing of return was 30th September, 2010. The assessee sought to file a revised return under section 139(5) which was not entertained by the AO for the reasons that original return was not filed within the due date. However, Id. AO has made an addition of Rs.1.41 crores which is undisclosed income of the Foundation and which was offered by the assessee. This voluntary disclosure was made by way of an alleged revised return filed on 6.3.2013. According to the AO, no search was carried out, therefore, no statement under section 132(4) was recorded. There cannot be any disclosure at the end of the assessee and accordingly there cannot be any statutory safeguard for the assessee to claim that since it has made voluntary disclosure and the income was assessed on the basis of its disclosure, therefore, no penalty should be imposed. The Id. AO has accordingly imposed a penalty of Rs.43,56,900 which is equal to the taxes sought to be evaded by the assessee on the alleged undisclosed returned income of Rs.1.41 crores offered for taxation by filing the alleged belated return.

30. The Id. representatives, did not dispute that all other facts and arguments are similar to the one dealt with in the KPC Medical

College & Hospital. In view of our discussion made with regard to the concealment as well as applicability of Explanation -1 appended to section 271(1)(c) in the case of KPC Medical College & Hospital, we are of the view that all those aspects are squarely applicable on the facts of the present case. Ld. CIT(A) has also not dealt with elaborately these aspects in the case of the present assessee. He simply relied upon his finding in the case of KPC Medical College & Hospital. Therefore, following our finding in the KPC Medical College & Hospital, we do not find merit in this appeal also. This appeal is dismissed.

31. In the result, appeals in ITA Nos.1832 to 1834/Kol/2014 are treated as partly allowed for statistical purpose and the appeal in ITA No.1835/Kol/2014 is dismissed.

Order pronounced in the open Court on

Sd/-
(B. P. Jain)
Accountant Member

Sd/-
(Rajpal Yadav)
Judicial Member

Dated ___23/06/2015_____

Mahata/-

Order pronounced in the open court 24/06/15

Sd/-
(B.P.JAIN)
A M

Sd/-
(MAHAVIR SINGH)
J M

Dated 24/06/15

Copy of the order forwarded to:

1.	The Appellant
2.	The Respondent
3.	The CIT concerned
4.	The CIT(A) concerned
5.	The DR, ITAT, Ahmedabad
6.	Guard File

BY ORDER

Dy. Registrar, ITAT, Ahmedabad

1. Date of dictation: 1/6,2/6,8/6 &12/6/2015
2. Date on which the typed draft is placed before the Dictating Member: 15/6/2015 other Member:
3. Date on which approved draft comes to the Sr. P. S./P.S.:
4. Date on which the fair order is placed before the Dictating Member for pronouncement: _____
5. Date on which the fair order comes back to the Sr. P.S./P.S.:
6. Date on which the file goes to the Bench Clerk:
7. Date on which the file goes to the Head Clerk:
8. The date on which the file goes to the Assistant Registrar for signature on the order:
9. Date of Despatch of the Order: