IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH `H': NEW DELHI

BEFORE SHRI C.L.SETHI, JM & SHRI B.C. MEENA, AM

I.T. A. No.1958/Del of 2007
Assessment Year: 1995-96

ACIT, Range –I, Faridabad.	**vs**	**M/s Nuchem Limited, 20/6, Mathura Road, Faridabad.**
Appellant		**Respondent**

Appellant by: Shri N.K. Chand, Sr. DR
Respondent by: Shri Virender Talwar

ORDER

PER C.L.SETHI, JM:

The revenue is in appeal against the order dated 13.2.2007 passed by the learned CIT(A) in the matter of penalty levied by the AO u/s 271(1)(c) of the Income-tax Act, 1961 (the Act) pertaining to the Asstt. Year 1995-96.

2. The revenue has taken a ground that CIT(A) has erred in deleting the penalty of Rs.93,70,000/- imposed by the AO u/s 271(1)(c) of the Act. This appeal initially came to be heard on 15.11.2007 by the Tribunal, and after hearing both the parties, the order of learned CIT(A) in deleting the penalty was upheld in the light of the decision of Hon'ble Punjab & Haryana High

Court in the case of CIT vs Prithipal Singh & Co, 183 ITR 69, which has been further upheld by the Hon'ble Supreme Court vide its decision reported in 249 ITR 670 (SC). The Tribunal has also relied upon the decision of Hon'ble Supreme Court in the case of Virtual Soft Systems vs CIT, 289 ITR 83 (SC) wherein the Hon'ble Supreme Court has held that prior to insertion of Explanation 4 to Section 271(1)(c) of the Act, by the Finance Act, 2002 w.e.f. 1.4.2003, in the absence of any positive income, and/or any tax being levied, penalty for concealment of income could not be levied. The tribunal's order is dated 7th December, 2007, which was appealed against by the revenue by filing an appeal before the Hon'ble High Court of Punjab & Haryana at Chandigarh. The Hon'ble High Court of Punjab & Harayana vide its decision dated 15.7.2009 set aside the order of the Tribunal by observing that the decision of Hon'ble Supreme Court in the case of Virtual Soft Systems Ltd. (supra) has since been overruled in subsequent judgment of the Hon'ble Supreme Court in the case of CIT vs Gold Coin Health & Food P. Ltd., (2008) 304 ITR 308 (SC), and remanded the matter to the Tribunal for decision on remaining points, which may survive.

3. This is how this appeal has again come up for our decision.

4. In the course of hearing, the learned counsel for the assessee has submitted that only point now survived for decision of the Tribunal is the

point raised in Ground No.2, where the revenue has taken a ground that the learned CIT(A) has erred in law in deleting the penalty imposed u/s 271(1)(c) by not taking cognizance of the provisions of Section 275(1)(a) of the Act. He further submitted that the issue whether penalty is to be levied u/s 271(1)(c) on merit is not now a subject matter for consideration inasmuch as the same was never raised by the revenue.

5. We have considered this submission of the assessee, and find that the contentions of the assessee are not correct. The revenue in ground No.1 has taken a ground that CIT(A) has erred in deleting penalty of Rs.93,70,000/- imposed by the AO u/s 271(1)(c) of the Act by applying the ratio of the judgment of Hon'ble P&H High Court in the case of Prithipal Singh & Co.(supra). This ground would show that the department is intended to challenge the order of CIT(A) in deleting the penalty. In other words, the department has taken a ground that CIT(A) has erred in deleting the penalty. We, therefore, are of the view that this ground would also cover as to whether the learned CIT(A) was justified in deleting the penalty of Rs.93,70,000 on merit imposed by the AO u/s 271(1)(c) of the Act. We, therefore, proceed to decide as to whether the penalty u/s 271(1)(c) has been rightly levied by the AO on merit, on which aspect of the matter, both the parties were heard at length.

6. In this case, the assessee company filed a return of loss at Rs.16,72,46,572/- on 30.11.95, which included brought forward losses of Rs.22,12,87,570/-. The assessee company then filed revised return on 22.2.96 declaring net loss of Rs.16,70,46,050/-. Assessee filed another revised return on 27.2.97 declaring a loss of Rs.21,47,97,740/-. Assessee again revised computation of income on 03.03.98, and submitted a letter dated 27.3.98 accepting certain additions pointed out by the AO. Thereafter, the assessment u/s 143(3) was framed by the AO on 31.3.98 at nil income where various additions and disallowances were made by the AO. Against the AO's order, the assessee preferred an appeal before the learned CIT(A), who vide order dated 10.2.2005 deleted certain additions out of the various additions made by the AO. The learned CIT(A) confirmed the following additions or disallowances:

1. Rs.11,668/- addition on account of purchases.
2. Rs.96,000/- being charges paid to Mrs. Bela Mukherjee for technical services.
3. Rs.21,000/- out of telephone expenses.
4. Rs.6,14,160/- being reimbursement of expenses relating to agents for collecting/renewing FDRs.

7. However, the assessee did not file any appeal against the following items of additions or disallowances made in the assessment:-

1. Rs.65,622/- on account of provisions for doubtful debts.

2. Rs.29,25,207/- on account of loss on sale of shares.
3. Rs.9,26,060/- on account of earlier year liability.
4. Rs.48,000/- on account of rent receivable.
5. Rs.6629/- on account of excess depreciation claimed.

8. In the course of assessment proceedings, the AO initiated penalty proceedings u/s 271(1)(c) of the Act. The AO ultimately levied penalty of Rs.93,70,000/- in respect of the various additions and disallowances, running into 22 items, made by him.

9. On an appeal, the learned CIT(A) deleted the penalty in respect of 13 numbers of additions or disallowances made by the AO, which additions stood deleted by the CIT(A). The learned CIT(A) had taken a view that as these additions were no more survived, no penalty could be levied on these additions since deleted.

10. In so far as the four additions or disallowances confirmed by CIT(A), the ld. CIT(A) observed that the assessee company had preferred an appeal before the Income-tax Appellate Tribunal on 30.3.2005, which was yet to be decided upon at the time when the CIT(A) decided the appeal arising from penalty order. However, the CIT(A) has taken a view that in respect of these four items of additions or disallowances confirmed in quantum appeal by the learned CIT(A), there was no question of penalty being levied as there was no concealment on the part of the assessee as there was no finding given by

the AO that the assessee's claim were bogus and non genuine. The CIT(A) further observed that mere disallowance of certain claim would not attract the penalty for furnishing inaccurate particulars of income or concealment of particulars of income as was held by the jurisdictional High Court in the case of Ajaib Singh & Co. vs CIT, 253 ITR 630 (P&H). The learned CIT(A) further observed that assessee was under bonafide belief that expenditure was incurred for the purpose of business and are allowable as deduction.

11. With regard to 5 numbers of the additions or disallowances in respect of which the assessee company did not file any appeal, the assessee submitted before the CIT(A) that the assessee company on its own agreed to the additions as was mentioned in the third revised return field on 3.3.98 in respect of Item No.4,and as was so stated in assessee's letter dated 27.3.98 in respect of Item Nos. 1, 2 & 3, and in the light of difference in the calculation of depreciation arising due to the rectification of the order u/s 154 of earlier year in so far as Item No.5 of addition is concerned. All these five items were considered by the CIT(A), and he had taken a view that no penalty on these items is called for. The learned CIT(A)'s observation in respect of penalty with reference to the additions or disallowances of 5 items in respect of which the assessee has not preferred any appeal is as under:

> "9.1 Further the fact that the appellant company has accepted the above disallowances do not invite the penalty as the acceptance may be due to several reasons and the AO has not brought out anything on record proving that the appellant company has deliberately concealed anything or furnished inaccurate particulars of its income. There is no finding by the AO to compel the appellant company to revise or disclose particulars regarding the items from (1) to (5) as above. Further, no penal consequence can be drawn from the above undisputed disallowances or add backs. Therefore, on these additions/disallowances also, no penal inference can be drawn and, therefore, no penalty is leviable."

12. The CIT(A) also made a general observation covering all the additions that on perusal of the penalty order, it was revealed that AO has merely reproduced the assessment order by just narrating the additions and disallowances made in the assessment order without brining out anything in the penalty order to prove the concealment of particulars of income or furnishing of inaccurate particulars of income by the assessee company. The CIT(A), therefore, had taken a view that the AO has passed the penalty order in a very mechanical manner.

13. The learned CIT(A) has also taken a view that no satisfaction was also recorded by the AO in the body of the assessment as to the concealment of income or furnishing of inaccurate particulars of income by the assessee

except by mentioning at the fag end of the assessment order that penalty proceedings u/s 271(1)(c) for furnishing inaccurate particulars of income has been initiated. Further, the learned CIT(A) has also deleted the penalty by relying on the decision of P&H High Court in the case of CIT vs Prithipal Singh & Co.(supra), which issue no more survives as already indicated and discussed above.

14. We shall first take the various additions and disallowances, which were confirmed by the learned CIT(A), and against which the assessee filed appeal before the Tribunal. These additions or disallowances are as under:

1. Rs.11,668/- addition on account of purchases.
2. Rs.96,000/- being charges paid to Mrs. Bela Mukherjee for technical services.
3. Rs.21,000/- out of telephone expenses.
4. Rs.6,14,160/- being reimbursement of expenses relating to agents for collecting/renewing FDRs.

15. Out of the aforesaid four additions, the disallowance of Rs.96,000/- being charges paid to Mrs. Bela Mukherjee for technical services though confirmed by the ld. CIT(A) has been deleted by the Tribunal. Similarly, the addition of Rs.21,000/- out of telephone expenses, and disallowance of Rs.6,14,160/-, being reimbursement of expenses relating to agents for collecting or renewing FDRs has also been deleted by the Tribunal.

Therefore, only addition out of the four additions, which is survived, is Rs.11,668/-, being the disallowance of purchases.

16. The other additions, which have been survived, against which no appeal was preferred by the assessee, are as under:

1. Rs.65,622/- on account of provisions for doubtful debts.
2. Rs.29,25,207/- on account of loss on sale of shares.
3. Rs.9,26,060/- on account of earlier year liability.
4. Rs.48,000/- on account of rent receivable.
5. Rs.6629/- on account of excess depreciation claimed.

Therefore, we are concerned with the following six items for the purpose of deciding the question as to whether penalty u/s 271(1)(c) has been rightly levied by the AO in respect of these additions:

1. Rs.11,668/- addition on account of purchases.
2. Rs.65,622/- on account of provisions for doubtful debts.
3. Rs.29,25,207/- on account of loss on sale of shares.
4. Rs.9,26,060/- on account of earlier year liability.
5. Rs.48,000/- on account of rent receivable.
6. Rs.6629/- on account of excess depreciation claimed.

17. With regard to the addition of Rs.11,668/-, the AO has stated in the assessment order that, as on 31.3.95, the assessee has shown the closing stock at nil. While examining the books of accounts and details of purchases and sales made in the month of March, 1995, it was observed that one

purchase of Rs.11,668/- was made by the assessee vide Invoice No.697 dated 31.3.95 of Maharashtra Dry Chemicals. The AO also found that the last sale made by the assessee was on 30.3.95, being made to Nuchem Weir Ltd., Faridabad, a sister concern of the assessee. In the light of these facts, the assessee was asked to show as to why this purchase amount was not shown in the closing stock as on 31.3.95. The assessee in its reply dated 23.3.98 submitted that the said purchases were part and parcel of items sold to Nuchem Ltd. vide sale bill dated 30.3.95 and the said purchase was claimed to have been included in the said sale. The assessee's contention was rejected by the AO by observing that it is very strange to note as to how the goods purchased from Bombay on 31.03.1995 could be consumed in the sale made on 30.03.1995. The assessee's reply was not found to be convincing and addition of Rs.11,668/- was accordingly made by the AO on account of inflation of purchases.

18. On an appeal, CIT(A) has confirmed the addition by observing that no evidence in the form of detailed invoices were furnished to support the assessee's contention. The CIT(A) has also taken the note of the AO's finding that there was no evidence on record to show that the purchases made by the assessee on 31.03.95 did form part and parcel of the items sold to M/s Nuchem Weir Ltd. on 30.3.1995.

19. On further appeal, the Tribunal upheld the CIT(A)'s order in confirming the addition made by the AO, by observing that even before the Tribunal, the assessee has not been able to produce any such evidence to show that the purchases made by the assessee did form a part and parcel of the items sold to Nuchem Weir Ltd. The Tribunal, thus, confirmed the findings of the learned CIT(A). In the penalty order, the AO has stated that in the light of the material discussed in the assessment order, it was evident that the assessee had furnished inaccurate particulars of income and also concealed the particulars of income by making wrong claims or by concealing certain relevant facts, so that the taxable income could be get reduced.

20. On an appeal against penalty order, CIT(A) has deleted the penalty for the reasons as already mentioned above. The CIT(A) has observed that no concealment on the part of the assessee has been pointed out by the AO, and the AO has not given any finding in the assessment order whether the above expenditure was bogus or non genuine, and mere disallowance would not attract penalty.

21. The learned DR has submitted that CIT(A) has erred in deleting the penalty in respect of the additions, which has been confirmed by the Tribunal and against which the assessee did not file any further appeal. He

further submitted that the assessee's explanation in respect of this addition is not at all bonafide and honest one, and the assessee has failed to furnish all relevant materials relating to the matter. He further submitted that when this addition was made in the assessment order, it was the burden of the assessee to prove and establish that the claim was made bonafide, and all the details related thereto were disclosed to the department. He, therefore, submitted that if one look to the background under which the addition is made, it is clear that the assessee's conduct in making the claim of purchases in the return of income was not at all bonafide as no person duly instructed under the law and fact would claim such a claim in the return of income, which is prima facie not admissible, even by any stretch of imagination. In support of the AO's order in levying penalty, the learned DR has placed reliance upon the following decisions:

1. CIT vs. Zoom Communication Pvt. Ltd., 2010-TIOL-360-HC-DEL-IT
2. ACIT vs TVS Finance & Services Ltd., 2009-TIOL-710-ITAT-MAD
3. CIT vs ECS Ltd., 2010-TIOL-287-HC-DEL-IT
4. CIT vs Shri Rakesh Suri, 2010-TIOL-357-HC-ALL-IT
5. CIT vs Escorts Finance Ltd. ITA No.1005/2008
6. ACIT vs Smt. Aarathi A Lad, 2009-TIOL-755-ITAT-BANG

22. With regard to the addition of Rs.11,668/- on account of purchases, the learned counsel for the assessee submitted that the items purchased were actually received by the assessee on 8.4.94, and were handed over to Nuchem Weir Ltd., who made these purchases vide assessee's sale bill dated 30.3.95, and thus, these purchases were made part of the said sale to Nuchem Weir Ltd., and, therefore, the same was rightly not taken into closing stock shown as on 31.3.95. He, therefore, submitted that there was no concealment or furnishing inaccurate particulars of income on the part of the assessee so as to attract penalty leviable u/s 271(1)(c) of the Act.

