IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**B**" KOLKATA*

Before **Shri N.V. Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.1303/Kol/2010 Assessment Year :2006-07

Suvaprasanna Bhatacharya BH-167, Salt Lake, Sector-II, Kolkata-700 016 [**PAN No.AEDPB 2611 R**]	**V/s.**	ACIT, Circle-55, 54/1, Rafi Ahmed Kidwai Road, Kolkata – 700 016
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri A.K. Tibrewal, FCA & Shri Amit Agarwal, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri Sanjit Kr. Das, JCIT, SR-DR
सुनवाई की तारीख/Date of Hearing	06-10-2015
घोषणा की तारीख/Date of Pronouncement	06-11-2015

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the Assessee is directed against the order dated 30.3.2010 of CIT(A)-XXXVI, Kolkata, relating to AY 2006-07, confirming in part, the order of the AO imposing penalty u/s.271(1) (c) of the Income Tax Act, 1961 (Act) on the Assessee.

2. The facts and circumstances under which penalty u/s.271(1)(c) of the Act was imposed on the Assessee by the AO are as follows:

The Assessee is an individual. He is a professional artist and is stated to have created many paintings. For AY 2006-07 the Assessee filed return of income declaring income of Rs.6,73,346/-. In the course of assessment proceedings, the AO issued a notice dated 28.7.2008

u/s.142(1) of the Act calling upon the Assessee to explain, among other things, as to whether the Assessee had deposited cash exceeding Rs.10 lacs in any savings Bank Account. In reply to the aforesaid notice the Asssessee submitted details of his investments in units of mutual funds and the source of funds for making such investment. The statement filed in this regard is placed at page-23 of the Assessee's paper book and relates to the period relevant to AY 04-05, 05-06 & 06-07. The source of income for AY 06-07 which was not disclosed to the department was stated to be Rs.68,78,869. The sum of Rs.68,78,869 was stated to be profession income from sale of work of art i.e., paintings. The investments were made through bank accounts of the Assessee with Standard Chartered Bank, Salt Lake, Kolkata and Kotak Mahindra Bank Ltd., Kolkata. These accounts were not disclosed in the balance sheet filed along with the original return of income. The AO accepted the fact that the source of investment in units of mutual funds was from and out of professional income as stated by the Assessee. The following additions were made by the AO with the following observations:

> "A. Investment in mutual funds: It was observed that the assessee had not disclosed a substantive part of his investments in mutual funds. Such investments, although done through bank (Std.Chartered Bank, Sale Lake, Kotak Mahindra Bank Ltd.) were found to be undisclosed. Summons was issued u/s.131(1) of the IT Act, 1961. The Assessee admitted to have made the investments amounting to Rs.60,99,454/- in the units of different mutual funds during the previous year, which was not disclosed in his return of income. Source of such deposits have been stated to be receipt from sale of paintings. This is added to his income.
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> B. Bank interest amounting to Rs.1,09,473/- credited in such accounts was not disclosed and it is being added to the income of the Assessee.
> C. Honorarium of Rs.5,500/- received during the previous year, not reported in his return of income is also being added to his income.

D. Foreign travel. The assessee is a celebrated painter enjoying a very good reputation in the field of art across the globe. During the previous year 2005-06, he visited the following countries.

Sl	Period	Country	Trip financed by	Reasons of visit
1	27/4/05 to 3/5/05	Pakistan	Self	Goodwill mission
2	29/6/05 to July 05	USA	North American Bengali Conference	Bangal Smmelan
3	14/7/05 to 22/7/05	Thailand Malaysia	Self	Travel
4	14/9/05 to 24/9/05	South Africa	Gallery Navya, New Delhi	Art Workshop
5	28/2/06 to 7/3/06	Cambodia Thailand	Gandhara Art Gallery, Kolkata	Art Workshop

E. When enquired about the expenses, the assessee in his sworn statement u/s. 131(1`) sated that sometimes, the visit is sponsored by the hosts. AT times, the assessee pays for his visits. The assessee has neither shown nor claimed any expenditure in this regard. It is being met out of income from sale of paintings. As such, the expenses should be added to the income of the assessee. When a trip is sponsored by an agency, it is still a benefit u/s. 28(iv) and shall be added to the income of the assessee. The assessee, in his sworn statement submitted that the only benefit he got was the exchange of view and knowledge about current developments in the field of art, which could not be measured in terms of money.

F. In the case of ITO, B-ward. Vijayawada vs. M/s Vijay Beer and Wines, Vijayawada. Hon'ble ITAT Hyderabad in its order dt. 10th June, 1986 in **ITA No.190/H85**, has considered a case of retailer of Wines and Hot Liquors supplied by M/s Phippson & Company Ltd., Calcutta and the nature of the receipt of the free air ticket given to the retailer who had fulfilled targeted purchases and who had got the lucky coupon under the scheme who would get a free air ticket to visit Singapore, Bangkok,. It was held that the same should be considered as a perquisite or benefit under s. 28(iv) of the IT Act 1961. Similar addition has been held to be valid by Hon'ble Allahabad High Court in the case of Additional Commissioner of Income-Tax, Lucknow vs Ram Kripal Tripathi 125 ITR 408 [All].

G. As the assessee has failed to submit the precise details of expenses, it is estimated to be Rs.2,00,000/- and is added to the income.

H. Short term capital gains:- The Assessee has earned a short term capital gains of Rs.10,38,101/- from the purchase/sale of such mutual

funds units. A sum of Rs.58,698/- was already disclosed by the Assessee in his return of income. The balance of Rs.9,79,410/- is being added to his income.

I. Long term capital gains the assessee purchased units of ICICI Prudential on 30/7/04 for Rs.5,000,000/- and sold it for Rs.9,81,159/- on 7/12/05, generating long term capital gains of Rs.4,71,159/- only. As this income is exempt, it is not being added to his income.

J. Dividend -The assessee has not reported any dividend from such investments as most of the units are under growth option.

K. Closing stock / work in progress of art – The assessee in his sworn statement has stated that at any given point of time, about 10-15 works of art are usually lying with different galleries. However, as he follows cash system or accounting, it is accounted in income only at the point of sale. Unsold paintings are retuned back, which are again displayed in other galleries. As such no value of closing stock WIP can be assigned. The plea of assessee is accepted and no addition is made on this account.

L. Expense – Apart from expenses mentioned in the return of income, the assessee has further claimed expenses of Rs.37,060/- which relate to bank and other charges. It is being accepted and allowed.

M. Income of the Assessee is being recomputed as under:-

Income as per return	Rs. 7,32,044
Add Income as per discussion in Sl.A above	Rs.60,99,454
Add Income as per discussion in Sl.B above	Rs. 1,09,473
Add Income as per discussion in Sl.C above	Rs. 5,500
Add Income as per discussion in Sl.G above	Rs. 2,00,000
Add Income as per discussion in Sl.H above	Rs. 9,79,410
Add Income as per discussion in Sl.L above	Rs. 37,060
Total Income	Rs. 80,88,821

Rounded off u/s.288A to Rs.80,88,820/- only including short term capital gains of Rs.10,38,108/- which will be taxed at special rate of 10%. Assessed u/s.143(3) of the I.T.Act, 1961. Issue demand notice. **Penalty proceeding u/s.271(1)(c) initiated.** Tax calculation is given shown below.

Tax		21,69,024
Add Surcharge		21,902
Education cess		47,719
Total		24,33,645
Less TDS	(-)	1,29,449
Total		25,23,977

Advance tax paid	(-)	25,000
Total		24,98,977
Less paid u/s. 140A	(-)	6,600
Total		24,92,377
Add 234B		7,50,419
Add 234C		123
Total Tax payable		30,23,135"

In this appeal challenge by the Assessee is to the levy of penalty u/s.271(1)(c) of the Act in respect of the addition of a sum of Rs.60,99,454, Rs.1,09,473 and Rs.9,79,410/- which was imposed by the AO and confirmed by the CIT(A).

3. The AO issued a show cause notice u/s.274 of the Act before imposing penalty against the Assessee u/s.271(1)(c) of the Act. In reply to the said notice the Assessee submitted he was an eminent artist and not aware of the intricacies of tax laws. He was advised by his tax consultant that income from sale of art is not taxable as it was in the nature of person effects and hence not a capital asset within the meaning of the definition of the said term u/s.2(14)(ii) of the Act. The assessee also pointed out that the sale of paintings was not done by him as an adventure in the nature of trade. The paintings were kept for years over because of his aesthetic sense. It gave him tremendous pleasure and pride of profession. The paintings were therefore his "*personal effects*". The sale was effeted for the very purpose of making investments in the units of mutual funds and to earn income from such investments for his livelihood. Therefore, the incidence of sale cannot be construed to be adventure in the nature of trade. Since the source of investments in units of mutual funds is explained as from and out of sale proceeds of paintings which are personal effects and hence not taxable, the very basis of addition by the AO is not correct. In the course of assessment proceedings, facts were placed before the AO but the Assessee did not want to fight on the issue of taxability of income from sale of paintings and was content paying taxes to avoid litigation. Assessment and penalty proceedings

are two different proceedings and the Assessee is not precluded from urging the correct position in law and on that ground avoid imposition of penalty though the Assessee has accepted an assessment. The Assessee thus submitted that imposition of penalty in respect of an addition of Rs.60,99,454/- was unsustainable.

3.1 With regard to the addition of bank interest of Rs.1,09,473/- the Assessee submitted that the same has already been considered while computing the undisclosed investments in units of mutual funds. The investments were all made through bank account and the bank balance including interest on a particular date was invested and hence bank interest should not be treated as undisclosed income separately due to the mere fact that the same has already been treated as undisclosed under the head undisclosed investments.

3.2 Regarding short term capital gains of Rs.9,79,410/- the Assessee submitted that the gains were the result of purchase and sale of investments as stated to have not been disclosed while filing the return of income. The bank balance on a particular date was invested as apparent from the bank statement. Hence Short term capital gain should not be treated as undisclosed under the head undisclosed investments.

3.3 The above submissions did not find favour with the AO. The AO held that the assessee had deliberately tried to conceal his professional receipt by depositing it in the bank account not disclosed to the department. He was well aware of the volume of transactions being carried out in various accounts. Such information was found out by the department. He had no option but to disclose it fully as the bank details were already with the department. The mistake was neither due to ignorance nor *bona fide*. The AO referred to the decision of the Hon'ble Supreme Court in the case of Dharmendra Textile Processors and others 306 ITR 277 (SC) and held that *mens rea* is not

essential for attracting civil liabilities. As such, there is no onus on the department to prove *mens rea* beyond doubt. The AO further observed that the assessee being a responsible professional was aware of volume of his receipts. He did not disclose it truly and fully. Investment in mutual fund was made from concealed income. It led to further concealment of dividend interest etc.

3.4 On appeal by the Assessee, the CIT(A) confirmed the order of the AO. The CIT(A) was of the view that the two bank accounts with Standard Chartered Bank and Kotak Mahindra Bank Ltd., were not disclosed by the assessee and it was only when the AO made verification with mutual funds/banks and thereafter the Assessee admitted undisclosed investments in mutual funds.

