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

BEFORE SHRI I.C. SUDHIR, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA Nos. 7034 to 7038/Del/2014
Assessment Years: 2006-07 to 2010-11

M/s. M.G. Contractors Pvt. Ltd. 603, Ring Road Mall, Near Deepali Chowk, Rohini New Delhi (PAN: AAACM9786A)	Vs.	DCIT, Central Circle-I, Faridabad
(Appellant)		(Respondent)

Assessee by : Sh. P.C. Yadav, Adv.
Department by : Sh. P. DAM Kanunjna, Sr. DR

Date of hearing : 24.06.2016
Date of pronouncement: 19 .09.2016

ORDER

PER I.C. SUDHIR, J.M.

1. In all these appeals preferred by the assessee, the action of the Learned CIT(Appeals) in sustaining the penalty levied under sec. 271(1)(c) of the Income-tax Act, 1961 at Rs.8,53,281 in assessment year 2006-07, Rs.73,54,710 in

assessment year 2007-08, Rs.6,81,615 in assessment year 2008-09, Rs.49,48,020 in assessment year 2009-10 and Rs.10,56,756 in assessment year 2010-11 has been questioned.

2. Heard and considered the arguments advanced by the parties in view of orders of the authorities below, material available on record and the decisions relied upon.

3. The relevant facts are that a search & seizure operation was conducted at the premises of the assessee and its group company on 18.02.2011. In response to the notice issued under sec. 153A, the assessee furnished return of income along with year-wise bifurcation of Rs.10 crores surrendered by the assessee immediately after the completion of search. The Assessing Officer framed assessments under sec. 153A accepting the returns of income filed for the assessment years under consideration. The Assessing Officer thereafter initiated penalty proceedings under sec. 271(1)(c) of the Income-tax Act, 1961 and levied the penalty for the assessment years under consideration. The aggrieved assessee approached the first appellate authority but could not succeed. The action of the learned CIT(Appeals) in upholding the penalty levied by the Assessing Officer for these assessment years has been questioned by the assessee before the ITAT.

4. In support of the ground, the Learned AR has furnished following submissions in the shape of written synopsis:

1. *It is submitted that on 18.02.2011, a search and seizure action was conducted at the premises of the assessee and its group companies. It is pertinent to mention here that neither any money, bullion, jewellery or other valuable article or thing was found nor any income based on any entry in books of assessee was assessed u/s 153A of the Act. Certain lose sheets admittedly were found but the same were ignored by the AO in assessment proceedings.*
2. *It is submitted that on 22.02.2011 that is within four days, immediately after the completion of search, assessee filed a letter with the AO and offered a lump sum surrender of Rs 10 Crore. The contents of this letter are reproduced in the assessment order. It is submitted that this letter was filed much before the issuance of any summon, notice, questionnaire from the investigation wing of the revenue, whose functions are to scrutinize the seized material and preparation of*

Appraisal Report. It is has been mentioned in this letter that this surrender has been made to buy peace of mind as well as a gesture of cooperation towards the department and subject to the condition that no penal action under any provisions of the IT Act would be taken against the assessee. Out of the surrender of Rs 10 Crore an amount of Rs 8, 45, 00,000/- was surrendered in the hands of assessee and balance of the amount was surrendered in the hands of one of the director namely K.C.Mittal.

3. *It is submitted that thereafter the AO after receiving the material from the investigating wing issued the notice of 153A on 22.02.2013. The assessee, in response to the notices of 153A, has filed its ROI along with year wise bifurcation of Rs 10 Crore as mentioned on Page 3 of AO's order. The chart is reproduced hereunder for ready reference.*

Asst. Year	*Returned Income*	*Amount Surrender*	*Total Returned Income*	*Pg of PB*
2006-07	*3,83,07,350/-*	*25,35,000/-*	*4,08,42,350/-*	*51 OF PB*
2007-08	*6,24,10,990/-*	*2,18,50,000/-*	*8,42,60,990/-*	*52 OF PB*
2008-09	*6,56,34,655/-*	*20,25,000/-*	*6,76,59,655/-*	*53 OF PB*
2009-10	*5,44,67,459/-*	*1,47,00,000/-*	*6,91,67,459/-*	*54 OF PB*
2010-11	*14,49,33,102/-*	*31,39,500/-*	*14,80,72,602/-*	*55 OF PB*
2011-12	*11,62,83,424/-*	*4,02,50,500/-*	*15,65,33,924/-*	--------
Total		*8,45,00,000/-*	*57,36,04,456/-*	