23. Rival contentions of both the parties have been considered. We have gone through the orders of the authorities below including the orders in the quantum matter. We have deliberated upon the relevant provisions of law contained in that behalf. The various decisions cited by both the parties have been perused.

24. Section 271(1)(c) of the Act provides for imposition of penalty in case the AO, in the course of any proceedings under the Act, is satisfied that any person has concealed particulars of his income or has furnished inaccurate particulars of such income. Explanation 1 to Sub section (1) to Section 271 of the Act provides that where in respect of any facts material to the computation of the total income of any person, such person fails to offer

an explanation or offers an explanation which is found to be false or he offers an explanation, which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of its total income, have been disclosed by him, then the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purpose of clause (c), be deemed to represent the income in respect of which particulars have been concealed. Thus, in the case of failure of the assessee to offer any explanation or explanation furnished by him being found false, penalty may be imposed on him. However, if the assessee offers an explanation, mere failure on his part to substantiate it will not be enough to warrant penalty, if the explanation is bonafide, and all the facts relating to the same were disclosed by him in the return. Explanation 1 to Section 271(1)(c) would be inapplicable in respect of any amount added or disallowed as a result of rejection of the explanation furnished by the assessee, provided that his explanation is shown to be bonafide and all the facts relating to the same and material to the computation of total income was disclosed by him. This position has been summarized by various decisions of the courts from time to time and has been recently summarized by the Hon'ble High Court of Delhi in the case of CIT vs Zoom Communication P. Ltd. reported in (2010)

DIOL-360-HC-DEL-IT, order being dated May 24, 2010. The position of law, thus, emerges is that so long as the assessee has not concealed any material fact, or the factual information given by him has not been found to be incorrect, he will not be liable to imposition of penalty u/s 271(1)(c) of the Act, even if the claim made by him is unsustainable in law, provided that he either substantiate the explanation offered by him or the explanation offered by him, even if not substantiated, is found to be bonafide. In other words, if the explanation is neither substantiated nor shown to be bonafide, Explanation 1 to Section 271(1)(c) would come into play and the assessee will be liable to penalty leviable u/s 271(1)(c) of the Act in respect of the additions or disallowances made by the AO in the assessment.

25. Therefore, we have to see as to whether the explanation offered by the assessee with regard to the addition of Rs.11,668/- made by the AO is bonafide, and whether the assessee has furnished all the facts relating to the same, and material to the computation of assessee's total income.

26. The addition of Rs.11,668/- is on account of alleged purchases of tri-methyl minea from Maharashtra Chemicals, Bombay vide bill No.697 dated 31.3.95. This purchase has been debited in the purchase account and has not been shown as closing stock in hand as on 31.3.95. The assessee has submitted that assessee had sold certain items to Nuchem Weir Ltd. vide

sale invoice dated 30.3.95, and this item was a part of the said sale sold to Nuchem Weir Ltd. However, we find that the assessee has not furnished any evidence or information to substantiate this explanation. While deciding the quantum appeal, the Tribunal has categorically stated that the assessee has failed to furnish any evidence in support of its explanation even before the authorities below as well before the Tribunal. The assessee has now contended before us that the delivery of the item was actually received on 8.4.95, and was directly handed over to Nuchem Weir Ltd., being part of sale items sold on 30.3.95. However, no evidence has been placed before us. This transaction is shown to have been made by the assessee with its sister concern. It is not understood that how the purchases made on 31.3.95 could be made a part of sale of items, which were sold on one day before i.e. 30.3.95. It is, thus, a case of furnishing inaccurate particulars of income, and even it is a case of making a false claim of purchases of Rs.11,668/-, which were not even included in the closing stock in hand shown as on 31.3.95. The assessee's explanation cannot by any stretch of imagination be said to be bonafide. The assessee has also not disclosed or furnished all relevant particulars relating to this item. It is, thus, a case where the assessee has made a false claim and the assessee has not been able to substantiate it, and as well as the explanation offered by the assessee is also found not to be

bonafide, and, at the same time, it is also found that the assessee has failed to furnish all relevant details or particulars relating to this claim. This claim was detected by the AO during the course of the assessment proceedings when he examined the detail of purchases and verified the closing sock inventory shown as on 31.3.95. Thus, this item is fit for imposition of penalty u/s 271(1)(c) of the Act even in the light of the decision of the Hon'ble Supreme Court in the case of Reliance Petro Products P. Ltd. (2010) 322 ITR 158 (SC), on which a strong reliance has been placed by the assessee inasmuch as, in the present case, there is a categorical finding about furnishing inaccurate particulars of claim of purchases and it is not a case where claim of the assessee in law has been merely disallowed without anything more. We, therefore, sustain the penalty with reference to this addition of Rs.11,668/- on account of disallowance of bogus purchases claimed by the assessee. The penalty order of AO is, thus, restored and that of the CIT(A) is set aside on this item.

27. The next addition in respect of which penalty has been levied by the AO is of Rs.65,622/- on account of provision for doubtful debts. While making this addition, the AO has observed that the assessee has debited a sum of Rs.65,622/- in the profit and loss account as provision for doubtful debts, though such provision is not allowable as deduction. He further

observed that the assessee has also agreed to the addition. Against this addition, no appeal was preferred by the assessee before the learned CIT(A). In the penalty order, the AO has stated that in the light of the observations made in the body of the assessment order, it was evident that assessee had furnished inaccurate particulars of its income, and concealed the particulars of income by making wrong claim. However, the penalty has been deleted by the CIT(A) by observing that the AO has not brought out anything on record proving that the assessee has deliberately concealed anything or furnished inaccurate particulars of income, and there was no finding that assessee was compelled to surrender the income by filing the revised computation of income.

28. Here, we are concerned with disallowance of claim of provision for doubtful debts. It is by now well settled that provision for doubtful debts is not admissible u/s 36(1)(vii) of the Act. The question as to whether provision for bad and doubtful debts made in the accounts of the assessee is allowable as bad debts written off as irrecoverable in the accounts of the assessee u/s 36(1)(vii) was debatable before the insertion of Explanation to that Section vide Finance Act, 2001 with retrospective effect from 1.4.1989. The position has been clarified by the legislature by inserting Explanation by the Finance Act 2001 with retrospective effect from 1.4.89. In the present

case, we are concerned with the Asstt. year 1995-96, in respect of which the assessee filed return of income on 30.11.95, when the position about the claim of provision for doubtful debts was not clear. Therefore, in this view of the matter, it is very difficult to hold that the assessee's claim was false and not bonafide. Here, we find that the assessee has made a claim for provision for doubtful debts and has disclosed the same in its account. Therefore, the assessee has been able to discharge its burden that lay upon it vide Explanation 1 to Section 271(1)(c) of the Act. Hence, the penalty levied on this item has been rightly deleted by the learned CIT(A), and his order on this aspect of the matter is upheld.

29. Next addition in respect of which penalty u/s 271(1)(c) has been levied by the AO is the disallowance of Rs.29,25,207/- on account of loss on sale of shares. In the assessment, the AO has stated that in the body computation of income, the assessee company has claimed loss of Rs.29,25,207/- on account of sale of shares of SSL/KPIL, and during the course of assessment proceedings, the assessee company was asked why set off of long term capital loss on sale of shares should not be disallowed against the current year's business income. In response to the notice, the assessee company filed a written reply dated 27.3.98, and after considering the reply of the company, long term capital loss was not allowed to be set off

against current year's business income, and addition was accordingly made. At the same time, the AO further mentioned that long-term capital loss is to be allowed to be carried forward in the next assessment year as per Section 74(1) of the Act. Against this disallowance made by the AO, assessee did not prefer any appeal before the learned CIT(A). In the light of the findings given in the assessment order, the AO had taken a view that assessee had concealed its particulars of income or concealed its income making it liable to penalty leviable u/s 271(1)(c) of the Act. The AO, thus, levied the penalty. However, CIT(A) deleted by the penalty by observing that AO has not brought out anything on record that the assessee company has deliberately concealed anything or furnished inaccurate particulars of income.

30. The learned Departmental Representative advanced identical arguments similar to the arguments advanced in relation to addition of Rs.11,668/- on account of bogus purchases and relied on same decisions.

31. With regard to the addition of Rs.29,25,207/- on account of loss on sale of shares, the learned counsel for the assessee submitted that the assessee revised voluntarily the income during the assessment proceedings by submitting letter dated 27.3.98, where the assessee agreed to make the addition in respect of which full particulars were disclosed in the

computation of income itself, and thus, it is not a fit case where penalty can be levied u/s 271(1)(c) of the Act inasmuch as the assessee has voluntarily offered the amount for tax as and when it was so realized.

32. We have heard both the parties and perused the material available on record. In the computation of income filed along with the return of income, the assessee company claimed a loss of Rs.29,25,207/- on account of sale of shares of SSL/KPIL. During the course of assessment proceedings, the assessee company was asked as to why the claim of set off of long-term capital loss on sale of shares against business income should not be disallowed. In response to the AO's show cause notice, the assessee company filed a written reply dated 27.3.98 stating that the loss on sale of shares of SSL/KPIL is the long term capital loss and it was included in computation of income since there was income in the year. It was further stated that, however, long term capital loss of the current year may be carried forward for adjustment in the next assessment year as per Section 74(1) of the Act. The AO then considered the assessee's reply, and had taken a view that long term capital loss is not eligible to be set off against the current year's business income, and thus, assessee's claim of set off of long-term capital loss against business income is disallowed, and addition was accordingly made. However, the AO stated that long-term capital loss

shall be eligible to be carried forward to next assessment year against long-term capital gain as per Section 74(1) of the Act. Against the AO's action, assessee did not prefer any appeal before the learned CIT(A). Thus, the AO's order stood final. The AO initiated penalty proceedings u/s 271(1)(c) of the Act, and in the light of the facts pointed out in the assessment order, the AO had taken a view that the assessee has concealed its particulars of income or has furnished inaccurate particulars of income. However, the CIT(A) deleted the penalty by observing that AO has not brought out anything on record to prove that assessee company has deliberately concealed anything or furnished inaccurate particulars of income.

33. After considering the position of law as discussed above in para 24 hereto, we are of the view that CIT(A) was wrong in holding that it was the burden of the AO to prove and establish that assessee company has deliberately concealed anything or furnished inaccurate particulars of income. It is now well settled that the mens rea is not an essential ingredient for levying penalty u/s 271(1)(c) of the Act as was held by the Hon'ble Supreme Court in the case of Union of India vs Dharmendra Textiles Processors (2008-TIOL-192-SC-CX-LB). In this case, since the assessee's claim was disallowed, it was the duty of the assessee to prove and establish that his claim was bonafide, and all the facts relating to the claim were duly

disclosed as so provided in under Explanation 1 to Section 271(1)(c) of the Act. We, therefore, proceed to see as to whether the assessee's claim was bonafide and the assessee has disclosed all the particulars material to the computation of income. We have carefully gone through the computation of income filed by the assessee with the original return of income filed on 30.11.95. In the computation of income, the assessee worked out the sum of Rs.29,25,207/-, being loss on sale of shares as per Annexure No.11. The assessee made a claim of set off of long-term capital loss against the income under the head 'profits and gains of business'. In the computation of income, the assessee computed the business income by taking the net profit as per P&L account as the base for determining the income chargeable to tax under the head 'profits and gains of business' after making several adjustment to the net profit shown in the P&L account. In the profit and loss account, the loss on sale of assets i.e. share of M/s SSL/KPIL was shown at Rs.11,44,000/-. In other words, the actual book loss on sale of shares was of Rs.11,44,000/-, which was enhanced to Rs.29,25,207/- after applying the inflation indexed cost, as per working given vide Annexure 11 to the computation of income. While computing the amount of long-term capital loss, the assessee company determined the indexed cost of shares by applying the cost inflation index to actual cost. In other words, the assessee

claimed indexed cost of acquisition instead of actual cost of shares to the assessee arrived at a loss of Rs.29,25,207/-, and thus, as against the actual book loss of Rs.11,44,000/-. It is well known that the actual cost of long term capital assets can be substituted by the indexed cost only for the purpose of computing the income under the long term capital gain as provided under Chapter IV Part 'E' 'Capital Gains' of the Act. The assessee has consciously and knowingly taken the indexed cost of acquisition of shares, and computed the long-term capital loss on sale of shares at Rs.29,25,207/-. It was, thus, well within the knowledge of the assessee that the loss of Rs.29,25,207/- was a long-term capital loss, which was worked out by the assessee as per the provisions of computation of capital gain under the Income-tax Act. As per Section 71 of the Act, the loss under the head 'capital gain' is not allowed to be set off against income under other head in that relevant assessment year. This section provides that when net result of the computation under the head 'capital gain' is a loss and the assessee has income assessable under any other head of income, the assessee shall not be entitled to have such loss set off against income under any other head. In the present case, the assessee has claimed set off of long term capital loss against the business income, which, by any stretch of imagination is not permissible under the provisions of Section 71 of the Act.

The assessee's explanation that it has claimed set off of long term capital loss against other income because of the fact that there was positive income in that year is totally unacceptable and unbelievable inasmuch as it is beyond any doubt that the long term capital loss is not at all permitted to be set off against the positive income under other heads. Therefore, the assessee's explanation is prima facie contrary to the clear provisions of law contained in Section 71 of the Act. The assessee is a limited company, which is guided and instructed by the tax experts, as would be clear from facts of the present case. In the computation of income, the assessee has made several adjustments to the net profit shown as profit and loss account, and while making various adjustments, the assessee company has made a reference to the various provisions of the Income-tax Act including certain decisions also. Therefore, it cannot also be believed that the assessee company did not know the provisions of Income-tax Act. It is not the case of the assessee that it was advised by some tax experts that the long term capital loss can be set off against the business income. In fact, in view of plain, specific and unambiguous provisions contained in Section 71 of the Act, no such advise could be expected to be given by any auditor or other tax expert. The assessee is not an ordinary layman, but is a company incorporated under the Companies Act and accounts of which are mandatorily subjected to audit. It

is the case where assessee has made adjustment to the actual book loss of Rs.11,44,000/- incurred by the assessee on sale of shares, and revised it to Rs.29,25,207/- after applying the inflation indexation cost. Therefore, the assessee's claim to set off long-term capital loss against business income cannot said to be a bonafide mistake on the part of the assessee. The assessee was well aware about the provisions of computation of long term capital gain as it has worked out the loss at Rs.29,25,207/- after applying indexed cost of acquisition as against actual loss of Rs.11,44,000/- as per books. It is also not the case where the claim was later withdrawn voluntarily by filing the valid revised return of income permitted u/s 139(5) of the Act before any enquiry was made or any query was raised by the AO. In the present case, the AO issued a show cause letter and then the assessee filed its reply on 27.3.98, just before the assessment made on 31.3.98. It is pertinent to note that the original return of income filed by the assessee on 30.11.95 was revised thrice i.e. first by revised return filed on 22.2.96, secondly on 27.2.97 and thirdly, on 3.3.98. After revising the original return of income for three times, the assessee again submitted a letter dated 27.3.98 in reply to the AO's query where certain items of income were agreed to be taxed. The claim of the assessee made in the original return of income was never revised or modified voluntarily by the assessee in any of the three

revised return filed from time to time by the assessee. It is thus, a case of deliberate act of making a false and impermissible claim on the part of the assessee. In the light of the facts of the present case, it is thus established that it is not a case where claim of the assessee has been merely disallowed under the law after rejecting the assessee's probable view but it is the case where the claim of the assessee was not at all maintainable by any stretch of imagination under the plain provisions of law, and, thus, by claiming the same, assessee has furnished false claim in the return of income. As pointed out above, we cannot lose sight of the fact that the assessee company is a company, which is availing professional assistance in preparing computation of income, and filing return of income. In the light of plain and unambiguous provisions contained in Section 71 of the Act, we fail to understand as to how such claim could be made by the present assessee company, and how this could have escaped the attention of the tax consultant or the auditor of the assessee company while preparing and filing return of income. Moreover, it has been never a claim of the assessee that the claim was made under any bonafide advice.

34. In the case of CIT vs Zoom Communications P. Ltd. (supra) and in the case of CIT vs Escorts Finance Ltd., 183 Taxman 453 (Delhi), the Hon'ble Delhi High Court has examined the claim made by the assessee on

account of income-tax paid by the assessee and equipment written off, and claim of deduction u/s 35D of the Act, for the purpose of penalty leviable u/s 271(1)(c) of the Act.

35. In the case of CIT vs Zoom Communications P. Ltd.(supra), the Hon'ble Delhi High Court has not accepted the general view taken by the Tribunal that since no person would claim the deduction on account of income-tax paid by the assessee to evade payment of tax, the claim made by the assessee was not malafide. The Hon'ble High Court observed that in the absence of the assessee company telling the AO as to who committed the oversight resulting in failure to add this amount on account of income-tax paid by the assessee while computing the income of the assessee, under what circumstances the oversight occurred and why it was not detected by those, who checked the income-tax return before it was filed and later by the auditors of the assessee company, we cannot accept the general view taken by the Tribunal. The Hon'ble High Court was of the view that no such general view taken by the Tribunal could have reasonably been taken, on the facts and circumstances prevailing in that case and, therefore, the decision of the Tribunal in that regard found to be suffered from the vice of perversity. They further observed that no hard and fast rule in this regard can be laid down, and every case will have to be decided considering the facts and

circumstances in which such a deduction is claimed, except that as to whether the explanation offered by the assessee for making the claim is shown to be bonafide or not. Applying this decision of jurisdictional Delhi High Court to the facts of the present case, we find that, in the present case, the assessee has not explained as to why and under what circumstances, the assessee made a claim of set off of long-term capital loss against business income, and why the same was not detected at a later stage when the assessee revised the return of income thrice i.e. on 22.2.96, 27.2.97 and lastly, on 3.3.98 except by agreeing to the addition vide letter dated 27.3.98 after an enquiry was made by the AO as to why this claim of set off of long term capital loss should not be disallowed against the business income. Thus, it is not a case where assessee has voluntarily withdrawn the claim in a bonafide manner. The assessee has withdrawn the claim only after the same was detected by the AO. As already observed above, the assessee company is a company, which was having professional assistance in computing of its income and filing the return of income, and it is not explained by it as to how such deduction could have been made while computing the income under the head "business" of the assessee company, and how it could also have escaped the attention of the assessee company particularly in view of the fact that assessee claimed the amount of long-term capital loss after

applying the cost inflation index, which is only permissible while computing the income under the head 'capital gains' and not under the head 'business income'. In the said decision of CIT vs Zoom Communications P. Ltd.(supra), the Hon'ble High Court has also taken note of the fact that only small percentage of income-tax returns are picked up for scrutiny, and in that case, the assessee would get away even without paying the tax legally payable by it, if the assessee's case is not picked up for scrutiny. The relevant observation of the Hon'ble High Court in this regard are reproduced as under:

> ***"20. The Court cannot overlook the fact that only a small percentage of the income-tax returns are picked up for scrutiny. If the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim is not found to be bonafide, it would be difficult to say that he would still not be liable to penalty u/s 271(1)(c) of the Act. If we take the view that a claim which is wholly untenable in law and has absolutely no foundation on which it could be made, the assessee would not be liable to imposition of penalty, even if he was not acting bonafide while making a claim of this nature, that would give a licence to unscrupulous assessees to make wholly untenable and unsustainable claim, without there being any basis for making them, in the hope that their return would not be picked up for scrutiny and they would be assessed on the basis of Self assessment u/s 143(1) of the Act and even if their***

> ***case is selected for scrutiny, they can get away merely by paying the tax, which in any case, was payable by them. The consequence would be that the persons who make claims of this nature, actuated by a mlafide intention to evade tax otherwise payable by them would get away without paying the tax legally payable by them, if their cases are not picked up for scrutiny. This would take away the deterrent effect, which these penalty provisions in the Act have."***

In this case, the Hon'ble High Court of Delhi has also considered the decision of Hon'ble Supreme Court in the case of Reliance Petro Products P. Ltd. (supra) and the position of law emerging from that case in the factual matrix of the case before Hon'ble High Court, has been discussed and analyzed as under:

> ***"16. The proposition of law which emerges from this case, when considered in the backdrop of the facts of the case before the Court, is that so long as the assessee has not concealed any material fact or the factual information given by him has not been found to be incorrect, he will not be liable to imposition of penalty u/s 271(1)(c) of the Act, even if the claim made by him is unsustainable in law, provided that he either substantiates the explanation offered by him or the explanation, even if not substantiated, is found to be bonafide . If the explanation is neither substantiated nor shown to be bonafide, Explanation 1 to Section 271(1)(c) would come in to play and the assessee will be liable to for the prescribed penalty.***

17. The assessee before us is a company which declared an income of Rs.1,21,49,861/- and accounts of which are mandatorily subjected to audit. It is not the case of the assessee that it was advised that the amount of income tax paid by it could be claimed as a revenue expenditure. It is also not the case of the assessee that deduction of income tax paid by it was a debatable issue. In fact, in view of the specific provisions contained in Section 40(ii) of the Act, no such advice could be given by an Auditor or other Tax Expert. No such advice has been claimed by the assessee even with respect to the amount claimed as deduction on account of certain equipment having become useless and having been written off. As noticed earlier, the Tribunal was entirely wrong in saying that Section 32(1)(iii) of the Act applies to such a deduction. It was not the contention before us that claiming of such a deduction u/s 32(1)(iii) was a debatable issue on which there were two opinions prevailing at the relevant time. In fact, the assessee did not claim, either before the AO or before the CIT(A) that such a deduction was permissible u/s 32(1)(iii) of the Act, No such contention on behalf of the assessee finds noted in the order of the Tribunal. Thus, it was the Tribunal, which took the view that Section 32(1)(iii) could be attracted to the deduction claimed by the assessee. It is also not the case of the assessee that it was due to oversight that the amount of income tax paid by the assessee as well as the amount claimed as deduction on account of certain equipment being written off could not be added back in the computation of income.

18. In the case of Reliance Petro Products Private Limited (supra), the addition made by the AO in respect of the interest claimed as a deduction u/s 36(1)(iii) of the Act was deleted by the CIT(A)

> ***though it was later restored by the Tribunal to the AO. The appeal filed by the assessee against the order of the Tribunal was admitted by the High Court. It was, in these circumstances that the Tribunal came to the conclusion that the assessee had neither concealed the income nor filed inaccurate particulars thereof. In recording this finding the tribunal felt that if two views of the claim of the assessee were possible, the explanation offered by it could not be said to be false. This, however, is not the factual position in the case before us. The facts of the present case thus are clearly distinguishable.***
>
> ***19. It is true that mere submitting a claim which is incorrect in law would not amount to giving inaccurate particulars of income of the assessee, but it cannot be disputed that the claim made by the assessee needs to be bonafide. If the claim besides being incorrect in law is malafide, Explanation 1 to Section 271(1) come into play and work to the disadvantage of the assessee."***

36. Similarly, in the case of CIT vs Escorts Finance Ltd.(supra), the order of the Tribunal deleting the penalty with reference to the disallowance of claim made u/s 35D of the Act was set aside and the AO's order levying the penalty was upheld. In that case, the Hon'ble High Court had agreed that the submission of the learned counsel for the revenue that hardly 5% returns are taken up for scrutiny and, therefore, with the hope that assessee's return may not come under scrutiny and may be assessed on the self assessment, an assessee can venture to give wrong information, and, therefore, merely because information was available in the tax audit report, would not absolve

the assessee, and what was to be seen was that whether the claim made was bogus. The Hon'ble High Court further observed that even if there is no concealment of income or furnishing of inaccurate particulars, but on the basis thereof the claim, which is made is ex facie bogus, it may still attract penalty provision. In that case, the Hon'ble High Court examined the issue as to whether the claim u/s 35D of the Act was bogus or it was a bonafide claim. The assessee pleaded bonafide as, according to the assessee, it was based on the information of the Chartered Accountant. However, it was observed by the Hon'ble High Court that they failed to understand as how the Chartered Accountants, who are supposed to be experts in tax liabilities, could give such information having regard to the plain language of Section 35D of the Act. The Hon'ble High Court also found that it was not a case where two opinions about the applicability of Section 35D were possible. The Hon'ble High court, therefore, hold that it cannot be a case of bonafide error on the part of the assessee, as relief available u/s 35D of the Act to finance company is ex facie inadmissible as that is confined only to the existing industrial undertaking for their extension or for setting up a new industrial undertaking. The Hon'ble court, therefore, hold that it was not a wrong claim made by the assessee but is a clear case of false claim, which would attract penalty.

37. With regard to the assessee's contention that assessee surrendered the amount during the course of assessment proceedings, and thus, no penalty could be levied, we make a useful reference to a decision of Hon'ble Allahabad High Court in the case of CIT vs Shri Rakesh Suri (supra) where it has been held that surrender made after the concealed income was detected by the Department cannot be held to be voluntary or bonafide but under compulsion, and in that case, the assessee cannot be absolved from levying penalty because he agreed to the addition at the time of assessment.

38. These decisions of Hon'ble Delhi High Court and Allahabad High Court are squarely applicable to the case before us inasmuch as, in the present case, it is totally unbelievable that how and under what circumstances, the claim of set off of long term capital loss could be made against the business income in the light of the plain and unambiguous language to Section 71 of the Act, and how such advise could be given by any tax consultant to claim the same. Therefore, it cannot be a case of bonafide error on the part of the assessee but it is a clear case of making false claim. In support of the view, we have taken above, reliance may also be placed upon another decision of Hon'ble Delhi High Court in the case of CIT vs ECS Ltd. (supra) where penalty levied by the AO with regard to the claim of deduction u/s 80-O on gross income was found to be justified

inasmuch as once it was the accepted position that deduction u/s 80-O had to be allowed only on net income, it was but obvious that expenditure incurred in India had also to be deducted to arrive at such a net income. Therefore, the assessee's claim of deduction u/s 80-O on gross income was found to be malafide and the penalty levied u/s 271(1)(c) by the AO was upheld. Similarly, in the present case before us, there is no controversy at least to the extent that long-term capital loss is not permitted to be set off against business income as clearly stated in plain and unambiguous language of Section 71 of the Act, and, therefore, the assessee's claim cannot be said to be bonafide.

39. Further, the decision of Hon'ble P&H High court in the case of CIT vs Ajaib Singh & Co. (supra), upon which a strong reliance has been placed by the learned CIT(A) as well by the learned counsel for the assessee, would also of no assistance to the assessee's case inasmuch as, facts of that case are quite different and distinct to that of the present case. In the case of CIT vs Ajaib Singh & Co. (supra), the penalty was levied by the AO in respect of addition of Rs.40,000/- which was sustained on estimated basis and in that context, it was held by the Hon'ble High Court that mere because addition was sustained that by itself, would not attract penalty u/s 271(1)(c) of the Act. The other addition made in that case was of Rs.4200/- on account of

sales-tax liability, which was a matter of debate, and in that context, it was held that mere making a claim, which is not acceptable to the revenue, no penalty can be levied. However, in the present case, it is not the case where addition has been made either on estimated basis or on a matter of debate. In the present case, the claim of the assessee is prima facie not at all maintainable in the eyes of law and no person acting bonafide would made such a claim in the return of income.

40. In the light of the position of law and the totality of facts of the case regarding this addition of Rs.29,25,207/- on account of disallowance of claim of loss of long-term capital loss on sale of shares as discussed in detail above, we reverse the order of learned CIT(A) and restore that of the AO on this count. In other words, we hold that the AO was justified in levying penalty u/s 271(1)(c) of the Act in so far as assessee's claim of set off of long term capital loss worked out after applying the cost inflation index, against the business income is concerned. The order of penalty passed by the AO on that count is confirmed.

41. Now, we come to the addition of earlier year liability no longer required amounting to Rs.9,26,060/- claimed by the assessee as deduction in the return of income. The assessee's claim was disallowed by the AO while determining the total income in the assessment made u/s 143(3) by AO. It is

not in dispute that an amount of Rs.9,26,060/- included in the Profit & Loss account was claimed as deduction on account of earlier year liability no longer required and written off, by the assessee. During the course of assessment proceedings, the assessee company was given a show cause by the AO as to why the said claim should not be disallowed. The assessee company in its reply dated 27.3.98 admitted the mistake. Accordingly, the addition of Rs.9,26,060/- was made to the total income of the assessee against which no appeal was preferred by the assessee. The AO initiated penalty proceedings u/s 271(1)(c) of the Act, and after hearing the assessee, he levied the penalty by observing that assessee had furnished inaccurate particulars of his income and also concealed the particulars of income by making wrong claims so that taxable income of the assessee may get reduced. However, the learned CIT(A) deleted the penalty by observing that no concealment has been pointed out in the assessment order and the AO has not given any finding that the assessee has concealed anything or furnished inaccurate particulars of income. The learned CIT(A) further observed that agreeing to the addition may be due to several reasons but that by itself not sufficient to levy penalty when there was no finding by the AO that the AO compelled the assessee company either to revise or disclose the income. He further observed that the AO has passed the penalty order in a very

mechanical manner without recording any mandatory satisfaction to initiate penalty proceedings in the assessment order.

42. Being aggrieved, the department is in appeal before us.

43. The contentions and submissions of the learned DR were similar and identical as that of contended in respect of above mentioned item of Rs.11,668/- on account of bogus purchases and Rs.29,25,207/-, being the addition by way of disallowance of assessee's claim to set off loss of long term on sale of shares against business income.

44. The learned counsel for the assessee, on the other hand, has submitted that the assessee has voluntarily accepted the addition as soon as the assessee's mistake was detected, and thus, it could not be said that assessee had concealed its income or furnished inaccurate particulars of income particularly in the light of the fact that al the particulars relating to this claim were disclosed in the return of income and in the course of assessment proceedings as well.

45. On this aspect of the matter as to whether penalty u/s 271(1)(c) has been rightly levied by the AO with regard to the disallowance of assessee's claim of deduction of earlier years liabilities no longer required and written back of Rs.9,26,060/-, we find that, in the course of assessment proceedings,

the AO issued a query on 23.3.98 to the assessee as to why the assessee's claim of deduction of liabilities no longer required written back is not to be disallowed and in response to the AO's query made on 23.3.90, the assessee submitted point-wise reply vide its letter dated 27th March, 1998 where the assessee has stated that the liabilities no longer required written back has been included in the other income in profit and loss account, but by mistake, deduction was claimed in the return of income, and hence, the same may be disallowed. The AO, therefore, disallowed the assessee's claim of deduction of liabilities no longer required written back. We have gone through the profit and loss account as well as computation of income filed by the assessee along with the return of income, and also the revised computation of income filed during the course of assessment proceedings from time to time. The assessee had a liability of Rs.9,26,060/-, which was found to be no more payable by the assessee, and hence, it was written back and credited to the profit and loss account. The assessee had shown other income of Rs.3,82,94,886/-, which includes an item of Rs.9,26,060/-, being the liabilities written back (net of balances written off). Since this liability was no longer required to be paid by the assessee and the net of the balances were written off in the books of accounts, it was rightly brought to profit and loss account as income. However, while filing the return of income, the

assessee deducted the same from the net profit as per P&L account without whispering anything or giving any explanation or narration as to why it has been reduced the same from the net profit shown as per profit and loss account. It is, thus, clear that though the amount was included in the P&L account, the deduction has been claimed by the assessee in the computation of total income for the purpose of assessment under the Income-tax Act, and claimed the same in the return of income filed by the assessee. When assessee was confronted with the situation, the assessee, in its reply, merely stated that it has been claimed by mistake without stating further, as to why and how this mistake was committed. When this amount was specifically included in the profit and loss account, and thereafter it was reduced from the net profit while computing the total income for the purpose of assessment under the Income-tax Act, it is not believable that the deduction was claimed by mistake. In the light of the facts of the present case, we find that it was a conscious decision of the assessee to claim the deduction without giving any sort of basis or reason for claiming the same as deduction. It is not the case of the assessee that these liabilities no longer required to pay but written back by crediting the same in the profit and loss account was on any capital account that the same were not to be included in the taxable income computed under the head 'profits and gains of business'.

The assessee has merely given a wild and evasive reply that the claim was made by mistake without saying anything more as to how and why the mistake came to be committed when particularly it is not in dispute that the assessee is a company incorporated under the Companies Act and is guided by the tax experts, as was already discussed and indicated above and the amount was included in the profit and loss account. Therefore, the views we have taken above with regard to the item of Rs.29,25,207/-, being the claim of set off of long term capital loss against business income, fully supports the penalty levied by the AO in respect of this disallowance of liabilities no longer required written back but claimed as deduction inasmuch as the assessee's explanation or conduct is not at all found to be bonafide, and the assessee has not been able to discharge its burden that lay upon it under Explanation 1 to Section 271(1)(c) of the Act. We further hold that the learned CIT(A) was unjustified in casting the burden upon the AO to prove that assessee has concealed the income though in the light of the various decisions of the Hon'ble Supreme Court, it was not necessary for the department to prove mens rea on the part of the assessee but, on the other hand, the assessee was obliged to prove and establish that his claim was bonafide and the surrender made by him was voluntarily. Before parting with this matter, we would like to state that the assessee's conduct in

agreeing to the addition vide letter dated 27.3.98 cannot said to be voluntary inasmuch as this surrender was made by the assessee only after the same was detected by the AO, and after issuing a show cause notice to the assessee. At this stage, it is also pertinent to note that had the claim was made by mistake while filing the original return of income, it is not understood and explained as to why assessee then failed to withdraw the claim in the revised return fixed three times before a query was raised by the AO. We, therefore, reverse the order of learned CIT(A) and restore that of the AO. In other words, the penalty levied by the AO on this item of liabilities no longer required but written back and claimed as deduction, is justified. The order of AO levying penalty on this item is, thus, confirmed.

46. Now, we shall come to the matter regarding penalty levied by the AO u/s 271(1)(c) in respect of the addition of Rs.48,000/- on account of rental income added in the assessment made by the AO. It was noticed by the AO that the assessee company had given part of business premises on rent to M/s Precision Industrial Moulders, Faridabad, a sister concern of the assessee. M/s Precision Industrial Moulders has claimed the deduction of rent of Rs.48,000/- in Asstt. Year 1995-96. However, the assessee in its return did not declare this income. However, the assessee included this amount in the revised computation of income filed on 3.3.98. Accordingly, addition of

Rs.48,000/- was made by the AO. Assessee did not file any appeal against this addition. The AO then levied the penalty. However, the CIT(A) deleted the penalty by giving identical reasons as given in the case of other additions discussed above.

47. We have heard both the parties and perused the material on record. In this case, the assessee filed its original return of income on 30.11.95 without including therein the aforesaid rental income of Rs.48,000/-. Thereafter, the assessee filed revised return along with the revised computation of income on 20.2.96. The reasons for revising this return as explained by the assessee are - that interest received from income-tax department, and certain other matters relating to the filing of TDS certificate, evidence of payment u/s 35(1), evidence of payment of HGST and interest receivable from various parties were left to be considered while filing the original return. In this first revised return of income filed by the assessee on 22.2.96, the rental income receivable by the assessee from the sister concern was still not disclosed. In the second revised return filed on 27.2.97, the rental income was again not disclosed. The assessee then again filed a letter dated 3rd March, 1998 in reply to the queries raised by the AO on 24.12.97. Along with this letter dated 3rd March, 1998, assessee again submitted third revised computation of income. The revised computation of income filed on 3rd March, 1998 is

placed at pages 35 to 38 of the paper book filed by the assessee. The assessee had also given reasons for revising the computation of income vide Annexure V, which is placed at page No.39 of the paper book. From perusal of the revised computation of income filed along with the letter dated 3.3.98, we find that the assessee had included the sum of Rs.48,000/-, being the rent receivable from M/s Precision Industrial Moulder, Faridabad with the reasons that the rent receivable from M/s Precision Industrial Moulders, Faridabad could not be accounted for in the year ended 31.3.95, amounting to Rs.48,000/-, which has been added to the income in this revised computation. From this, it is clear that the assessee filed this revised computation of income on 3.3.98 only after necessary queries were made by the AO on 24.12.97. Prior to this revised computation of income filed on 03.03.98, the assessee already revised the return twice, first on 22.2.96, and then again on 27.2.97 where this rental income was not offered for taxation. The rent payable by M/s Precision Industrial Moulder, Faridabad was claimed as deduction in their return of income. The fact that the assessee had to receive rent from that sister concern is not in dispute. In the reasons given for revising the computation on 03.03.98, the assessee has merely stated that the rent receivable from M/s Precision Industrial Moulder could not be accounted for in the year ended 31.3.95, without mentioning any

reason or cause as to why and under what circumstances the said rental income left to be included in the original return of income and as well in the revised return filed twice before the income was offered to tax on 03.03.98. In other words, the assessee has not given any explanation as to why this amount was not included in the original return of income and further in the revised returns filed by the assessee prior to 3.3.98. The revised computation of income on 3.3.98 is only after certain queries were raised by the AO on 24.12.97 in the course of assessment proceedings. The assessee has stated in his letter dated 3rd March, 1998 that the assessee's reply dated 3.3.98 is with reference to the AO's queries made on 24.12.97. It, thus, makes it clear that this revised computation of income filed by the assessee was made after enquiry and investigation was made by the AO and not voluntarily. Had it been a bonafide mistake while filing the original return of income, that could have been easily rectified in the revised return of income filed twice before filing this revised return of computation of income on 3rd March,1998. We, therefore, hold that the assessee has disclosed this amount of Rs.48,000/- under compulsion and his conduct is not bonafide. In other words, the disclosure of income by the assessee in the letter dated 03.03.1998 is not bonafide but is as a result of enquiry made by the AO during the assessment proceedings. The various observations and reasons given by us while

sustaining the penalty in respect of the item of Rs.29,25,207/- and Rs.9,26,060/- holds the field even on this point. We, accordingly, reverse the order of learned CIT(A) and restore that of the AO. In other words, the penalty levied by the AO u/s 271(1)(c) in respect of the amount of Rs.48,000/- on account of rental income is upheld.

48. The last addition in respect of which penalty has been levied by the AO is the disallowance of Rs.6629/- on account of excess depreciation claimed. This addition of Rs.6629/- was made by the AO in the light of the WDV worked out in the assessment orders of earlier years, which were rectified u/s 154 vide order dated 30.3.98.

49. The AO levied penalty u/s 271(1)(c), which has been deleted by the CIT(A) by making identical observations as made in other items. With regard to the claim of depreciation, learned AR submitted that depreciation was disallowed consequent to rectification of assessment order of earlier years vide order u/s 154 dated 30.3.98 i.e. one day before the impugned assessment, and, therefore, this addition cannot be a subjected to a penalty.

50. We have heard both the parties and perused the orders of authorities below. We find that disallowance of claim of depreciation is merely consequential to the assessment orders of earlier years, which were rectified u/s 154 on 30.3.95 after the return was filed by the assessee. The adjustment

to the opening WDV of assets is as a result of the WDV finally worked out in earlier years after giving effect to the various orders of earlier years. Therefore, this cannot be considered to be a material where penalty u/s 271(1)(c) can be levied. Therefore, we uphold the order of CIT(A) in canceling the penalty in so far as the disallowance of depreciation of Rs.6629/- is concerned. In other words, the penalty levied by the AO on this item of disallowance of depreciation of Rs.6629/- is cancelled.

51. With regard to the other items on which the AO has levied penalty, we find that the other additions made by the AO in assessment order are no more survived inasmuch as they have been deleted by the appellate authority, and, thus, the question of imposing penalty on those items did not arise.

52. Having regard to the observations made by the AO in the assessment order with regard to the additions made by him and in respect of which no appeal was preferred by the assessee, it is quite discernible that the assessee has failed to disclose true and correct income and their particulars in the return of income filed by the assessee, which fact was sufficient for AO to initiate penalty proceedings u/s 271(1)(c) of the Act. Further, in the light of facts pointed out by the AO in support of making addition of Rs.11,668/- on account of bogus purchases, it is clear that the AO has initiated correctly the

penalty proceedings for furnishing inaccurate particulars of income by the assessee. It is by now well settled that there is no requirement for the AO to record specifically his satisfaction in the assessment order initiating penalty proceedings u/s 271(1)(c) of the Act, but such satisfaction is only required to be discernible form the assessment order reading as a whole. In the present case, this condition is satisfied, as observed above.

53. In the light of the discussions made above, we, therefore, hold that the order of the penalty u/s 271(1)(c) passed by the AO is valid and justified in so far as the following items of additions or disallowances are concerned as discussed and held above:

(i) Rs.11,668/- addition on account of purchases;
(ii) Rs.29,25,207/- on account of set-off of long-term capital loss against business income;
(iii) Rs.9,26,060/- on account of liability no longer required;
(iv) Rs.48,000/- on account of rent receivable.

54. In the result, the appeal filed by the revenue is partly allowed as indicated above.

55. This decision was pronounced in the Open Court on 23rd July, 2010.

(B.C. MEENA)
ACCOUNTANT MEMBER

(C.L. SETHI)
JUDICIAL MEMBER

Dated: 23rd July, 2010

Vijay

Copy to:

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

Assistant Registrar