3.5 Before the Tribunal the learned counsel for the Assessee reiterated the stand taken before the AO and CIT(A). He further submitted that the AO has not recorded satisfaction in the order of assessment that the Assessee is liable to be proceeded against u/s.271(1)(c) of the Act except recording as follows in the order of assessment viz., "**Penalty proceeding u/s.271(1)(c) initiated."** According to him, the above manner of initiation of penalty proceedings in the order of assessment is not in accordance with law. In this regard he made reference to the decision of the Hon'ble Karnataka High Court in the case of *CIT Vs. MWP Ltd.* (2014) 41 taxmann.com 496 (Karn.). In the aforesaid decision it was held that mere mention of "Penalty Proceedings under section 271(1)(c) initiated separately" in assessment order, does not amount to a direction under Section 271(1)(c) for levy of penalty. The learned counsel pointed out that the Hon'ble Karnataka High Court in the aforesaid decision has considered the effect of Sec.271(1B) of the Act, in the light of the decision of the Hon'ble Delhi High Court in the case of Ms.Madhushree Gupta Vs. Union of India 317 ITR 107(Del) wherein it was held

> *"In the result, conclusions are as follows : (i) sec. 271(1B) is not violative of Art. 14 of the Constitution; (ii) the position of law both pre and post amendment is similar, inasmuch, the AO will have to arrive at a prima facie satisfaction during the course of proceedings with regard to the assessee having concealed particulars of income or furnished inaccurate particulars, before he initiates penalty proceedings; (iii) 'prima facie' satisfaction of the AO that the case may deserve the imposition of penalty should be discernible from the order passed during the course of the proceedings. Obviously, the AO would arrive at a decision, i.e., a final conclusion only after hearing the assessee; (iv) at the stage of initiation of penalty proceeding the order passed by the AO need not reflect satisfaction vis-a-vis each and every item of addition or disallowance if overall sense gathered from the order is that a further prognosis is called for; (v) however, this would not debar an assessee from furnishing evidence to rebut the 'prima facie' satisfaction of the AO; since penalty proceeding are not a continuation of assessment proceedings; (vi) due compliance would be required to be made in respect of the provisions of ss. 274 and 275; (vii) the proceedings for initiation of penalty proceeding cannot be set aside only on the ground that the assessment order states 'penalty proceedings are initiated separately' if otherwise, it conforms to the parameters set out hereinabove are met. The prayers made in the writ petitions are thus rejected with the caveat that provisions of s. 271(1)(c) post-amendment will be read in the manner indicated above."*

Pointing out the above observations, it was contended that the order of assessment in the present case does not spell out any satisfaction as is contemplated in the decisions referred to above. The AO accepted whatever evidence the Assessee produced and also the offer of the Assessee to tax investments of units of mutual funds, interest income in SB Account with bank and Short Term Capital Gain on sale of units of mutual funds.

4. The learned counsel for the Assessee also drew our attention to the show cause notice issued u/s.274 of the Act before imposing penalty and submitted that the said notice does 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 printed 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 Vs. 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 printed show cause notice, than the imposition of penalty on the basis of such invalid show cause notice cannot be sustained.

4.1 Reference was also made to several judicial pronouncements. In particular our attention was drawn to a decision of the Hon'ble Supreme Court in the case of *Price Waterhouse Coopers Pvt.Ltd. Vs. CIT* 348 ITR 306 (SC) wherein it was held inadvertent errors in the return of income filed cannot be the basis to impose penalty u/s.271(1)(c) of the Act.

4.2 The learned DR relied on the order of the CIT(A). He placed reliance on the decision of the Hon'ble Supreme Court in the case of *MAK Data (P) Ltd. Vs. CIT* 358 ITR 593 (SC) wherein it was held that satisfaction is not required to be recorded in any particular manner or reduce such manner of arriving at satisfaction in writing.

4.3 The learned counsel for the Assessee placed reliance on the decision of the Hon'ble AP High Court in the case of *CIT Vs. Lotus Constructions* (2015) 55 taxmann.com 182 (AP) wherein the Hon'ble AP High Court explained the decision of the Hon'ble Supreme Court in the case of *MAK Data* (supra) and held that in the absence of initiation of penalty proceedings in the order of assessment, imposition of penalty u/s.271(1)(c) of the Act was unsustainable.

5. We have given a very careful consideration to the rival submissions. The facts go to show that the AO came to know that the Assessee had made investments in units of mutual funds. The source of funds for making investments in units of mutual funds was the starting point of enquiry by the

AO. It is not in dispute that the source of funds for making such investments was the sale of assessee's own paintings. If the painting are considered as "*personal effects*" than they cannot be regarded as "*capital assets*" within the meaning of Sec.2(14)(ii) of the Act. Consequently the receipts on sale of paintings had to be treated as capital receipts not chargeable to tax. This was the reason, according to the assessee that receipts on sale of paintings was not disclosed as "i***ncome***" in the return of income filed. The Assessee pleaded that the professional advice he received in this regard was that it was not income and hence need not be disclosed. Let us see whether this professional advice has any basis.

5 1. At the time of enactment of the 1961 Act, section 2(14) read as under:

> (14) "capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include—
>
> (i) any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession;
>
> (ii) personal effects, this is to say, movable property (including wearing apparel, jewellery and furniture) held for personal use by the assessee or any member of his family dependent on him;
>
> (iii) agricultural land in India."

Sub-Clause (ii) was substituted w.e.f. 1st April, 1973 by the Finance Act, 1972 for the original sub-cl. (ii) to exclude jewellery from "personal effects". Under s. 45 of the IT Act, any profits or gains arising from the transfer of a '*capital asset*' are chargeable to tax. The term '*capital asset*' as defined in cl. (14) of s. 2 of the IT Act does not include, inter alia, personal effects, i.e. movable property including wearing apparel, jewellery and furniture held for personal use by the assessee or any member of his family dependent on him. In view of the specific exclusion of jewellery from the definition of '*capital asset*' profits and gains arising from the transfer of jewellery held for personal use are not chargeable to income tax. The exemption of capital gains arising from transfer of jewellery facilitates tax evasion through bogus or inflated claims of sale of

Jewellery for explaining moneys introduced in business. This exemption has therefore been withdrawn making capital gains arising from the transfer of personal jewellery chargeable to income-tax on the same basis as capital gains relating to assets other than lands or buildings. As it was not intended to levy any tax on capital gains arising from bona fide transfer of jewellery made for the purpose of acquiring any other jewellery for personal use, it has been specifically provided in new s. 54C in the Act that where such jewellery is acquired within six months of the transfer, any profits and gains arising from the transfer will not be liable to tax if the whole of the full value of the consideration is spent in acquiring the new jewellery. Where only a part of this consideration is used in acquiring new jewellery, a proportionate part of the capital gain will not be liable to tax. Consequential amendment has also been made in s. 45 of the Act. The above amendment took effect from 1st April, 1973 and applied in relation to asst. yrs. 1973-74 and subsequent years.

5.2 By the Finance Act, 2007, in cl. (14), for sub-cl. (ii), the following was substituted w.e.f. the 1st day of April, 2008.

> ‘(ii) personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the assessee or any member of his family dependent on him, but excludes—
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> (a) jewellery;
>
> (b) archaeological collections;
>
> (c) drawings;
>
> (d) paintings;
>
> (e) sculptures; or
>
> (f) any work of art.
>
> Explanation : For the purposes of this sub-clause, "jewellery" includes—
>
> (a) ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel;

(b) precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel;'

The expression "*personal effects*" has not been defined in the Act. It would ordinarily mean physical chattels having some personal connection with the assessee such as articles of personal or domestic use, clothing, furniture etc. "*personal effects*" would not include money or securities for money or choses-in-action represented by promissory notes. The expression would normally include privately owned articles for intimate use by the assessee. The essential feature, thus appears to be that article in question should have intimate relation with the person of the assessee and should be of personal use, that is to say, should be normally, ordinarily and commonly in such use. Even though prior to 01.04.2008, a painting could be regarded as a "*personal effect*", but, before a painting can be regarded as a "*personal effect*" there must be evidence on record to show that it was intimately and commonly used by the assessee, for the purpose of exclusion from the definition of capital asset.

5.3 In the penalty proceedings, the Assessee pointed out that the sale of paintings was not done by him as an adventure in the nature of trade. The paintings were kept for years over because of his aesthetic sense. It gave him tremendous pleasure and pride of profession. The paintings were therefore his "*personal effects*". This aspect has not been disputed by the AO. In the statement recorded u/s.131 of the Act by the AO in the course of assessment proceedings, in answer to ***Question No.11*** the assessee has stated that the paintings are made as per creation desire of the assessee. Therefore, it would be proper to accept the contention of the assessee that the paints were his "*personal effects*".

5.4 The AO has not disputed the position that the source of funds for investment in units of mutual funds was the sale of paintings which were personal effects and therefore income from sale of paintings were capital

receipts not chargeable to tax. Therefore, the plea of the assessee that the on the basis of professional advice, receipts from sale of paintings was treated as capital receipt not chargeable to tax, is found to be acceptable. Therefore the plea of the assessee that receipts from sale of paintings were not offered to tax on a *bona fide* belief is acceptable. Consequential imposition of penalty in so far as, it relates to the addition of Rs.60,99,454/-, in our view is unsustainable, as there was neither concealment of particulars of income or furnishing of inaccurate particulars of income.

6. We shall now deal with the question whether proper satisfaction was arrived at by the AO for initiating penalty proceedings u/s.271(1)(c), in the course of concluding the assessment proceedings, wherein the additions in respect of which penalty was imposed were made. On the above issue, the first aspect which, we notice is that in the order of assessment, which we have extracted in the earlier part of this order, nowhere spells out or indicates that the AO was of the view that the assessee was guilty of either concealing particulars of income or furnishing inaccurate particulars of income. The offer to tax of income by the assessee has just been accepted. It is no doubt true that it is not the requirement of the law that the satisfaction has to be recorded in a particular manner, especially after the introduction of the provisions of Sec.271(1B) of the Act with retrospective effect from 1.4.1989. Nevertheless, as laid down by the Hon'ble Delhi High Court in the case of *Ms.Madhushree Gupta* (supra), the position of law both pre and post Sec.271(1B) of the Act is similar, inasmuch, the AO will have to arrive at a *prima facie* satisfaction during the course of proceedings with regard to the assessee having concealed particulars of income or furnished inaccurate particulars, before he initiates penalty proceedings '***prima facie***' satisfaction of the AO that the case may deserve the imposition of penalty should be discernible from the order passed during the course of the proceedings. At the stage of initiation of penalty proceeding, the order passed by the AO need not reflect satisfaction vis-a-vis each and every item of addition or disallowance, if overall sense

gathered from the order is that a further *prognosis* is called for. The decision of the Hon'ble Supreme Court in the case of *MAK Data (P) Ltd*. (supra) has to be understood in the context of the facts of the said case. The relevant portion of the judgment in the aforesaid case, reads thus:

> *"9. We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. AO during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer 8 deeds duly signed, have been impounded in the course of survey proceedings under Section 133A conducted on 16.12.2003, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The AO, in our view, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under Section 271 read with Section 274 of the Income Tax Act, 1961.*
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> *10. The AO has to satisfy whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing……."*

7. The Revenue places reliance only on the sentence appearing in para-10 of the judgment without reading it in the context of the observations in the last portion of **para-9** of the said judgment. Therefore even the Hon'ble supreme court's decision suggests that the satisfaction need not be recorded in a particular manner but from a reading of the assessment order as a whole such satisfaction should be clearly discernible. If the AO accepts all the contentions of the assessee and the offer of income that has not been declared in the return of income to tax without indicating either directly or

indirectly that the assessee has concealed particulars of income or furnished inaccurate particulars of income, it cannot be said that satisfaction for initiation of penalty proceedings is discernible from the order of assessment. If the assessee in good faith offers income to tax voluntarily prior to any positive detection by the AO, such voluntary offer cannot be taken advantage of by the AO to initiate penalty proceedings against the assessee without specifying the reasons why penalty proceedings are initiated u/s.271(1)(c) of the Act. In the present case, we have read the order of assessment as a whole and are satisfied that satisfaction for initiation of penalty proceedings is not discernible from the order of assessment. We therefore concur with the argument of the learned counsel for the assessee that initiation of penalty proceedings was not proper in the present case and on that ground the imposition of penalty u/s.271(1)(c) of the Act is unsustainable.

8. The next argument that the show cause notice u/s.274 of the Act which is in a printed form does not strike out as to whether the penalty is sought to be levied on the for "*furnishing inaccurate particulars of income*" or "*concealing particulars of such income*". On this aspect we find that in the show cause notice u/s.274 of the Act the AO has not struck out the irrelevant part. It is therefore not spelt out as to whether the penalty proceedings are sought to be levied for "*furnishing inaccurate particulars of income*" or "*concealing particulars of such income*".

8.1 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.

8.2 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.

> "NOTICE UNDER SECTION 274
>
> *59. As the provision stands, the penalty proceedings can be initiated on various ground set out therein. If the order passed by the Authority categorically records a finding regarding the existence of any said grounds mentioned therein and then penalty proceedings is initiated, in the notice to be issued under Section 274, they could conveniently refer to the said order which contains the satisfaction of the authority which has passed the order. However, if the existence of the conditions could not be discerned from the said order and if it is a case of relying on deeming provision contained in Explanation-1 or in Explanation-1(B), then though penalty proceedings are in the nature of civil liability, in fact, it is penal in nature. In either event, the person who is accused of the conditions mentioned in Section 271 should be made known about the grounds on which they intend imposing penalty on him as the Section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in Section 271(1)(c) do not exist as such he is not liable to pay penalty. The practice of the Department sending a printed farm where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law when the consequences of the assessee not rebutting the initial presumption is serious in nature and he had to pay penalty from 100% to 300% of the tax liability. As the said provisions have to be held to be strictly construed, notice issued under Section 274 should satisfy the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended if the show cause notice is vague.* ***On the basis of such proceedings, no penalty could be imposed on the assessee.***

60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet those grounds. After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the grounds on which he is called upon to answer. It is not open to the authority, at the time of imposing penalty to impose penalty on the grounds other than what assessee was called upon to meet. Otherwise though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would offend principles of natural justice and cannot be sustained. ***Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order was passed and further discovery of facts subsequent to the imposition of penalty cannot validate the order of penalty which, when passed, was not sustainable.***

61. The Assessing Officer is empowered under the Act to initiate penalty proceedings once he is satisfied in the course of any proceedings that there is concealment of income or furnishing of inaccurate particulars of total income under clause (c). 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 Gujarat 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 Taxman 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 pro forma without striking of the relevant clauses will lead to an inference as to non-application of mind."

The final conclusion of the Hon'ble Court was as follows:-

"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 order of the Appellate Authority or 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) & (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(l)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).

h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.

i) The imposition of penalty is not automatic.

j) 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 authorities it has resulted in payment of such tax or such tax liability came to be admitted 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 IB 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 ground mentioned in Section 271 are mentioned would not satisfy requirement of law.

r) The assessee should know the grounds which he has to meet specifically. Otherwise, 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 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."
>
> (emphasis supplied)

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. 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.

For the reasons given above, we hold that levy of penalty in the present case cannot be sustained. We therefore cancel the orders imposing penalty on the Assessee and allow the appeal by the Assessee.

9. **In the result, appeal filed by assessee is allowed.**

Order pronounced in the open court 06/11/2015

Sd/-	Sd/-
(N.V.Vasudevan)	(Waseem Ahmed)
(Judicial Member)	(Accountant Member)

Kolkata,
*Dkp
दिनांकः- 06/11/2015 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी / Appellant-Suvaprasanna Bhattacharya, BH-167, Salt Lake, Sector-II, Kol-91
2. प्रत्यर्थी / Respondent-ACIT, Cir-55, 54/1, Rafi Ahmed Kidwai Road, Kolkata-16
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।