4. *Thereafter, the AO has issued notice u/s 143(2) along with questionnaire of 142(1). In this questionnaire the AO has simply asked the assessee about the entries mentioned in seized Annexure-A-2, A-3, A-4, A-5, A-6 and A-7 and A-9.*
5. *It is submitted that in response to the above the assessee vide its letter dated 20.03.2013, intimated that said notings in all the diaries had been written merely for reference purpose only and has nothing to do with the actual working of the company. The assessee, however just to honour the surrender, has offered proportionate amount belonging to each year as its Income as depicted in above chart.*
6. *It is submitted that the AO after analyzing all the facts and circumstances accepted the amount of income offered by the assessee for various years and has framed the assessment on returned income. It is crucial to reproduce the final observation of the AO at Page No-4 of the Assessment Order.*

> *"The above contention of the assessee has been considered and found to be acceptable since the assessee has honoured the surrender made during the course of search"*

7. *Thereafter, the AO vide notice dated 28.03.2013, initiated penalty proceedings against the assessee copies of the notices are at Page No-1-5 of the PB. Assessee filed its reply before the AO, wherein it has been contended that there is no concealment at all and the assessee does not fall under the rigors of explanation 5A of the Income Tax Act-1961. However the contentions of the assessee were discarded and penalty for all the years are levied by the AO.*
8. *Action of the AO has been affirmed by the CIT (A) and now assessee is in appeal.*

Submissions of the assessee in respect of ground number 1 & 4:-

9. *Penalty is void-ab-initio:-It is submitted that in the instant case a perusal of the notice issued by the AO under section 274 of the ITA Act would show that he has not struck off the irrelevant clause of the notice, meaning thereby the AO has not*

apprise the assessee about the specific charge, under which assessee has been held guilty of penal action. It is submitted that these types of notices are severely criticized by the various high courts and apex court in the following judgments and ultimately penalty has been quashed. Reference can be made to the following decisions.

a. *Ramila Ben Vs ACIT 60 TTJ 171(Ahmadabad)*
b. *CIT Vs Mannu Engg. 122 ITR 306(Guj)*
c. *Dillip N Sherrof reported in 291 ITR 519(SC)- Wherein these kind of notices are severely criticized by the Apex Court.*
d. *Smt Rita Saudhrey reported in 146 taxation 59(Del)*
e. *Manjunath Cotton Mills reported in 359 ITR 0565(Kar).-Recent Decision.*

10. *It is pertinent to mention here that in the case of Manjunath (Supra) also the income was surrendered as a result of survey and penalty was levied u/s 271(1)(C) of the Act. However, the Hon'ble (Karnataka) High Court after referring to the decision of T.Ashok Pai (SC) 292 ITR 11 (SC) has held as under:-*

> *Concealment, furnishing inaccurate particulars of income are different. Thus the Assessing Officer while issuing notice has to come to the conclusion that whether is it a case of concealment of income or is it a case of furnishing of inaccurate particulars. The Apex Court in the case of Ashok Pai reported in 292 ITR 11 at page 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujrat High Court in the case of MANU ENGINEERING reported in 122 ITR 306 and the Delhi High Court in the case of VIRGO MARKETING reported in 171 Taxmn 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. Therefore, when the Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind*

11. *It is submitted that the above decision has been followed by various benches of the ITAT, for example recently Calcutta bench of the ITAT in the following cases, which were also covered under explanation 5A of section 271(1)(C) of the Act, has followed the verdict of Manjunath cotton and has quashed the penalty proceedings after observing that the notice of penalty u/s 274 was not specific in as much as the AO has not struck off the irrelevant clauses of the notice.*
    a. *Thakur Prasad Sao in ITA No1534/Cal/2013 dated 23.03.2016(Copy in Decisions Paper Book)*
    b. *Ramesh Prasad Sao in ITA No-997/Kol/2011 dated 03.02.2016(Copy in decisions PB)*
    c. *Parmeshwari Devi- Copy of the decision is annexed in Paper book-Delhi Bench*
12. *In view of the above it is submitted that the penalty levied by the AO deserve to be deleted on this ground alone.*

Submissions of the assessee in respect of ground 2 & 3 are as under:-

13. *Without prejudice to the contentions raised in ground number 1 and 4, it is submitted that a bare reading of the provisions of explanation 5A of section 271(1)(C) made it clear that for invoking the same, framing of assessment u/s 153A, on the basis of incriminating material found in the course of search, is sine-qua-non particularly for those years for which no proceedings are pending on the date of search.*

14. *It is submitted that clause (a) of explanation 5A is not at all applicable in the present case, and as per clause (b) presence of any income based on any entry in books of accounts or other documents is a condition precedent. Admittedly in the present case no income, based on any entry in books of assessee, has been detected in the course of assessment proceedings.*

15. *It is next submitted that provisions of Explanation 5A are deeming and penal provisions therefore they are to be construed in a stricter manner and nothing can be imported in the statute which is not there in the section.*

16. *It is submitted that it is an admitted fact that nothing was found in search which has been corroborated by the AO with the surrender of the assessee during the course of assessment proceedings. It is submitted that recently Hon'ble Mumbai Bench of the ITAT in the case of Sejal Exports (India) in ITA No 5724/Del/2014, under similar set of facts has held that AO is duty bound to corroborate the surrender with seized material and if this exercise has not been done then explanation 5A cannot be invoked- (See Decisions Paper Book Page-E Para-9). Further assessee seeks to rely on the following judgments*

    a. *Ajay Traders Vs DCIT ITA No-296/Del/2014- Copy in decisions Paper Book*
    b. *Financial Technologies- Copy enclosed in decisions paper book.*

17. *It is relevant to mention here that in the case of Sejal Exports also the assessee has made surrender after the search action, in that case statement of the assessee was also recorded at the time of search.*

Submissions of the assessee in respect of ground Number- 5, 6& 7 of the Appeal

20 *It is next submitted that had the assessee would have retracted the surrender even additions were not tenable in assessment u/s 153A, as no incriminating material has been unearthed during the course of search. If that be so then penalty cannot be levied at all.*

21 *It is submitted that the Ld CIT(A) has failed to appreciate that search was conducted in 2011, letter offering surrender was made in 2011 itself(within four days) and assessment was framed in 2013, which means department was in*

possession of the alleged incriminating material for almost two years, and if the department was of the view that surrender made is an eyewash then it would have refused to accept the surrender and would have framed the assessment on the basis of material gathered in search. However, additions were made solely relying on the surrender made by the assessee. Therefore, now revenue cannot allege concealment or furnishing of inaccurate particulars. Acceptance of surrender for the purpose of assessment without corroborating with seized material and refusal of the surrender for levying penalty is not permissible.

22 *The Ld CIT(A) has failed to appreciate that there are two Circulars of the Board namely circular number 286 of 2003 and 286 of 2013, which prohibits confessional statement and directs the authorities to concentrate on documentary evidence- Copy of the circulars is there in Decisions Paper book. Therefore additions made contrary to the directions of the board are not tenable in law. Reliance can be placed on the following judgments*

a. *CIT Vs Best Plastics reported in 295 ITR 256(Del)- Authored by Hon'ble T.S.Thakur ji*
b. *CIT Vs Nayana P Dedhia reported in 270 ITR 572(AP)*
c. *Aggrwal Farms Vs ITO 85 TTJ 723(Del)*

23 *It is next submitted that the CIT-(A) has failed to appreciate that no assessments were pending (except for AY 2010-11) on the date of search and hence quantum additions were not at all tenable in the eyes of law had the assessee would have retracted the surrender. Further it is now well settled law that addition under new provisions can only be made, on the basis of some incriminating material found in search in respect of those years, assessment of which were not pending on the date of search. A statement alone dehors any material cannot be treated as incriminating material (Delhi High Court in Rajpal Bhatia 333 ITR 315). Further a reference can be made to the following decisions*

a. *CIT Vs Kabul Chawala reported in 380 ITR 573(Del).*
b. *CIT Vs Kurele Paper reported in 380 ITR 571(Del).*

24 *It is submitted that so far as AY 2010-11 would concern the CIT (A) has failed to appreciate that in this year the AO has failed to corroborate the surrender with any documentary evidence and further failed to scrutinize the regular items also and hence in this year also quantum was not tenable.*

25 *Bona-fide surrender: It is submitted that it is an admitted fact that the surrender was made dehors, any statement or any material or any questionnaire, issued by investigation wing of the department or by the AO. Therefore, it can be said that the surrender was bona-fide and the same was made as a gesture of cooperation towards department in a bona-fide manner.*

26 *It is next submitted that surrender was made before the commencement of post search proceeding, under a bona-fide belief that if, there would be a delay or the surrender would have been made after the issuance of questionnaire or summon from investigation wing then it would not be treated as voluntary surrender and hence it can be said that assessee has made the surrender under bona-fide belief that he will immunity from penalty u/s 271(1)(C), which are discretionary provisions. If he made surrender before the detection of any unrecorded transactions.*

27 *It is next submitted that Chairman of the assessee Company was not aware of the guidelines of CBDT, in which guidelines it has been prescribed that no surrender would be obtained from any assessee and if any surrender would be obtained it will be taken adversely. There are two circulars of the board namely one of the 2003 and one of the 2014. See Page No- 60-62 of Decisions Paper book. This fact and position of law would also prove that the surrender was bona fide and made in order to cooperate with department.*

28 *It is next submitted that there are decisions of ITAT & High Courts, wherein referring to these circulars, even additions have been deleted. Therefore, it can be*

said that even after lapse of 2 years, from the date of surrender and filing of ROI in 2013. Assessee has obliged his surrender and cooperates with the department under a bona-fide belief that he will be exonerated from penalty, if we will cooperate with department. Premsons decision-

29 *Further assessee seeks to rely on the judgment of Suresh Chand Mittal reported in 251 ITR 9(SC) larger bench. In this case it has been held in categorical terms that surrender made by the assessee upon persistent queries of AO, in a search matter should be treated as bona fide surrender. It is submitted that so far as the case of the present assessee is concerned the facts are on better footage. Further assessee seeks to rely on the following decisions.*

a. *CIT Vs Harkaran Das Ved pal- 336 ITR 8(Del)*
b. *CIT Vs Shri Ramdas Motors reported in 238 ITR 177(AP)*

30 *It is next submitted that provisions of section 271(1)(C) are discretionary provisions as is evident from the fact that the legislature has used the expression "may" and the same are not automatically invoke able in each and every case. In the context reliance can be placed on the decision of Hon'ble Hyderabad Bench in the case of K. Dheedar Ahmed reported in 97 ITD 240(Hyd) wherein the Hon'ble Bench after referring to the decision of Hon'ble Apex Court in the case of Hindustan Steel Ltd. Vs State of Orrisa reported in 83 ITR 26(SC) has held that "at least in some exceptional cases, discretion vested in the officer should be used to drop proceedings". A reference can also be made to the decision of Hon'ble Delhi High Court in the case of CIT Vs Maya Rani Reported in 92 ITR 394(Del), wherein it has been held by the Jurisdictional High Court that word 'may' used in section 271(1) means that the authorities have a discretion either to levy or not to levy a penalty.*

31 *It is submitted that the present is not a case of any entry provider who indulge in money laundering type activities rather a case of a reputed assessee who is filing ROI every year and declaring substantial income every year. And has obliged his promise in a way that he has included the surrendered income in its ROI and has paid taxes on the same. The assessee has not gone for the loop holes, with help of which he would have gone tax free. Therefore it is submitted that discretion provided u/s 271 (1) (c) ought to be have been exercised in this case. Further assessee seek to rely on the following judgments*

a. *Shri P.V.Ramna Reddy ITA No-1852-1857/Hyd/2011- Wherein it has been held that section 271(1)(C) is discretionary provision and cannot be invoked where income is surrendered and assessment has been made on such surrender. Copy of the decision is attached in PB*

Submissions of the assessee in respect of Ground number 8 are as under:-

32 *It is submitted that provisions of section 153A are non-obstantive provisions they exclude the operation of section 139(1), meaning thereby the return filed in pursuance to a notice of 153A would replace the original return filed under section 139(1) of the Act. And concealment of income has to be seen with reference to the fresh return filed in pursuance to the notice of 153A of the Act.*

33 *It is submitted that if there is no difference in the returned income(filed in response to the notice of 153A) and assessed income then no penalty under section 271(1)(C) would be leviable as held in the following judgments, wherein it has been held that return filed in pursuance to the notice of 153A would replace the original return and concealment has to be judge with reference to the new return*

a. *Prem Arrora, vide it's order dated 09-03-2010 in ITA No 4702 of 2010- Copy in decisions Paper Book*

b. Sejal Export ITA No 5724 of 2012 Mumbai- Copy in decisions Paper Book

23 *Explanation of the assessee not proved to be false:-It is next submitted that during the course of assessment proceedings and penalty proceedings the assessee has tendered an explanation in respect of the alleged seized material. The assessee explained that the figures mentioned on these documents are rough jottings and has no bearing on the working of the Company. It is interesting to note down that this explanation of the assessee has also been accepted by the AO categorically in the order of assessment. However he has levied the penalty on the ground that explanation 5A cannot be ignored. However the revenue has not brought any material on record to prove that the explanation of the assessee is false or any income has been assessed on the basis of any entry mentioned in seized documents.*

24 *It is submitted that, as per the decision of Reliance petrochemicals reported in 322 ITR 158(SC) inaccurate particulars have to be seen with reference to the documents annexed with the ROI. And if they are correct or there is no material on record to show that the details furnished by the assessee are not correct then penalty under section 271(1)(C) is not leviable.*

25 *It is submitted that accounts of the assessee are audited and no adverse remarks have been made by the auditors in this regard. Therefore, it is incorrect to say that assessee had furnished inaccurate particulars of his income. Therefore as per the judgment of Reliance Petro Chemicals it is not a case where assessee has furnished any inaccurate particulars of his income. Had the AO detected some more amount and have added the same to the income of the assessee or the AO could have pointed out some fallacy in the particulars of the assessee then situation would have been completely different*

26 *It is submitted that recently the Hon'ble Lucknow Bench of the tribunal in the case of Star International Vs ACIT reported in 308 ITR (AT) 33(Luk) has held*

that there has to be some positive material on record collected and referred to by the AO which would show that either the assessee has concealed the particulars of his income or has furnished inaccurate particulars of his income. Hon'ble Bench further held that there has to be something for comparison to prove that what was claimed by the assessee was false or inaccurate.

27 In view of the above it is most humbly prayed that penalty imposed may be deleted."

5. The Learned Senior DR on the other hand has placed reliance on the orders of the authorities below. He submitted that the assessee had surrendered Rs.10 crores as undisclosed income due to incriminating documents found during the course of search. He submitted that the declaration of income was made only after search thus it is clear in view of Explanation-5A to sec. 271(1)(c) of the Act that there was concealment of particulars of income and furnishing inaccurate particulars thereof on the part of the assessee towards the income surrendered to attract levy of penalty under sec. 271(1)(c) of the Act.

6. The Learned AR rejoined with the submissions that there was no incriminating material found during the course of search and assessment was already framed under sec. 143(3) of the Act well before the date of search and only in the assessment year 2010-11, the assessment was pending on the date of search. In the assessment year 2010-11 as well, no corroborative evidence was there to justify the addition made in the assessment framed under sec. 153A of the Act. He submitted that the acceptance of the returns of income for the assessment years under consideration filed in response to the notice issued under sec. 153A of the Act itself suggests that the assessments have been framed on the basis of surrendered income and it was not based upon the incriminating material found during the course of search. The surrender was made immediately after completion of search itself suggests that it was voluntary action on the part of the assessee.

7. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. The learned counsel for the assessee drew out attention to the show cause notice issued u/s. 274 of the Act before imposing penalty and submitted that the said notice doe s not specify as to whether the assessee is guilty of having "furnished inaccurate particulars of income" or of having "concealed particulars of such income". He pointed out that show cause notice does not strike out the irrelevant portion viz., "furnished inaccurate particulars of income" or "concealed particulars of such income". He further drew attention to the assessment order also stating that there is no charge specified in the assessment order itself. He drew our attention to a decision of the Hon'ble' Karnataka High Court in the case of CIT v. Manjunatha Cotton & Ginning Factory (2013) 218 Taxman 423 (Kar.) wherein it was held that if the show cause notice u/s. 274 of the Act does not specify as to the exact charge viz., whether the charge is that the assessee has "furnished inaccurate particulars of income" or "concealed particulars of income" by striking out the irrelevant portion of pointed show cause notice, then the imposition of penalty on the basis of such invalid show cause notice cannot be sustained. To examine this argument of the ld. AR we firstly examine facts for assessment year 2006- 2007, The assessment under section 153A (1) (b) of the income tax act was framed on 28/03/2013 wherein returned income under section 153A is accepted as assessed income. While initiating the penalty proceedings under section 271 (1) (C), Ld. assessing officer in assessment order has stated that the assessee has not disclosed this income is Suo Moto but for the search this income would not have been unearthed. Hence he was satisfied that the penalty under section 271 (1) (C) read with expression 5A of the income tax act has to be initiated for which notice under section 271 (1) (C) is being issued separately. Then he went on to say that :-

> " However as discussed above, I am satisfied that the assessee is liable for facing penalty proceedings under section 271 (1) (c) of the income tax act 1961 read with explanation 5A thereto, with regards to the addition of Rs.

> 2535000/- as detailed above and accordingly penalty proceedings are being initiated separately for the issue of notice under section 274 of the act."

Further at the end of the assessment order it has been stated that in respect of income is disclosed to tax/additions made a separate notice under section 274 read with section 271 (1) (c) is issued in respect of all the disclosures/additions above. The first contention raised by Ld. authorized representative is that in the notice issued there is no reference about whether the show cause is for furnishing of inaccurate particulars of income or concealment of income. Therefore he submitted that when the charge made against the assessee is twin charge the notice is not a valid notice for levy of the penalty. Even if the para No. 8 of the penalty order is seen where it is mentioned as under :-

> "8. The provisions of section 271 (1) (C) read with explanation 5A are clearly attracted as the assessee has concealed particulars, furnished inaccurate particulars of its income for the previous year 2005 – 06."

From above it is apparent that even at the time of initiation of penalty proceedings as well as at the time of levy of penalty, the Ld. assessing officer is not sure whether he is levying penalty for furnishing of inaccurate particulars of its in income or concealment of the income. The learned counsel for the assessee drew out attention to the show cause notice issued u/s. 274 of the Act before imposing penalty and submitted that the said notice doe s not specify as to whether the assessee is guilty of having "furnished inaccurate particulars of income" or of having "concealed particulars of such income". He pointed out that the pointed show cause notice does not strike out the irrelevant portion viz., "furnished inaccurate particulars of income" or "concealed particulars of such income". He drew our attention to a decision of the Hon'ble' Karnataka High Court in the case of CIT v. Manjunatha Cotton & Ginning Factory (2013) 218 Taxman 423 (Kar.) wherein it was held that if the show cause notice u/s. 274 of the Act does not specify as to the exact charge viz., whether the charge is that the assessee has "furnished inaccurate particulars of income" or "concealed particulars of income"

by striking out the irrelevant portion of pointed show cause notice, then the imposition of penalty on the basis of such invalid show cause notice cannot be sustained. The Hon'ble Karnataka High Court in the case of CIT & Anr. v. Manjunatha Cotton and Ginning Factory, 359 ITR 565 (Karn), has held that notice u/s. 274 of the Act should specifically state as to whether penalty is being proposed to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income. The Hon'ble High court has further laid down that certain printed form where all the grounds given in section 271 are given would not satisfy the requirement of law. The Court has also held that initiating penalty proceedings on one limb and find the assessee guilty in another limb is bad in law. It was submitted that in the present case, the aforesaid decision will squarely apply and all the orders imposing penalty have to be held as bad in law and liable to be quashed. The Hon'ble Karnataka High Court in the case of CIT & Anr. v. Manjunatha Cotton and Ginning Factory (supra) has laid down the following principles to be followed in the matter of imposing penalty u/s.271(1)(c) of the Act.

"63. In the light of what is stated above, what emerges is as under :

(a) Penalty under section 271(1)(c) is a civil liability.

(b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.

(c) Willful concealment is not an essential ingredient for attracting civil liability.

(d) Existence of conditions stipulated in section 271(1)(c) is a sine qua non for initiation of penalty proceedings under section 271.

(e) The existence of such conditions should be discernible from the assessment order or the order of the appellate authority or the revisional authority.

(f) Even if there is no specific finding regarding the existence of the conditions mentioned in section 271(1)(c), at least the facts set out in Explanation 1(A) and 1(B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.

(g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under section 271(1)(c) is a sine qua non for the Assessing Officer to initiate the proceedings because of the deeming provision contained in sub-section (1B).

(h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Income-tax (Appeals) and the Commis sioner.

(i) The imposition of penalty is not automatic.

(j) The imposition of penalty even if the tax liability is admitted is not automatic.

(k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by the authorities it has resulted in payment of such tax or such tax liability came to be admit ted and if not it would have escaped from tax net and as opined by the Assessing Officer in the assessment order.

(l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bona fide, an order imposing penalty could be passed.

(m) If the explanation offered, even though not substantiated by the assessee, but is found to be bona fide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.

(n) The direction referred to in Explanation 1(B) to section 271 of the Act should be clear and without any ambiguity.

(o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the assessing authority.

(p) Notice under section 274 of the Act should specifically state the grounds mentioned in section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income

(q) Sending printed form where all the grounds mentioned in section 271 are mentioned would not satisfy the requirement of law.

(r) The assessee should know the grounds which he has to meet specifically. Otherwise, the principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.

(s) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.

(t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.

(u) The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not

> operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on the merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings."
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> [underline supplied by us]

It is clear from the aforesaid decision that on the facts of the present case that the show cause notice u/s. 274 of the Act is defective as it does not spell out the grounds on which the penalty is sought to be imposed. Even The assessment order is also silent on this aspect. Therefore in the complete assessment proceedings as well as penalty proceedings against the assessee that whether it has furnished inaccurate particulars of income or has concealed particulars of income. The provisions of penalty proceedings cannot be distinctly applied in assessments related to search and other regular assessment. Therefore the principles laid down by the decision of Hon'ble Karnataka High Court also squarely applies to the facts of the present case even though exploration 5A of section 271(1)(C) is invoked. Similar view has been taken by other coordinate benches in following decisions:-

1) DCIT Central circle versus Shaym Sundar Dhanuka 1869 – 1870/KOL/2013
2) Smt. Champa Goel Vs ACIT ITA No 696/Chd/2012
3) Nisheeth Kumar Jain versus ACIT ITA 961 – 964/KOL/2013
4) Harishkumar Sarogi V DCIT ITA No 1222-1226/Kol/2011 & 1496-1499/Kol/2011

Following the decision of the Hon'ble Karnataka High Court, we hold that the orders imposing penalty in all the assessment years have to be held as invalid and consequently penalty imposed is cancelled.

Secondly these facts are undisclosed that assessments for the assessment years under consideration have been framed under sec. 153A of the Act accepting the returns of income on the surrendered amounts filed by the assessee in response to the notice issued under sec. 153A of the Act as under :-

Sr No	A Y	Returned income u/s	Assessed income

		153.A	
1	2006-07	40842350	40842350
2	2007-08	84260990	84260990
3	2008-09	67659655	67659655
4	2009-10	69167459	69167459
5	2010-11	148072602	148072602

In the present case the income is offered by appellant on ad hoc basis without co-relating the amount of year wise disclosure without any corroborating evidence. The above disclosure has been accepted by Ld. assessing officer without referring to any incriminating material pertaining to respective years. Ld. assessing officer as well as the 1st appellate authority has also not referred to any material based on which disclosure is made and assessed by the Ld. assessing officer. In view of this it is apparent that disclosure is without any material but merely on the statement of appellant. In our view, there may be several reasons for making surrender by an assessee and merely on this basis an inference beyond doubt cannot be drawn that there was concealment of particulars of income or furnishing inaccurate particulars thereof on the part of the assessee towards the surrendered income to attract penal provisions under sec. 271(1)(c) of the Act. In the present case, vide letter on 22.2.2011 i.e. immediately after the completion of search, the assessee has offered a lump sum surrender of Rs.10 crores well before issuance of any summons, notice, questionnaire from the investigation wing of the Revenue, with this submission that the surrender was made to buy peace of mind as well as a gesture of cooperation towards the department and subject to the condition that no penal action under any provisions of the Income-tax Act, 1961 would be taken against the assessee. Further Hon'ble Gujarat High Court in case of Kirit Dayabhai patel V ACIT (ITA 1181 of 2010) has held as under

> "13. Considering the facts and circumstances of the case and also considering the decisions relied upon by learned senior advocate for the appellant, we are of the considered opinion that the view taken by the Tribunal is erroneous. The CIT(A) rightly held that it is not relevant whether any return of income was filed by the assessee prior to the date of search and whether any income was undisclosed in that return of income. In view of specific provision of Section 153A of the I.T. Act, the return of income filed in response to notice under Section 153(a) of the

I.T. Act is to be considered as return filed under Section 139 of the Act, as the Assessing Officer has made assessment on the said return and therefore, the return is to be considered for the purpose of penalty under Section 271(1)(c) of the I.T. Act and the penalty is to be levied on the income assessed over and above the income returned under Section 153A, if any."

Similar are the facts in the case of Sajal Exports (India) vs. ACIT (supra) wherein the Assessing Officer had completed the assessment under sec. 153A by accepting the additional income so offered by the assessee, the Assessing Officer initiated penalty proceedings under sec. 271(1)(c) of the Act and levied penalty relying upon the Explanation-5A to section 271(1)(c) of the Act, the Learned CIT(Appeals) also upheld the penalty. The ITAT deleted the penalty with this observation as

"*the very fact that the partner of the assessee agreed to offer a lump sum figure of Rs.12 crores shows that there is no one to one relationship between the documents found and the income surrendered, i.e., it was a lump sum surrender to take care of all the deficiencies, if any. In respect of the year under consideration also, the additional income surrendered by the assessee has not been linked by the Assessing Officer to any of the seized documents. What we notice from the discussion made in the penalty order is that there were some documents evidencing payment of salary and loans in cash. With regard to the same, the employee of the assessee admitted that the salary and loans have been paid in cash. The partners of the assessee firm also after consulting the employees, admitted the same. However, there is no discussion about the quantum of salary/loan paid in cash out of which, how much was accounted and how much was unaccounted, so that one can decipher about the undisclosed income, if any, that can be gathered from those documents".*

The ITAT held that the Assessing Officer should make specific reference to the documents based upon which the undisclosed income was assessed by him and the validity of the order of penalty must be determined with reference to the information, facts and material in the hands of the authority imposing penalty at the time the order was passed. It was held that the Assessing Officer did not refer to any of the documents or material found during the course of search from which

the impugned undisclosed income was found out, hence the tax authorities could not have placed reliance on Explanation-5A to sec. 271 of the Act without making specific reference to the documents, which reveal about concealment of income i.e. the conditions prescribed in the Explanation 5A has not been satisfied. Similar view as expressed by the ITAT in the case of Sejal Exports (India) (supra), discussed in the above paragraph, has been expressed by Delhi Bench of the ITAT in the case of Pawan Kumar Gupta vs. ACIT (supra). The ITAT in that case has held that concealment of income has to be seen with reference to addition brought to tax over and above the income returned by the assessee in response to the notice issued under sec. 153A and therefore, once return of income under sec. 153A is accepted by the Assessing Officer, it can neither be a case of concealment of income nor furnishing inaccurate particulars of such income. In the present case, it is evident from the assessment order that the Assessing Officer has reproduced in the assessment order, the surrender letter written by the assessee to the Joint Director of Income Tax (Investigation). On the basis of the said letter the Assessing Officer has noted that the assessee had made only a lump sum surrender of Rs. 10 crores and no bifurcation whatsoever based on seized documents or on the basis of financial years was submitted by the assessee. Regarding Annexures A-2, A-3, A-4, A-5, A-6, A-7 and A-9 which were diaries seized during the course of search contained certain payments made by the assessee company spreading out in different financial years starting from financial year 2006-07 to 2010-11, the assessee explained that the notings in all the diaries are written merely for reference purpose only and there was no continuity in the entries that have been recorded in the diaries and that the said diaries contain many other figures which had no significance to the actual working of the assessee company. The assessee contended further that just to honour the surrender made during the course of search and in order to avoid unnecessary litigation the assessee had surrendered entries in these diaries in the past years also. The Assessing Officer has thereafter recorded that the above contention made by the assessee has been considered and found to be acceptable since the assessee has honoured the surrender made during the course of search.

The Assessing Officer has justified the levy of penalty under Section 271(1)(c) of the Act on the basis that the assessee had not disclosed the income *suo motu* but for the search, this income would not have been unearthed. It is thus evident from the assessment order itself that the additions in the assessments framed under section 153A of the Act have been made on the basis of the surrender made by the assessee without linking the additions surrendered with any incriminating documents or any corroborative evidence in support. We thus respectfully following the above cited decisions hold that the Assessing Officer was not justified in invoking the penal provisions under Section 271(1)(c) of the Act for the levy of penalty on the additions made by accepting the return of income filed by the assessee as in such a situation an inference beyond doubt cannot be drawn that there was concealment of particulars of income or furnishing of inaccurate particulars thereof on the part of the assessee towards the additions made by accepting the returns of income filed by the assessee. The Hon'ble Supreme Court in the case of CIT Vs. Suresh Chandra Mittal (supra) has been pleased to hold that once the revised returns have been regularized by Revenue the explanation of the assessee that he has declared additional income to buy peace and to come out of vexed litigation could be treated as bona fide and penalty under Section 271(1)(c) was not leviable, though the assessee had surrendered additional income by way of revised returns after persistent queries by the Assessing Officer. This decision also supports the case of present assessee, rather it is on better footing as the assessee in the present case had made surrender immediately after search and before issuance of any notice and had declared the surrendered income in the returns of income accepted by the Assessing Officer. Besides, the CBDT has time and again vide its Circulars No. 286 of 2003 and 286 of 2013 prohibited the assessing authorities to make assessment solely on the basis of confessional statements of the assessee and to concentrate on documentary evidence. The very purpose behind it is that in case of retraction from its statements by the assessee, the case of the Revenue should not fail. We thus while setting aside the orders of the authorities below direct the Assessing Officer to delete the penalty questioned

in the above ground of the appeals for the assessment years under consideration. The ground is accordingly allowed.

8. In the result, all the appeals of the assessee are allowed.

Order pronounced in the open court on 19.09.2016.

-Sd/-	-Sd/-
(PRASHANT MAHARISHI)	(I.C. SUDHIR)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 19/09/2016

Mohan Lal/Rk/ak keot

Copy forwarded to:

1) Appellant
2) Respondent
3) CIT
4) CIT(Appeals)
5) DR:ITAT

ASSISTANT REGISTRAR