®

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated this the 13th day of December, 2012

PRESENT

THE HON'BLE MR. JUSTICE N KUMAR

AND

THE HON'BLE MR. JUSTICE ARAVIND KUMAR

ITA No. 2564/2005
C/w
ITA No.2565/2005,
ITA No.5020/2009,
ITA No. 5022/2009,
ITA No. 5023/2009,
ITA No. 5025/2010
and
ITA No. 5026/2010

In ITA No.2564 of 2005

BETWEEN:

1. The Commissioner of Income Tax
C. R. Building
Gulbarga

2. The Income Tax Officer
Ward-I
C. R. Building
Bellary ...Appellants

(By Sri Y.V. Raviraj, Advocate)

AND:

M/s. Manjunatha Cotton and
Ginning Factory
Andral Road
Bellary ...Respondent

(By Sri A. Shankar, Advocate)

This ITA filed under Section 260A of I.T. Act, 1961 arising out of order dated 21-12-2005 passed in ITA No.1307/Bang/2003 for the Assessment year 2000-01, praying to (i) formulate the substantial question of law stated therein; (ii) allow the appeal and set aside the order passed by the ITAT, as prayed for therein.

In ITA No.2565 of 2005

BETWEEN:

1. The Commissioner of Income Tax
C. R. Building
Gulbarga

3. The Income Tax Officer
Ward-I
C. R. Building
Bellary ...Appellants

(By Sri Y.V. Raviraj, Advocate)

AND:

M/s. Manjunatha Ginning
and Pressing
Andral Road
Bellary ...Respondent

(By Sri A. Shankar, Advocate)

This ITA filed under Section 260A of I.T. Act, 1961 arising out of order dated 21-12-2005 passed in ITA No.1306/Bang/2003 for the Assessment year 2000-01, praying to (i) formulate the substantial question of law stated therein; (ii) allow the appeal and set aside the order passed by the ITAT, as prayed for therein.

IN I.T.A. NO. 5020 of 2009

BETWEEN:

1. The Commissioner of Income-Tax,
   C.R.Building, Navanagar,
   Hubli.

2. The Assistant Commissioner of
   Income-Tax, Circle – 1,
   Bellary. ...Appellants.

(Sri Y.V.Raviraj, Advocate)

AND:

M/s.Veerabhadrappa Sangappa & Co.
No.2/138, Bellary Road,
Sandur, Bellary. ...Respondent

(Sri Chaitanya K.K., Advocate)

This ITA is filed under Section 260-A of the Income Tax Act, 1961, praying to set aside the order passed by the Income Tax Appellate Tribunal, Bangalore Bench, in ITA No.1359/Bang/2008 dated 9.4.2009 and etc.

In ITA No.5022/2009:

BETWEEN:

1. The Commissioner of Income Tax,
Central Circle, C.R.Building,
Queens Road, Bangalore.

2. The Assistant Commissioner of
Income Tax,
Central Circle – 2(2),
Bangalore. ...Appellants

(By Sri Y.V.Raviraj, Advocate)

AND:

M/s.V.S.Lad & Sons,
Prasanth Nivas,
Krishna Nagar,
Sandur, Bellary. ...Respondent

(By Sri K. P.Kumar, Senior Counsel for
M/s King & Partridge)

This ITA is filed under Section 260-A of the Income Tax Act, 1961 against order dated 09.04.2009 passed in ITA No.1027/BANG/2008 on the file of the Income Tax Appellate Tribunal, Bangalore, and confirming the order of the Appellate Commissioner and confirm the order passed by the Assistant Commissioner of Income Tax, Circle–1, Bangalore for the assessment year 2004-05.

In ITA No.5023/2009:

BETWEEN:

1. The Commissioner of Income Tax,
Central Circle, C.R.Building,
Queens Road, Bangalore.

2. The Assistant Commissioner of
Income Tax,
Circle – 1, Bellary. ...Appellants

(By Sri Y.V.Raviraj, Advocate)

AND:

M/s.V.S.Lad & Sons,
Prasanth Nivas,
Krishna Nagar,
Sandur, Bellary ...Respondent

(By Sri K.P.Kumar, Sr.Counsel for
M/s.King & Partridge)

This ITA is filed under Section 260-A of the Income Tax Act, 1961 against order dated 09.04.2010 passed in ITA No.1026/BANG/2008 on the file of the Income Tax Appellate Tribunal, Bangalore, and confirming the order of the Appellate Commissioner and confirm the order passed by the Assistant Commissioner of Income Tax, Circle–1, Bangalore for the assessment year 2003-04.

In I.T.A. No.5025/2010

BETWEEN:

1. The Commissioner of Income Tax,
   C.R.Building, Navanagar, Hubli.

2. The Income Tax Officer,
   Ward No.1, Bagalkot. ...Appellants

(BY Sri.Y.V.Raviraj, Advocate)

AND:

M/s.G.M.Exports,
Marawadigalli,
Ilkal, Tq:Hunkund,
Dist: Bagalkot. ...Respondent

(By Sri Sangram S.Kulkarni, Advocate)

This ITA is filed under Section 260-A of the Income Tax Act, 1961, against the order dated 30.11.2009 passed in I.T.A. No.135/PNJ/2008 on the file of the Income Tax Appellate Tribunal, Panaji Bench, Panaji, partly allowing the appeal and confirm the order passed by the Income Tax Officer, Ward-I, Bagalkot, for the assessment year 2003-04.

In I.T.A. No.5026/2010

BETWEEN :

1. The Commissioner of Income Tax,
   C.R.Building, Navanagar, Hubli.

2. The Income Tax Officer,
Ward No.1, Bagalkot. ...Appellants

(By Sri.Y.V.Raviraj, Advocate)

AND:

M/s.G.M.Exports,
Marawadigalli,
Ilkal, Tq:Hunkund,
Dist: Bagalkot. ...Respondent

(By Sri Sangram S.Kulkarni, Advocate)

This ITA is filed under Section 260-A of the Income Tax Act, 1961, against the order dated 30.11.2009 passed in I.T.A. No.136/PNJ/2008 on the file of the Income Tax Appellate Tribunal, Panaji Bench, Panaji, dismissing the appeal filed under Section 271(1)(c).

These ITAs coming on for further hearing this day, ***N. KUMAR J*** delivered the following:

J U D G M E N T

A batch of appeals where different facets of Section 271 of the Income Tax Act, 1961 are involved, were placed before us. Therefore, we heard all the learned counsel appearing in the batch of cases, considered all the arguments addressed and interpreted Section 271 in its different facets and have laid down the law.

FACTUAL MATRIX
FACTS IN ITA Nos. 2564 & 2565/2005

2. The facts of this case are as under:-

The assessee – firm in ITA No. 2564/2005 is in the business of purchasing kapas and converting it into cotton in the ginning factory owned by it and trades in cotton and cotton seeds. The assessee had filed the return of income for the assessment year 2000-01 declaring total income of Rs.2,29,520/-. A survey under Section 133A of the Income Tax Act (for short hereinafter referred to as 'the Act') was conducted in the business premises of the assessee on 23.11.2000. During the course of survey, a notebook was found in the business premises of the assessee, wherein certain transactions carried were noted. These transactions pertains to four cases showing names and amounts. The total of the transactions amounted to Rs.7,98,200/-. The partner of the assessee - firm explaining those entries stated that the transactions noted in the book relate to the book

creditors for which there are no liability. The assessee was called upon to file confirmation letters of credit balance of certain creditors. The same was not filed by the assessee. The department obtained a letter from the creditor who stated that it had no transaction with the assessee during the financial year relevant to the assessment year 2000-01 and informed the department that no balance is receivable from the assessee. Therefore, the explanation offered by the assessee was not accepted, the said income was brought to tax. The assessee admitted the said sum of Rs.7,98,200/- as income by filing the revised return of income on 08.12.2000 for the assessment year 2000-2001, declaring the total income of Rs.10,40,100/-.

3. Likewise in I.T.A.2565/2005, the assessee had filed the return of income for the assessment year 2000-2001 declaring total income of Rs.1,49,250/-. The assessee during the course of survey declared Rs.17,03,731/- as income representing cessation of liabilities towards creditors. In the

course of the assessment proceedings, the assessee was asked to file confirmation letter in respect of the creditor M/s. Sri.Gururaghavendra Cotton Ginning Factory, Bellary against whom Rs.1,00,000/- credit balance was outstanding. The assessee was requested to get the confirmation letter, to which the assessee expressed its inability. The department directly wrote a letter to the said creditor. The creditor in his reply dated 14.02.2003 stated that there is no balance receivable from the assessee. When the assessee was confronted with the said letter, he asserted that the said amount was outstanding at the end of the accounting period ended on 31.03.2000 in the books and the creditor may have stated on the date of enquiry. His explanation was not accepted and an addition of Rs.1,00,000/- was made. Thereafter the assessee filed a revised return of income on 8-12-2000 declaring the total income of Rs.18,52,980/-.

4. In view of the assessees having admitted to declare the amounts above referred to as income

representing cessation of liabilities towards creditors, these amounts were added as income of the assessee and tax demand was raised thereto vide assessment orders dated 26.02.2003. Assessee did not pursue the said orders and accepted the quantum proceedings. It is on the basis of the said revised return, the additions were made.

5. Therefore, notice under Section 274 read with Section 271(1)(c) of the Act was issued to the assessee to explain why penalty should not be levied for having concealed particulars of income/showing inaccurate particulars of income. The assessee contended that the said amounts were paid to the agriculturists towards purchase of Kappas, which was noted in the rough cash book and the entries were yet to be entered in the cash book at the time of survey. To buy peace with the Department, they have voluntarily agreed to declare the said sums towards cessation of the creditors liabilities and that accordingly as per the instructions of authorities, they filed revised return

of income for the assessment year 2000-01 on 08.12.2000. Though the survey was made on 23-11-2000 during the financial year 2000-01 relevant to the assessment year 2001-02, they had paid taxes for the assessment year 2000-01 itself and co-operated with the department in Survey and assessment proceedings to keep good relations. Assessing Officer found that reply was not convincing and did not accept the same and as such minimum penalty of Rs.3,14,370/- and Rs.5,96,310/- was levied in terms of Section 271(1)(c) of Income Tax Act, 1961.

6. Aggrieved by the said order of levy of penalty, both the assessees filed appeals before C.I.T (Appeals), Gulbarga, in ITA No.64-65/03-04/BLY. The Appellate Authority by separate orders dated 18.02.2004 confirmed the levy of penalty and dismissed the appeals filed by the assessees. Being aggrieved by these orders, assessees preferred further appeals in I.T.A.No.1306 &1307/BANG/03 before Income Tax Appellate Tribunal Bangalore Bench. The

Tribunal accepted the explanation offered by the assessee and held penalty cannot be levied on inference and allowed the appeals filed by the assessees and deleted the levy of penalty. Thus, revenue has filed these two appeals questioning the orders of the Tribunal dated 21.12.2004.

FACTS IN ITA NO.5020 OF 2009

7. The assessee M/s.Veerabhadrappa Sangappa & Co., is a partnership firm carrying on the business of Mining & Processing of iron ore and sale and export. For the assessment year 2003-04, they filed a return declaring an income of Rs.1,17,53,980/-. The return filed was processed and the assessment was completed under Section 143(1) of the Act on 20.01.2005. On 01.02.2006, a survey was conducted under Section 133A of the Act and information was collected under Section 133(6) of the Act. The statutory returns, which were filed by the assessee, when compared with the stock position reflected in Form 3(c)(b) disclosed a difference of 3,01,240 metric tons. On 27.02.2006, a

notice under Section 148 of the Act was issued for re-opening of the assessment. On 05.05.2006 the assessment was completed under Section 143(3) read with Section 147 of the Act. The assessee contended that it was handling bulk material and there were no facilities to weigh the ore in such quantity and stock records were maintained on estimate basis. Therefore, to ward off litigation and to buy peace in the Department, the assessee agreed that they had in stock, ores of such magnitude. Accordingly, an addition of Rs.4,98,38,000/- being the value of 3,98,704/- metric tons was made under Section 69 of the Act. Simultaneously, the proceedings under Section 274 read with Section 271(1)(c) of the Act was initiated on 01.01.2006.

8. The assessee preferred an appeal as against the assessment order. The Appellate Authority came to the conclusion that there was stock outside the books of accounts, the fact of which was accepted by the assessee also and the assessee has been producing more iron ore

than what is being shown as produced in the books of accounts. Therefore, he held addition made under Section 69 of the Act is unsustainable. However, he made the addition as closing stock/suppressed stock of 3,98,704 metric tons. Thus he gave relief to the extent of Rs.1,47,29,052/- and the value of the suppressed stock of ore, which was added was Rs.3,51,08,948/-. To purchase peace, the assessee agreed to pay the tax and had not challenged the order of the Appellate Authority. Even after the said order of the Appellate Authority, the Assessing authority proceeded with the penalty proceedings initiated on 05.05.2006. The assessee filed his objections to the same on 26.02.2007 contending that the Assessing Officer has not recorded satisfaction about the assessee furnishing inaccurate particulars or concealing the income. Addition made under Section 69 of the Act at Rs.4,98,39,000/- has not been accepted by the Appellate Authority, who also had not agreed with the valuation of stock done by the assessing authority. The assessing authority's satisfaction to impose

penalty was on the basis of the additions made by him under Section 69 as investments made outside the books, which has been set-aside by the Appellate Authority and therefore, he contended that penalty proceedings have to be dropped. Overruling all the objections by an order dated 14.03.2007, imposing penalty of Rs.1,22,88,132/- was passed. The assessing authority observed in his order that the Appellate Authority had confirmed the quantity of stock suppressed by the assessee, which was outside books of accounts based on the materials collected by the Assessing Authority. The only change suggested by the Appellate Authority was the method of computation of the concealed income. Aggrieved by the said order, the assessee preferred an appeal to the Appellate Authority. The Appellate Authority confirmed the said order of penalty by its order dated 22.07.2008.

9. Aggrieved by the said order, the Assessee preferred an appeal to the Tribunal. The Tribunal held that on perusal of the notice issued under Section 271(1)(c) of the

Act, it is clear that it is a standard proforma used by the Assessing Authority. Before issuing the notice the inappropriate words and paragraphs were neither struck off nor deleted. The Assessing Authority was not sure as to whether she had proceeded on the basis that the assessee had either concealed its income or has furnished inaccurate details. The notice is not in compliance with the requirement of the particular section and therefore it is a vague notice, which is attributable to a patent non-application of mind on the part of the Assessing authority. Further, it held that the Assessing Officer had made additions under Section 69 of the Act being undisclosed investment. In the appeal, the said finding it set-aside. But addition was sustained on a new ground, that is under valuation of closing stock. Since the Assessing Authority had initiated penalty proceedings based on the additions made under Section 69 of the Act, which was struck down by the Appellate Authority, the initiated penal proceedings, nolonger exists. If the Appellate Authority had initiated

penal proceedings on the basis of the addition sustained under a new ground it has a legal sanctum. This was not so in this case and therefore, on both the grounds the impugned order passed by the Appellate Authority as well as the Assessing Authority was set-aside by its order dated 9th April, 2009. Aggrieved by the said order, the present appeal is filed.

In ITA Nos.5022 and 5023 of 2009

10. The assessee M/s.V.S.Lad & Sons is a partnership, firm carrying on the business of mining, processing of iron ore, its sale and export. For the assessment year 2003-04, the Assessing Officer made additions of Rs.55,74,02,205/- and for the assessment year 2004-05 a sum of Rs.19,14,73,408/- under Section 69 of the Act being undisclosed stock and concluded the assessment accordingly. Thereafter, the Assessing Authority simultaneously initiated penal proceedings under Section 271(1)(c) of the Act. Against the aforesaid additions, the assessee preferred appeal to the Commissioner of Income tax

(Appeals). The Appellate Authority held that the Assessing Authority had not brought any evidence of any expenditure outside books of accounts, so as justify the additions under Section 69. Therefore, he set aside the said additions. However, he found that there is a stock outside books of accounts. It has to be valued and brought to tax. Therefore, held that the closing stock for assessment purpose should also be taken as 5.74,715 tons. When valued at a rate of Rs.87.50 per ton, the value of closing stock would be Rs.5,02,87,562/-. The value of closing stock disclosed in return of income is Rs.80,87,110/-. Therefore, the total addition on account of un-accounted stock would be Rs.4,22,00,452/-. This is the sum which should be brought to tax as the value of un-accounted stock. Likewise, even for the assessment year 2004-05, the Appellate Authority held that, all the factual/legal arguments for assessment year 2004-05 are exactly the same as discussed in detail for the assessment year 2003-04. His findings are also the same. Therefore, he held, even if a finding is given for assessment

year 2003-04, there is no case for invocation of Section 69 is made out. There is no evidence that the assessee had invested un-accounted monies in acquiring the stock of 8,11,328 tons and after verifying and analyzing the pros and cons of the issue, the Appellate Authority held the total addition for un-accounted stock will amount to Rs.8,06,44,608/-, i.e., the sum which should be brought to addition as value of stock produced outside the books of accounts. Therefore, he directed the Assessing Authority to make the addition of Rs.8,06,44,608/-, instead of sum of Rs.19,14,73,408/-. Accordingly, the additions made by the Assessing Authority were deleted by the Appellate Authority. But under valuation of the closing stock has been brought to tax under a different head. In essence, the disallowances made by the Appellate Authority were on different grounds.

11. Acting on the said finding recorded by the Appellate Authority, the Assessing Authority in the penalty proceedings initiated under Section 271(1) (c) of the Act

initially on the basis of the assessment order passed by him proceeded with the same proceedings and imposed the penalty on the basis of the order of the Appellate Authority. Aggrieved by the said order, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The Appellate Authority directed the cancellation of the penalty levied. Aggrieved by the said order, the Revenue preferred an appeal before the Tribunal. The Tribunal held the initiation of the penal proceedings should have been made on the new grounds and that too by the Appellate Authority, Gulbarga who made the orders of disallowances by upholding the disallowances on different grounds for both the assessments years under dispute. This was not so. That being the situation, they declined to interfere with the order passed by the Appellate Authority who has cancelled the levy of penalty. Aggrieved by the said order, the Revenue has preferred this appeal.

ITA Nos.5025 and 5026 of 2010

12. The assessee M/s. G.M. Exports is a partnership firm, which is engaged in the business of manufacture of trading of processed dimensional granite blocks. It is also engaged in the business of dealing in import of ceramic tiles. Return of income for the assessment year 2003-04 was filed on 28.11.2003 declaring a total income of Rs.3,62,590/-. For the assessment year 2004-05 the return was filed on 29.10.2004 declaring the total income of Rs.4,78,649/-. The returns were processed under Section 143(1) of the Act on 13.02.2004 for the assessment year 2003-04 and on 25.01.2005 for the assessment year 2004-05. Subsequently, the returns were taken up for scrutiny. The additional DIT Investigation Unit-I at Bangalore forwarded certain information on account of a search conducted under Section 132 of the Act at the assessee's premises on 10.04.2003 stating that the assessee - Firm was under-invoicing and mis-declaring their import of ceramic tiles. It is stated that the assessee had changed the invoice and description in the

Bill of Entry after it was assessed by the Customs. The assessee was asked to submit his explanation. Thereafter, the assessing authority recorded a finding that the assessee received excess stock, the sources of which required to be explained by the assessee. The assessee filed his reply on 20.03.2006 offering his explanation. The assessing authority was not convinced and therefore, the assessing authority proceeded with the assessment order and added amounts of Rs.16,35,726/- and 18,76,678/- to the total income of the assessee being the excess stock for the tiles imported by the assessee under two bills of entry during the year, treating the same as unexplained investment.

13. The said addition was challenged by the assessee in an appeal before the Commissioner of Income Tax (Appeals). In the meanwhile, the matter relating to valuation of the tiles imported by the assessee under Section 14 of the Customs Act came to be decided by the Customs Excise and Service Tax Appellate Tribunal, wherein a part

relief was allowed to the assessee by reducing the valuation by Rs.15,98,076/-, accepting the contention of the assessee that excess quantity was supplied by the foreign parties to adjust the higher value of American Dollar per square meters. In the invoice, against the actual rate, a higher value of US $8.50 per sq. ft. was charged as against US $6.50 per sq. ft. Relying on the aforesaid judgment, the appellate authority allowed relief of Rs.15,98,076 to the assessee and restricted the addition to Rs.35,12,404 made by the assessing authority to Rs.19,14,328/-. The assessee accepting the said decision, did not prefer any appeal and paid the tax. Similar relief was granted for the subsequent years 2004-05.

14. Thereafter, a show cause notice was issued under Section 271(1)(c) based on the orders passed by the Appellate Authority. Penalty proceedings were initiated. Explanation was also sought from the assessee in respect of the addition of Rs.2,92,448/- on account of difference in the

credit balance appearing in the name of M/s. Mysore Minerals Limited in the books of accounts of the assessee-company and as shown by the assessee in its books of accounts. The assessee replied contending that the said addition was made in the assessment on agreed basis and therefore, there was no justification to impose penalty under Section 271(1)(c) in respect of the said addition. Insofar as the excess quantities are concerned it was contended that a notional valuation adopted under the customs valuation rules could not be taken as a basis to allege any concealment of his income from the assessee. There was nothing available on record to show that any extra payment either in the books or outside the books was made by the assessee against the imported tiles and in the absence of the same, it cannot be said that any unexplained investment was made on behalf of the assessee to attract levy of penalty under Section 271(1)(c). The said explanation was not accepted and penalty was imposed. Aggrieved by the said order imposing penalty, the assessee preferred an appeal to

the Commissioner of Income tax (Appeals). The Appellate Authority held that although the claim of the assessee has not been accepted by the Assessing authority, it did not out-rightly reject the assessee's contention there by implying that there is some bonafides in the assessee's contention. There was no evidence or material on record to suggest that the assessee has deliberately acted in defiance of law to conceal its income in the form of excess stock, since its explanation in regard to higher rate and lower rate has been accepted to a great extent. There was material to indicate that the assessee has actually paid higher rate for the said consignment and it has made payment in excess of any other mode. Therefore, they were of the view that the penalty is based on the valuation of excess stock and such valuation has been determined between the Bill of exchange rate and rate contended by the assessee. Addition to income may be justifiable, but levy of penalty on such valuation of excess stock is not necessary.

15. Insofar as the penalty relatable to the difference in the accounts of M/s.Mysore Minerals Limited to the tune of Rs.4,92,448/- is concerned, the assessee accepted the said addition as he was not able to reconcile itself. Nothing is found as to prove that the assessee has consciously made the concealment or furnished inadequate particulars of his income. Thus, in the facts and circumstances of the case, no penalty is leviable on such agreed addition.

16. In so far as, excess stock which was sent without including the quantity in the Bill of Exchange, the assessee has submitted its explanation, which was not accepted for want of evidence. Therefore, in this regard more than one view was possible on the basis of the assessee's explanation before the Customs Department. Hence, it cannot be said to be a pre-conceived devise to conceal income. Further, the assessee has pointed out that even till today, the materials are lying in the Customs Department godown since it was confiscated and the entire tiles is

allowable loss and therefore, inference of concealment would not lie. Therefore, the Appellate Authority held that there could be no presumption of concealment or furnishing of inaccurate particulars since there was no malifide intention on the part of the assessee and therefore, the appellant has discharged the burden in explaining the circumstances of omission or negligence as discussed above. Therefore, they proceeded to delete the penalty levied on both the orders.

17. Aggrieved by the said order, the Revenue preferred an appeal to the Tribunal. The Tribunal, on consideration of the aforesaid material held the valuation under Section 14 of the Customs Act is a sort of notional valuation inasmuch as the same is done without taking into consideration the actual payment made by the purchaser of imported goods. There was nothing brought on record to show that any payment outside the books of accounts was made by the assessee against purchase or import of tiles from the overseas supplements and in the absence of the

same, the alleged under-invoicing of imported tiles on the basis of valuation made under the Customs Act would justify the addition to the total income of the assessee but not imposition of penalty under Section 271(1)(c) of the Act. The said addition made on the basis of the valuation made under the Customs Act was accepted by the assessee to buy peace of mind and to avoid extra litigation. Therefore, the Tribunal was of the view that no adverse inference can be drawn against the assessee on the basis of the same to impose penalty under Section 271(1)(c). Similarly, the addition made on account of difference in creditors' accounts was accepted by the assessee to avoid any further litigation as he could not reconcile the difference. Therefore, no penalty under Section 271(1)(c) could be imposed in respect of such agreed addition unless the explanation offered by the assessee for accepting such addition is found to be false. They were of the view that it was not a fit case to impose penalty under Section 271(1)(c) of the Act and therefore, they did not find any justification to interfere with the well

considered order of the Appellate Authority deleting the penalty. Aggrieved by these orders, the Revenue has preferred this appeal.

18. We have heard the learned counsel appearing for the parties. The learned counsel fairly submitted that the substantial questions of law as framed at the time of admission required to be reframed. Accordingly, we recast the issues in all the appeals as under:

ITA No.2564 and 2565 of 2005

> *"Whether the Tribunal was correct in holding that there was no concealment of income and there was no cessation of liability but it was on assesses agreement, additions have been made and therefore no penalty is attracted despite there being no evidence to substantiate such a conclusion and consequently recorded a perverse finding?"*

ITA No.5020 of 2009

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

2. *Whether the proceedings initiated by the Assessing Authority was legal and valid?*

ITA Nos.5022 and 5023 of 2009

i) *Whether the Tribunal was justified in holding that the basis for initiation of the penalty proceedings is the satisfaction of the Appellate Authority in coming to a conclusion based totally on a different ground other than the ground on which the Assessing Authority had passed the assessment order?*

ii) *Whether the proceedings initiated by the Assessing Authority was legal and valid?*

ITA Nos.5025 and 5026 of 2010

> *"When the two fact finding authorities have concurrently held that the explanation offered by the assessee is not false, though the assessee has failed to conclusively prove the explanation offered, does a case is made out for interference?"*

RIVAL CONTENTIONS

19. Sri Raviraj, learned counsel for the revenue, submitted that in the original return of income, the assessee had not declared the income which came to be detected by the department during the course of survey. It is after the survey the assessees have filed the revised returns which itself would go to show that amount offered during the survey is concealed income. There is no finding by the tribunal that there was cessation of liability of these amounts during the relevant financial year. Hence, he contends that levy of penalty is required to be sustained. For imposition of penalty *mens rea* is not a requirement.

Once the conditions mentioned in Section 271 (1) (c) is held to have been established the imposition of penalty is automatic and no discretion is left in the authorities.

20. Sri. Shankar, learned counsel appearing for the assessees contends that explanation offered by the assessees was not held to be false by the Tribunal. The payments recorded in a rough cash book which was found during the time of survey did not contain any dates against the payments made and entries were to be made by the accountant on the next working day and as such in order to buy peace with the department the assessees in quantum proceedings voluntarily declared the sum as income representing cessation of creditors liabilities. The additional income offered was in the nature of agreed addition and in penalty proceedings an independent finding has to be arrived at by conclusively holding that assessee owns the concealment and in the absence thereof penalty cannot be

levied. Thereafter the order of tribunal deleting levy of penalty would not call for interference.

21. Insofar as dis-allowance of expenses non-confirmation of balance from the creditor is concerned, they agreed to buy peace with the department by agreeing for addition and paying tax on and the said amount and interest thereof, however, the said explanation was not accepted. The assessing authority held that the assessee has concealed the particulars of income/furnished inaccurate particulars of income and imposed penalty. A similar order was passed in the connected matter also. The Appellate Authority affirmed the said order.

22. Aggrieved by the said order, the assessee preferred the appeal before the Tribunal. The Tribunal on careful examination of the entire material on record held that from the diary it is seen that no dates are mentioned as against the entries. Thus, it is not clear when the liability

ceases. Even though the assessee agreed for the addition to income, it cannot be positively concluded that the liability ceased during the relevant year only. The assessee, no doubt agreed for addition but with a rider that no penalty would be initiated or levied. Had the assessee known that the penalty would be further levied, he would have been in a position to substantiate that cessations in the assessment proceedings was not during the year. Under Section 143(3) the revised return has been accepted as such without any finding that the additional income offered is the concealed income. On the contrary, it is mentioned that as agreed upon at the time of survey, the assessee had admitted the income in the revised return. This shows that without any further act of holding that the amount declared is the concealed income for the assessement year, the assessment has been completed. Thus, though it can be stated that the assessee agreed for addition, the assessee never agreed that the same amounts to concealment of particulars of income/furnishing of inaccurate particulars of income.

Though adverse inference can be drawn in assessment proceedings that the assessee failed to substantiate the entry but in the penalty proceedings, penalty cannot be levied on inference. Therefore, they held the admission of an additional income do not lead to conclude that the assessee has failed to furnish the income/inaccurate particulars of income are furnished. Therefore, the Tribunal held the penalty under Section 271(1)(c) of the Act is not attracted in both the cases and accordingly ordered for its deletion.

STATUTORY PROVISIONS

23. Chapter XIV of the Income Tax, 1961 deals with procedure for assessment. Section 139 deals with return of income. Section 140 deals with return by whom to be signed. Section 140A deals with self assessment. Section 141 deals with provisional assessment. Section 142 deals with enquiry before assessment. Section 143 deals with assessment. Section 147 deals with income escaping assessment. Chapter XXI deals with penalties imposable.

Section 271 deals with failure to furnish returns, comply with notices, concealment of income, etc., It reads as under:-

> ***"271. FAILURE TO FURNISH RETURNS, COMPLY WITH NOTICES, CONCEALMENT OF INCOME, ETC.***
>
> *(1) If the Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person -*
>
> *(a) Omitted*
>
> *(b) Has failed to comply with a notice under sub-section (1) of section 142 or sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142; or*
>
> *(c) Has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty, -*
>
> *(i) Omitted*

(ii) In the cases referred to in clause (b), in addition to any tax payable by him, a sum which shall not be less than one thousand rupees but which may extend to twenty-five thousand rupees for each such failure;

(iii) In the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than but which shall not exceed three times the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income:

Explanation 1 : Where in respect of any facts material to the computation of the total income of any person under this Act, -

(A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) to be false, or

(B) Such person 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 his 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 purposes of clause (c) of this sub-section be deemed to represent the income in respect of which particulars have been concealed.

24. Section 274 deals with procedure to be followed before imposing penalty under Chapter XXI. It reads as under:-

*"**274. Procedure**. (1) No order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard.*

(2) No order imposing a penalty under this Chapter shall be made-

(a) by the Income- tax Officer, where the penalty exceeds ten thousand rupees;

(b) by the Assistant Commissioner, where the penalty exceeds twenty thousand rupees,

except with the prior approval of the Deputy Commissioner.

(3) An income- tax authority on making an order under this Chapter imposing a penalty, unless he is himself the Assessing Officer, shall forthwith send a copy of such order to the Assessing Officer'.

25. Chapter XXII deals with offences and prosecutions. Section 276C deals with willful attempt to evade tax, etc., It reads as under: -

Section 276C. WILFUL ATTEMPT TO EVADE TAX, ETC

(1) If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable, -

(i) in a case where the amount sought to be evaded exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other

provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine.

***Explanation**: For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person –*

(i) Has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or

(ii) Makes or causes to be made any false entry or statement in such books of account or other documents; or

(iii) Willfully omits or causes to be omitted any relevant entry or

statement in such books of account or other documents; or

(iv) Causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.

26. Chapter XXI enacts provisions for the levy, imposition and collection of penalty. It embodies a necessary purpose of the Act. In a taxing statute, the legislature must envisage and provide for cases where the assessees attempt to contravene the provisions of the Act and to evade payment of the rightful taxes levied thereunder. If such contingencies are not visualised and such leaks are not plugged, no taxation law can be effectively and satisfactorily implemented. Without such a sanction, there is the danger of evasion of tax. Thus, provisions for levy and collection of penalties for contravening their requirements, has become an integral part of such enactment and one of their

purposes. Sections 271 and 273 of the Act provide for imposition of penalties on recalcitrant and dishonest assessees who attempt to evade the proper incidence of taxation on their true income in the manner set out therein.

27. Section 271 is a specific provision providing for imposition of penalties, and is a complete code in itself, regulating the procedure for the imposition of penalties prescribed. The proceedings have therefore to be conducted in accordance therewith, subject always to the rules of natural justice. The provisions for the assessment and levy of tax will not apply as such for the imposition of penalty. In such a situation, i.e., when there is a specific provision, proceedings should be taken only thereunder and not under any other provision. Section 271 alone, therefore, governs the imposition of penalties for concealment of income or for furnishing inaccurate particulars of such income. The validity of penalty proceedings will have to be tested only from the perspective of Section 271.

28. Section 271(1) makes appropriate provision for levying penalties on assessee in different eventualities. One such eventuality is for concealment of income or furnishing of inaccurate particulars of such income. The penalty provisions has two distinct limbs. One limb deals with the condition precedent for initiating penalty action and assumption of jurisdiction of the authority concerned. This limb is separately enacted in Clause (c) of sub-section (1) of section 271. The other limb of the penalty provisions is the substantial part which deals with the actual imposition of the liability for penalty and the quantification thereof. This limb is found enacted, in clauses (iii) of sub-section (1) of Section 271. This however cannot mean that the two limbs have to be read disjunctively. Ordinarily, penalty can be imposed under clause (c) of Section 271(1) and the quantum of penalty is prescribed in clause (iii) of the same sub-section.

29. As is clear from Sec. 271(1)(c) the said provision is attracted only when the condition stipulated in Section 271(1)(c) are attracted. If those conditions are not fulfilled there is no question of exercising power under the said provision to impose penalty. Therefore, it is necessary to find out what are the conditions, which must exist before initiating the proceedings under Section 271.

30. Section 271(1)(c) makes it clear that if the Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Act is satisfied that any person has concealed particulars of his income or furnished inaccurate particulars of such income, then he may direct that such person shall pay by way of penalty stipulated in the aforesaid provision. Then the question is, when an income is said to be concealed so as to attract the penalty provisions. Explanation 1 sets out the circumstances which justifies levy of penalty. It reads as under:

"Explanation 1: Where in respect of any facts material to the computation of the total income of any person under this Act,-

(A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Commissioner to be false, or

(B) Such person 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 his 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 purposes of clause (c) of this sub-section be deemed to represent the income in respect of which particulars have been concealed."

31. After insertion of Explanation 1 to Section 271(1)(c), the law on concealment and penalty has become

stiffer. The explanation as it stands now is a complete code having the following features:

(1) *Every difference between reported and assessed income needs an explanation.*

(2) *If no explanation is offered, levy of penalty may justified.*

(3) *If explanation is offered, but is found to be false, penalty will be exigible.*

(4) *If explanation is offered and it is not found to be false, penalty may not be leviable, -*

(a) such explanation is bona fide.

(b) the assessee had made available to the Assessing Officer all the facts and materials necessary in computation of income.

32. Therefore the Explanation-I understood in the proper context, in particular, clause (c) of Sub-section (1) of Section 271 makes the intention of the legislaure manifest. It clearly sets out when penalty is leviable and when penalty is not leviable. The condition precedent for levying the

penalty is the satisfaction of the authority that there is a concealment of the particulars of the income or inaccurate particulars are furnished to avoid payment of tax. Once the authority comes to such conclusion, the law mandates that before imposing penalty, the assessee must be heard. The assessee is given the opportunity to offer his explanation. Once such an opportunity is given and the assessee fails to offer the explanation or offers explanation which is found to be false, then the penalty will follow as prescribed under Clause (iii) of clause (c) of sub-section (1) of Section 271. Where the assessee offers an explanation and substantiate the explanation, the question of imposing penalty would not arise. Even in cases where he fails to substantiate the explanation, but if he proves that explanation offered is a bonafide one and all the facts relating to the same and material to the computation of his total income has been disclosed by him, then, in law, a discretion is vested with the authority not to impose penalty. In other words, if the assessee offers explanation, but fails to substantiate the

same, but, if he proves that explanation offered is bonafide, but is not sufficient to substantiate the explanation and discloses all material for the computation of his total income, the question of imposing penalty would not arise.

33. The scope and ambit of clause (c) has got enlarged by the insertion of Explanations 1 to 6 to this sub-section. The provisions contained in clause (c) of sub-section (1) of section 271 lay down the conditions precedent for the Assessing Officer or other concerned authority assuming jurisdiction to initiate penalty proceedings for concealment of income. The concealment referred to in this 'clause' is a concealment from the Assessing Officer. The basis on which penalty for concealment is to be levied and quantified is indicated in sub-clause (iii) of sub-section (1) of section 271. For starting the penalty proceedings under this clause, the condition precedent is that the Assessing Officer must be satisfied that a person has concealed particulars of his income or furnished inaccurate particulars of such income.

The ingredients which go to make up the conditions precedent to the infliction of penalty are:

(i) the Assessing Officer or the Commissioner (Appeals) in the course of a proceeding before him must be satisfied that an assessee has concealed or furnished incorrect particulars of his income;

(ii) there must be a determination by the Assessing Officer or the Commissioner (appeals) that the assessee has concealed or furnished inaccurate particulars of his income; and

(iii) a refusal on the part of the taxing officer to accept the income returned, as correct.

Then it takes us to the next question what is concealment.

CONCEALMENT

34. The word 'conceal' means to hide, to keep secret. The phrase 'conceal the particulars of his income' would include false deduction or exemptions claimed by the assessee in his return. The word 'conceal' involves a knowledge on the part of the assessee of the real income when giving the particulars. Concealment might arise even if the statement as to the income is a guarded one, as, for example, the enquiry should be made to ascertain the correct income. Concealment of income may arise in various ways. It may take various forms of manipulation of entries in accounts, non-disclosure of items of source that existed and income that has clearly been earned by the assessee in the previous year, claim of false deductions or losses, suppression of sales, camouflage of income as loans taken from third parties and claim of interest thereon as deduction, giving a colour of agricultural income to the otherwise taxable income, and unexplained investments that can be clearly attributed to concealed income. However, mere

addition or estimates made on mere suspicion that there is something wrong with the book entries or their incompleteness, inadvertent omissions, debatable additions or disallowances, cash credits or investments not accepted as genuine, and rejection of a claim of expenses may not be themselves justify a penalty. The finding in assessment proceedings can be rebutted in the penalty proceedings to even demonstrate that the amount taxed was not income, or it has been taxed in the wrong year.

35. The condition precedent for inference of concealment of income is the intention to conceal income. This part of the clause earlier contained an adverbial prefix 'deliberately'. The word 'deliberately' in the above phrase was dropped by the Finance Act, 1964, with effect from 1 April, 1964. So, the element of *mens rea* was sought to be excluded from 1 April, 1964. However, notwithstanding the absence of the qualifying word 'deliberately' the furnishing of inaccurate particulars also has to be conscious and so a deliberate act,

which is involved in the very expression 'concealed'. The Apex Court in the case of ***RELIANCE PETRO PRODUCTS*** reported in ***322 ITR 165*** has explained the meaning of the words, 'furnish inaccurate particulars of income'. It is stated that reading the words in conjunction, they must mean the details supplied in the return which are not accurate, nor exact or correct, not according to truth or erroneous. When an item has not been shown at all, it would fall in the limb of concealment and an item which has been shown in the return but wrongly, would come under the limb of furnishing inaccurate particulars of income. Yet, broadly speaking, the effect of the amendment which has to be read along with the Explanation that was inserted by the Finance Act, 1964 has been that it is no longer necessary to establish that the assessee had deliberately concealed the particulars of his income or furnished inaccurate particulars of such income. It is sufficient to show that the furnishing of inaccurate particulars is the result of gross or wilful neglect. The expression 'particulars of such income' to cover a case where

a false explanation is given as to the source of income. The word 'income' in clause (c) refers to positive income only. Evasion of tax is the *sine qua* non for imposition of penalty. If there is no taxable income or tax assessed for payment during a particular year, the question of evasion and consequently penalty does not arise.

NOT AUTOMATIC

36. The levy of penalty is not a matter of course. It has to be found that the assessee concealed any income. Where there is no concealment, or no material for concealment, no penalty can be imposed. But where the assessee has concealed income, any subsequent act of voluntary disclosure would not affect the imposition of penalty. The mere addition to the taxable income would not automatically lead to an order of penalty. Further, the levy of penalty is not an automatic concomitant of the assessment. Therefore, safeguards have been provided for in the Act itself to see that penalties are levied only in appropriate cases. The Apex Court in the case of *SURESHCHANDRA MITTAL*

reported in *251 ITR 9*, held that higher income offered after search would not lead to levy of penalty automatically. The Apex Court in the case of *DILIP SHROFF* reported in *291 ITR 529*, at Page 547 at para 62 has observed that finding in assessment proceedings cannot automatically be adopted in penalty proceedings and the authorities have to consider the matter afresh from different angle. This Court in the case of *VASANTH K HANDIGUND* reported in *327 ITR 233,* has held that when addition has been accepted to buy peace and avoid litigation and the explanation was found reasonable by the appellate authorities the cancellation of penalty was justified. This Court in the case of *BHADRA ADVANCING PVT LIMITED* reported in *210 CTR 447*, held that merely because the assessee has filed a revised return and withdraw some claim of depreciation penalty is not leviable. The additions in assessment proceedings will not automatically lead to inference of levying penalty. This Court in the case of *GUJAMGADI* reported in *290 ITR 168***,** has held that every addition to income by the Income Tax Officer will not

automatically attract levy of penalty. Similar view has also been taken by this Court in the case of *BALAJI VEGETABLE PRODUCTS PRIVATE LIMITED* reported in *290 ITR 173*. The facts of the addition has to be looked into and the conduct of the assessee may also be taken into consideration. Merely because addition has been accepted and taxes paid along with interest should mitigate the attitude of the Assessing Officer in not levying penalty rather than levy of penalty. The Punjab and Haryana High Court in the case of *SURAJ BHAN* reported in *294 ITR 481*, has held that when an assessee files revised return showing higher income penalty cannot be imposed merely on account of the higher income. There is no deeming fiction for survey similar to explanation 5 or 5A which are in respect of search action only. There is no deeming fiction for higher income declared during survey and the assessing authorities cannot levy penalty automatically in case of survey cases where higher income is declared after survey. The Punjab and Haryana High Court in the case of *HUKUMCHAND HARI PRAKASH* reported in *72*

CTR 271, has held that additional income offered after survey cannot lead to imposition of penalty. In cases where the assessee have accepted the view of the department and have either filed revised return or letters accepting the addition and offered the additional income to tax and have not filed appeal or revision, the Assessing Officers are duty bound in law to take these factors and also the facts leading to addition and use the discretion vested in them in the main provision of the Section.

37. It was contended that for imposing penalty under Section 271 (1)(c) of the Act, mens rea is not the requirement. Therefore, once the aforesaid conditions mentioned in the aforesaid provision is satisfied, the imposition of penalty is automatic. There is no discretion left with the authorities in the matter of imposing penalty. In support of the said contention, the revenue relied on the judgment of the Apex Court in the case of ***UNION OF INDIA***

VS. DHARMENDRA TEXTILES PROCESSORS & OTHERS reported in ***(2008) 306 ITR 277 (SC)***.

38. The Supreme Court in the case of ***GUJARAT TRAVANCORE AGENCY V. CIT [1989] 3 SCC 52***, at page 55, paragraph 4 held as under:

> *".....It is sufficient for us to refer to section 271(1)(a), which provides that a penalty may be imposed if the Income-tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to section 276C which provides that if a person wilfully fails to furnish in due time the return of income required under section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of section 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the*

penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by statute proceeds on the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of proceeding under Section 27(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of means rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in section 271(1)(a) which requires that means rea must be proved before penalty can be levied under that provision……"

39. Following the said judgment and other cases the Apex Court in the aforesaid *Dharmendra's* case summarised the principles as under:-

> *(a) Mens rea is an essential or sine qua non for criminal offence.*
>
> *(b) A straitjacket formula of mens sea cannot be blindly followed in each and every case. The scheme of a particular statute may be diluted in a given case.*
>
> *(c) If, from the scheme, object and words used in the statute, it appears that the proceedings for imposition of the penalty are adjudicatory in nature in nature, in contradiction to criminal or quasi-criminal proceedings, the determination is of the breach of the civil obligation by the offender. The word 'penalty' by its will not be determinative to conclude the nature of proceedings being criminal or quasi-criminal. The relevant considerations being the nature of the functions being discharged by the*

authority and the determination of the liability of the contravener and the deliquency.

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

It further held that :

"It is significance to note that the conceptual and contextual difference between section 271(1)(c) and section 276C of the Income-tax Act was lost sight of in Dilip N. Shroff's case (2007) 8 Scale 304 (SC)."

The Explanations appended to section 272(1)(c) of the Income Tax Act entirely indicate the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the return. The judgment in Dilip N. Shroff's case (2007) 8 Scale 304 (SC) has not considered the effect and relevance of section 276C of the Income-Tax Act. The object behind the enactment of section 271(1)(c) read with the Explanations indicates that the said section has

been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the Income-Tax Act."

……..Dilip N. Shroff's case (2007) 8 Scale 304 (SC) was not correctly decided but Chairman, SEBI's case (2006) 5 SCC 361 has analysed the legal position in the correct perspectives. The reference is answered."

40. In the *Dharmendra*'s case the apex Court was dealing with the penalty provisions contained in the Central Excise Act, 1944, Sec. 11AC. They have referred to penalty provision in the Income Tax Act 271(1)(c). After referring to various judgments on the point rendered by both the Apex Court as well as various High Courts it was held that Mens Rea is not an essential element for imposing penalty for breach of civil obligations. Further, it was held

the judgment of the Apex Court in *Dilip N. Sharoff*'s case, where it had been held Mens Rea is essential, it was sought to be distinguished by saying the conceptual and conspectual difference between Sec. 271(1)(c) and 276(c) of the Income Tax Act, was lost sight of in *Dilip N. Sharof*'s case. Further at para no. 27 they proceeded to hold that explanation appended to Sec. 272(1)(c) of the Income Tax Act entirely indicate the element of strict law on the assessee for concealment or for giving inaccurate particulars while filing a return. The judgment in *Dilip N. Sharof*'s case has not considered the effect and relevance of Sec. 276(c) of the Income Tax Act. The object described enactment of Sec. 271(1)(c) read with the explanation indicates that the said Section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability, willful concealment is not an essential ingredient for attracting a civil

liability as is the case in the matter of prosecution u/S 276(c) of the Income Tax Act.

41. In almost every case relating to penalty, judgment in *Dharmendra*'s case was referred to on behalf of the Revenue as if it laid down that in every case of non payment or short payment of duty the penalty clause could automatically get attracted and the authority has no discretion in the matter. Therefore the Apex Court had an occasion to interpret the law laid down in *Dharmendra*'s case. After referring to the relevant portion of the *Dharmendra*'s case. This is what the Apex Court held in ***UNION OF INDIA VS. RAJASTHAN SPINNING & WEAVING MILLS*** reported in ***(2009) 224 CTR (SC) 1*** at paras 20, 21, 23 and 24 as under:

> *20. At this stage, we need to examine the recent decision of this Court in Dharmendra*

Textile (supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short-payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (aftab alam, J.) was a party to the decision in Dharmendra Textile (supra) and we see no reason to understand or read the decision in that manner.....".

21. From the above, we fail to see how the decision in Dharmendra Textile (supra) can be said to hold that S. 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

23. The decision in Dharmendra Textile (supra) must, therefore, be understood to mean that though the application of S. 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section,

once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-s.(2) of s.11A. That is what Dharmendra Textile (supra) decides.

24. It must, however, be made clear that what is stated above in regard to the decision in Dharmendra Textile (supra) is only insofar as s. 11 (A) (C) is concerned. We make no observations (as a matter of fact there is no occasion for it!) with regard to the several other statutory provisions that came up for consideration in that decision."

42. In Dharmendra's case at para 28 and 29, the Court observed as follows:

"28. In Union Budget of 1996-97, s. 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating

that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

29. Above being the position, the plea that the rr.96ZQ and 96ZO have a concept of discretion in built cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered……."

43. From the aforesaid judgment of the Apex Court it is clear the decision in *Dharmendra Textiles* case is to be understood as a decision u/s 11AC of the Central Excise Act. Though Sec. 271(1)(c) of the Income Tax Act has been extensively quoted and some observations are made, it is not a decision where the interpretation of Sec. 271(1)(c) fell for consideration before the Court. Therefore in Rajasthan Spinning & Mills case, the Supreme Court has categorically held at para no. 24 that the

decision in *Dharmendra Textile*'s case is only in so far as Sec. 11AC of Central Excise Act is concerned.

44. The Apex Court in the case of ***COMMISSIONER OF INCOME TAX ACT VS. ATUL MOHAN BINDAL,*** reported in ***(2009) 317 ITR 1 (SC)*** relying on *Rajasthan Mill's* case explained the scope of Section 271 (1)(c) as under:

> ***"****A close look at section 271(1) (c) and Explanation 1 appended thereto would show that in the course of any proceedings under the act, inter alia, if the Assessing Officer is satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income, such person may be directed to pay penalty. The quantum of penalty is prescribed in clause (iii). Explanation 1, appended to section 27(1) provides that if that person fails to offer an explanation or the explanation offered by such person is found to be false or the explanation offered by him is not substantiated and he fails to prove that such*

explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, for the purposes of section 271(1)(c),the amount added or disallowed in computing the total income is deemed to represent the concealed income. The penalty spoken of in Section 271(1)(c) is neither criminal nor quasi-criminal but a civil liability; albeit a strict liability. Such liability being civil in nature, means rea is not essential.

.....The decision in Dharmendra Textile must, therefore, be understood to mean that though the application of section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of

section 11A. That is what Dharmendra Textile decides.

Then the Apex Court held as under:

"It goes without saying that for applicability of section 271(1)(c), the conditions stated therein must exist."

45. Following the said judgment it was held that it goes without saying that for the applicability of Section 271(1)(c) conditions stated therein must exist.

46. In a recent judgment the Supreme Court after referring to the aforesaid Judgments in the case of ***COMMISSIONER OF INCOME TAX VS. RELIANCE PETROPRODUCTS PVT. LTD.,*** reported in ***(2010) 322 ITR 158 (SC)*** held as under:

"9. Therefore, it is obvious that it must be shown that the conditions under section 271(1)(c) must exist before the penalty is

imposed. There can be no dispute that everything would depend upon the return filed because that it is the only document, where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. In Dilip N. Shroff v. Joint CIT (2007) 6 SCC 329, this Court explained the terms "concealment of income" and "furnishing inaccurate particulars". The court went on to hold therein that in order to attract the penalty under Section 271(1)(c), mens rea was necessary, as according to the Court, the word "inaccurate" signified a deliberate act or omission on behalf of the assessee. It went on to hold that clause (iii) of section 271(1)(c) provided for a discretionary jurisdiction upon the assessing uthority, inasmuch as the amount of penalty could not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of income, but it may not exceed three times thereof. It was pointed out that the term "inaccurate particulars" was not defined anywhere in the

Act and, therefore, it was held that furnishing of an assessment of the value of the property may not by itself be furnishing inaccurate particulars. It was further held that the Assessing Officer must be found to have failed to prove that his explanation is not only not bona fide but all the facts relating to the same and material to the computation of his income were not disclosed by him. It was then held that the explanation must be preceded by a finding as to how and in what manner, the assessee had furnished the particulars of his income. The court ultimately went on to hold that the element of mens rea was essential. It was only on the point of mens rea that the judgment in Dilip N. Shroff V. Joint CIT' was upset in Union of India V. Dharmendra Textile Processors', after quoting from section 271 extensively and also considering section 271(1)(c), the court came to the conclusion that since Section 271(1)(c) indicated the element of strict liability on the assessee for the concealment or for giving inaccurate particulars while filing return, there was no

necessity of mens rea. The court went on to hold tht the objective behind the enactment of section 271(1)(c) read with Explanations indicated with the said section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, wilful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under section 276C of the Act. The basic reason why decision in Dilip N. Shroff v. Joint CIT was overruled by this Court in Union of India V. Dharmendra Textile Processors, was that according to this Court the effect and difference between section 271(1)(c) and section 276C of the Act was lost sight of in the case of Dilip N. Sharoff V. Joint CIT. However, it must be pointed out that in Union of India v. Dharmendra Textile Processors, no fault was found with the reasoning in the decision in Dilip N. Shroff v. Joint CIT, where the Court explained the meaning of the terms "conceal" and "inaccurate". It was only the ultimate inference in Dilip N. Shroff v. Joint CIT to the effect that mens rea was an

essential ingredient for the pentlay under section 271(1)(c) that the decision in Dilip N. Shroff v. Joint CIT was overruled.

10. We are not concerned in the present case with the mens rea. However, we have to only see as to whether in this case, as a matter of fact, the assessee has given inaccurate particulars. In Webster's Dictionary, the word "inaccurate" has been defined as:

> *"not accurate, not exact or correct; nor according to truth; erroneous; as an inaccurate statement, copy or transcript".*

11. We have already seen the meaning of the word "particulars" in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous……."

47. The object behind the enactment of section 271(1)(c) read with the Explanations indicates that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the Income-Tax Act. The word 'penalty' by its nature will not be determinative to conclude the nature of proceedings being criminal or quasi-criminal. That the intention of the legislature is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. There is nothing in section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. Mens rea is an essential or sine qua non for criminal offence. Mens rea is not essential element for imposing penalty for breach of civil obligations or liabilities. It was only on the point of mens rea that the judgment in *Dilip N. Shroff V. Joint CIT*" was upset in *Union of*

India V. Dharmendra Textile Processors. It was only the ultimate inference in *Dilip N. Shroff v. Joint CIT* to the effect that mens rea was an essential ingredient for the penalty under section 271(1)(c) that the decision in *Dilip N. Shroff v. Joint CIT* was overruled. For the applicability of Section 271(1)(c) conditions stated therein must exist. Therefore, it is obvious that it must be shown that the conditions under section 271(1)(c) exist before the penalty is imposed.

DEEMING PROVISION

48. As the opening words of Explanation 1 makes it clear where in respect of any facts material to the computation of the total income of any person under this Act such person fails to offer an explanation or offers an explanation which is found to be false or offers an explanation which is not able to substantiate and fails to prove that such explanation is bonafide, then the amount added or disallowed in computing the total income of such

person as a result thereof shall for the purposes of clause (c) of this sub-section be deemed to represent the income in respect of which particulars have been concealed. Therefore, it is clear that aforesaid instances by itself do not constitute concealment. The Assessing Officers were just writing at the end of the assessment order that penalty proceedings are initiated or something to the effect. The Delhi High Court in the case of Ram Commercials has held that such a note alone in the assessment order does not satisfy the requirement of assuming jurisdiction in law in respect of the initiation of penalty proceedings. The satisfaction should be in the assessment order. The said view was also approved by the full Bench of the Delhi High Court in the case of *RAMPUR ENGINEERING* reported in *309 ITR 143.* The said view has been approved by the Apex Court in the case of *DILIP SHROFF* reported in *291 ITR 591.* That is the view the courts have consistently taken. After taking note of the judicial pronouncements in this regard, the Legislature

thought it fit to insert Section 271(1)(B), which reads as under:

> *"271(1)(B) Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and the said order contains a direction for initiation of penalty proceedings under clause (c) of sub-Section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c)."*

49. By the aforesaid deeming provision a legal fiction is created. When the assessment order contains a direction for initiation of penalty proceedings such order shall deem to constitute satisfaction of the Assessing Officer for initiation of penalty proceedings under sub-clause (c) of Section 271 of the Act. As the language of Section 271 makes it clear before a direction is issued to pay penalty, the person issuing the direction must be satisfied about the condition mentioned in

clause (c) of Section 271(1). The question is, whether such satisfaction should be in writing. As the satisfaction has to be in the course of any proceedings and it is at the time of computation of the total income of any person and as it results in an assessment order which has to be mandatorily in writing, the satisfaction should be found in the said order. The existence of these facts is a condition precedent for initiation of penalty proceedings under Section 271. This provision is attracted once in any such assessment orders, a direction for initiation of penalty proceedings under clause (c) of sub-section (1) is made. Thereby, it means even if the order does not contain a specific finding that the assessee has concealed income or he is deemed to have concealed income because of the existence of facts which are set out in Explanation 1, if a mere direction to initiate penalty proceedings under clause (c) of sub-section (1) is found in the said order, by legal fiction, it shall be deemed to constitute satisfaction of the Assessing Officer for initiation of penalty proceedings under said clause (c). The said

provision came up for interpretation by the Delhi High Court in the case of *MADHUSHREE GUPTA* reported in *317 ITR 107,* wherein the Delhi High Court held that the satisfaction should be discernable in the assessment order. Position post amendment is not in much variance with pre-amendment. They held that provisions will fall foul of Article 14 of the Constitution if the same is not read in the manner it has read and in fact has read down the provisions to hold it Constitutional. Therefore according to Delhi High Court, in post amendment and pre amendment there is not much difference and the satisfaction is required to arrived in the ccurse of assessment proceedings and should be discernable in the assessment order. Therefore, this provision makes it abundantly clear that satisfaction of the Assessing Officer before initiation of penalty proceedings is a must. The satisfaction should be that he has concealed particulars of his income or furnished inaccurate particular of such income and even in the absence of those expressed words or findings recorded in the Assessment proceedings, if a

direction as aforesaid is mentioned, it constitutes satisfaction of the Assessing Officer.

DIRECTION

50. A reading of Section clearly indicates that the assessment order should contain a direction for initiation of penalty proceedings. The meaning of the word direction is of importance. Merely saying that penalty proceedings are being initiated will not satisfy the requirement. The direction to initiate proceedings should be clear and not be ambiguous. It is well settled law that fiscal statutes are to be construed strictly and more so the deeming provisions by way of legal fiction are to be construed more strictly. They have to be interpreted only for the said issue for which it has deemed and the manner in which the deeming has been contemplated to be restricted in the manner sought to be deemed. As the words used in the legal fiction or the deeming provisions of Section 271(1B) is Direction, it is imperative that the assessment order contains a direction.

Use of the phrases like (a) penalty proceedings are being initiated separately and (b) penalty proceedings under Section 271(1)(c) are initiated separately, do not comply with the meaning of the word direction as contemplated even in the amended provisions of law. The direction should be clear and without any ambiguity. The word 'direction' has been interpreted by the decision of the Apex Court in the case of *RAJENDRANATH* reported in *120 ITR pg.14***,** where it has been held that in any event whatever else it may amount to, on its very terms the observation that the ITO is free to take action, to assess the excess in the hand of the co-owners cannot be described as a direction. A direction by a statutory authority is in the nature of an order requiring positive compliance. When it is left to the option and discretion of the ITO whether or not take action, it cannot be described as a direction.

51. Therefore, it is settled law that in the absence of the existence of these conditions in the assessment order penalty

proceedings could not be proceeded with. The proceedings which are initiated contrary to the said legal position are liable to be set aside.

WHEN DEEMING PROVISION NOT APPLICABLE

52. Sub-section (1)(B) only deals with satisfaction of the Assessing Officer. However, under the scheme of Section 271, the persons who are authorised to compute income as well as initiate the proceedings or the Assessing Officer or the Commissioner of Appeals or Commissioner in the course of revisional jurisdiction, Explanation 1 applies to all these three Officers whereas the deeming provision (1)(B) refers only to the Assessing Officer. Therefore, if an order of assessment is passed by Commissioner of Appeals or Commissioner in the course of the said proceedings, if they are satisfied that there is any concealment of particulars of his income or he has furnished inaccurate particular of income the said satisfaction must be expressly stated in the said order. If that is not stated, at least, the order should

state what is mentioned in Explanation 1. It is only if those facts are set out in the order, then the deeming provision in Explanation 1 applies and the concealment of income could be presumed and then they are entitled to initiate penalty proceedings under Section 271. If the said order do not disclose the facts set out in Explanation 1, they are not entitled to the benefit of deeming provision contained in provision (1)(B). The said deeming provision is confined only to the Assessing Officer.

53. From these discussion, it is clear that condition precedent for initiation of penalty proceedings under Section 271(1)(c) is existence of condition referred to in the said section. The person initiating penalty proceedings should be satisfied about the existence of said conditions which should be reflected in the assessment orders passed by them. In a given case, after appreciating the entire records, the Officer passing the order may categorically state that he is satisfied that the assessee has concealed income. Once such a finding

is recorded that is sufficient to initiate penalty proceedings. Assuming such a categorical finding is not recorded in the order, at least, he has to record facts as contemplated in Explanation-1. If these facts are discernible from the assessment order, the deeming clause in Explanation 1 is attracted and the income is deemed to have been concealed. That gives the jurisdiction to the Officer passing the order to initiate the penalty proceedings. If the Officer passing the assessment order is the Assessment Officer, in the said order, the aforesaid facts are not discernible, at least he must direct initiation of proceedings under Section 271(1)(c). Then Section (1)(B) is attracted and these conditions deemed to exist which confers jurisdiction on him to initiate penalty proceedings. Section (1)(B) has no application to an order passed by Commissioner of Appeals or Commissioner.

WHO INITIATES PENALTY PROCEEDINGS

54. As is clear from the words in Section 271, if the Assessing Officer or the Commissioner of Appeals or the

Commissioner in the course of any proceedings under this Act is satisfied that any person has concealed particulars of his income or furnished inaccurate particulars of his income, he may direct that such person shall pay by way of penalty the amount mentioned therein. Therefore, the penalty proceedings have to be initiated by the person who is satisfied about the concealment of income or furnishing of inaccurate particulars of income in the course of any proceedings under this Act. In a given case if the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal or in revision, the authority is satisfied regarding concealment and furnishing of inaccurate particulars, then it is that authority which is satisfied about the said concealment or furnishing of inaccurate particulars has to initiate penalty proceedings and then pass orders in respect of the penalty to be imposed. The imposition of penalty may be done at the stage of assessment or at the stage of an appeal. At the assessment stage, the Assessing Officer has to issue a notice to the

assessee to show cause why a penalty should not be imposed and this notice has to be issued in the course of the assessment proceedings. The imposition of the penalty has also to be done by the Assessing Officer but this can be done within the time prescribed in section 275.

55. In the case of initiation of penalty proceedings during the course of appeal or revision proceedings, the authority who has to be satisfied is the authority in whose proceedings the issue is examined and not any other authority. The levy of penalty has also to be done by the same officer as the language used in the later part of Section 271 is that: " He may direct that such person shall pay by way of penalty". The authority in which proceedings, there is satisfaction of concealment or furnishing inaccurate particulars of income alone can levy the penalty and not any other authority. If the Commissioner (Appeals) in the course of appeal proceedings is satisfied then it is the Commissioner (Appeals) who have to initiate the penalty proceedings and

also complete the same by levying the penalty. He cannot permit the assessing authority to levy penalty.

56. Provisions of Section 274(3) makes it clear that if an authority other than the Assessing Officer passes an order under Chapter XXI which deals with matters of penalties then such authority has to forthwith send the copy of the order to the Assessing Officer. This fortifies that it is the authority who is satisfied in the course of the proceedings before it has the jurisdiction to initiate and levy of penalty. The Allahabad High Court in the case of *MOTILAL SHAMSUNDAR* reported in *84 ITR 183* held that when the amounts were discovered in the course of appellate proceedings before him, it was discovered by him. It was for him then to impose the penalty. If he was satisfied that the assessee had concealed the particulars of his income or had deliberately furnished inaccurate particulars of it.

57. The question of their recording satisfaction and then calling upon the Assessing Officer to initiate penalty proceedings would not arise. Penalty proceedings has to be initiated by the authority which is satisfied about the concealment of the particulars of the income or furnishing of inaccurate particulars of income.

PROCEDURE FOR IMPOSING PENALTY

58. It must be noticed that this finding recording concealment in the order to be passed by these authorities is only for the purpose of initiating. The said finding is not conclusive; it is in the nature of prima facie satisfaction, which authorises them to initiate the penalty proceedings. Once a penalty proceedings is validly initiated, then under Section 274(1) an obligation is cast on the person initiating the proceedings to issue notice to the assessee. When such a notice is issued, it is open to the assessee to contest the accusation against him that he has concealed income or he has furnished inaccurate particulars. As there is an initial presumption of concealment, it is for the assessee to rebut

the said presumption. The presumption found in Explanation 1 is a rebuttable presumption. If the authority, after hearing the assessee and looking into the material produced in the said proceedings before him is satisfied that though the income is undisclosed there was no intent to avoid tax and therefore, if he holds there is no concealment of income, then question of imposing penalty would not arise. It may be a case of not disclosing income without any intent to avoid tax; it may be a case of furnishing particulars without any intention to avoiding tax. Both stand on the same footing. It is only when the authority is satisfied that non-disclosure of income or furnishing inaccurate particulars was with the intention of evading tax, then it amount to concealment, it amounts to furnishing inaccurate particulars. Then, at his discretion, he may impose penalty as provided under the Act. Therefore, merely because the assessee accepted addition or deletion and did not challenge the assessment order by way of appeal, it cannot be concluded that such addition or deletion amounts to

concealment of income or furnishing of inaccurate particulars. When a plea is taken that in order to avoid litigation and purchase peace, the tax levied is paid with interest, if the assessee is able to demonstrate his bona fides and if the authority is satisfied about his bonafides, then the question of imposing penalty would not arise. Similarly, in cases where though the tax was not actually due but still the assessee pays tax with a hope of claiming deductions in the subsequent years, if the assessee is able to demonstrate there was no liability to pay tax at all, merely if assessee pays tax and he does not challenge order, that would not constitute concealment of income so as to enable the authorities to impose penalty. Similarly, in cases, where the legal position is not well settled, when few High Courts and Tribunals have taken a view in favour of the assessee and some High Courts and Tribunals have taken a view in favour of the Revenue and on legal advice if an assessee relies on the said legal position for not disclosing the income and for non-payment of tax, certainly, that is a fact which should

weigh in the penalty proceedings after the assesee has paid tax with interest before imposing penalty.

NOTICE UNDER SECTION 274

59. As the provision stands, the penalty proceedings can be initiated on various ground set out therein. If the order passed by the Authority categorically records a finding regarding the existence of any said grounds mentioned therein and then penalty proceedings is initiated, in the notice to be issued under Section 274, they could conveniently refer to the said order which contains the satisfaction of the authority which has passed the order. However, if the existence of the conditions could not be discerned from the said order and if it is a case of relying on deeming provision contained in Explanation-1 or in Explanation-1(B), then though penalty proceedings are in the nature of civil liability, in fact, it is penal in nature. In either event, the person who is accused of the conditions mentioned in Section 271 should be made known about the grounds on which they intend imposing penalty on him as

the Section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in Section 271(1)(c) do not exist as such he is not liable to pay penalty. The practice of the Department sending a printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law when the consequences of the assessee not rebutting the initial presumption is serious in nature and he had to pay penalty from 100% to 300% of the tax liability. As the said provisions have to be held to be strictly construed, notice issued under Section 274 should satisfy the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended if the show cause notice is vague. On the basis of such proceedings, no penalty could be imposed on the assessee.

60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing

inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet those grounds. After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the grounds on which he is called upon to answer. It is not open to the authority, at the time of imposing penalty to impose penalty on the grounds other than what assessee was called upon to meet. Otherwise

though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would offend principles of natural justice and cannot be sustained. Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order was passed and further discovery of facts subsequent to the imposition of penalty cannot validate the order of penalty which, when passed, was not sustainable.

61. The Assessing Officer is empowered under the Act to initiate penalty proceedings once he is satisfied in the course of any proceedings that there is concealment of income or furnishing of inaccurate particulars of total

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

striking of the relevant clauses will lead to an inference as to non-application of mind.

INDEPENDENT PROCEEDING

62. The penalty proceedings are distinct from assessment proceedings, and independent therefrom. The assessment proceedings are taxing proceedings. The proceedings for imposition of penalty though emanating from proceedings of assessment are independent and separate aspects of the proceeding. Separate provision is made for the imposition of penalty and separate notices of demand are made for recovery of tax and amount of penalty. Also separate appeal is provided against order of imposition of penalty. Above all, normally, assessment proceedings must precede penalty proceedings. Assessee is entitled to submit fresh evidence in the course of penalty proceedings. It is because penalty proceedings are independent proceedings. The assessee cannot question the assessment jurisdiction in penalty proceedings. Jurisdiction under penalty

proceedings can only be limited to the issue of penalty, so that validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter in penalty proceedings. It is not possible to give a finding that the re-assessment is invalid in such penalty proceedings. Clearly, there is no identity between the assessment proceedings and the penalty proceedings. The latter are separate proceedings that may, in some cases, follow as a consequence of the assessment proceedings. Though it is usual for the Assessing Officer to record in the assessment order that penalty proceedings are being initiated, this is more a matter of convenience than of legal requirement. All that the law requires, so far as the penalty proceedings are concerned, is that they should be initiated in the course of the proceedings for assessment. It is sufficient, if there is some record somewhere, even apart from the assessment order itself, that the Assessing Officer has recorded his satisfaction that the assessee is guilty of concealment or other default for which penalty action is

called for. Indeed, in certain cases, it is possible for the Assessing Officer to issue a penalty notice or initiate penalty proceedings even long before the assessment is completed. There is no statutory requirement that the penalty order should precede or be simultaneous with the assessment order. In point of fact, having regard to the mode of computation of penalty outlined in the statute, the actual penalty order cannot be passed until the assessment is finalised.

CONCLUSION

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

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

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

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

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

e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.

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

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

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

i) The imposition of penalty is not automatic.

j) Imposition of penalty even if the tax liability is admitted is not automatic.

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

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

m) If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and

material to the computation of his total income have been disclosed by him, no penalty could be imposed.

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

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

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

q) Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.

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

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

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

u) The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings.

The assessment or reassessment cannot be declared as invalid in the penalty proceedings.

In ITA 2564 & 2565/2005

64. In the light of what we have stated above, it is clear that merely because the assessee agreed for addition and accordingly assessment order was passed on the basis of this addition and when the assessee has paid the tax and the interest thereon in the absence of any material on record to show the concealment of income, it cannot be inferred that the said addition is on account of concealment. Moreover, the assessee has offered the explanation. The said explanation is not found to be false. On the contrary, it is held to be bonafide. In fact in the assessment proceedings there is no whisper about these concealment. Under these circumstances, the entry found in the rough cash book could have been reflected in the accounts for the said financial year in which the survey took place as the last date for closing the account was still not over . The very fact that the assessee agreed to pay tax and did not challenge the

assessment order, it is clear the conduct of the assessee cannot be construed as malafide. Therefore, the Tribunal was justified in setting aside the orders passed by the Appellate Authority as well as the Assessing Authority.

65. In so far as the imposition of penalty is concerned, it is not in accordance with law. No fault could be found with the Tribunal for deleting the penalty. Thus, we answer the substantial question of law in favour of the assessee and against the Revenue.

In ITA No. 5020/2009

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

In ITA Nos. 5022 & 5023/2009

67. In the instant case, the penalty proceedings are initiated by the Assessing Authority initially on the basis of his assessment order. During the pendency of the said penalty proceedings, the assessment order was challenged by way of an appeal. In appeal, the Appellate Authority deleted the additions made under Section 69 of the Act by the Assessing Authority. Instead, he sustained additions under new grounds, i.e., under valuation of the closing stock, i.e., the finding recorded by the Appellate Authority, for the first time on being satisfied by the material available on record. However, the Assessing Authority in the penalty proceedings took note of the Appellate order and suitably amended the penalty proceedings and proceeded further in the matter and then imposed penalty. Therefore, it is clear, that the subject matter of the penalty proceedings is the order of the Appellate Authority and not the order passed by the Assessing Authority. If the Appellate Authority was satisfied with the addition it has to be made on the ground of

under valuation of the closing stock, which was not the finding recorded by the Assessing Authority, which was not the basis for the initiation of the penalty proceedings by the Assessing Authority then in view of the law aforesaid, it is the Appellate Authority who should have initiated penalty proceedings and issued notice to the assessee to show-cause why penalty should not be imposed. The said procedure is not followed and therefore though for different reasons, the first Appellate Authority set aside the order levying penalty, the Tribunal correctly appreciated the facts and in a proper perspective and was justified in not interfering with the order passed by the Appellate Authority setting aside the penalty order. In that view of the matter, we do no see any justification to interfere with the well considered order passed by the Tribunal. Thus, the substantial questions of law are answered in favour of the assessee and against the Revenue.

In ITA Nos. 5025 & 5026/2010

68. In view of the aforesaid legal position, when two fact finding authorities were satisfied that the explanation offered by the assessee is not false and it is a bonafide one though the assessee has failed to conclusively prove the explanation offered, we do not find any justification to interfere with the well considered order passed by the Tribunal. Accordingly, the substantial question of law is answered in favour of the assessee and against the Revenue.

Hence, we pass the following:-

O R D E R

(a) All the appeals are dismissed.

(b) No costs.

Sd/-
JUDGE

Sd/-
JUDGE

Kms/bvb/ckl/ksp