IN THE INCOME TAX APPELLATE TRIBUNAL "F", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI SANDEEP GOSAIN, JM

ITA No.3622/Mum/2016
(**Assessment Year : 2010-2011**)
ITA No.3623/Mum/2016
(**Assessment Year : 2007-2008**)
ITA No.3624/Mum/2016
(**Assessment Year : 2009-2010**)
ITA No. 3625/Mum/2016
(**Assessment Year : 2008-09**)

Uttam Value Steels Limited (Formerly known as Lloyds Steel Industries Limited) Uttam House, 69, P.D.Mello Road, Carnack Bunder, Mumbai - 400009	Vs.	ACIT – CC-41, Mumbai
PAN/GIR No.		**AAACL6670Q**
Appellant)	..	**Respondent**)

Assessee by	Shri K Shivram alongwith Shri Rahul Hakani
Revenue by	Mrs. Padmaja – CIT DR
Date of Hearing	**22/03/2017**
Date of Pronouncement	**22/05/2017**

आदेश / O R D E R

***PER SANDEEP GOSAIN (J.M)*:**

These are the appeals filed by assessee against the order of CIT(A)-48, Mumbai dated 31/03/2016 for the A.Y.2007-08 to 2010-2011 in the matter of imposition of penalty u/s.271(1)(c) of the IT Act.

2. We have heard the counsels for both the parties and we have also perused the material placed on record as well as the orders passed by the revenue authorities. As per the facts of the present case, assessee

is a listed public limited company engaged in the business of manufacturing steel. The assessee has a manufacturing plant situated at wardha.. A survey action u/s 133A was taken by the Investigation Wing against the assessee on 19/12/2012. The survey took place at the office premises as well as at the factory premises where the manufacturing activity is carried on. Not a single piece of paper is found either from the office premises or from the factory premises which could prove or indicate or suggest that the assessee has earned unaccounted income. However, during course of survey, statement of Director of Company Shri Babu Lal was recorded on 21/12/2012, wherein he offered income earned during the course of business. No iota of proof is also found regarding the manufacturing results disclosed by the assessee. The Investigation Wing has not issued a -single letter or a show cause or a questionnaire after conduct of the survey to the assessee pointing out any discrepancy or defect in the books of account or regarding detection of unaccounted income. The assessee on its own voluntarily filed a letter dated 27/12/2012 on 07/01/2013 with the Investigation Wing offering the income of Rs.557.50 crores for A.V. 2007-08 to 2010-11. As no incrementing material/document was found, the assessee was left with no choice but to state that the said income was generated on account of difference in yield, when in fact and in substance there was no defect or error in the yield which is disclosed by the assessee in the regular books of accounts. The assessee thereafter filed the return of income disclosing the income offered in the letter

dated 27/12/2012 on 15/01/2013 and filed a copy of the same with the Investigation Wing. Notice u/s 148 was issued on 25/11/2013 received by the assessee on 27/11/2013. The assessee filed a letter stating that the return filed voluntarily on 15/01/2013 may be treated as return in response to notice u/s 148. The assessments for the impugned assessment years were framed u/s 147 r.w.S. 143(3) of the Income Tax Act("the Act"). The impugned penalty in respect of impugned assessment years were imposed by the ACIT, Central Circle-41, Mumbai("AO") u/s.271(1)(c) of the IT Act.

3. By the impugned order, CIT(A) confirmed the penalty so imposed by the AO against which assessee is in further appeal before us.

4. Common grounds have been raised in all the years under consideration. The ground taken by assessee in the A.Y.2010-11 reads *as under:-*

> *1. The learned CIT (A) failed to appreciate that the Appellant has neither concealed its income nor furnished inaccurate particulars thereof.Therefore, the penalty of Rs. 36,98,42,950/- is liable to be deleted.*
>
> *2. Without prejudice to the above, the learned CfT (A) failed to appreciate that the Appellant is a loss-making company and has brought forward losses which were entitled to be set off against income, if any, of the current year. This shows that the Appellant never had the intention to conceal its income or furnish inaccurate particulars thereof.*
>
> *3. Without prejudice to the above, the learned Cl'T (A) failed to appreciate that the Appellant had suo motu included the income offered during survey in the return which was filed*

before issuance of notice under sec. 148 which was duly accepted by the AO. Since the returned income was accepted, there is no question of levying penalty on the same.

4. Without prejudice to the above, the learned Cl'T (A) failed to appreciate that the AO had not specified in the notice u/s 271(1)(c) r.w.s. 274 whether the penalty was leviable for concealment of income or for furnishing inaccurate particulars thereof. Therefore, the penalty is liable to be deleted.

5. Without prejudice to the above, the learned CIT(A) failed to appreciate that the AO has not specified the exact charge in the penalty order whether the Appellant had concealed its income or furnished inaccurate particulars thereof. Therefore, the levy of penalty is not justified.

5. Before us, qua the legal issue, the Ld. Counsel submitted that, firstly, in the assessment order, the AO has not framed any specific charge, on which he intends to impose penalty, he has mentioned under both the charges, which cannot be the case, because both the charges in penalty operates in two different fields. Secondly, he submitted that, in the notice issued under section 274 r.w.s. 271, the AO has not satisfied himself and has not struck off the particular charge, that is, penalty sought to be imposed is whether on concealment of income or for furnishing of inaccurate particulars of income. In the penalty order while levying the penalty, he has levied the penalty for concealing the particulars of taxable income, that is, for concealment of income. Thus, he submitted that such a levy of penalty is not tenable in view of law laid down in catena of decisions including that of the Karnataka High Court in the

case of CIT vs Manjunatha Cotton and Ginning Factory, reported in [2013] 359 ITR 565. This decision, he submitted has been followed by various benches of the Tribunal and later on reiterated by the Karnataka High Court again in the case of Steel Industries, reported in [2014] 51 taxmann.com 127. The lists of all the decisions filed before us in the form of separate compilation are as under:-

Sr.No.	Case Law	ITA / Citation
1	CIT v. Manjunatha Cotton & Ginning Factory	I359 ITR 565) (Kar)
2	CIT v. SSA's Emerald Meadows	73 taxmann.com 241 (Kar)(HC)
3	CIT v. SSA's Emerald Meadows	(73 taxmann.com 248)(SC)
4	CIT v. Samson Perinchery	(ITA 1154, 953, 1097, 1226 / 2014, order dated January 5, 2017)(Bom HC)
5	M/s. Wadhwa Estate & Developers India Pvt. Ltd., vs. ACIT	ITA 2158/Mum/2016 order dated February 02, 2017 (TMum)
6	Dr. Sarita Milind Darave v. ACIT	ITA No.2187/Mum/2014, order dated 21, 2016)(TMum)
7	Sejal P. Savla v. ACIT	ITA 3282/Mum/2015 order dated August 10, 2016 (TMum)
8	ACIT v. Dipesh M. Panjwani	ITA No.6330,5878,6328,6188/M/2012, order dated March 18, 2016)(TMum)
9	Sanghavi Savla Commodity Brokers P Ltd. vs ACIT	ITA No. 1746/Mum/2011
10	Parinee Developers Pvt Ltd vs ACIT	ITA No.6772/M/2013, order dated September 11, 2015)(T.Mum)
11	Shri Hafeez S Contractor vs ACIT	ITA No. 6222/Mum/2013
12	H Lakshminarayana vs ITO	61 Taxmann.com 373 (Bang-Trib)
13	Tulip Mines pvt. Ltd., v. DCIT	ITA No.2407/Kol/2013, order dated October 7, 2016)
14	Suvaprasanna Bhatacharya vs ACIT	ITA No.1303/Kol/2010
15	DCIT v Ittina Properties Pvt Ltd.	ITA No.36/Bang/2014
16	A.R. Chadda v. ACIT	(80 ITD 56) (T Del)(TM)
17	CIT vs Steel Centre	51 taxmann.com 127 (Kar-HC)
18	CIT vs Manjunathan Cotton & Ginning Factor	359 ITR 565 (Kar-HC)

6. The Karnataka High Court in the case of Manjunath Cotton and Ginning Factory (supra) has observed and held as under:-

> *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 form 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 order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing 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 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".

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 not 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".

7. On merits it was contended by learned AR that it was a voluntary disclosure and nothing incriminating was found either during the course of survey or thereafter. He invited our attention to the income assessed which was equal to the return income except in the A.Y.2010-11. As per learned AR, there was addition of Rs.4,38,93,410/- in the A.Y.2010-11 as compared to the return income and the disclosure made by the

assessee in the revised return. As per learned AR the said addition also does not call for levy of concealment penalty in view of the replies submitted by the assessee dated December 30, 2013 when it was submitted that the purchases made during the year from M/s Gupta Metallics and power Ltd. all the necessary details were filed. All the purchases are duly reflected in the books of account and purchases are supported by the invoices. It was submitted that material in respect of these purchases were received at the factory premises of the assessee at wardha. The payments are made by a/c payee cheques and the material purchased was consumed in the manufacturing process. The AO conveniently ignored all these submissions only on the ground that the said supplier company did not file sales tax return / income tax returns for last three to four years. The addition is made simply for the reason that the supplier party did not show the sales before the sales tax department or the income tax department. It is submitted that by producing all the necessary details the assessee had discharged the onus prima facie. If the AO was to disallow the purchases then he was required to make further queries which he did not make. The assessee, in view of losses did not contest such addition but that in itself cannot be held to be sufficient for levy of concealment penalty without having brought any material on record that the submissions made by the assessee regarding purchase of the material from the said party was in anyway incorrect, more particularly when yield declared by the assessee in the revised return was duly accepted by the AO on the purchases

which include the impugned purchases. The law is well-established that penalty proceedings are distinct and different from assessment proceedings and even if the assessee does not challenge the addition the levy of concealment penalty is not automatic. Therefore, it is requested that the mere addition made to the income cannot be a ground for sustainable of concealment penalty, particularly in the facts and circumstances of the present case.

8. Following judicial pronouncements were relied on by learned AR:-

Vipul Life Sciences Ltd., v DCIT [2015]68 SOT 321 (Mum)

> *In this case survey under section 133A was conducted on November 20, 2012. During the survey assessee offered additional income of Rs. 34,73,47/- in addition to original returned income at Rs. 8,43,618. In response to notice under section 148 return of income was filed at Rs. 1,19,10,300/- and assessment was completed at Rs. 1,19,11,555/- by making small addition of Rs. 1,235/- to the returned income filed in response of notice under section 148. On the additional income offered penalty of Rs. 11,80,489/- was levied. The AO rejected the objection of the assessee that penalty should not be levied as the assessment has been framed according to the returned income in which the additional income was offered. The AO observed that the returned of income was neither filed under section 139(1) nor it was a revised return as per provisions of section 139(5). This fact is mentioned in para 6 while reproducing the order passed by the CIT(A). It was further 'Observed by the AO that in consequent to survey action taken on November 20, 2012 the assessee filed letter dated January 14, 2013 and subsequently has filed return of income in response to notice under section 148 dated March 4, 2013 and assessment was framed vide order dated March 26,2013. In these circumstances the levy of penalty was sustained by CIT(A) and his order was challenged before the ITAT. The ITAT taking note of all the above facts mentioning*

in para 24 of the order and taking recourse to the decision of the coordinate bench in the cases of Muninaga Reddy v ACIT [2013] 37 taxmann.com 440(8ang.); Vasavi Shelters v. ITO [2013] 32 taxmann.com 26(8ang.); Ajay Sangari v ACIT [2011] 51 SOT 127(Chd.); CIT v Shankaerlal Nebhumal Uttamchandani [2009] 311 ITR 327(Guj.); Oilip Kedia v ACIT [2013] 40 taxmann.com 102(Hyd.); SVC Projects (P.) Ltd. v JCIT [2011] 132 ITO 11(Vishaka.); after referring to all these decisions and after extracting relevant portions of the decision it has been held by the Tribunal that in all these cases either there was a search operation or there was a
survey operation on the assessee and a consequence thereof, the assessee filed its return/revised return/reassessment return including the amount offered for tax and which was accepted by the AO. IT was observed that in all these cases the judicial fora was of the view that the penalty was not exigible. The relevant portion from the said decision is reproduced below:-

30. We are supported by the decision of the coordinate Bench at Bangalore in the case of Muninaga Reddy v. Asstt. CIT [2013J 37 taxmann.com 440, where it was held,
"There can be no concealment or nondisclosure, as the assessee had made a complete disclosure in the return and offered the surrendered amount for the purposes of tax and, therefore, no penalty under section 271(1)(c) could be levied. The words 'in the course of any proceedings under this Act' in section 271(1) are prefaced by the satisfaction of the Assessing Officer or the Commissioner (Appeals). When a survey is conducted by a survey team, the question of satisfaction of Assessing Officer or the Commissioner (Appeals) or the Commissioner does not arise. One has to keep in mind that it is the Assessing Officer who initiates penalty proceedings and directs the payment of penalty. He cannot record any satisfaction during the course of survey. Decision to initiate penalty proceedings is taken while making assessment order. It is thus obvious that the expression 'in the course of any proceedings under this Act' cannot have the reference to survey proceedings. It necessarily follows that concealment of particulars of

income or furnishing of inaccurate particular of income by the assessee has to be in the return filed by him. The assessee can furnish the particulars of income in his return and everything would depend upon the return filed by the assessee. This view gets supported by Explanations 4, 5 and 5A of section 271 (1). Obviously no penalty can be imposed unless the conditions stipulated in the said provisions are duly and unambiguously satisfied. Section 271 (1)(c) has to be construed strictly. Unless it is found that
there is actually a concealment or nondisclosure of the particulars of income, penalty cannot be imposed. There is no such concealment or non disclosure, as the assessee had made a complete disclosure in the return and offered the surrendered amount for the purposes of tax".
This is an identical case, where survey operations had taken place and the assessment was reopened u/s 148, the coordinate Bench deleted the penalty.
31. In the case of Vasavi Shelters v. ITO [2013] 32 taxmann.com 26, the coordinate Bench at Bangalore held,
"There can be no concealment or nondisclosure as the assessee had made a complete disclosure in the return and offered the surrendered amount for the purposes of tax and therefore no penalty under section 271(1)(c) could be levied. The words 'in the course of any proceedings under this Act' in section 271(1)(c) are prefaced by the satisfaction of the Assessing Officer or. the Commissioner (Appeals).

When a survey is conducted by a survey team, the question of satisfaction of Assessing Officer or the Commissioner (Appeals) or the Commissioner does not arise. One has to keep in mind that it is the Assessing Officer who initiates penalty proceedings and directs the payment of penalty. He cannot record any satisfaction during the course of survey. Decision to initiate penalty proceedings is taken while making assessment order. It is, thus, obvious that the expression 'in the course of any proceedings under this Act' cannot have the reference to survey proceedings.

It necessarily, follows that concealment of particulars of income or furnishing of inaccurate particular of income by the assessee has to be in return filed by it. The assessee can

furnish the particulars of income in his return and everything would depend upon the return filed by the assessee. This view gets supported by Explanations 4 as well as 5 and 5A of section 271.
Obviously, no penalty can be imposed unless the conditions stipulated in the said provisions are duly and unambiguously satisfied.

Since the assessee was exposed during survey, may be, it would not have disclosed the income but for the said survey. However. there cannot be any penalty only on surmises, conjectures and possibilities.

Section 271(1)(c) has to be construed strictly. Unless it is found that there is actually a concealment of nondisclosure of particulars of income in return filed by assessee, penalty cannot be imposed. There is no such concealment or nondisclosure as the assessee had made a complete disclosure in the return and offered the surrendered P. amount for the purposes of tax".

32. In the case of Ajay Sangari v. Addl. CIT [2011J 16 taxmann.com 1151[2012J 51 SOT 127 (Chd.) (URO) coordinate Bench at Chandigarh held,
"Whether since Assessing Officer had failed to point out any discrepancy in explanation furnished by assessee and had proceeded to assess income in hands of assessee on basis of surrender made by assessee, it could not be said that assessee had concealed any income
And there was no merit in levy of penalty under section 271 (1)(c).
33. In the case of CIT v. Shankerlal Nebhumal Uttamchandani [2009J 311 ITR 327 (Guj), it was held,

"In the circumstances, it is apparent that the same income, namely, the amounts in the bank accounts along with interest there on, have been assessed in the hands of the assessee as well as different family members. Hence, even the Department is not certain as to the right person who is amenable to tax qua the said income. in the circumstances,

the Tribunal rightly came to the conclusion that no penalty is exigible under the provisions of section 271 (1)(c) of the Act when the Tribunal has found that admittedly the family members have not been treated as benamidars of the assessee nor have the family members stated that they are the benamidars of the assessee.
13. In the view that the court has taken it has not been found necessary to enumerate and deal with more than a dozen authorities cited by both the sides. The question referred for the opinion of this court is, therefore, answered in the affirmative, i.e., in favour of the assessee and against the Revenue. The reference stands disposed of accordingly with no order as to costs".

34. In the case of Dilip Kedia v. Asstt. CIT [2013J 40 taxmann.com 102 (Hyd.) the coordinate Bench at Hyderabad held,

"considering all the aspects viz., the assessee had declared the amount he will be offering in the course of statement recorded under section 132(4), the Assessing Officer has not brought on record any other materials or evidence for coming to the conclusion that the assessee had concealed any income except for the statement recorded under section 132(4), even the CBDT has cautioned the Assessing Officers to make additions based purely on the sworn statements recorded under section 132(4), the Explanation 5A as it stood on the date of filing of return / revised return by the assessee, levy of penalty on the additional income included in the return based only on the sworn statement of the assessee cannot be sustained. Accordingly the penalty levied upon the assessee deserved to be deleted".

35. In the case of SVC Projects (P.) Ltd. v. Jt. CIT [2011J 12 taxmann.com 155/132 1TD 11 the coordinate Bench at Vishakhapatnam held,
additions were made by the Assessing Officer under any account. Now the question arise whether the additional income declared by the assessee during the course of survey conducted before the start of the assessment proceedings can be called to be an addition for invoking the Explanation 2,

on claim of the assessee raised in succeeding year to be the source of deposits? The answer to certainly in the negative because the Explanation 2 can only be invoked where the additions of income are made during the course of assessment of earlier assessment years. Therefore, we are of the considered view that the provisions of Explanation to section 271 can only be invoked where the source of any receipt, deposit, outgoing or investment in any assessment year is claimed by any person to be an amount which had been added in computing the income or deducted in computing the loss in the assessment year of such person for any earlier assessment year or years but in respect of which no penalty under clause (3) of section 271 (1) had been levied. Meaning thereby, if no additions were made or losses were reduced in any assessment of any earlier assessment years Explanation 2 to section 271 (1) cannot be invoked even then the assessee claimed the additional income offered in earlier assessment years to be the source of any receipt, deposit, outgoing or investment in succeeding year. It is also a settled position of law that the rule of strict interpretation be applied to the penal provision under the I. T. Act.

In the instant case, undisputedly no additions were made in the assessment for the assessment year 2004-05 as the Assessing Officer has accepted the revised return filed by the assessee without tinkering with accounts prepared by him and computed his income. Therefore, the Explanation 2 to section 271(1) cannot be invoked and the penalty under section 271 (1)(c) cannot be levied in assessment year 200405 for the additional income offered during the course of survey. We therefore, set aside the order of the CIT(A) and delete the penalty". 36. As it can be noted, that the in all the above cases extracted by us, either there was a search operation or there was a survey operation on the assessee and as a consequence thereof, the assessee filed its return / revised return / reassessment return including the amount offered for tax and which was accepted by the AO. In all these cases, the judicial fora was of the view that penalty was not exigible."

CIT v Shankerlal Nebhumal Uttamchandani [2009] 311 ITR 327(Guj)

In this case search was conducted on October 27, 1987 at the premises of firm and its partners. During the course of search various documents, loose papers, pass books, bank statements, etc. were found and seized on the basis of bank pass books in the names of various family members of the assessee, certain queries were raised by the revenue and proceedings were going on. On February 27,1989 the assessee surrendered the amount reflected in the bank accounts in the name of family members as his own income from undisclosed sources which was followed by revised return filed on March 31, 1989. Notices u/s 148 were issued to regularise those returns on February framed in the basis of revised returns including estimated addition of marriage expenses and concealment penalty was initiated. On the offered income penalty was levied which was upheld by the CIT(A). The Tribunal deleted the penalty on the ground that though queries were raised from the assessee with regards to deposits in the bank accounts but no specific notice was issued by the departmental authorities alleging particular item of income which has been concealed by the assessee. Thus, there was only a prima facie belief that the assessee has concealed his income and the process of detection was not complete by dated March 31, 1989 when the assessee filed the revised return in which the additional income was offered. On these facts it was argued on behalf of the department before Hon'ble High Court that Tribunal has failed to appreciate that the default was committed by the assessee when the return on income was originally filed and declaration in the revised return did not absorb the assessee so as to delete the penalty imposed. It was also argued that filing of revised return consequent upon certain queries raised by the department was an admission of the assessee regarding concealment of income and therefore Tribunal has erred in coming to the conclusion that there was no detection and the returns were voluntary in nature. These submissions of the department are recorded in para 8 of the judgment. On these submissions their Lordships have held that Tribunal was right in coming to the conclusion that till

March 31, 1989 process of detection was not complete and their Lordships noted the fact that the very same amount standing to the credit of the bank account of various family members had already been assessed by the revenue authorities. Thus, their Lordship's have upheld the order of the Tribunal vide which the penalty was deleted. For the sake of completeness para 11 to 13 from the above decision are being reproduced:-

"11. As noted hereinbefore, the Tribunal has in terms found that though certain queries were raised and put to the assessee there was no specific pinpointing of particular items of income which have been concealed by the assessee. The Tribunal has found, as a matter of fact, that till March 31, 1989, the process of detection was not complete, the date March 31, 1989, being the date of filing of the revised returns. In face of these findings recorded on the basis of evidence appreciated by the Tribunal, the court does not find it necessary to deal with any other issues considering the question referred for the opinion of this court. In fact, there is no material on record to indicate that the aforesaid finding of the Tribunal is incorrect in any manner whatsoever. Furthermore, the Tribunal has also noted as a matter of fact that the very same amounts standing to the credit of the bank accounts of various family members had already been assessed by the Departmental authorities along with interest in the hands of the family members and it was also an admitted position that those family members have nowhere admitted that the family members were benamidars of the assessee

12. In the circumstances, it is apparent that the same income, namely, the amounts in the bank accounts along with interest thereon, have been assessed in the hands of the assessee as well as different family members. Hence, even the Department is not certain as to the right person who is amenable to tax qua the said income. In the circumstances, the Tribunal rightly came to the conclusion that no penalty is exigible under the provisions of section 271 (1)(c) of the Act when the Tribunal has found that admittedly the family members have not been treated as benamidars of the

assessee nor have the family members stated that they are the benamidars of the assessee.

13. In the view that the court has taken it has not been found necessary to enumerate and deal with more than a dozen authorities cited by both the sides. The question referred for the opinion of this court is, therefore, answered in the affirmative, i.e., in favour of the assessee and against the Revenue. The reference stands disposed of accordingly with no order as to costs."

The above decision will be fully applicable to the fact of the present case. The survey was conducted on December 19, 2012. Much before any detection was made, the additional income was voluntarily offered for taxation in the statement recorded during the course of survey. Almost immediately the surrender was reiterated vide letter dated December 27, 2012 filed on January 7,2013 and within a period of eight days the returns were revised. Notice u/s 148 was issued much after the revised returns filed by the assessee on the dates described in
the tables above and all of them are prior to the issue of notice u/s 148. The returns were voluntary returns and income declared therein were accepted by the AO. Therefore, the above case is fully applicable to the case of the assessee and it is a case where the income was voluntarily offered to tax before any detection was made by the department. It may also be mentioned here that in the above case the revised returns filed by the assessee in respect of AY 1985-86 and 1986-87 were beyond the time limit described in section 139(5) of the Act, thus, Ld. AO and CIT(A) have committed an error to reject the voluntary action of the assessee to file return beyond the period prescribed in section 139(5) as the relevance of voluntary revised return is to be seen in the context of non-levy of penalty particularly whereas the reassessment itself has been done in accordance with the revised return so filed by the assessee.

9. It was also brought to our notice that the Assessing Officer has made several incorrect statement and allegations while levying the penalty. This was duly brought to the notice of the CIT (A) in the course of the hearing vide written submissions filed before him. However, the CIT (A) has completely ignored such vital factual discrepancies pointed out by the assessee. The relevant part of the written submissions filed before the CIT (A) as under:-

> *"39. The Learned Assessing Officer while passing the older u/s. 271('l)(c) has made various wrong statements and false allegation. In para 2 the Learned Assessing Officer stated that large scale evasion of tax by Lloyds group by way of routing unaccounted cash through share application money was unearth during the search action conducted at the premises of Jog/a Properties on 04/03/2010 in consequence of other search action conducted on 25/11/2009 in case of Shri Mukesh Choksi who was engaged in the business of pro v/ding bogus bills, bogus tong term, short term gains, speculation profit and bogus share application money. There is not a single truth in this statement of the Learned Assessing Officer Firstly in a search on 04/03/2010 nothing incrementing was found either against Jogia group companies or against Lloyds group. This proves that the statement of Learned Assessing Officer is wrong. Secondly in a search on 0410312010 a disclosure of income was made amounting to Rs. 109.75 crores in respect of certain transactions of share capita! However, the companies filed Nil return and did not offer the income. The Assessing Officer passed the order u/s. 143(3) r w , 153A and 153C and made the additions of Rs. 12245 crores and the same is deleted by CIT (Appeals). As on the date of passing of the assessment order of the penalty order, no addition survives and hence the allegation that unaccounted cash was routed by Lloyds group."*

10. It was further pointed out by the CIT (A) as under:

'42 The Learned Assessing Officer in para 121 has stated that due to departmental action in 2010 and 2012 the appellant facing consistent and repeated investigation was left with no choice and preferred to come clean and offer the surprised income over the years as additional income. It is also stated that the sequence of events narrated supra that when Investigation trail was leading to the assessee company then it was forced to offer the suppressed income as additional income. This is wrong statement of fact as 2010 there was no search or survey on the appellant. Not a single correspondence has taken place by the investigation wing or the Assessing Officer during 2010 proceedings either at investigation level or at assessment level In 2010 survey proceedings also as explain earlier there was no proof of evidence either pre or post survey which could lead to conclusion that the department had sufficient information against the appellant and the appellant had no option but to offer the income. This proves that the statement of the Learned Assessing Officer is contrary to the facts."

11. As per learned A.R, none of the above submissions were considered by the CIT(A).

12. CIT v Suresh Chandra Mittal [2000] 241 ITR 124 (Madhya Pradesh) (HC) affirmed by supreme court in CIT v Suresh Chandra Mittal [2001) 251 ITR 9 (SC).

"Once revised assessment was regularised by revenue and Assessing Officer had failed to take any objection in that matter, assessee's declaration of income in revised returns and his explanation that he had done so to buy peace with department and to come out of vexed litigation could be treated as bona fide and no penalty could be levied for concealment of income."

13. It was submitted by learned AR that decision of the Bombay High Court in CIT v Smt Kaushalya(Supra) is not appl icable to the facts of the present case for following reasons:

- The issue is now decided by the Apex Court in Commissioner of Income-tax v. SSA'S Emerald Meadows [2016] 73 taxmann.corn 248 (SC) wherein it is clearly held that there is no merit in the petition. The SLP was against the order of Karnataka High Court in -CIT v. SSA'S Emerald Meadows [2016] 73 taxmann.corn 241 (Kar.) wherein the High Court affirmed decision of Tribunal, relying on decision of CIT v Manjunath Cotton and Ginning Factory (2013) 359 ITR 565(Karn) holding that notice issued by Assessing Officer under section 274 read with section 271 (1)(c) was bad in law, as it did not specify under which limb of section 271(1)(c) penalty proceedings had been initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. Hence, the ratio laid down in CIT v Manjunath(Supra) has been confirmed by the Supreme Court.

- In the case of CIT v Manjunath(Supra) one of the appeals disposed off was Veerabhadrappa Sangappa & Co ITA NO 5020 of 2009 [Pg no 577] where the issue involved was identical. SLP against said appeal was dismissed. Order of SLP was submitted at the time of hearing.

- The Bombay High Court in CIT vs. Samson Perinchery ITA NO 1154 of 2014 dtd5/1/2017 (Bom)(HC) after considering decision of CIT v Manjunath(Supra) has held that failure by the AO to specify in the s. 274

notice whether the penalty is being initiated for 'furnishing of inaccurate particulars of income' or for 'concealment of income' is fatal. It reflects non- application of mind and renders the levy of penalty invalid. Hence, decision in CIT v Samson (Supra) which is a later decision will have higher precedence value over CIT v Smt Kaushalya [Supra].

-When there are two conflicting decisions of the same higher court of equal strength and later decision has not considered earlier decision then lower court must follow the decision which lays down the law more elaborately and accurately as held in Amar Singh Yadav v Shanti Devi & Ors AIR 1987 Pat 191. As Bombay High Court in CIT vs. Samson Perinchery (Supra) has followed Karnataka High court in CIT v Manjunath(Supra) which has ultimately been upheld by the Apex Court as pointed out above, the decision of Bombay High Court in CIT vs. Sarnson Perinchery (Supra) has to be followed.

- Without prejudice to above the Bombay High Court in CIT v Smt Kaushalya [1995] 216 ITR 660 (Bom)(HC) has held that the SC cannot be vague. In the facts of the present case penalty is initiated in Asst order and confirmed in penalty order for twin charges ie concealment of income as well as furnishing inaccurate particulars of income. This is impermissible as held in Mangalam Drugs & Organics Ltd v DCIT ITA No. 5454/M/2011 AY 04-05 DTD 24/912015 (MUm)(Trib).

14. On the other hand, Ld. CIT DR submitted that, the entire facts and circumstances leading to the levy of penalty has to be seen and simply because inappropriate words have not been deleted in the notice issued

u/s.271(1)(c), does not mean that whole penalty proceedings gets vitiated. Section 271(1)(c) provides levy of penalty under both the charges and if the AO in the penalty order has levied the penalty on any one of the charge then also, it cannot be held that penalty order is bad in law. The substance and facts relating to levy of penalty has to be seen. On merits, she strongly relied upon the order of the CIT(A).

15. It was also contention of CIT DR that AO has properly recorded satisfaction while passing assessment as well as penalty order which clearly indicate proper application of mind by the Assessing Officer. She also relied on the decision of Bombay High Court in case of Smt. Kaushalya & Ors. 216 ITR 660 (Bom) to canvass support for her plea that non-striking off the irrelevant portion of notice would not invalidate the imposition of penalty u/s271(1)(c) of the Act.

16. As per learned DR, the undisclosed income is unearthed as a result of survey u/s. 133A and investigations carried out by the department. Due to this, the assessee offered additional income of Rs. 557.5 cr. for the AYs 2007-08 to 2010-11. The assessee never intended to offer this income to the department and the assessee had guilty mind with all the elements of mens rea. That is why the assessee did not offer this income in the original returns filed u/s. '139(1) for the AYs 2007-08 to 2010-11. This income is offered after the survey operation when the assessee was totally cornered and had no alternate but to offer this income' for taxation. The assessee is giving the wrong statement that this is a self declaration. The evidences of undisclosed income were

detected at the time of survey itself. Shri Babulal Agarwal, Managing Director of the assessee company had categorically admitted in his statement recorded on 21.12.2012 that the assessee company had generated unaccounted fund in various years which was invested as share application money in 14 companies which in turn invested the same in share application money of Shree Global Tradefin Ltd. and finally invested in the assessee company as share application money.12. Reliance was placed by Ld. DR in the case of Mak Data Ltd. The Hon'ble Delhi High Court vide order dated 22.01.2013 reported in 31 Taxman 35. In that case also a survey u/s. 133A was conducted and the assessee surrendered undisclosed income on account of share application money. The argument of the assessee was that surrender of income was suo moto before any investigation and there was no other evidence in the possession of the department except the surrender. The Hon'ble High Court did not accept the argument of the assessee and confirmed levy of penalty by the AO and set aside the order of the ITAT which had cancelled the penalty. The assessee filed appeal before the Hon'ble Supreme Court The Hon'ble Supreme Court vide order dated 30.10.2013 reported in 38 Taxmann.com 448 has confirmed the order of the Hon'ble Delhi High Court.

17. We had carefully gone through the orders of the authorities below and the material placed before us. We had also deliberated on the judicial pronouncements referred by lower authorities in their respective

orders as well as cited by learned AR and DR during the course of hearing before us in the context of factual matrix of the case.

18. From the record we found that survey proceedings were initiated in the assessee's case on December 19, 2012 and also in some other cases. In a statement on oath which was recorded on December 21, 2012 Sh. Babu Lal Agarwal, then director of the assessee company, had offered the income earned by the assessee through its business. As a result letter dated December 27, 2012 addressed to DDIT(Inv.) Unit-IX(3) Mumbai was filed on January 7, 2013 wherein an additional income of Rs. 557.50 crores was offered and the same was included in the returns of income filed for the impugned assessment years and also formed part of the assessed income on which impugned penalty has been levied.

19. The additional income so offered was accepted and assessed by AO. Such income was bifurcated into various heads which have been accepted by the AO and additional income has been assessed accordingly. For sake of completeness of facts regarding additional income in respect of each of the year as offered by assessee and accepted by AO for making the addition are described under the head trading sales, Raw Materials purchases for manufacturing, purchases from other parties for manufacturing difference on account of yield. Yearwise details are as under:-

A.Y.2007-08

Sr. No.	Nature of head	Particulars	Qty (MT)	Gross	Income
1	Trading Sales A	Trading other than "Ragni trading & Investment Ltd., and Shree Global Tradefin Ltd., (assessee sister concern)	14616	44.94	0.88
2	Trading Sales B	"Trading with Ragni trading & Investment Ltd., and Shree Global Tradefin Ltd., (assessee sister concern)	0	4.9	0.1
3	RM purchase for manufacturing	Cost of raw material is inflated by 4% in AY 2007-08, Now disclosed as additional income of Rs.17.37 crores.	302586	434.12	17.37
4	A. purchase from other parties for manufacturing	Bogus purchases from 15 parties which were identified by Sales Tax authorities as non-genuine	0	0	0.16
5	B. purchase from other parties for manufacturing	Bogus purchases with three parties viz., VMN steel Chem (India) Pvt. Ltd., Akash Steel Traders and Rajvi Trading Pvt. Ltd.,	33399	10.96	10.96
6	Difference on a/c. of yield	Difference in "Yield as per Steel-Industrial norms(84.5%)" and yield shown by assessee		0	142.00
		TOTAL			**171.47**

A.Y.2008-09

Sr. No.	Nature of head	Particulars	Qty (MT)	Gross	Income
1	Trading Sales A	Trading other than "Ragni trading & Investment Ltd., and Shree Global Tradefin Ltd., (assessee sister concern)	100025	338.87	7.03
2	Trading Sales B	"Trading with Ragni trading & Investment Ltd., and Shree Global Tradefin Ltd., (assessee	0	35.73	0.72

		sister concern)			
3	A. purchase from other parties for manufacturing	Bogus purchases from 15 parties which were identified by Sales Tax authorities as non-genuine	0	0	0.23
4	Difference on a/c. of yield	Difference in "Yield as per Steel-Industrial norms(84.5%)" and yield shown by assessee	0	0	118.00
		TOTAL			**125.98**

2009-10

Sr. No.	Nature of head	Particulars	Qty (MT)	Gross	Income
1	Trading Sales A	Trading other than "Ragni trading & Investment Ltd., and Shree Global Tradefin Ltd., (assessee sister concern)	118580	524.82	22.68
2	Trading Sales B	"Trading with Ragni trading & Investment Ltd., and Shree Global Tradefin Ltd., (assessee sister concern)	0	32.85	1.41
3	A. purchase from other parties for manufacturing	Bogus purchases from 15 parties which were identified by Sales Tax authorities as non-genuine	0	0	1.32
4	Capex	Addition to P & M worth 2.91 cr in A.Y.2009-10 not fully supported with evidence & vouchers	0	2.91	0.22
5	Difference on a/c. of yield	Difference in "Yield as per Steel-Industrial norms(84.5%)" and yield shown by assessee	0	0	130.00
		TOTAL			**155.63**

2010-11

Sr. No.	Nature of head	Particulars	Qty (MT)	Gross	Income
1	Trading Sales A	Trading other than "Ragni trading & Investment Ltd., and	189238	793.96	22.55

		Shree Global Tradefin Ltd., (assessee sister concern)			
2	Trading Sales B	"Trading with Ragni trading & Investment Ltd., and Shree Global Tradefin Ltd., (assessee sister concern)	0	0	0.7
3	A. purchase from other parties for manufacturing	Bogus purchases from 15 parties which were identified by Sales Tax authorities as non-genuine	0	0	0.7
4	Capex	Addition to P & M worth 2.91 cr in A.Y.2009-10 not fully supported with evidence & vouchers	0	0	0.4
5	Difference on a/c. of yield	Difference in "Yield as per Steel-Industrial norms(84.5%)" and yield shown by assessee	0	0	80.00
		TOTAL			**104.42**

20. In this manner, the additional income has been assessed as per offer made by the assessee in pursuance to survey conducted by the department on December 19, 2012 for which statement of the then Director was recorded on December 20,2012 and offer was made. Immediately on January 7,2013 letter dated December 27,2012 was filed with the DDIT (Inv.) confirming the offer of additional income and immediately revised returns were also filed on January 15, 2013 before any detection was made by the Department. It is evident from the facts that notice u/s.148 was issued not only after the offer was made but long after the return was filed by the assessee. Date wise events upto the date of issue of notice u/s.143(2) in respect of AY 2007-08 are described as under:-

LIST OF DATES AND EVENTS

Sr. No.	Date	Particulars
1	30/10/2007	Original return of income filed
2	23/12/2009	Date of Assessment order u/s.143(3)
3	19/12/2012	Survey u/s.133A
4	20/12/2012	Statement of Sh. Babu Lal Agarwal, then the director of the assessee company recorded by the survey authorities wherein he offered the unaccounted income generated during AYs 2007-08 to 2010-11 of an amount of Rs.556,96,50,000/-.
5	07/01/2013	Letter dated 27/12/2012 filed with DDIT (Inv.) Unit-IX(3), Mumbai, confirming the offer of the unaccounted income as per the breakup in AYs 2007-08 to 2010-11 of amounting to Rs.557.50 crores as per letter and describing all the details
6	15/01/2013	Revised return according to the offer of undisclosed income was filed.
7	21/03/203	Notice u/s.148 was issued
8	06/09/2013	Notice u/s.143(2) was issued.

21. For AYs 2008-09 to 2010-11 dates in respect of above serial number 2 to 6 are same and rest of the dates are described assessment year wise in the following table:-

Assessment Year	Original return of income filed	Date Assessment order u/s.143(3)	Notice u/s.148 was issued	Notice u/s.143(2) was issued
2008-09	25/09/2008	23/12/2010	05/12/2013	10/12/2013
2009-10	27/09/2009	30/12/2011	25/11/2013	02/12/2013
2010-11	26/09/2010	20/12/2012	25/11/2013	02/12/2013

22. In the penalty notices so issued in respect of AYs-2007-08 to 2010-11 u/s 274 r.w.s 271 of the Income Tax Act, 1961 dated January 6, 2014 the ITO did not Specify as to whether the penalty was leviable for concealment of income or for furnishing inaccurate particulars thereof.

Copy of notices issued by the AO in respect of each of the assessment years are placed in the paper book.

23. On the above facts AO has levied the concealment penalty and the CIT(A) has upheld the concealment penalty. We found that Ld. CIT(A) has narrated the discussion made by the AO in the penalty order in para 4.1 and at pg. 19 of the impugned order the CIT(A) has extracted the analysis of the AO in the penalty order in respect of AY 2007-08 and in para 4.2 it has been specifically stated by the CIT(A) that the facts ·relevant to all the assessment years are identical with the facts of AY 2007-08 except of quantum of additional income declared by the assessee which was then added by the AO while passing the reassessment orders under section 147 r.w.s 143(3) in para 4.3 he has reproduced the analysis of the AO in which it was stated by the AO that the submissions of the assessee with regards to non levy of penalty can be summarised which inter alia include that the disclosure has been made suo moto by the assessee and it was to buy peace and was conditional subject to non-levy of penalty. The AO observed that the action taken under section 133A and post survey investigation resulted in unearthing the concealment of additional income which was due to departmental action in 2010 and then in 2012; that the assessee was facing consistent and repeated investigation, therefore, was not left with any choice except to come clean and offered the suppressed income over the years as additional income. Therefore the AO has held that penalty was leviable. Such conclusion of the AO has been reproduced at

pg. 23 of the impugned order. From the record we found that the assessee has had raised before CIT(A) manifold arguments that notice issued under section 271 (1)(c) is not justified and such contention is recorded at Pg. 27 of the impugned order. From Pgs. 28-36 Ld. CIT(A) reproduced the submissions made by the assessee before him. At Pgs. 28-32 the submissions of the factual aspect are recorded and specific submission were made in respect of each of the addition and it was pointed out that neither the survey team nor the AO had any proof or evidence to conclude that the assessee had filed inaccurate particulars regarding the total addition of Rs. 171.47 crores. These submissions are reproduced by Ld. CIT(A) in para 5.1 at pg. 24-36 of the impugned order.

24. With regards to the addition of share capital on the basis of survey and search, etc. on third parties it was submitted before the lower authorities that so far as it relates to share capital introduced in

fourteen companies the issue was well settled and the assessment in the case of eight companies are done under section 153A/153C for the block period and out of total share application/capital of Rs. 340 crores the AO has accepted the claim of Rs. 225.55 crores and made addition of Rs. 122.45 crores which orders were passed on December 26, 2011. Against the addition eight companies had filed appeals before the CIT(A) and CIT(A) deleted the addition vide order dated July 20, 2012, July 23, 2012, July 24, 2012, July 25, 2012, July 26, 2012 and July 27, 2012 and all these events happened prior to the date of survey at

assessee's premises and thus, share capital has been accepted as genuine either at assessment stage or in appeal proceedings. These submission of the assessee are reproduced by the CIT(A) at pg. 31 of the impugned order. However, there was no evidence or material from which it can be said that the additional income offered by the assessee were detected by the department in the search and surveys. Therefore, the offer made by the assessee was voluntary. Upon such submissions made by the assessee before CIT(A), Ld. CIT(A) has specifically required the AO to furnish details of evidence available with the AO to make these additions. Such requirement by the CIT(A) from the AO are listed at pg. 37 of the impugned order where the relevant portion of letter written by CIT(A) to AO is reproduced.

25. In reply to CIT(A) calling the remand report, the AO submitted two letters dated April 29,2015 and May 18,2015. From the letter dated April 29, 2015 it was noted by the CIT(A) that AO did not give specific answers to the queries raised by CIT(A). Therefore, it has been mentioned by him in para 6.3 at pg. 39 of the impugned order that the first remand report sent by the AO was cryptic and did not address the points on which the comments were sought. Therefore, Ld. CIT(A) provided second opportunity to the AO for which the second letter was submitted. In second reply too no reference was made to any evidence or material to substantiate the additions except the excerpt from the statements recorded during the course of survey regarding voluntary offer of the addition and reference can be made to the second remand

report of the AO which has been reproduced in the impugned order at pgs. 39-62 of the order. The conclusion drawn by CIT(A) to uphold the addition are recorded in para 10.1 from pg. 63 of the impugned order. It can be seen from the impugned order that from para 10.1 to 11.11 Ld. CIT(A) has discussed the admission made by the then director of the assessee company who made the declaration of additional income which was duly reflected in the return filed immediately after the statement made during the survey, thereafter, in para 12.1 Ld. CIT(A) has discussed that whether the addition was solely on the basis of admission of income by the assessee. He has observed that he has perused the material available on record including survey report and statement of various persons recorded. Again, CIT(A) was referring to the survey and search actions taken on Mukesh Chokshi group and M/s Shree Global Tradefin Ltd., etc. and after referring to the statements only he concluded that in view of the search and survey conducted by the Department on Mukesh Chokshi group and M/s Global Tradefin Ltd., the assessee was left with no other alternative but to surrender and offer the amount involved as its income. Such conclusion of the CIT(A) is recorded in para 12.4 to 12.6 of the impugned order at pg. 73-75.

26. It is clear from the remand report sent by AO and the inference drawn by CIT(A) that there was no material or evidence except the statements to support the conclusion. It is only on account of voluntary offer made in the statement recorded on December 20, 2012 followed by the immediate letter dated December 27, 2012 submitted on January 7,

2013 and filling of income tax returns on 15.01.2013 including the income voluntary offered to tax. The conduct of the assessee is bonafide and in answer to question No.40 it was made clear that the offer is subject to non levy of concealment penalty.

27. We found that initially Ld. CIT(A) took cognizance of the arguments of the assessee that there was no material or evidence on record to support the impugned addition and it is only on account of voluntary offer made by the assessee and finding that first remand report did not fulfill the requirements of first letter written to AO seeking remand report, Ld. CIT(A) again required the AO to submit detailed report. In second remand report also the AO did not refer to any such material or evidence and wholly relied upon the statements. It was also made clear that after the search on Mukesh Choksi group and survey on Jogia Properties not even single enquiry letter was issued to the assessee. However, while drawing the conclusion against the assessee Ld. CIT(A) has conveniently ignored these very factors which are very important to determine the issue that whether or not the assessment of the impugned addition is on account of detection by the Department or the question that the offer is voluntary and bonafide. In view of the facts that voluntary offer was made in statement dated January 15, 2013 which was followed by letter dated 27.12.2012 filed on 07.01.2013 and immediate filling of the revised return on 15.01.2013 all immediate and prompt actions taken by the assessee indicates not only the bonafide conduct of the assessee but also establish the fact that the impugned addition is on

account of voluntary offer made by the assessee during the survey and till the date of filling of the voluntary returns i.e. on January 15, 2013 there was no detection by the Department. Such bonafide and voluntary action of the assessee is further strengthen by the fact that Ld. AO has accepted the offer and income has been determined according to returns of income filed on January 15, 2013 except an addition of Rs. 4,38,93,410/- in the AY 2010-11 on account of purchases made from Gupta Metallics as per para 6 of the assessment order for AY 2010-11.

28. Before proceeding to assail the penalty Order and the impugned order, it may be mentioned that while upholding the penalty Ld. CIT(A) and CIT DR has relied on some decisions, which have no application to the present case as these have been rendered in different context as follows.

MAK Data ('P.) Ltd. v. CIT [2013] 358 ITR 593

- In this case pursuant to survey conducted on December 16, 2003, blank transfer deeds of share signed by the persons who applied for the shares were found and impounded on the basis of which addition was made on the offer made by the assessee during the course of the assessment proceedings and addition of Rs. 40,47,000/- was made. The Supreme Court while affirming the penalty has taken the note of the fact that the survey was conducted more than ten months before the assessee filed its regular return of income. The Supreme Court took note of the fact that had it been the intention of the assessee to

make true and full disclosure of its income, it would have filed the return declaring the income inclusive of the amount which was surrendered later during the course of assessment proceedings and from these facts, consequentially, it is clear that the assessee had no intention to declare its true income. It is therefore levy of penalty was upheld. The facts in the present case are entirely different as the assessee, before detection of the impugned addition had made voluntary disclosure in the statement submitted during the course of survey which was followed by detailed letter submitted on January 7, 2013 and return of income on January 15, 2013 including the offered income which has been accepted by the AO. To substantiate the above submissions reference is invited to the following observations of the Hon'ble apex court from this decision:-

> *"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 or association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer 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."*

-The above view is also strengthened by the decision of the Hon'ble Jurisdictional High Court dated February 9, 2016 in the case of CIT vs. Shri. Hiralal Doshi ITA No. 2331 of 2013 wherein their lordships have discussed the decision of the Supreme Court in the case of MAK Oata(supra) and observed that the said case would not be universally applicable as the said case was rendered on the facts which are completely distinguishable (para 10 is to be reproduced).

> *"10. The reliance by the Revenue upon the decision of the Apex Court in Mak Data P. Ud(supra) to contend that the justification of having deleted and accepted the amount of RS.1.62 Crores as business income, to buy peace is not available. We find that the facts in that case are completely distinguishable and the observations made therein would not be universally applicable.*
> *In that case, a sum of Rs.40.74 lakhs had never been disclosed to the Revenue. During the course of survey, the assessee therein had surrendered that amount with a covering letter that this surrender has been made to avoid litigation and buy peace with the Revenue. In the aforesaid circumstances, the Apex Court held that the words like "to avoid litigation and buy peace" is not sufficient explanation of an assessee's conduct. It held that the assessee had to offer an explanation for the concealment of income and/or furnishing of inaccurate particulars of income by leading cogent and reliable evidence. The Apex Court further records that in the facts of*

> *the case before it the surrender of income was not voluntary but was made only on the account of detection by the Assessing Officer during the course of survey. Further, the Apex Court also records the fact that the survey was conducted more than 10 months before the assessee filed its return of income. However, the assessee therein had not declared this income in its return of income filed subsequent to the survey which again indicated the fact that he had no intention to declare its true income. In any event, the facts in the present case as found by the CIT(A) and the Tribunal is that the Respondent assessee had disclosed an amount of Rs. 1.62 Crores in the original return by crediting the same to its capital account being Long Term Capital Gain on the sale of share. Thus, the Appellant was under bonafide belief that the income from long term capital gain was exempt from tax. Thus, the decision of the Apex Court would not apply to the facts arising in the present case. "*

- Thus, it has been held that bonafide belief and disclosure prompted by survey could make a difference and can be considered as a factor for non-levy of concealment penalty. Thus, the reliance by Ld. CIT(A) on decision in the case of MAK Data(supra) is incorrect and not sustainable in law.

Deloitte Consulting India (P.) Ltd. v ACIT [2014] 151 ITD 454

- In this case also the assessee did not disallow entire marketing expenses in respect of international transaction and this issue was already referred by the AO to the TPO. Thereafter, the assessee revised its return and it was held that such action of the assessee was not voluntary and during the course of assessment proceeding. Thus, this case is also not applicable to the facts of the present case.

A.M. Shah & Co. v CIT [1999] 238 ITR 415(Guj.)

The facts of the case are entirely different from the facts of the case of the assessee. The assessee challenged the levy of penalty on the ground inter alia including that the assessment was on estimate basis and' penalty could not be sustained. The fact was that serious discrepancies were found in the books of account and excess sales were shown while purchases were not shown, bogus purchases were claimed and purchases were not shown in sales or stock. The assessee never revised its return and serious discrepancies were noticed in the books of accounts itself. Therefore, facts of the said case do not match with the present case and the levy of concealment penalty in that case is entirely in different context.

Prempal Gandhi v CIT [2011] 335 ITR 23(P&H)

In this case after assessment was completed it came to the notice of the AO that the assessee had substantial transactions in the bank which were not disclosed. Reassessment proceedings were initiated and assessee filed revised return in pursuance to reassessment proceedings offering the peek credit and interest thereon with a condition that no penalty be imposed and he may not be prosecuted. The AO did not accept the conditions. It is on these facts levy of penalty was upheld by the High Court. The facts of this case are entirely different from the facts of the present case. In the above case the revised return was filed only after initiation of reassessment proceedings i.e. after the issue of notice under section 148 whereas in

the present case, the return were revised much before issue of notice under section 148 and the facts are different in its entirety. In the decision of Hon'ble apex court in the case of Sun Engineering 198 ITR it has been held that while following judicial precedent, it is important to see the context in which such decision has been rendered. The context in the above case being entirely different, the ratio laid down in the above decision cannot be applied to the present case.

29. In view of the above factual position, we first deal with the legal ground taken by assessee which reads as under:-

> *4. Without prejudice to the above, the learned Cl'T (A) failed to appreciate that the AO had not specified in the notice u/s 271(1)(c) r.w.s. 274 whether the penalty was leviable for concealment of income or for furnishing inaccurate particulars thereof. Therefore, the penalty is liable to be deleted.*
>
> *5. Without prejudice to the above, the learned CIT(A) failed to appreciate that the AO has not specified the exact charge in the penalty order whether the Appellant had concealed its income or furnished inaccurate particulars thereof. Therefore, the levy of penalty is not justified.*

30. The two charges for initiating the penalty operate on two different footing and under the penal provision the charge has to be very specific and not vague. These charges are not to be reckoned as any casual remark, which can be interchanged by the AO at any stage on his whims and fancies. It is not an error which is rectifiable or to be ignored, albeit it is a fatal error which vitiates the entire initiation itself. If charge itself is vague and not clear, then the onus cast upon the assessee under

Explanation itself gets vitiated as assessee is precluded from a chance to give a specific rebuttal on that charge. It is a trite law that circumstances and facts for levy of penalty under both the grounds operate in a different fields. The courts have held that in the notice under section 274 r.w.s. 271, the AO has to specify the charge on which he intends to levy penalty. This aspect of the matter has been consistently reiterated by the Hon'ble High Courts from time to time.

31. We found that Notice under section 271(1)(c) is issued on standard performa in which inappropriate words and paragraphs were neither struck off nor deleted. Reference is made to the copy of notice issued under section 274 r.w.s 271 of the Income Tax Act, 1961 on January 2, 2014 in respect of all the assessment years the copies of which are placed in the paper book. We found that the said notices have been issued on standard performa and in the notices the inappropriate words and paragraphs were neither struck off nor deleted. Thus, the assessing authority was not sure as to whether he had proceeded on the basis that the assessee had either concealed its income or had furnished inaccurate particulars. Thus, the notices so issued are not in compliance with the requirement of the particular section and therefore it is a vague notice, which is attributable to a patent non-application of mind on the part of the assessing authority.

32. There can be no doubt that penalty u/s. 271(1)(c) of the Act is levied for concealing particulars of income or for furnishing inaccurate particulars of such Income, which are the two limbs of this provision. In other words,

it is only when the authority invested with the requisite power is satisfied that either of the two events existed in a particular case that proceedings u/s. 271(1)(c) of the Act are initiated. This pre-requisite should invariably be evident from the notice issued u/s. 274 r.w.s. 271 of the Act, which is the jurisdictional notice, for visiting an assessee with the penal provision. The intent and purpose of this notice is to inform the assessee as to the specific charge for which he has been show caused so that he could furnish his reply without any confusion and to the point. In the present case, neither the assessee nor anyone else could make out as to whether the notice u/s. 274 r.w.S. 271 of the Act was issued for concealing the particulars of income or for furnishing inaccurate particulars of such income disabling it to meet with the case of the Assessing Officer. There are a catena of judgments highlighting the necessity for identifying the charge for which the assessee is being visited and in all those decisions, Hon'ble Courts have repeatedly held that where the jurisdictional notice is vague, similar to the one in the present case, the consequent levy cannot be sustained.

33. In this connection, reliance is first placed upon the judgment of the Hon'ble Karnataka High Court In the case of CIT v. Manjunatha Cotton and Ginning Factory & Ors. and Veerabhadrappa Sangappa and Co. (359 ITR 565, 577, 601, 603-604) in which the facts are similar. In those bunch of tax appeals, several assessee and several issues were involved. In so far as LT.A. No. 5020 of 2009 was concerned, one of the substantial questions on which the appeal was filed by the revenue was:

> *"Whether the notice issued under section 271(1)(c) in the printed form without specifically mentioning whether the proceedings are initiated on the ground of concealment of income or on account of furnishing of inaccurate particulars is valid and legal?"*

34. While answering the above in favour of the assessee, the following findings were recorded by the Hon'ble Court:

> *"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 [2007] 292 ITR 11 (SC) 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 Works reported in [1980] 122 ITR 306 (GUJ) and the Delhi High Court in the case of CIT v. Virgo Marketing P Ltd reported in [2008 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. "(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. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind.*

35. Thereafter, in so far as the manner in which the statutory notice was required to be issued, the Hon'ble Court concluded thus:

> *(p) Notice u/s 274 of the Act should be 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.*

36. Finally, in concurring with the findings recorded in the order of the Tribunal, it was held thus:

> *66. In view of the aforesaid law, we are of the view that the Tribunal was justified in holding that the entire proceedings are vitiated as the notice issued is not in accordance with law and accordingly justified in interfering with the order passed by the appellate authority as well as the assessing authority and in setting aside the same. Hence, we answer the substantial questions of law framed in this case in favour of the assessee and against the Revenue. "*

37. The aforesaid judgment was unsuccessfully challenged by the revenue as it was rejected vide Petition for Special Leave to Appeal (C) No. 13898/2014 dated 11.07.2016, a copy of which was placed on record.

38. Reliance was next placed upon another judgment of the Hon'ble Karnataka High Court in the case CIT v. SSA'S Emerald Meadows (Income Tax Appeal No. 380 of 2015 decided on 23.11.2016). In this case also s similar situation arose in as much as the Hon’ble Court was required to adjudicate on the following substantial question:

> *(1) Whether, omission of assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation*

> *even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?"*

39. The aforesaid question was dealt with by the Honble Court in favour of the assessee in the following words:

> *"3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with section 271(1)(c) of the Income-tax Act 1961 (for short 'the Act; to be bad in law as it did not specify which limb of Section 271(1)(c) of the Act the penalty proceedings had been initiated le. whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunel while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of Commissioner of Income-tax vs. Manjunatha Cotton And Ginning Factory (2013) 359 ITR 565.*
> *4. In our view since the matter is covered by judgment of the Division Bench of this Court we are of the opinion no substantial question of law arises in this appeal for determination by this Court. The appeal is accordingly dismissed."*

40. The SLP filed by the department in the aforesaid case also was dismissed by the Hon'ble Supreme Court vide Petition for Special Leave to Appeal (C) No .... ./2016 (CC No. 11485/2016) dated 05.08.2016. Copies of the aforesaid judgment of the Hon'ble Karnataka High Court and that of the Hon'ble Supreme Court have been placed on record.

41. The Honble jurisdictional High Court in the case of CIT v. Shri Samson Perinchery [Income Tax Appeal No. 1154 of 2014 and others dated 05.01.2017] had also occasion to consider a similar issue. In this case, though proceedings u/s. 271(1)(c) of the Act were initiated for furnishing

of inaccurate particulars of income, in the notice issued u/s. 274 r.w.s. 271 of the Act in the standard form, the charge for which it was issued was also not identified, as in the present case. In deleting the levy, so far as non-specification of the default in the jurisdictional notice, the following findings were recorded by the Hon'ble Bombay High Court:

> *"7 Therefore, the issue herein stands concluded in favour of the Respondent-Assessee by the decision of the Karnataka High Court in the case of Manjunath Cotton and Ginning Factory (supra). Nothing has been shown to us in the present facts which would warrant our taking a view different from the Karnataka High Court in the case of Menjuneth Cotton and Ginning Factory (supra).*
> *8. In view of the above, the question as framed do not give rise to any substantial question of law Thus, not entertained"*

42. The Hon'ble Supreme Court in Dilip N. Shroff v/s JCIT, [2007] 291 ITR 519 (SC), has observed that while issuing the notice under section 274 r/w section 271, in the standard format, the Assessing Officer should delete the inappropriate words or paragraphs, otherwise, it may indicate that the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or had furnished inaccurate particulars of income. This, according to the Hon'ble Supreme Court, deprives the assessee of a fair opportunity to explain its stand, thereby, violates the principles of natural justice. As held by the Hon'ble Supreme Court in CIT v/s Reliance Petroproducts Pvt. Ltd. [2010] 322 ITR 158 (SC), the aforesaid principle laid in Dilip N. Shroff (supra) still holds good in spite of the decision of the Hon'ble Supreme

Court in UOI v/s Dharmendra Textile Processors (2008) 306 ITR 277 (SC). The Hon'ble Jurisdictional High Court in CIT v/s Smt. Kaushalya & Ors., [1995] 216 ITR 660 (Bom), observed that notice issued under section 274 must reveal application of mind by the Assessing Officer and the assessee must be made aware of the exact charge on which he had to file his explanation. The Court observed, vagueness and ambiguity in the notice deprives the assessee of reasonable opportunity as he is unaware of the exact charge he has to face. The Hon'ble Jurisdictional High Court in Samson Perinchery (supra), following the decision of Hon'ble Karnataka High Court in CIT v/s Manjunatha Cotton & Ginning Factory, [2013] 359 ITR 565 (Kar.), held, order imposing penalty has to be made only on the ground on which the penalty proceedings has been initiated.

43. In addition to the aforesaid binding judgments, there are several orders passed by co-ordinate Benches of he Tribunal on this very point. In all those orders also penalty levied u s. 271(l)(c) of the Act on the basis of similar vague notice was cancelled. Relevant paragraphs from some such orders are extracted below:

> (a) Prakash H. Savla v. ACIT (ITA No. 3381/Mum/2015 dated 11.11.2016):
>
> *"5. We have considered the rival submissions and perused the relevant material on record We have gone through the notice u/s. 274 r.ws. 271(1)(c) of the Act issued on 30.122009 by the AD (p. 40-41 of the Paper Book). At the end of the notice, it has been mentioned that inappropriate words end paragraph should be deleted The AD has not done so. In fact in the said notice. 'have concealed the particulars of your income or*

furnished inaccurate particulars of such income' are appearing. There is no denial above fact by the Id DR.
5.4 In CIT vs. Smt Kaushalya (1994) 75 Taxman 549 (Bom), the Hon'ble Bombay High Court has held that 'The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charges he had to face. In this background, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified .
6. Respectfully following the above decisions. we hold that the notice dated 30.12.2009 issued by the AD u/s. 274 r.ws. 271 of the Act for the AY 2003-04 for initiating penalty proceedings u/s. 271 (l)(c) of the Act In the present case is invalid "

(b) Oleander Farms P. Ltd. V. DCIT (ITA No. 5197/Mum/2014 dated 28.11.2016)
"6. We have considered the rival submissions and perused the relevant material on record We find in the notice u/s. 274 r.w.S. 271 dated 27/12/2011, the AO has mentioned 'have concealed the particulars of your income or ------furnished inaccurate particulars Of such income.' The said notice has been filed by the Id Counsel of the assessee in the paper book which is at page 30 In the said notice issued by the AO, it has been mentioned at bottom that inappropriate words and paragraphs be deleted Still the AO has not deleted the inappropriate words and paragraphs. It is not spelt out as to whether penalty proceedings are sought to be levied for 'furnishing inaccurate particulars of income' or 'concealing particulars of such income Thus there is merit in the contentions of the Id Counsel of assessee on the above fact
6.4. In CIT vs. Smt. Kaushalya [1994] 75 Taxman 549 (Bom), the Hon'ble Bombay High Court has held that 'The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charges he had to face. In this background, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified'
Respectfully following the above decisions, we hold that the notice dated 27122011 issued by the AO u/s. 274 r. w. s. 271 of the Act for the A Y 2004-05 for initiating penalty

proceeding u/s. 271(1)(c) of the Act in the present case is invalid In view of the above, the other grounds of appeal raised by the assessee against the levy of penalty u/s. 271 (1) (c) of the Act require no adjudication at this stage. The order of the Id CIT (A) sustaining the penalty of the Act is thus set aside."

(c) Chandru K. Mtrchandani vs. ITO (ITA No. 5368/Mum/2014 dated 05.04.2017)

"4.1.2 In this regard the learned A.R. of the assessee drew the attention of the Bench to the notice issued by the Assessing Officer to the ITO Ward 14(3)3), Mumbai under section 274 r w. s. 271 (l)(c,) of the Act dated 30.12.2011 (copy placed at pg 1 of paper book). It is submitted that the notice is a standard printed notice which does not indicate the required particulars, le. as to whether the initiation of penalty is for concealment of income or for furnishing of inaccurate particulars of income, since the AO has not deleted therein the inappropriate words and paragraphs; thereby evidencing total non-application of mind by the AO and of his not being clear as to under which of the two limbs the penalty was to be considered for.

4.3.3 The Legal position- has been reiterated by the Hon'ble Karnataka High court in the case of CIT vs. Manjunatha Cotton & Ginning Factory (2013) 359 ITR 5675 (Kart) and which has not been interfered with by the Hon'ble Apex Court in the appeal preferred against it by Revenue. This proposition has been affirmed and upheld by the Hon'ble Bombay H19l7 Court in the case of CIT vs. Samson Perinchery "supra). Before us, no contrary judgment of the Hon'ble High Courts or of Hon 'h/e Apex Court, referred to and followed by the coordinate Bench in its order in Precisions Containers Ltd. (supra) has been brought to our notice or cited or referred to. Therefore, taking into consideration the facts and circumstances of the case on hand and applying the ratio and deriving support from the decision of the Hon'ble Apex Court relied on by the Coordinate Bench in its order (supra) we hold that the notice dated 30.12.2011 issued for initiation of penalty proceedings under section 271(1)(c) of the Act for A. Y 2006-07 is defective and issued without application of mind and is therefore invalid and bad in law. Consequently the order dated 27.09.2013

levying penalty under section 271(1)(c) of the Act for A.Y 2006-07 is also invalid and liable to be cancelled In this view of the mater the impugned order of the learned CIT (A) is reversed and the additional grounds and 2 raised by the assessee for A. Y 2006-07 are allowed."

(d) Global Proserv Ltd. V. ACIT (ITA Nos. 7332 to 7335/Mum/2014 dated 14.03.2017)

"10. We also find from the notice dated 263.2013 issued under section 271(1)(c) rws. 274 of the Act extracted hereinbefore that the notice has been issued in standard format without striking off any of the two limbs ie. for concealing the particulars of income or furnishing inaccurate particulars of income of such income under which the penalty was initiated against the assessee. In view of these facts we are of the view that the AO lacked application of mind in initiating penalty proceedings while framing assessment and also while issuing the notice initiating penalty proceedings u/s. 274 r.ws. 271(1)(c) of the Act.

11. We are therefore respectfully following the ratio laid down by the Hon'ble High Courts including the jurisdictional High Court and Supreme Court hold that the order of the CIT (A) upholding the imposition of penalty u/s. 271(1)(c) of the Act where the AO had not specified or mentioned the charge on which the penalty has been imposed is not correct and cannot be sustained In view of the foregoing discussion we set aside the order of CIT(A) and direct the AO to delete the penalty levied u/s. 271(1)(c) of the Act."

(e) Dr. Santa Wind Davare v. ACIT & vice versa (ITA No. 2187/Mum/2014 & anr dated 2 1.12.2016)

"12. A combined reading of the decision rendered by the Hon'ble Bombay High Court in the case of Smt. B. Kaushalya and Others (supra) and the decision rendered by Hon'ble Supreme Court in the case of D111p N. Shroff (supra) would make it clear that there should be application of mind on the part of the AU at the time of issuing notice. Here, in the instant case, the assessing officer did not specify the charge for which the penalty proceedings were initiated and also issued an incorrect notice. Both the acts of the AG, in our view, clearly show that the AO did not apply his mind when he issued notice to the assessee and he was not sure as to

what purpose the notice was issued The Hon'ble Bombay High Court has discussed about non-application of mind in the case of Kaushalya "supra) and observed as under-

The notice clearly demonstrated non-application of mind on the part of the Inspecting Assistant Commissioner The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charge he had to face. In this back ground quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified'

In the instant case also, we are of the view that the A 0 has issued a notice, that too incorrect one, in a routine manner Further the notice did not specify the charge for which the penalty notice was issued Hence, in our view, the AG has failed to apply his mind at the time of issuing penalty notice to assessee,

14. In view of the foregoing discussions, we are of the view that assessee should succeed on this legal issue. Accordingly, the penalty proceedings initiated by the A0 without application of mind is liable to be set aside and we order accordingly."

(f) Wadhwa Estate & Developers India Pvt. Ltd. V. ACIT (ITA No. 2158/Mum/2016 dated 24.02.2017

7. Further on a reference to the notice issued under section 274 r/w sect/on 271, which is in a standard printed format, a copy of which is placed at Page-i 7 of the paper book, we have found that the Assessing Officer has not specified which limb of the provision contained under section 271(1)(c) is attracted to the assessee.

The Hon'ble Jurisdictional High Court in CIT v/s. Smt. Kaushalya & Ors. [1995] 216 ITR 660 (Bom), observed that notice issued under section 274 must reveal application of mind by the Assessing Officer and the assessee must be made aware of the exact charge on which he had to file his explanation. The Court observed vagueness and ambiguity in the notice deprives the assessee of reasonable opportunity as he is unaware of the exact charge he has to face. The Hon'ble Jurisdictional High Court in Samson Perinchety (supra) following the decision of Hon'ble Karnataka High Court in CIT v/s. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 5675 (Karn) held, order imposing penalty has to be made

> *only on the ground on which the penalty proceedings has been initiated In the present case, neither the assessment order nor the notice issued under section 274 indicate the exact charge on the basis of which the Assessing Officer intends to impose penalty under section 271(1)(c). Therefore, viewed in the light of the principles laid down in the judicial precedents discussed herein above, we are of the opinion that the Assessing Officer having failed to record his satisfaction while initiating proceedings for imposition of penalty under section 271(1)(c) as to which limb of the provisions of section 271(1)(c) is attracted, the order imposing penalty is invalid.....*

44. In so far as the judgment of the Hon'ble Bombay High Court in the case of CIT v. Smt. Kaushalya and Ors (216 ITR 660), rendered on 14.01.1992, it may be noted that in their subsequent and recent decision in the case of CIT v. Shri Samson Perinchery (supra), discussed above, the issue was decided in favour of the taxpayer. It is well settled that when there are conflicting judgments, the latter one has to be followed as per Bhika Ram and Ors. v. UOI [238 ITR 113 (Del)]. The ratio laid down in Bhika Ram and Ors. v. UOI [238 ITR 113 (Del)] was followed in Datamatics Financial Services Ltd. v. JCIT [95 lTD 23, 30 (Mum)]. The relevant observations made by the Tribunal in that case on the point were:

> *"7 Considering the first submission, we find that it is only the later decision which has a precedent over earlier decision even in a case where earlier decision was neither cited nor discussed in the later decision. The situation in the present case is rather on strong footing as the earlier decision was under consideration of their Lordships In the later decision. In the case of Bhika Ram (238 ITR 113), their Lordships of Delhi High Court, when faced with a situation where in a later decision, the Hon 'ble Supreme Court did not consider the earlier decision, observed as follow:-*

'However, learned counsel for the petitioner relied on Satinder Singh v. limrao Singh AIR 1961 SC 908, to submit that compensation would not be treated as income. Learned counsel further submitted that the decision of the Supreme Court in Satinder Singh 's case AIR 1961 SC 908 was not brought to the notice of the Supreme Court when Bikram Sigh 's case [1997] 224 IT!? 551, was decided. It /5 also submitted that the reasoning on which their Lordsh,s have proceeded in the case of Satinder Singh AIR 1961 SC 908, was also not argued before the Supreme Court in Bikram Singh 's case [1997] 224 ITR 551. Not only are we not satisfied about the correctness of the submission so made, we are also of the opinion that such a plea is not open for consideration by us and Bikram Singh 's case [1997]224 ITR 551 (SC), being a later pronouncement of the Supreme Court by a Bench of co-equal strength, it is binding on us."

45. Similar findings were recorded in ITO v. Sanatan Textrade Ltd. [2010] 4 ITR (Trib) 593 (Mum). They were:

'11. Now the posit/on which prevails before us is that there is one judgment in the case of CIT v. Pithwa Engg. Works [2005] 276 ITR 519 (Born) dated July 1, 2005, according to which the instruction prescribing the monetary limit is applicable even to old references; and on the other hand the judgment in the case of Chhajer Packaging and Plastics (P.) Ltd /20081300 ITR 180 (Born) dated September 28, 2007 rules that the instructions laying down the monetary limits for filing appeals are prospective and do not apply to pending matters. Patently there is a conflict of the opinion in the two judgments of the hon 'ble jurisdictional High Court. Both these judgments have been rendered by the hon 'b/e Bombay High Court with the strength of two judges each. The question which looms large before us is to decide whether the later or the former judgment should be followed The Hon'ble Delhi High Court in the case of Bhika Ram v. Union of India [1999] 238 ITR 113 has held that a later decision by a Bench of equal strength is binding In view of this precedent, it is manifest that the judgment rendered in the case of Chhajer

> *Packaging and Plastics P. Ltd [2008] 300 ITR 180 (Born) is binding on us and accordingly only the monetary limit relevant at the time of filing the appeal is to be considered The instruction providing a different monetary ceiling of tax effect, prevailing at the time when appeal is taken up for hearing, is not germane"*

46. In fact, the co-ordinate Benches have already followed this precedent in Prakash H. Savia v. ACIT, Oleander Farms P. Ltd. V. DCIT, Dr. Santa Milind Davare v. ACIT & vice versa and Wadhwa Estate & Developers India Pvt. Ltd. v. ACIT, discussed hereinabove. It was also held in that when there are conflicting judgments of jurisdictional High Court and if the earlier judgment is not referred to at all in the latter one, it is open to the Tribunal to follow the judgment, the reasoning of which appeals to it, vide CIT v. Madhukant M. Mehta [132 ITR 159, 180 (Guj)].

47. Recently ITAT Mumbai Bench in the case of Meherjee Cassinath Holdings Pvt. Ltd., in ITA No.2555/Mum/2012 vide order dated 28/04/2017 has held as under:-

> *8. We have carefully considered the rival submissions. Sec. 271(1)(c) of the Act empowers the Assessing Officer to impose penalty to the extent specified if, in the course of any proceedings under the Act, he is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. In other words, what Sec. 271(1)(c) of the Act postulates is that the penalty can be levied on the existence of any of the two situations, namely, for concealing the particulars of income or for furnishing inaccurate particulars of income. Therefore, it is obvious from the phraseology of Sec. 271(1)(c) of the Act that the imposition of penalty is invited only when the conditions prescribed u/s 271(1)(c) of the Act exist. It is also a well accepted proposition that 'concealment of the particulars of*

income' and 'furnishing of inaccurate particulars of income' referred to in Sec. 271(1)(c) of the Act denote different connotations. In fact, this distinction has been appreciated even at the level of Hon'ble Supreme Court not only in the case of Dilip N. Shroff (supra) but also in the case of T.Ashok Pai, 292 ITR 11 (SC). Therefore, if the two expressions, namely 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' have different connotations, it is imperative for the assessee to be made aware as to which of the two is being put against him for the purpose of levy of penalty u/s 271(1)(c) of the Act, so that the assessee can defend accordingly. It is in this background that one has to appreciate the preliminary plea of assessee, which is based on the manner in which the notice u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 has been issued to the assessee- company. A copy of the said notice has been placed on record and the learned representative canvassed that the same has been issued by the Assessing Officer in a standard proforma, without striking out the irrelevant clause. In other words, the notice refers to both the limbs of Sec. 271(1)(c) of the Act, namely concealment of the particulars of income as well as furnishing of inaccurate particulars of income. Quite clearly, non-striking-off of the irrelevant limb in the said notice does not convey to the assessee as to which of the two charges it has to respond. The aforesaid infirmity in the notice has been sought to be demonstrated as a reflection of non-application of mind by the Assessing Officer, and in support, reference has been made to the following specific discussion in the order of Hon'ble Supreme Court in the case of Dilip N. Shroff (supra):-

"83. It is of some significance that in the standard proforma used by the Assessing Officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.

84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. (See Malabar Industrial Co. Ltd. v. CIT [2000] 2 SCC 718]"

9. Factually speaking, the aforesaid plea of assessee is borne out of record and having regard to the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the notice in the instant case does suffer from the vice of non-application of mind by the Assessing Officer. In fact, a similar proposition was also enunciated by the Hon'ble Karnataka High Court in the case of M/s. SSA's Emerald Meadows (supra) and against such a judgment, the Special Leave Petition filed by the Revenue has since been dismissed by the Hon'ble Supreme Court vide order dated 5.8.2016, a copy of which is also placed on record.

10. In fact, at the time of hearing, the ld. CIT-DR has not disputed the factual matrix, but sought to point out that there is due application of mind by the Assessing Officer which can be demonstrated from the discussion in the assessment order, wherein after discussing the reasons for the disallowance, he has recorded a satisfaction that penalty proceedings are initiated u/s 271(1)(c) of the Act for furnishing of inaccurate particulars of income. In our considered opinion, the attempt of the ld. CIT-DR to demonstrate application of mind by the Assessing Officer is no defence inasmuch as the Hon'ble Supreme Court has approved the factum of non-striking off of the irrelevant clause in the notice as reflective of non-application of mind by the Assessing Officer. Since the factual matrix in the present case conforms to the proposition laid down by the Hon'ble Supreme Court, we proceed to reject the arguments advanced by the ld. CIT-DR based on the observations of the Assessing Officer in the assessment order. Further, it is also noticeable that such proposition has been considered by the Hon'ble Bombay High Court also in the case of Shri Samson Perinchery, ITA Nos. 1154, 953, 1097 & 1126 of 2014 dated 5.1.2017 (supra) and the decision of the Tribunal holding levy of penalty in such circumstances being bad, has been approved.

11. Apart from the aforesaid, the ld. CIT-DR made an argument based on the decision of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Others, 216 ITR 660 (Bom.) to canvass support for his plea that non-striking off of the irrelevant portion of notice would not invalidate the imposition of penalty u/s 271(1)(c) of the Act. We have carefully considered the said argument set-up by the ld. CIT-DR and find that a similar issue had come up before our coordinate Bench in the case of Dr. Sarita Milind Davare (supra). Our coordinate Bench, after considering the judgment of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Ors., (supra) as also the judgments of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) and Dharmendra Textile Processors, 306 ITR 277 (SC) deduced as under :-

"12. A combined reading of the decision rendered by Hon'ble Bombay High Court in the case of Smt. B Kaushalya and Others (supra) and the decision rendered by Hon'ble Supreme Court in the case of Dilip N Shroff (supra) would make it clear that there should be application of mind on the part of the AO at the time of issuing notice. In the case of Lakhdir Lalji (supra), the AO issued notice u/s 274 for concealment of particulars of income but levied penalty for furnishing inaccurate particulars of income. The Hon'ble Gujarat High Court quashed the penalty since the basis for the penalty proceedings disappeared when it was held that there was no suppression of income. The Hon'ble Kerala High Court has struck down the penalty imposed in the case of N.N.Subramania Iyer Vs. Union of India (supra), when there is no indication in the notice for what contravention the petitioner was called upon to show cause why a penalty should not be imposed. In the instant case, the AO did not specify the charge for which penalty proceedings were initiated and further he has issued a notice meant for calling the assessee to furnish the return of income. Hence, in the instant case, the assessing officer did not specify the charge for which the penalty proceedings were initiated and also issued an incorrect notice. Both the acts of the AO, in our view, clearly show that the AO did not apply his mind when he issued notice to the assessee and he was not sure as to

what purpose the notice was issued. The Hon'ble Bombay High Court has discussed about non-application of mind in the case of Kaushalya (supra) and observed as under:-
"....The notice clearly demonstrated non-application of mind on the part of the Inspecting Assistant Commissioner. The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charge he had to face. In this back ground, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified."

In the instant case also, we are of the view that the AO has issued a notice, that too incorrect one, in a routine manner. Further the notice did not specify the charge for which the penalty notice was issued. Hence, in our view, the AO has failed to apply his mind at the time of issuing penalty notice to the assessee."

12. The aforesaid discussion clearly brings out as to the reasons why the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) is to prevail. Following the decision of our coordinate Bench in the case of Dr. Sarita Milind Davare (supra), we hereby reject the aforesaid argument of the ld. CIT-DR.

13. Apart from the aforesaid discussion, we may also refer to the one more seminal feature of this case which would demonstrate the importance of non-striking off of irrelevant clause in the notice by the Assessing Officer. As noted earlier, in the assessment order dated 10.12.2010 the Assessing Officer records that the penalty proceedings u/s 271(1)(c) of the Act are to be initiated for furnishing of inaccurate particulars of income. However, in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act of even date, both the limbs of Sec. 271(1)(c) of the Act are reproduced in the proforma notice and the irrelevant clause has not been struck-off. Quite clearly, the observation of the Assessing Officer in the assessment order and non-striking off of the irrelevant clause in the notice clearly brings out the diffidence on the part of Assessing Officer and there is no clear and crystallised charge being conveyed to the assessee u/s 271(1)(c), which

has to be met by him. As noted by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the quasi-criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice, and in the present case, considering the observations of the Assessing Officer in the assessment order alongside his action of non-striking off of the irrelevant clause in the notice shows that the charge being made against the assessee qua Sec. 271(1)(c) of the Act is not firm and, therefore, the proceedings suffer from non-compliance with principles of natural justice inasmuch as the Assessing Officer is himself unsure and assessee is not made aware as to which of the two limbs of Sec. 271(1)(c) of the Act he has to respond.

14. Therefore, in view of the aforesaid discussion, in our view, the notice issued by the Assessing Officer u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 is untenable as it suffers from the vice of non- application of mind having regard to the ratio of the judgment of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) as well as the judgment of the Hon'ble Bombay High Court in the case of Shri Samson Perinchery (supra). Thus, on this count itself the penalty imposed u/s 271(1)(c) of the Act is liable to be deleted. We hold so. Since the penalty has been deleted on the preliminary point, the other arguments raised by the appellant are not being dealt with.

15. In the result, the appeal filed by the assessee is allowed, as above.

48. In the case of SLK Properties ITA No.140/PN/2014 vide order dated 18.03.2016, Pune Bench of ITAT held as under:-

19. The first plank of argument of the Ld. Counsel for the assessee is regarding the validity of the penalty order in view of an invalid notice for levy of penalty. According to him in para 10 of the assessment order the AO has initiated penalty proceedings u/s.271(1)(c) of the I.T. Act, 1961 for concealing the particulars of income and furnishing of inaccurate particulars of such income. Even at the end of the assessment

order the AO mentions issue notice u/s. 274 r.w.s. 271(1)(c) also of the Act, 1961 for concealment of income as discussed in the body of the assessment order. Further the notice dated 22-03-2012 for penalty proceedings u/s. 271(1)(c) does not speak clearly as to whether such penalty is being levied for concealment of income or furnishing of inaccurate particulars of income. Therefore, according to him, in view of the decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory (Supra) which has been followed by the Coordinate Bench of the Tribunal in the case of Sanjog Tarachand Lodha (Supra) such penalty notice is bad in law where it is not clear from the notice u/s.274 about the reasons for levying penalty. According to him, the penalty order passed on the basis of such invalid notice is not sustainable.

20. We find merit in the above submission of the Ld. Counsel for the assessee. Admittedly, the AO in the body of the assessment order at para 10 has initiated penalty proceedings for concealment of particulars of income and furnishing inaccurate particulars of income by the assessee. At the end of the assessment order the AO mentions issue notice u/s.274 r.w.s.271(1)(c) for concealment of income as discussed in the body of the order. The relevant para 10 and last part of the assessment order read as under :

"10. The penalty proceedings u/s.271(1)(c) of the I.T. Act, 1961 for concealing the particulars of income and furnishing inaccurate particulars of such income are separately initiated."

....
....

"Assessed u/s.153A(b) r.w.s.153C of the I.T. Act, 1961. Charge interest due as per section 234A, 234B & 234C of the I.T. Act, 1961. Give credit for prepaid taxes after verification. Issue notice u/s.274 r.w.s.271(1)(c) of the I.T. Act, 1961 for concealment of income as discussed in the body of order."

21. We further find from the notice issued u/s.274 r.w.s.271(1)(c) dated 31-12-2008 is also silent on the reasons

for initiation of penalty proceedings u/s.271(1)(c) of the I.T.Act, 1961.

22. We find identical issue had come up before the Pune Bench of the Tribunal in the case of Sanjog Tarachand Lodha Vs. ITO vide ITA Nos. 688 and 689/PN/2014 order dated 31-08- 2014 for A.Yrs. 2007-08 and 2008-09. We find the Tribunal under identical circumstances had held the notice issued u/s.271(1)(c) r.w.s. 274 as invalid and cancelled the penalty levied on the basis of such invalid notice by observing as under:

"5. We have heard the submissions made by the ld. DR and have thoroughly perused the written submission along with paper book filed by the assessee. A search and seizure action u/s. 132 of the Act was conducted on 21-05-2009 in the case of Lodha Group. Pursuant to notice issued u/s. 153A, the assessee filed his return of income for the impugned assessment years. In the return of income for the impugned assessment years, the assessee declared additional income admitted during the course of search. The assessment was completed u/s. 153A r.w.s. 143(3) by accepting the income returned by the assessee. Thus, no further addition was made during the course of assessment proceedings. Penalty u/s. 271(1)(c) was initiated against the assessee on the additional income admitted during search and returned u/s. 153A proceedings. The assessee has placed on record notices issued u/s. 271(1)(c) r.w.s. 274 of the Act for levy of penalty in the assessment years 2007-08 and 2008-09. The said notices are at pages 15 and 16 of the paper book. A perusal of notices show that they are stereo type notices, with blank spaces. Specific reasons for levy of penalty u/s. 271(1)(c), whether it is for concealment of particulars or for furnishing inaccurate particulars or for both, have not been specified. The assessee in his written submission has pointed out that if the irrelevant columns of the printed form of notice u/s. 274 have not been stuck off by the Assessing Officer, the notice for levy of penalty u/s. 271(1)(c) shall be deemed to be invalid. In support of these submissions, reliance has been placed on the decision of Hon'ble Karnataka High Court in the case of CIT

Vs. Manjunatha Cotton & Ginning Factory reported as 359 ITR 565 (Karan).

6. A perusal of the order passed u/s. 271(1)(c) dated 28-06-2012 levying penalty shows, that in para 2 the Assessing Officer has specifically mentioned that penal proceedings u/s. 271(1)(c) are initiated for concealing the income. The relevant extract of para 2 of the order levying penalty reads as under:

"2. .....Since assessee had originally concealed income to the extent of Rs.7,92,190/-, penalty proceedings u/s. 271(1)(c) of the Act was initiated on finalization of assessment proceedings."

In both the impugned assessment years, the order levying penalty are similarly worded.

7. In the concluding paragraph of the order, the Assessing Officer has observed that the penalty is levied for furnishing of inaccurate particulars of income and concealing income. The relevant extract of para 7 of the order reads as under:

"7. I am satisfied that the assessee has without any reasonable cause, furnished an inaccurate particulars of income and thereby concealed his income to the extent of ....."

Furnishing of inaccurate particulars of income and concealing of income are two different expressions having different connotations. For initiating penalty proceedings, the Assessing Officer has to be very specific for the reasons of levying penalty, Whether it is for furnishing of inaccurate particulars of income or concealing of income or for both. In the present case, a perusal of notice issued u/s. 271(1)(c) r.w.s. 274 shows that the Assessing Officer has not specified the reasons for levying of penalty i.e. whether it is for furnishing of inaccurate particulars or concealment of income or both. Further, a bare perusal of the order levying penalty would show that the Assessing Officer is not clear whether the penalty is levied for concealment of income or furnishing of inaccurate particulars of income or both.

8. The Hon'ble Karnataka High Court in the case of CIT Vs. Manjunatha Cotton & Ginning Factory (supra) has held that where it is not clear from the notice u/s. 274 the reasons for levying of penalty the notice itself is bad in law and the penalty order passed on the basis of such notice is not sustainable. The relevant extract of the order of Hon'ble High Court reads as under:

"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 form 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 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."

9. Thus, in the facts of the case and documents on record, we are of the considered view that the notice issued u/s. 271(1)(c) r.w.s. 274 is invalid and thus, the subsequent penalty proceedings arising there from are vitiated. The impugned orders are set aside and the appeals of the assessee are allowed."

23. So far as reliance on the decision of Mak Data Pvt. Ltd. by the Ld. Departmental Representative is concerned the same in our opinion is not applicable to the facts of the present case. The decision in the case of Mak Data Pvt. Ltd. has to be understood in the context of the facts of the said case. Therefore, before relying on a particular sentence or paragraph of the said decision one has to read the preceding paragraph of the said decision which read as under:

"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 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.

Therefore, the reliance only on the sentence appearing in para 10 of the judgement without reading it in the context under which said observation was made in para 9 is misplaced by the Ld. Departmental Representative.

24. A plain reading of the decision of Hon'ble Supreme Court from para 9 and 10 combinedly suggest 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. Therefore, the reliance by the Ld. Departmental Representative on the decision of Mak Data Pvt. Ltd. in our opinion is misplaced and not applicable to the facts of the present case. This view of ours finds support from the decision of Kolkata Bench of the Tribunal in the case of Suvaprasanna Bhataacharya Vs. ACIT in ITA No.1303/Kol/2010 order dated 06-11-2015 for A.Y. 2006-07.

In this view of the matter, we are of the considered opinion that since it is not clear from the notice u/s.274 the reasons for levying of penalty as to whether it is for concealment of income or for furnishing of inaccurate particulars of income, therefore, the notice itself is bad in law and invalid. Therefore, the penalty order passed subsequently on the basis of such invalid notice also has to be held as bad in law. We accordingly cancel the penalty levied by the AO. Since the assessee succeeds on this technical ground the arguments on merit is not being adjudicated being academic in nature.

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

49. Recently ITAT Mumbai Bench in the case of Visaria Securities Pvt. Ltd., in ITA No.7585/Mum/2016 vide order dated 08/05/2017 has held as under:-

13. We have heard arguments on this issue and a perusal of the notice issued under section 274 r.w.s. 271 of the Act dated 26.12.11 and 11.08.14 reveals that the AO has not deleted the inappropriate words and parts of the notice, whereby it is not clear as to the default committed by the assessee, i.e. whether it is concealment of particulars of income or furnishing of inaccurate particulars of income that the penalty under section 271(1)(c) of the Act is sought to be levied. In this regard, we find that the Hon'ble High Court of Karnataka in its order in the case of M/s Manjunatah Cotton & Ginning Factory in ITA No. 2546 of 2005 dated 13.12.2012, relied on by the assessee, has held that such a notice, as has also been issued in the case on hand, is invalid and the consequential penalty proceedings are also not valid. The relevant portion of their Lordships judgement at paras 59 to 62 thereof are extracted hereunder for reference: -

"59. As the provision stands, the penalty proceedings can be initiated on various ground set 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, inthe 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 13 156, 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. Thom, 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."
14. The conclusion drawn therein by their Lordships at para 63 thereof and particularly at p) to s) thereof are as under: -
"63 ……..
a) ……..
p) Notice under section 274 of the Act should specifically state the ground 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 the limb and finding the assessee guilty of another limb is bad in law." 15. It may be mentioned that in this regard, no contrary decision of the Hon'ble Apex Court or the Hon'ble Bombay High Court has been brought to our notice or placed before us for consideration. Therefore, respectfully following the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory reported in (2013) 359 ITR 565 (Kar), decision of Hon'ble Bombay High Court in the case of CIT Vrs Samson Perinchery dated 05.01.2017, we hold that the notice issued under section 274 r.w.s. 271 of the Act dated 26.12.11 and 11.08.14 for A.Y. 2009-10 for initiating penalty proceedings under section 271(1)(c) of the Act in the case on hand is invalid and consequently, the penalty proceedings are also invalid. Therefore the penalty levied by AO and upheld by the Ld. CIT(A) is hereby dropped.

50. In the case of Chandru K. Mirchandani in ITA no. 5368/Mum/2014 order dated 05/04/2017, after taking into account the ratio laid down in the case of CIT v. Samson Perinchery of the Bombay High Court as well as other decisions of the various high courts, the tribunal deleted the penalty levied by the assessing officer on the ground that the penalty notice

issued was defective and without application of mind since the Assessing Officer had failed to delete therein the inappropriate words in paragraphs.

51. In the case of Global Proserv Ltd. v. ACIT in ITA no. 7332 to 7335/Mum/2014 order dated 14/03/2017, Hon'ble Tribunal deleted the penalty levied by the assessing officer u/s.271(1)(c) of the Act under the identical circumstances and after taking into account the judgement of the Bombay High Court in the case of CIT v. Smt. Kaushalya [216 ITR 660], order of the co-ordinate bench in the case of the Dhaval K. Jain v ITO in ITA 996/Mum/2014 and followed the ratio laid down by the Bombay High Court in the case of CIT v. Samson Perinchery.

52. In the case of Dr. Sarita Milind Darave v ACIT in ITA no. 2187/Mum/20 14 order dated21/12/2016, the Hon'ble Tribunal deleted the penalty levied by the assessing officer u/s.271(1)(c) of the Act under the identical circumstances and after taking into account the judgement of the Bombay High Court in the case of CIT v. Smt. Kaushalya [216 ITR 660] and followed the ratio laid down by the Bombay High Court in the case of CIT v. Samson Perinchery.

53. In view of the aforesaid binding judgments and orders of the coordinate Benches of the Tribunal, the inevitable inference could be that in the instant cases before us the Assessing Officer had not made up his mind as to the specific charge to which the assessee was to be penalized. In the premises, as has been held in the rulings discussed hereinabove, the levy of penalty u/s. 271(1)(c) of the Act was not justified. Accordingly

on this legal ground we delete the penalty in all the years under consideration.

54. Although we have deleted the penalty on legal ground, but as both the parties had argued at length on merits of the levy or otherwise of penalty, for the sake of completeness we also decide the issue on merits. Even on merit the penalty levied cannot be sustained. The detailed reasons thereof are as under. On perusal of the orders passed by the lower authorities it is clear that there are two foundations set up against the assessee by the Department to levy the penalty.

> *A. Alleged cash generation out of several activities like mis-declaring yield of steel, suppression of gross profit on trading turnover, bogus purchase, inflation of purchase etc.*
> *B. Alleged utilization of such cash generation for the purpose of introducing share application money in 14 companies.*

55. We found that none of the above allegations are either factually correct or established from the material on record.

56. Taking up the first foundation of levy of penalty it can be observed that there is no evidence whatsoever, except the survey statement, to support the allegation of cash generation. As explained in detail before the lower authorities the statements were general in nature and in fact, during the course of the proceedings before the Assessing Officer himself, the assessee had taken a categorical stand that there is no generation of cash by mis-declaring yield of steel or by resorting to any other method. Nothing has been brought on record by the Assessing Officer to prove

anything contrary. Thus, there is no evidence or material on record to support the allegation of cash generation. When the assessee took a categorical stand before the Assessing Officer to the effect that there is no generation of cash, it is incumbent upon the Assessing Officer to prove with the help of material on record that there was in fact a generation of cash and thereby concealment of income. Nothing of that sort has been done.

57. In respect of the declaration of income on account of correct yield in the steel production, we found that the addition was made purely on the basis of adhoc formulae contained in the statement of the assessee. The actual yield of the steel was compared with the standard yield of 84.5% in each of the assessment years and varying amounts were offered in the four assessment years under consideration on the assumption that there has to be an uniform yield of 84.5% year-afteryear. During the assessment proceedings, the Assessing Officer had, in fact, wanted further justification in respect of additional income on account of difference in yield. Accordingly, he made the following observations in para 2.11 on page No. 10 of the assessment order for A.Y. 2007-08.

> *'2.11 In these assessment proceedings, the AR of the assessee vide order sheet entry dated 09-12-2012 was asked to furnish justification in respect of the additional Income on account of difference in yield detected during the course of survey and post survey proceedings."*

58. In reply to the above, the assessee had submitted as under:

9. As regards your query regarding the basis for adopting the yield at 84 % during A.Yrs 2007-08 to 2010-11, as explained in the earlier correspondence during the survey proceedings, the Investigation Wing in the oral discussion had indicated that in the steel industry the average yield ranges in the range of 84% to 8595. During the course of survey, it was explained that the yield depends upon the process being carried out by the different companies and also on the type of the raw material, which Is being used for manufacturing steel There is no hard and fast rule or formula, which could be adopted as a benchmark for determining the ratio of raw material to finished goods, being the yield in the manufacturing process. We were informed at that time the data available In the public domain of a competitor viz., Ispat Industries Ltd demonstrate that their yield was about 84%. The process undertaken by the Ispat Industries Ltd is a different than the process adopted by us and also the type of raw material used by them was also different from the raw material It was also explained that due to poor quality of raw material, inefficiency of the old plant & machinery, inappropriate compensation of different kind of raw mater/al and defect in the production required re-melting the average yield in all these four years was in the range of 7747961 to 80.56%. Based on all these facts and in order to buy peace the working of the Investigation Wing of the average yield was accepted"

59. From the above, it is evident that during the course of the assessment proceedings, the assessee took a categorical stand that the declaration on account of yield was based on adhoc working suggested by the investigation wing during the course of survey. It was further contended that the offer was made to buy peace. This submission of the assessee was not disputed by the Assessing Officer in the assessment proceedings.

60. Similar is the position in respect of the addition made on account of profit margin in steel trading activity wherein adhoc profit margin of 3% is assumed for all the years. In the same manner, there is another adhoc addition on account of inflation of raw-material cost by 4%. Thus, all the additions made during the assessment proceedings are on the basis of declaration made during the course of survey and accordingly. offered in the return of income. However, this was neither been accepted by the assessee nor proved by the Assessing Officer by any evidence whatsoever. Therefore, the inflation of expenditure and thereby generation of cash cannot be the basis of levy of penalty u/s. 27(1)(c) of the Act.

61. Apart from this, the CIT (A) had given a specific opportunity to the Assessing Officer by way of remanding the matter to him, not only once but twice. While directing the remand report, the CIT (A) specifically asked the Assessing Officer to bring on record any evidence in support of his claim that income has been concealed and cash has been generated by mis-declaring the yield of steel. This is evident from the letter dated 15.04.2015 addressed by the CIT(A) to the Assessing Officer, the gist of which has been extracted in paragraph 6.1 of the impugned order. Since the Assessing Officer did not address to the issues on which his report was called for, the CIT (A) had given another opportunity to him vide letter dated 18.05.2015. The second opportunity given to the Assessing Officer and the report furnished in response thereto have been referred to in paragraph No. 6.3 of the impugned order and thereafter. Though the

Assessing Officer had consumed about fifteen pages, even a cursory reading of the exhaustive reply show that he had not dealt with the specific directions contained in paragraph 6 of the letter dated 15.04.2015, referred to above. Since the Assessing Officer had failed to adduce any evidence in spite of specific directions, the CIT (A) should not have taken any adverse view in the matter while giving his verdict.

62. The Assessing Officer ought to have brought on record the positive evidence to show that the actual yield of the steel has been concealed and the same was 84.5% for the years under consideration. Needless to say that the onus is on the Department to prove the existence of the income which has been alleged to be concealed. In the present case the same has not been done as the only evidence in possession of the Assessing Officer is survey statement whereas during the assessment proceedings the assessee has maintained that the yield was properly disclosed.

63. As regards the declaration made on account of bogus purchases and inflated purchases, we noticed that except the statement of Mr. Babulal Agarwal, Director of the company and others, recorded during the course of survey and the declaration made by him, there is nothing on the record to support the allegation of bogus or inflated purchases. There is a reference in the assessment order to some of the enquiry made by the investigation wing prior to the date of survey. However, the result of the enquiry has not been brought on record. In fact, while making an addition, and also at the time of levying the penalty, the Assessing Officer has

completely relied upon the statement of the director and not on any hard evidence. In these circumstances, the categorical stand of the assessee that there was no inflation or booking of bogus purchases and thereby generation of any cash deserves to be accepted.

64. It is important to note that penalty proceedings are separate and distinct from the assessment proceedings. The addition of income in the assessment proceedings cannot by itself be the basis for levy of penalty u/s. 271(1)(c) of the Act, more particularly when the assessee has challenged the existence of the income itself.

65. The judgment of the Hon'ble Gujarat High Court in the case of National Textiles v. CIT (249 ITR 125) is on this point. In this case, the Hon'ble Court was concerned about the tenability or otherwise of penalty u/s. 271(1)(c) of the Act qua addition made u/s. 68 of the Act. Since the levy was sustained up to the stage of the Tribunal, the assessee approached the Hon'ble High Court where, in deleting the penalty, it was held thus:

> *'Held, that, in the instant case, the cash credits were not satisfactorily explained by evidence and documents. The parties who had advanced the alleged temporary loans were neither disclosed nor were there any supporting documents on record The accountant, who had arranged the loans was not produced and it was stated that he had left the service as relations with him were strained In this state of accounts and evidence in the quantum proceedings, the Department was justified in treating the cash credits as income of the assessee, but merely on that basis by recourse to Explanation 1 penalty under section 271(J)(c) could not have been imposed without the Department making any other effort to come to the conclusion that the cash credits could in no circumstances*

> *have been amounts received as temporary loans from various parties. Admittedly, the assessee in the quantum proceedings failed to produce the accountant but the Department also in penalty proceedings made no effort to summon him. Therefore, it was a case where there was no circumstances to lead to a reasonable and positive inference that the explanation that cash credits were arranged as temporary loans was false. The facts and circumstances were equally consistent with the hypothesis that they could have been sundry loans in small amounts obtained from different parties. Therefore, the imposition of penalty was not justified."*

66. The co-ordinate Bench in the case of ACIT v. VIP Industries Ltd. [30 SOT 254, 262-263 (Mum)] had also taken a similar view. In this case, the issue for consideration was the validity or otherwise of the levy u/s. 271(1)() of the Act with respect to additions sustained in quantum proceedings. In disagreeing with the levy made by the Assessing Officer and in-concurring with the findings of the CIT (A) for deleting penalty levied with respect to an addition sustained, the Tribunal held as under:

> *"8.....A great deal of emphasis had been laid by the Id DR on the fact that since the addition has been upheld by the Tribunal, then the penalty should also be confirmed In our considered opinion the mere fact of confirmation of addition cannot per se lead to the confirmation of the penalty. It is obvious that both the quantum and the penalty proceedings are independent of each other In the penalty proceedings the assessee is given chance to show that why the penalty be not imposed with reference to the addition made or confirmed in the quantum proceedings. If the assessee succeeds in explaining his case then no penalty can follow and vice versa. It is, therefore, amply clear that the confirmation of the addition by the Tribunal in quantum proceedings cannot mean that the penalty be automatically confirmed If the content/on of the Id DR is taken to the logical conclusion then the penalty proceedings would require obliteration from the*

> *statute and the very act of making addition in quantum should entitle the Assessing Officer to impose penalty simultaneously."*

67. In the case of Shirm Capital Management v. ITO [ITA No. 2876/Mum/2010 dated 24.06.2011] also, the Tribunal had occasion to consider and adjudicate a similar issue. There, the tenability or otherwise of penalty levied u/s. 271(1)(c) of the Act with respect to part of the addition made u/s. 68 of the Act sustained in first appeal, and also a disallowance of interest of certain amount was debated. Since the levy was sustained in the first appeal, the dispute was carried in further appeal in which it was held thus:

> *"5. ..... The balance addition made under section 68 to the extent of Rs. 650 Iakhs, however, was sustained by the Tribunal mainly because there was failure on the part of assessee to satisfactorily explain the unsecured loans to the extent of Rs. 650 /akhs in terms of section 68. There was, ho we ver nothing brought on record during the course of quantum proceedings to show that the said amount represented assessee's own income/money which was introduced in the form of unsecured loans. On the contrary, the said amount was treated as deemed income of the assessee by invoking the pro visions of section 68 mainly because assessee failed to satisfactorily explain the relevant unsecured loans in terms of sect/on 68. As held by the Hon 'ble Allahabad High Court in the case of Add!. CIT vs. Rawa/pindi Floor Mills P. Ltd. 125 ITR 243, if the assessee fails to prove the genuineness of loans in the assessment proceedings, the addition towards total income can be said to be justified but on that ground alone penalty under section 271(1)(c) cannot be imposed"*

68. The other foundation for levy of penalty is utilization of cash by the assessee in the share application money of fourteen companies. The relevant discussion on background facts is on page No. 1 to 4 of the

penalty order. It is important to note that in the entire assessment proceedings there is no mention about such utilization of cash in share application money. The assessment order merely talks about booking of various bogus expenses and the disallowance thereof. The Assessing Officer has not even alleged in the assessment order that the assessee has utilized the cash in share application money of fourteen companies. At the conclusion of the relevant discussion in the assessment order the Assessing Officer has initiated the penalty proceedings u/s. 271(1)(c) of the Act. Thus, the penalty has been initiated on the ground that the assessee had booked bogus expenditure in respect of introduction of cash in 14 companies. As submitted in detail hereinabove, the levy of penalty on the above ground cannot be sustained as there is no evidence of booking of such bogus expenditure or misdeclaration of yield or profit. The question, therefore, now is whether the penalty which was initiated on account of alleged bogus expenditure, could be levied in respect of introduction of cash in 14 companies.

69. It is a well-settled proposition in law that levy of penalty u/s. 271(1)(c) of the Act is permitted only on those counts on which the same was initiated and satisfaction was recorded. In other words, penalty cannot be levied on a ground which is not specified in the assessment order while initiating the penalty and for which satisfaction has not been recorded. In support of this view, reliance is placed upon the binding judgement of the jurisdictional High Court in the case of CIT v. Acme Associates [2016] 76 taxmann.com 242. In this case, noticing that the aggregate area of two

flats bought by a couple through a joint agreement exceeded 1,000 sq. It, the claim for deduction u/s. 80-IB(10) of the Act was disallowed by the Assessing Officer. Simultaneously, proceedings u/s. 271(1)(c) of the Act were initiated for furnishing 'inaccurate information/concealing of income'. The appeal filed in quantum proceedings was withdrawn as during its pendency the assessee was served with notice u/s. 153A of the Act consequent to search u/s. 132 of the Act. Thereafter, the Assessing Officer levied penalty u/s. 271(1)(c) of the Act on the very ground for which proceedings under this provision were initiated. However, in the appeal filed there against, it was confirmed on a different ground, namely, that during the search the assessee had disclosed that the project in respect of which the deduction was claimed was not completed before the due date, i.e. 31.03.2008. This order, however, was overturned in second appeal. In the appeal filed u/s. 260A of the Act at the instance of the revenue, the Hon'ble jurisdictional High Court was pleased to uphold the order impugned in the following words:

> *"9. It is undisputed position before us that initiation of penalty under Section 271 (1)(c) of the Act by the Assessing Officer is on the ground of area of flat being sold in excess of 1000 sq. ft. being concealed It was this ground that the Respondent - assessee is required to offer explanation during penalty proceedings to establish that the claim as made in the return of income was not on account of furnishing of inaccurate particulars of income or concealment of income vis-a-vis of selling flat having area of 1000 sq. ft. The Assessing Officer under the Act also considered the Respondent -assessee '5 explanation in the context in which the penalty proceedings were initiated and did not rightly place any reliance upon the subsequent events. In an appeal from the order of the*

Assessing Officer, the CIT (A) could not have imposed penalty on a new ground which was not the basis for initiation of penalty. The appeal before the CIT (A) was with regard to issue of penalty under Section 271(1)(c) of the Act only on the ground on which the penalty proceedings were initiated in the assessment order"

70. There is an allegation that Shree Global Trade fin Ltd (SGTL) and the 14 companies detailed in paragraph 3.6 of the penalty order, from whom share application money was received, were not reliable as, according to the Assessing Officer, they were only paper companies. However, except making such bald allegation, AO had not brought on record any evidence in support. In any case, when the assessee had adduced corroboratory evidences in support of its cases, the onus had shifted and it was for the Assessing Officer to prove his case which he had miserably failed.

71. Most importantly, the additions made in most of the aforesaid companies were deleted by the CIT (A) and they were concurred with in the further proceedings. In the case of Jogia Properties Ltd., one of the 14 companies, the additions on account of share application money were made by the Assessing Officer in assessment years 2008-09 and 2009-10 and when his orders were carried in appeals, they were deleted by the CIT (A) holding that such additions were not warranted. Feeling aggrieved, the dispute was carried by the revenue in further proceedings to the Tribunal and, relying upon the admission and offer made by one of the directors and another and also the linkage of one Shri Mukesh Chokshi, a hawala dealer with the receipt, restoration of the additions was

sought for. However, in absence of any corroborating evidence, as in the case of the assessee, the Tribunal after considering a plethora of rulings on the point, had decided the controversy in favour of the assessee by observing as under:

> *14 We have perused the case laws relied upon by the Ld Representatives of the parties. In our view, each case has to be decided on its own facts. Merely because, in the case of one company Gold Star Finvest Pvt. Ltd run by Mukesh Choksh, the income has been determined on percentage/commission basis treating the said company as accommodation entry provider, that Itself cannot hold a justification to completely ignore the facts and evidences brought on the file by the assessee. The case of the assessee has to be adjudged on the basis of its own set of facts and evidences. Moreover the facts and circumstances of the case of the assessee are squarely covered by the various decisions of the Hon 'b/e Jurisdictional High court Of Bombay. We further find that the issue, relating to the investments made by the companies relating to the said Mr. Mukesh Chokshi in some other cases, has travelled up to the level of Hon'ble Supreme Court In the case of "Shri Mukesh R. Marolia vs. Additional CIT" (2006) 6 SOT 247 (Mum), the assessee had made share transaction through the companies M/s. Richmond Securities Pvt. Ltd. and M/s. Scorpio Management Mr Mukesh Chokshi has been the director of M/s. Richmond Securities Pvt. Ltd The Tribunal, after considering the overall facts and circumstances of the case, observed inter-alia that on the basis of evidence available and there being no incriminating material found during the search action, observed that the assessment has to be completed on the basis of records and material available before the Assessing Authority. The personal know/edge and excitement on events should not lead the AO to a state of affairs where salient evidences are overlooked Where every transaction of the assessee has been accounted, documented and supported in such an event even though, the amount invested by the assessee has grown into a very sizeable amount which looks quite amazing the evidence produced by the assessee cannot*

be brushed aside. The Tribunal under such circumstances deleted the addition. The Revenue took the matter to the Hon'ble Bombay High Court. The Hon'ble Bombay High Court, while adjudicating the above issue in tI7e case styled as "CIT vs. Shri Mukesh R. Marolia" in I/A No. 456 of 2007 decided on 07.09.2011, observed that though there was some discrepancy in the statement of director (Mr Mukesh Chokshi) of M/s. Richmond Securities Pvt Ltd regarding the sale transact/on, but owing to the factual finding given by the Tribunal on the basis of evidences furnished by the assessee, the decision of the Tribunal cannot be faulted. The Hon 'ble Bombay High Court upheld the finding of the Tribunal holding the sale transactions as genuine.

The Department preferred appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court dismissed the SLP No.20146/2012 styled as "CIT vs. Shri Mukesh R. Marolia vide order dated 27.01.14

Similarly in the case of "CIT vs. M/s. Kesar A. Gada in ITA No. 300 of 2013 decided on 21.01.15 wherein the AO, while making the additions under section 68 of the Act, had relied upon the statement of Mr. Mukesh Chokshi that he had given various accommodation entries to various parties. The Hon 'b/e Bombay High Court observed that where the assessee had brought the relevant evidences regarding the genuineness of transaction and that in his statement Mr Mukesh Chokshi had not mentioned the name of the respondent/assessee as one to whom accommodation entries were given, the Hon 'ble Bombay High Court upheld the findings of the Ld. CIT(A) which were further confirmed by the Tribunal holding that the transactions were genuine and the additions under sect/on 68 of the Act were not warranted Similar findings have been given by the Hon'ble Bombay High Court in the case of 'CIT vs. Kasturben H Gada" in ITA No. 299 of 2013 decided on 21.01.15 In CIT vs. M/s. Sharda Credit Pvt. Ltd (supra), the Hon'ble High Court has dismissed the appeal of the revenue on identical facts. The Hon'ble Bombay High Court while upholding the order of the Tribunal in the above stated appeals has also relied upon the decision of the Hon'ble Bombay High Court in the case of "Shri Mukesh R. Marolia" (supra). Even in the case of "Smt Rajni S Chowdhry" (supra), the Hon'ble Bombay High Court has upheld the decision of

the Tribunal given on the basis of appreciation of evidence and factual finding accepting the transaction carried carries through broker M/s Gold Star Finvest (P) ltd as genuine.

15. We further find that the issue is squarely covered by the various decisions of the Tribunal on the basis of same facts. Recently the Tribunal, in the case of "ITO vs. Superfine Construction Pvt. Ltd & Others" in ITA No 3645/M/2014 & Others vide common order dated 30.11.2015 in identical facts and circumstances while dealing with the issue of making investments by way of share application money Invested by the same companies as in the case of an assessee le. M/s. Talent Infoways and M/s. Mihir Agencies, has upheld the findings of the L CIT (A) deleting the additions.

The other case laws relied upon by the Ld. DR are thus not applicable to the case of the assessee in the light of the direct decision of the Jurisdictional High Court on the identical facts which holds a binding precedent on this Tribunal Even otherwise there is no evidence on record that the assessee had given its own money to the Investing company for the purpose of making investments. It may be observed that the Hon 'ble Supreme Court in the case of Lovely Exports Pvt. Ltd referred above has clearly laid down the law that once the assessee has given the complete details and the information of the investors who have made investments in the share capital of the company and proved identify then no addition can be made in the hands of the assessee company and in respect of such investments the department should proceed against the individual investor In the case in hand also, the requisite details, proof, confirmation, evidences etc are produced The ratio of the decision of the Hon 'ble Supreme Court is directly applicable on the facts of the case.

In view if the above discussion of the matter, we do not find any infirmity in the factual finding given by the CIT (A) after duly appreciation of evidence on the file and the same is accordingly upheld"

72. In the appeals concerning Archive Realty Developers Ltd., Karburi Properties Development Ltd., Vedisa Properties Developers Ltd., Auster Properties Developers Ltd. and Reve Properties Developers Ltd. for A.Ys.

2008-09 and 2009-10, and Chikura Properties Ltd. for A.Y. 2009-10, which are other six entities appearing in the list given in paragraph No. 3.6 of the penalty order also, similar orders were passed by the Tribunal by placing reliance upon the aforesaid order in Jogia Properties Ltd. vide ITA Nos. 6104 & 6105/Mum/2012 and Ors. dated 18.11.2016.

73. Thus, the above orders of the Tribunal passed in some of the cases out of the 14 companies clearly establish that the share application money received by those companies are genuine and proved. Thus, there is no involvement of the present assessee in introduction of share capital, much less in cash, in those companies. Therefore, the other foundation of the Assessing Officer in levying the penalty, i.e., utilization of cash in introduction of share application money in 14 companies also fails.

74. As regards the observation of the CIT (A) that some out of the fourteen companies have taken a stand before the CIT (A) that their share application money was proved as the assessee had declared the same, we observe that there is nothing to support the above allegation. In any case, such contention, which is that of 14 companies and not that of the assessee, has not been accepted by the Department and, therefore, it cannot be said that the assessee has given any cash merely because some of those entities have raised such contention at some stage of their litigation.

75. The Income-tax Department cannot take contradictory stand on the same set of facts. While deciding the case of 14 companies, the Income-tax Department having taken a stand that introduction of share application

money was not explained by disclosure made by the present assessee, while levying the penalty the Income-tax Department cannot base their finding on the footing that the assessee had introduced share application money in 14 companies. In any case, the Tribunal in some of the cases out of 14 companies has already held the share application money to be genuine on merit and, therefore, the entire issue based on the stand taken by 14 companies becomes academic.

76. The main argument which has been repeatedly harped upon in the order of the Assessing Officer as well as the CIT (A) is regarding the search which took place on 25.11.2009 at the premises of Shri Mukesh Choksi and also a search on 04.03.2010 which took place at the premises of Jogia Properties Ltd. It has been repeatedly emphasized that Shri Mukesh Choksi is involved into accommodation transactions and the share application money of 14 companies are bogus as the same has been routed through the companies controlled by Shri Mukesh Choksi. However, this allegation completely loses its relevance when we see that the Tribunal has passed the order in the case of Jogia Properties Ltd. and subsequently in the case of another eight companies wherein the share application money has been held to be genuine. It is also relevant to note that in the corresponding order of CIT (A) as well as in the order of Tribunal in all the above cases, there is a detailed discussion about the share application money and also reference to above searches and the enquiry in the case of Shri Mukesh Choksi. After considering the entire

gamut of information and facts, the CIT (A) and the Tribunal have come to the conclusion that the share application money is genuine.

77. In light of this, the large part of the discussion made by the Assessing Officer and the CIT (A) in their respective orders becomes irrelevant and without base. The penalty levied on such incorrect base deserves to be quashed.

78. Recently Hon'ble Delhi High Court in the case of Neeraj Jindal ITA No.463/2016 & CM No.26604/2016 vide order dated 09/02/2017 observed as under:-

> *13. At the outset, it must be noted that pursuant to the search and seizure operation conducted under Section 132(4) of the Act, the assessee was given notice under Section 153A to file fresh return of his income. Thereafter, the assessee filed revised returns and the return filed by the assessee under Section 153A was accepted as such by the A.O. However, the A.O. was of the opinion that inasmuch that the income disclosed by the assessee under Section 153A was higher than the income in the original return filed under Section 139(1) and since in his view, such disclosure of income was a consequence of the search conducted on the assessee, there was concealment of income which attracted Section 271(1)(c) of the Act. Therefore, the question that needs to be answered is whether penalty is to be levied automatically whenever the assessee declares a higher income in his return filed under Section 153A in comparison to the original return filed under Section 139(1). 14. The Supreme Court held, in Shri T. Ashok Pai v. Commissioner of Income Tax, Bangalore (2007) 7 SCC 162, that penalty under Section 271(1)(c) is not to be mandatorily imposed. In other words, the levy of penalty under this provision is not automatic. This view has been reiterated in Union of India v. Rajasthan Spinning and Weaving Mills, (2009) 13 SCC 448 to say that for there to be a levy of penalty under Section 271(1)(c), the conditions laid out therein have to be specifically fulfilled.*

Section 271(1)(c) of the Act, being in the nature of a penal provision, requires a strict construction. While considering the interpretation of this provision, this Court in Commissioner of Income Tax v. SAS Pharmaceuticals (2011) 335 ITR 259 (Del), stated that: "It is to be kept in mind that Section 271(1)(c) of the Act is a penal provision and such a provision has to be strictly construed. Unless the case falls within the four-corners of the said provision, penalty cannot be imposed. Subsection (1) of Section 271 stipulates certain contingencies on the happening whereof the AO or the Commissioner (Appeals) may direct payment of penalty by the Assessee." Thus, what is required to be judged is whether there has been a "concealment" of income in the return filed by the assessee. 15. Earlier decisions indicated a conflict of opinion as to whether Section 271(1)(c) required the revenue to specifically prove mens rea on the part of the assessee to conceal his income. In order to remove the element of mens rea, the Finance Act, 1964 deleted the word "deliberately" that preceded the words "concealed the particulars of his income" in Section 271(1)(c). Nonetheless, even post the amendment, the Apex Court in K.C. Builders v. Assistant Commissioner of Income Tax, 265 ITR 562 (SC) held that: "The word „concealment" inherently carried with it the element of mens rea. Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if takes out the case from the purview of non-disclosure, cannot by itself take out the case from the purview of furnishing inaccurate particulars. Mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In order that a penalty under Section 271(1)(c) may be imposed, it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his income." 16. Thus, despite the fact that there is no requirement of proving mens rea specifically, it is clear that the word "conceal" inherently carries with it the

requirement of establishing that there was a conscious act or omission on the part of the assessee to hide his true income. This was also the conclusion of the Supreme Court in the case of Dilip N. Shroff Karta of N.D. Shroff v. Joint Commissioner of Income Tax, Special Range Mumbai and Anr., (2007) 291 ITR 519 (SC). In a later decision in Union of India v. Dharmendra Textile Processors, (2008) 13 SCC 369, the Supreme Court overruled its decision in Dilip N. Shroff (supra). Thereafter, in Commissioner of Income Tax v. Reliance Petroproducts Pvt. Ltd., (2010) 11 SCC 762 the Court clarified that Dilip N. Shroff (supra) stood overruled only to the extent that it imposed the requirement of mens rea in Section 271(1)(c); however, no fault was found with the meaning of "conceal" laid down in Dilip N. Shroff's case. Thus, as the law stands, the word "conceal" in Section 271(1)(c), would require the A.O. to prove that specifically there was some conduct on part of the assessee which would show that the assessee consciously intended to hide his income. 17. In this case, the A.O. in his order noted that the disclosure of higher income in the return filed by the assessee was a consequence of the search conducted and hence, such disclosure cannot be said to be "voluntary". Hence, in the A.O.'s opinion, the assessee had "concealed" his income. However, the mere fact that the assessee has filed revised returns disclosing higher income than in the original return, in the absence of any other incriminating evidence, does not show that the assessee has "concealed" his income for the relevant assessment years. On this point, several High Courts have also opined that the mere increase in the amount of income shown in the revised return is not sufficient to justify a levy of penalty. 18. The Punjab & Haryana High Court in Commissioner of Income Tax v. Suraj Bhan, (2007) 294 ITR 481 (P & H), held that when an assessee files a revised return showing higher income, penalty cannot be imposed merely on account of such higher income filed in the revised return. Similarly, the Karnataka High Court in the case of Bhadra Advancing Pvt Limited v. Assistant Commissioner of Income Tax, (2008) 219 CTR 447, held that merely because the assessee has filed a revised return and withdrawn some claim of depreciation penalty is not leviable. The additions in assessment

proceedings will not automatically lead to inference of levying penalty. The Calcutta High Court in the case of Commissioner of Income Tax v. Suresh Chand Bansal, (2010) 329 ITR 330 (Cal) held that where there was an offer of additional income in the revised return filed by the assessee and such offer is in consequence of a search action, then if the assessment order accepts the offer of the assessee, levy of penalty on such offer is not justified without detailed discussion of the documents and their explanation which compelled the offer of additional income. The Madras High Court in the case of S.M.J. Housing v. Commissioner of Income Tax, (2013) 357 ITR 698 held that where after a search was conducted, the assessee filed the return of his income and the Department had accepted such return, then levy of penalty under Section 271(1)(c) was not justified. From the above cases it would be clear that when an assessee has filed revised returns after search has been conducted, and such revised return has been accepted by the A.O., then merely by virtue of the fact that such return showed a higher income, penalty under Section 271(1)(c) cannot be automatically imposed.

79. Full Bench of Allahabad High Court in case of Bhairav Lal Verma vs. Union of India in C.M.W.P.No.1502 of 1991 vide order dated 17/10/1997 held as under:-

As a principle of law it cannot be held that the disclosure of the concealed income 'after the raid or search cannot be voluntary. It is a question which has to be decided by the Department in each case on the basis of the material available on the record. The criteria for deciding this question is to find out as to whether the Department has any incriminating material with regard to the disclosed income. If the answer is in the affirmative, the disclosure cannot be said to be voluntary. But if the Department has no incriminating material with regard to the income disclosed, the disclosure is liable to be treated as voluntary even if it was made after raid/ search.

81. Applying the proposition laid down in the above judicial pronouncements to the facts of the instant case, we do not find any merit for imposition of penalty.

82. In view of the above discussion, we do not find any merit for imposition of penalty u/s.271(1)(c) on the legal ground of notice u/s.271(1)(c) r.w.s. 274 as well as on merits. Accordingly, we delete the penalty imposed u/s. 271(1)(c) in all the years under consideration.

83. In the result, appeals of the assessee are allowed.

Order pronounced in the open court on this 22/05/2017.

Sd/-	**Sd/-**
(R.C. SHARMA)	**(SANDEEP GOSAIN)**
ACOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 22/05/2017
Karuna Sr.PS

Copy of the Order forwarded to :

1.	The Appellant
2.	The Respondent.
3.	The CIT(A), Mumbai.
4.	CIT
5.	DR, ITAT, Mumbai
6.	Guard file. सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai