**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH 'E', NEW DELHI**

**Before Sh. G. C. Gupta, Vice President And Sh. N. K. Saini, AM**

**ITA No. 1324/Del/2013 : Asstt. Year : 2003-04**
**ITA No. 1325/Del/2013 : Asstt. Year : 2004-05**
**ITA No. 1326/Del/2013 : Asstt. Year : 2005-06**

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| M/s Marvel Tea Estate (I) Ltd., VPO, Uklana, Dist. Hisar-125113 | Vs | DCIT, Central Circle Karnal |
| **(APPELLANT)** | | **(RESPONDENT)** |
| **PAN No. AACCM6183D** | | |

**ITA No. 1327/Del/2013 : Asstt. Year : 2004-05**
**ITA No. 1328/Del/2013 : Asstt. Year : 2005-06**

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| M/s Marvel Chemicals (I) Ltd., (Now Renamed as Marvel Global Ltd.), VPO, Uklana, Dist. Hisar-125113 | Vs | DCIT, Central Circle Karnal |
| **(APPELLANT)** | | **(RESPONDENT)** |
| **PAN No. AADCM7626A** | | |

**Assessee by : Sh. K. Sampat & V. Raj Kumar, Advs.**
**Revenue by : Sh. P. Dam Kanunjna, Sr. DR**

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| **Date of Hearing : 24.03.2015** | | **Date of Pronouncement : 22.05.2015** |

## ORDER

**Per N. K. Saini, AM:**

These five appeals by the assessee are directed against the separate common orders each dated 31.01.2013 for the assessment years 2003-04, 2004-05 & 2005-06 relating to the assessee M/s Marvel Tea Estate (I) Ltd. and for the assessment years 2004-05 & 2005-06 relating to M/s Marvel Global (I)

Ltd. passed by the ld. CIT(A), Central, Gurgaon. The issue involved in all these appeals relate to the penalty u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as the Act). The facts are similar and the appeals were heard together to so these are being disposed of by this common order for the sake of convenience and brevity.

2. First we will deal with the appeal in ITA No. 1324/Del/2013 for the assessment year 2003-04. The only effective ground raised in this appeal reads as under:

> *"That on the facts and in the circumstances of the case and in law, the authorities below erred in holding that the Appellant had furnished inaccurate particulars of income, thereby imposing penalty u/s 271(1)(c) of the Act in a sum of Rs. 22,96,875/-"*

3. Facts of the case in brief are that a search and seizure operation was carried out at the business premises of the assessee on 04.09.2008 and thereafter the assessment proceedings u/s 153A of the Act r.w.s 143(3) of the Act were completed after making an addition of Rs. 62,50,000/- on account of paid up share capital in the assessee company. The assessee was confronted with the findings of the Investigation Wing of the Income Tax Department as regards the shareholders who were found not existing at the given addresses. It was therefore implied that those entities were made by the group on paper only to introduce its unaccounted income generated from tea business as bogus share capital.

The assessee on confronting surrendered the amounts involved vide letter dated 10.05.2010, furnished during the course of assessment proceedings, enclosing therein a list of the entities. The AO however proceeded to levy the penalty u/s 271(1)(c) of the Act holding that there was sufficient material and circumstances which lead to the reasonable conclusion that the amount of the share capital introduced during the year represented the assesseeôs income and there was conscious concealment on the part of the assessee. The AO also noted that as the assessee had not preferred appeal against the addition and having paid all due taxes, it was evident that the onus cast upon the assessee remained un-discharged. Accordingly, penalty u/s 271(1)(c) of the act was levied for a sum of Rs. 22,96,875/-.

4. Being aggrieved the assessee carried the matter to the ld. CIT(A) and submitted that it had voluntarily surrendered Rs. 62,50,000/- on account of share capital which was accepted by the AO while passing the order u/s 153A(1)(b) of the Act and that during the assessment as well as the penalty proceedings all relevant evidences/explanation were submitted including the identity proof, PAN, copy of income tax return, MOA, COI form no. 18 & 32 etc. It was further submitted that to prove the creditworthiness, the assessee submitted duly sworn and notarized affidavit from the creditor deposing on oath all those facts as stated in the confirmation. It was further stated that neither the transactions were in cash nor did the assessee deposited cash in its bank account for the

equivalent amount just before issuance of bank draft/cheques and that there was no concealment of income as the surrender had been made on agreed basis. It was also stated that the surrender and non-filing of appeal against addition could not be made the basis of imposing the penalty. The other submissions of the assessee before the ld. CIT(A) as incorporated in para 5.2 of the impugned order are reproduced verbatim as under:

*"5.2. It was further submitted as under:*

*Further confirmation of all the applicants have submitted with other evidences in which they confirmed that they have invested in our shares. As well as duly sworn and notarized affidavit from the applicant deposing on oath all these facts as stated in the confirmation. In the circumstances, all the shares applicants were and are identifiable and creditworthy. The mere facts the Directors of applicant companies are not produced as asked by AO, cannot make the identity of the shareholder doubtful. When documentary evidence was placed on record to prove the identify of all the shareholders including their PAN/GIR numbers and filling of other documentary evidence in the form of ration cara etc. which had neither been controverted nor disproved by the AO, then no further interference, is called for. It is undisputed that all the share applicants has confirmed their investment in the share capital of the appellant company, had given their PAN, were assessed to tax, relied on CIT Vs Makhni and Tyagi (P) Ltd. Reported in 267 ITR 433 (2001).*

*Department has also accepted in assessment order itself that "the details regarding introduction of share application were given through income tax return and as well as through*

*registrar of companies. All the details, regarding share application money were also produced during the year.*

*Further it is well established in various case decisions that the assessing officer cannot make the addition on account of unexplained share capital far the following reasons:*

*i) The applicants concerned were identified.*

*ii) The applicants confirmed the payment of money to the appellant for purchase of shares.*

*iii) The transactions in question were by cheques/bank draft.*

*iv) The affidavit of the subscribers are filed indicating their full address, details of deposits made with the appellant and sources where from money was obtained to make the deposits. Copies of bank accounts were furnished. These affidavits were notarized. There was no ground for disbelieving the contents of the affidavits.*

*v) Subscribers were companies incorporated with the Registrar of Companies. Proper inquiries would have revealed the true facts of the case. The appellant cannot be faulted if there was no limit to rebut.*

*vi) The shares have been allotted to the shareholders and return of allotment has been submitted to the Registrar of Companies.*

*vii) The existence of these companies i.e. deposits of shares application money has also been verified from the website of department of companies' affairs. The existence of the shareholders therefore cannot be doubted.*

*In the assessment order, AO has quoted "assessee also failed to produce affidavit from the directors proving the source of capital introduced and also failed to produce the directors of such companies."*

*Where as we have submitted affidavits from the directors of all companies in which they have confirmed that they have invested in shares of our companies*

*Not only affidavits but confirmations from all the share applicants are also submitted.*

*Further the transactions are related to 6-7 years ago therefore it would take so much time to reconstitute all the things. But no sufficient time has been provided to us to produce directors of the companies and were compelled to take decision of surrender under hectic conditions.*

*Here we also want to submit that:*

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| *No legal obligation on the assessee to produce director* | *Observation like non production of share applicants/affidavits do not support the AO. At the time, we are not in the position to produce directors before AO. If AO want to investigate the existence of companies, they should have to issue notice/summons to the companies' and it is nowhere mentioned in the order whether any notice/summons were issued. In this case assessee cannot be held responsible for non production of directors.* |

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| | *Further there was no legal obligation on the assessee to produce director of other representative of the applicant companies before the AO, as held in the following case:*<br>*In the case of CIT vs. Victor Electronics Ltd. ( supra) ( 2010) 42 DTR (Del) 152, it has been clearly laid down by the Hon'ble Delhi High Court that*<br>*"There is no obligation on the assessee to produce director or representative of the applicant companies before the AO, and therefore, failure of assessee to produce them could not, by itself, have justified the additions made by the Assessing Officer, when the assessee had furnished documents, on the basis of which, the AO, if he so wanted, could have summoned them for verification. Similarly, in the present case, mere because directors of share applicants companies were not found available at the addresses given that by itself is not sufficient for the AO to reject assessee's case when the assessee has furnished all documents relating to share applicants, such as their permanent account no., details of Income- tax assessment,* |

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| | *registration of companies under companies act and bank details." Similar circumstances exist in the case of Income Tax Officer, ward 11(3), New Delhi. Vs. M/s Francotyp Postalia India Pvt. Ltd., ITA No. 671/Del/2010 assessment year 2006-07 where decision of the CIT(A) is uphold by INCOME TAX APPELLATE TRIBUNAL, DELHI BENCH 'B' NEW DELHI in deleting the addition of Rs. 31,80,000/- on account of share application money received by the assessee.* |

*In order to prove that all the share applicants exist, we submit following:*

- *All the companies are incorporated in ROC.*
- *All the applicants have PAN No. and also filling income tax return.*
- *We has furnished permanent account number and copy of Income tax returns of all the share applicants and the same has not been found to be false or untrue by the AO.*
- *All the applicants are assessed by Income tax department for which assessment orders are issued by income tax authorities. Whether this is not the sufficient evidence of existence of these applicants. The AO did not make any verification in this regard either form the internal record of the department or from the concerned bank. If he so wanted, he could have called for the IT*

*returns of the share applicants to ascertain whether the investment made in our company was reflected in their balance sheets or not.*

- *In case of corporate applicants balance sheets are audited by chartered accountants.*
- *Also holding bank account which is quite impossible in absence of existence. The share application money was received by our company by way of bank drafts, through normal banking channels. Nothing prevented the AO from summoning the record of the banks from which bank draft issued by the applicant companies were drawn. No such course was however adopted by him.*

  *AO has not declined that the payment of share application money was not made from the bank account of the applicant companies.*

*We have also filed name and address of directors of applicant companies.*
*Admittedly, copies of application for allotment of shares were also provided to the AO.*

*AO has not declined that the share applications were not signed on behalf of the applicant companies and were forged documents or the shares were not actually allotted to the companies.*

*We have filed copies of resolutions passed by the board of directors of applicant companies, besides their hank statements and IT returns. The addresses of the applicant companies are recorded in these documents.*

*AO has not declined that the copies of board resolutions, IT returns and bank statements were not genuine documents.*

*These companies are active and properly filling their income tax return. Further ROC related compliances are properly complied by these companies which can be verified from ROC website. Then without proper verification, how AO can decide that these companies are not in existence.*

*The AO has merely relied upon the Investigation wing without referring to the evidences or materials on the basis of which it could be said that the companies are bogus. The AO has not made any enquiry from the respective AO assessing those share applicants. The AO has also not made any enquiry from the office of registrar. The AO has also not made any enquiry from the office of ROC about existence of these companies and the details of their directors.*

*As held by ITAT, DELHI F Bench in the case of INCOME TAX OFFICER vs. PURVI FABRICS & TEXTURISE (P) LTD. ITA No. 4382/Del/2009 AY 2001-02 (2010) 47 DTR (Del) (Trib.) 225 that there was no legal obligation on the assessee to produce some directors or other representative of the share applicant companies before the AO and failure of assessee to produce them would not by itself be sufficient to make the addition by the AO particularly when the assessee had furnished documents in support of the genuineness of the share application money received by the assessee.*

*In other decision of the Delhi High Court in case of CIT vs. Victor Electrodes Ltd. in ITA No. 586 of 2010 dated 12th May 2010 [reported at (2010) 42 DTR (Del) 157- Ed.] similar view has been taken by the Hon'ble Delhi High Court that once the details of IT returns, bank statements etc. with regard to the various share applicants have been provided, the mere fact that*

*parties were not produced before the AO was not good enough for making the addition. The Hon'ble Court has held that since the AO had not made any efforts to find out the latest address of the directors and details of these companies, the identity of the share applicants and the genuineness of the transactions were held to be genuine on the basis of records and details submitted by the assessee. The issue was decided in favour of the assessee and against the Revenue. In the present set of facts also the AO has been provided various opportunities through remand proceedings to carry out any inquires or make verifications with regard to PAN and other details of the share applicants. Through letter dated 22nd Feb., 2010 the AO was specifically asked to make any inquires required and issue any summons to different parties for controverting the documents submitted by the Authorised Representative of the appellant regarding the identity and genuineness of the transaction. The relevant portion of the letter of the office of the CIT(A) is as under:*

*Various documents have been enclosed for establishing the identity and genuineness of the transaction. It has also been argued that the facts of the case are similar as that of the AY 2006-07 where the issue has been decided in favour of the appellant.*

*Similar decision held by ITAT DELHI A BENCH in the case of ASSISTANT COMMIS5IONER OF INCOME TAX vs AJNARA INDIA LTD. ITA No. 3612/Del/2010 (2011) 135 TTJ (Del) 430 (2011) 49 DTR 273*

*Madam, there was no attempt made by the AO to summon the director of the applicant companies. The addresses of these companies are available on the share application forms, memorandum and articles of association and their IT returns. If the AO had any doubt identity of the share applicants, he could*

*have summoned the directors of the applicant companies. No such attempt was, however, made by him.*

*Similarly in the case of SOPHIA FINANCE LIMITED it has been held that if the shareholders are identified and it is established that they have invested money for the purchase of shares, then the amount received by the company would be regarded as a capital receipt. It is further submitted that from all the material placed on record by us, there is no doubt that we have fulfilled the onus of establishing the source of share capital, genuineness of the transaction and the credit worthiness of the shareholder.*

*With reference to the genuineness of the transaction it is submitted that the payments were received by account payee cheques/bank draft only. A perusal of the bank statement of the investor company makes it clear that it had made many such transaction during the year under assessment and that this was not the only transactions that had taken place during the year.*

*With reference to creditworthiness it is submitted that the assessee company was not required to prove the source as has been held in the case of Daulatram Rawatmull 1972 CTR (SC) 411 (1973) 87 ITR 349 (SC). It is further submitted that the applicability of section 68 of the Act to the share capital is very limited as has been held in the case of CIT vs. SOPHIA FINANCE LMITED (1993) 113 CTR (Del) 472 (1994) 205 ITR 98 (Del). Since the amount has been deposited through the normal banking channel, their creditworthiness could not be doubted in view of the decision in Sophia Finance Co., case Supra. Therefore no addition is called for in the hands of the assessee.*

*On being perusal of assessment order, we found that AO has drawn adverse inference from offer of surrender. We have*

*surrendered this amount only for peace of mind with the condition of no penalty therefore such addition cannot be a basis to treat us having concealed particulars of income or having furnished inaccurate particulars of income. It is quite wrong that there was wrong intention because the entire share capital stood disclosed to the department as having been entered in the. regular account books maintained by our company prior to the date of search on 04.09.2008, under section 132 against Marvel Tea Estate (I) Ltd., as per details given by the AO himself in assessment order u/s 153A(1)(b) of IT Act, 1961.*

*The details of shareholders were filed before the ROC, New Delhi and therefore, the AO has no reason to treat the share capital as undisclosed income of assessee. Therefore, there was no concealment on our part. The levy of penalty without any material against assessee is unwarranted and inconsistent with the provision of law.*

*In this regard, in order to substantiate our fact, we submit as follows: There is no concealment of Income*
*In order to levy the penalty u/s 271(1)(c) of the Act, following conditions should be satisfied.*

*If any person has*

a) *Concealed the particulars of his income, or*
b) *Furnished inaccurate particulars of his income*
c) *Concealed the particulars of fringe benefits, or*
d) *Furnished inaccurate particulars of such fringe benefits.*

*But in our case:*

a) *There was no any concealment of income*

*b) We have not furnished any inaccurate particulars of income. We have only surrender the amount for peace of mind subject to no penalty. But Ld. Income Tax Authority has accepted the 1st condition of surrender but not considered the 2nd condition of no penalty.*

*c) There was no any concealment of fringe benefits.*

*d) We have not furnished any inaccurate particulars of fringe benefits.*

*Leaving aside the technically or legality of the matter, it is submitted with due regards that, it is not out of place to submit that at the time of completing assessment, surrender was offered only to buy peace of mind and with the precondition that we will not be liable for any panel action in respect of the same. It is also amply clear from our stand which we took as per mutual agreement that we did not file any appeal before any appellate authority against the addition made as we were under bonafide belief that no penalty proceedings shall be initiated as mutually agreed and discussed with regard to the surrender made. We have paid the full taxes on the demand created on the addition made. Hence keeping in view our discussions and our commitment, penalty should not be levied.*

*Further, Assessee relied on a plethora of cases to submit that there was no concealment in regard to the share capital. The same was duly shown in the balance sheet filed with income tax return in Income Tax Deportment for the relevant year.*

*The offence of concealment is a direct attempt to hide an item of income or a portion thereof from the knowledge of IT authorities. In the present case we have not concealed the amount of share capital and proper details were given to income tax department through income tax return and as well as Registrar of companies. All the details regarding share*

*capital were also produced during the assessment proceedings and penalty proceedings.*

*We have surrendered during assessment proceedings despite of the fact that we have all documentary evidences of share capital just to purchase peace with a condition that no penalty proceedings will be initiated. Interest and tax on this surrendered amount itself was so heavy that it was like penalty and further imposition of penalty has ruined the humble petitioner because practically there was no concealment except a compromise to avoid litigation.*

*Further it is important to mention here that our books of accounts have been scrutinized u/s 143 (3) for "the assessment year 2003-04 by the Addl. Commissioner of Income Tax, Hisar and he has properly verified each and every detail of share applicants and made no any doubt regarding existence of share applicants. Further it is no worthwhile to mention that our books of accounts are also scrutinized u/s 143(3) for the AY 2004-05 and 2005-06. All the details regarding share capital of the company are duly verified by Ld. Income Tax Authorities in each year. Therefore there is no question arises regarding concealment of income."*

5. The assessee also contended that the surrender was on agreed basis and was conditional and also submitted as under:

*"Thus in the light of all above facts placed before you, it is well settled that under the situation as in our penalty could not be levied. There is no accuracy in the fact that there is any concealment of any income. At a certain point of time, with a view to avoid litigation and to buy peace of mind we agreed to surrender the amount subject to no penalty and paid tax on such income. We also paid whole the demand of penalty. We*

*only want to channelize the energy and our resources towards productive work and to make amicable settlement with the department that is why we offered to surrender the amount as income subject to condition that offer is by way of voluntarily disclosure without admitting any concealment and subject to no initiation of penalty."*

6. The ld. CIT(A) after considering the submissions of the assessee observed that the penalty u/s 271(1)(c) of the Act is to be levied if the assessee has concealed particulars of income or had furnished inaccurate particulars of such income. He further observed that the assessee introduced its share capital through certain companies, despite knowing the fact that those companies were existing only in paper. The ld. CIT(A) mentioned that no doubt the share capital was raised in the assessment years 2003-04, 2004-05 and 2005-06 which had been disclosed in its returns of income filed u/s 139(1) of the Act and those returns were also assessed u/s 143(3) of the Act. However, the entire activity came to light only after a search was conducted on the assessee group of companies and consequent to which proceedings were initiated u/s 153A of the Act. The ld. CIT(A) pointed out that as per the provisions of section 153A(1) of the Act, once the assessee is subjected to the process of section 132(1) of the Act, the AO has to assess the total income of the assessee and while determining the same, he has to consider both the disclosed and the undisclosed income. The ld. CIT(A) observed that there is no condition u/s 153A of the Act that the additions should be made on the basis of evidence found in the course of search or

the post search materials or information available with the AO which could be relatable to evidence found, therefore, the information in the original assessment was of no consequence as assessment was framed de-novo in respect of the income escaping tax. The ld. CIT(A) further observed that the imposition of penalty was not dependent on the consent or otherwise of the assessee on the basis of an agreed surrender, what was germane was the facts of the case leading to the conclusion that the assessee had consciously acted to conceal and file inaccurate particulars of its income. The ld. CIT(A) observed that the assessee was confronted with the findings of the Investigation Wing during the assessment proceedings and requiring him to file full evidence of the additions to its share capital and to produce the directors of the investor company with affidavits for verification but the same was not complied with, which persuaded the assessee to voluntarily surrender the amount of Rs. 65,00,000/-, Rs. 40,00,000/- and Rs. 15,00,000 for the assessment years 2003-04, 2004-05 and 2005-06 respectively vide letter dated 10.05.2010. The ld. CIT(A) further observed that it was by virtue of investigation carried out by the department regarding various companies used to make accommodation entries and assesseeôs inability to produce the directors of the companies who had invested in its shares, during the subsequent proceedings that led to the assessee coming forward to accept the introduction of its unaccounted money as share capital through these entities. The ld. CIT(A) also observed that the surrender

letter was filed by the assessee consequent to further query by the AO. So, there was no requirement of further investigation by the AO as challenged by the assessee, when the findings of the Investigation Wing were available and assessee suo-moto had came forward with the surrender letter. Accordingly, the penalty levied by the AO was confirmed.

7. Now the assessee is in appeal. The ld. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that all the documents relating to the introduction of share capital in the assessment years 2003-04, 2004-05 and 2005-06 were furnished before the AO during the course of regular assessment proceedings and the AO after proper verification, framed the assessment u/s 143(3) of the Act. The ld. Counsel for the assessee referred to the page no. 8 of the penalty order dated 28.03.2011 and submitted that the assessee proved the identity and the existence of the company by furnishing the following documents:

- *Proof of filing of income tax return in the shape of ITR*
- *Application for investment in shares.*
- *Proof of allotment of shares made by the assessee company in shape of Form No. 2 and receipt of ROC.*
- *Affidavit for investing in equity shares of the assessee company.*
- *Copy of bank statement of both sides.*
- *Copy of MOA*
- *Copy of certificate of Incorporation.*

It was further submitted that the aforesaid documents were also furnished during the course of assessment proceedings u/s 153A(1)(b) of the Act, which established that all the companies were genuine. It was also submitted that the AO asked the assessee to furnish the names and addresses of all the persons from whom the share capital money was raised, details of amount with their PAN, copy of IT returns, copy of receipt along with date. It was stated that the assessee furnished all the requisite information and discharged the onus cast upon it. It was further stated that the payments were received by account payee cheques and that the bank account statement of the investor company made it clear that many such transactions were made during the year and it was not the only transaction that had taken place during the year, therefore, only on the basis that the assessee surrendered the amount, it was not sufficient to levy the penalty u/s 271(1)(c) of the Act. It was submitted that section 271AAA of the Act has been inserted w.e.f 01.04.2007 and Sub-section (3) of the said section provides that no penalty under the provisions of clause (c) of Sub-section (1) of section 271 of the Act shall be imposed upon the assessee in respect of undisclosed income where search has been initiated u/s 132 of the Act on or after the 1st day of June, 2007. It was further submitted that the penalty was not leviable u/s 271(1)(c) of the Act because the search took place on 04.09.2008 and that the penalty, if any was to be levied, it was leviable u/s 271AAA of the Act. It was contended that in the instant case no penalty was leviable

as per the provisions of Sub-section (2) of section 271AAA of the Act because the assessee substantiated the manner in which the amount on account of share capital was received and gave all the information during the course of assessment proceedings, therefore, the penalty u/s 271(1)(c) of the Act levied by the AO and sustained by the ld. CIT(A) was not justified.

8. In his rival submissions that the ld. DR strongly supported the impugned order passed by the ld. CIT(A) and reiterated the observations made in the penalty order by the AO as well as in the impugned order of the ld. CIT(A).

9. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the assessee disclosed all the information relating to the increase in share capital i.e. the form of application for investment in shares, proof of allotment of shares in the shape of Form No. 2 and receipt of ROC, affidavit for investment in equity share of the assessee, copy of bank statement of the assessee as well as the investor, copy of memorandum of Association, copy of certificate of incorporation and proof of filing of the Income Tax Returns by the investor. Therefore, it cannot be said that the assessee concealed any particulars or information relating to the share applications from the department. The aforesaid fact has also been

admitted by the AO at Page No. 11 of the penalty order wherein he has mentioned as under:

> *"The fact that despite providing the details like proof of Income Tax Return, PAN, copy of certificate of incorporation, MOA etc., the assessee chose to surrender the introduction of share capital being bogus. If this was not the case, he would not have produced a letter of surrender during the assessment proceedings. What more is pertinent to note that it was as a result of investigation carried out by the Department that the assessee was forced to furnish a letter of surrender by accepting that the share capitals introduced by him was his own unaccounted money given the colour of genuineness through various entities. It is simple that nobody will offer any amount for taxation unless it has been generated through unaccounted sources."*

10. From the aforesaid observation of the AO, it is clear that whatever was added that was the result of investigation carried out by the Investigation Wing of the Department. However, the AO during the course of regular assessment proceedings u/s 143(3) of the Act was fully satisfied with the explanation of the assessee and no addition was made in spite of the fact that all the information relating to increase in share capital were furnished by the assessee. So, it cannot be said that the assessee concealed any information or particulars from the department. It is well settled that penalty proceeding and assessment proceedings are two different and distinct proceedings. In such type of cases, there can be many reasons for making the surrender but the surrender itself is not a conclusive proof of concealment of income or furnishing of inaccurate

particulars of income. In the present case, it is also noticed that the AO levied the penalty u/s 271(1)(c) of the Act. However, for levying the penalty in search cases the Finance Act, 2007 inserted section 271AAA of the Act w.e.f 01.04.2007. The said section read as under:

*"271AAA*

*(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of June, 2007 (but before the 1st day of July, 2012), the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.*

*(2) Nothing contained in sub-section (1) shall apply if the assessee,—*

*(i ) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;*

*(ii ) substantiates the manner in which the undisclosed income was derived; and*

*(iii ) pays the tax, together with interest, if any, in respect of the undisclosed income.*

*(3) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).*

*(4) The provisions of sections 274 and 275 shall, so far as may be, apply in relation to the penalty referred to in this section."*

11. From the plain reading of Sub-section (1) of section 271AAA of the Act, it is clear that the penalty under this section may be levied if a search action is taken u/s 132 of the Act on or after first day of June, 2007 but before the first day of July, 2012 (as inserted for the Finance Act, 2007 w.e.f 01.04.2007). However, Sub-section (3) of section 271AAA clearly states that no penalty under the provisions of clause (c) of Sub-section (1) of section 271 of the Act shall be imposed upon the assessee in respect of the undisclosed income referred to in Sub-section (1) i.e. the undisclosed income found after the search, the word ñshallò used in Sub-section (3) to section 271AAA of the Act makes it mandatory, therefore, the penalty u/s 271(1)(c) of the Act was not leviable in the present case. Therefore, it can be said that the AO wrongly invoked the provisions of section 271(1)(c) of the Act and levied the penalty under said section. In the present case, since the search took place on 04.09.2008 i.e. after first day of June 2007, therefore, penalty if any was leviable that was to be levied u/s 271AAA of the Act but not u/s 271(1)(c) of the Act. We, therefore, considering the totality of the facts and the provisions contained in section 271AAA of the Act are of the view that the penalty levied by the AO u/s 271(1)(c) of the Act was not justified and the ld. CIT(A) wrongly upheld the penalty levied by the AO. In that view of the matter, we set aside the impugned order and delete the penalty levied by the AO u/s 271(1)(c) of the Act.

12. The facts for the assessment years 2004-05 and 2005-06 in ITA Nos. 1325 & 1326/Del/2013 in the case of M/s Marvel Tea Estate (I) Ltd. i.e. the assessee and in ITA Nos. 1327 & 1328/Del/2013 in the case of M/s Marvel Global Ltd., VPO Uklana, Distt. Hisar are similar to the facts involved in ITA No. 1324/Del/2013 are similar, therefore, our findings given in the former part of this order shall apply *mutatis mutandis* for these appeals also.

13. In the result, the appeals filed by the assessees are allowed.

(Order Pronounced in the Court on 22/05/2015)

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|---|---|
| **Sd/-** | **Sd/-** |
| **(G. C. Gupta)** | **(N. K. Saini)** |
| **VICE PRESIDENT** | **ACCOUNTANT MEMBER** |

**Dated: 22/05/2015**
*Subodh*
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR**