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IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction [Income Tax]

ORIGINAL SIDE

ITA/66/2018

PRINCIPAL COMMISSIONER OF INCOME
TAX-1, KOLKATA

VS

M/S. THAKUR PRASAD SAO & SONS.
PVT. LTD.

BEFORE :

THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI

And

THE HON'BLE JUSTICE RAJARSHI BHARADWAJ

Date :2nd May, 2024*Appearance :**Smt. Smita Das De, Adv.**...for the appellant.**Sri Abhratosh Majumder, Sr. Adv.**Sri AvraMazumder, Adv.**Smt. Alisha Das, Adv.**Sri Samrat Das, Adv.**Sri Kausheyo Roy, Adv.**...for the respondent.*

1. Heard Smt. Smita Das De, learned senior standing counsel for the appellant/revenue and Mr. Abhratosh Majumder, learned senior advocate assisted by Mr. AvraMazumder, learned counsel for the respondent/assessee.
2. The present appeal relates to **penalty under section 271(1)(c)** of the Income Tax Act, 1961 (hereinafter referred to as the said 'Act, 1961') relating to **assessment years 2006-07 and 2007-08**.
3. This appeal was admitted by this Court by order dated 14th May, 2018 on the following substantial question of law :-

*“Whether the penalty proceedings under Section 271(1)(c) of the Income Tax Act, 1961 are invalid **if the show-cause notice does not specifically spell out the grounds for imposition of the proposed penalty?**”.*

Facts

4. Briefly stated facts of the present case are that a **search** was conducted by the income tax department **on 23.11.2007 under section 132(1)** of the Act, 1961 against various persons and business concerns of “Thakur Prasad Sao Group of Chaibasa” at different locations of Chaibasa and Kolkata. A **survey was conducted under section 133A** of the Act was carried out simultaneously at different places of the Group at Joda (Orissa), Rourkela, Jamshedpur and Tirildih(Jamshedpur). The aforesaid Group is engaged in mining of iron ore, manufacturing of sponge iron and trading in liquor. In the course of search and seizure operations, Panchnama were drawn in the name of various assesseees in the Group including the assessee herein. After the search and seizure operations, the respondent/assessee has disclosed income of Rs.4,99,00,000/- through Sri R.P. Sao, director of the company for the assessment year 2006-07. A notice under section 153A of the Act was issued and assessment was completed determining total income of the respondent/assessee at Rs.27,14,06,050/-. Against the aforesaid assessment order under section 153A, the respondent/assessee filed an appeal before the CIT(A) who granted the relief by deleting additions of Rs.54,91,493/-. During the course of assessment proceedings, the respondent/**assessee admitted that cash amounting to Rs.4,20,19,077/- was received without there**

being any supply of material to the party concerned, i.e. Sree Metallik Limited. On the basis of the aforesaid entries, Sri Ramesh Prasad Sao declared an undisclosed income of Rs.4,30,00,000/- including the aforesaid amount, in the return of income filed under Section 153A for the assessment year 2007-08. **Under invoicing of sales was also admitted** by the respondent/assessee which was not recorded in the books of accounts that were offered to tax as part of disclosure under section 132(4) of the Act. (Accordingly, a sum of Rs.19,25,388/- for the assessment year 2006-07 and Rs.43,02,020/- for the assessment year 2007-08 were disclosed as an additional income pursuant to the search.) It was also found that **expenditures** under various heads were enhanced by the assessee to the extent of **Rs.4,79,05,925/-** which the respondent/assessee **admitted to be not genuine business expenses** and, accordingly, disclosed additional income pursuant to the search in the assessment year 2006-07. **Thus, a total sum of Rs.4,99,00,000/- was admitted as undisclosed income in the assessment year 2006-07** which forms part of total disclosure of Rs.27 crores of the Group made under section 132(4) of the Act, 1961.

5. Similarly, for the **assessment year 2007-08** notice under section 153A of the Act, 1961 was issued to the respondent/assessee on 26.2.2009 and in response thereof, respondent/assessee filed return of income on 31.3.2009 declaring total income of Rs.1,38,39,05,410/- as against original return filed on 31.10.2007 under section 139 disclosing income of Rs.127,24,13,150/-. **After the search and seizure operations and impounding of documents, the respondent/assessee declared an**

undisclosed income of Rs.13,16,25,370/- which was added to the income disclosed in the returns apart from certain other additions. In the assessment order the assessing officer mentioned that penalty proceeding under section 271(1)(c) of the Act, 1961 has been initiated and show cause notice under section 274 for imposing penalty under section 271(1)(c) read with Explanation 5A of the Act is being issued separately.

6. The aforesaid assessment orders were followed by notices under section 271(1)(c) read with section 274 of the Act, 1961. The respondent/assessee participated in the penalty proceedings for both the assessment years i.e. assessment years 2006-07 and 2007-08 and made **submissions** through his authorised representative, namely, Sri Manav Chhawchharia, FCA, as under –

Submissions for assessment year 2006-07 in penalty proceeding

- (i) *Total disclosure of Rs. 27 crores was made in the name of various assesses of the Sao Group. **The company has admitted undisclosed income of Rs. 4,99,00,000/-for the A.Y. 2006-07.***
- (ii) *In the statement recorded u/s 132(4) on 24-11-2007, Mr. R.P. Sao, Director of the Co. said thatthe ad-hoc disclosure of additional income ofRs. 4.99 Cores for the A.Y.2006-07 was made on the expectations that no penalty u/s 271(0)(c) will be imposed upon it.*
- (iii) *Undisclosed income of Rs. 4,99,00,000/- was duly included in the return filed u/s 153A which is treated as return u/s 139. Assessment was also completed on the returned income; hence no question of penalty arises.*

- (iv) **Disclosure u/s 153A was made by the assessee voluntarily, after the search.** Thus, there is no concealment of income in this year.

Submissions for assessment year 2007-08 in penalty proceeding

- (i) Total disclosure of Rs.27 crores was made in the name of various assesses of the Sao Group. **The company has admitted undisclosed income of Rs. 10,63,00,000/-for the A.Y. 2007-08.**
- (ii) In the statement recorded u/s 132(4) on 24-11-2007, the assesseeCo. said that the ad-hoc disclosure of additional income of Rs.10.63 Crores for this year was made on the expectations that no penalty u/s 271(1)(c) would be imposed upon it.
- (iii) Undisclosed income of Rs. 10,63,00,000/- was duly included in the return filed u/s 153A which is treated as return u/s 139. Assessment was also completed on the returned income; hence no question of penalty arises.
- (iv) **Disclosure u/s 153A was made by the assessee Voluntarily, after the search.** Thus, there is no concealment of income in this year.

7. The assessing officer considered the submissions of the respondent/assessee and imposed a penalty of Rs.1,67,97,340/- under section 271(1)(c) of the Act read with Explanation 5A for the assessment year 2006-07 and Rs.3,63,20,279/- for the assessment year 2007-08.
8. The reasons recorded by the assessing officer in the **penalty order** for the **assessment year 2006-07**, is reproduced below :-

“The above submission has been carefully considered. The relevant facts of the case are reproduced below to ascertain whether the assessee had

indeed declared voluntarily the undisclosed income of Rs.4,99,00,000/- for the A.Y. 2006-07:

a) Original return was filed voluntarily u/s 139 on 25-11-2006 disclosing total income of Rs.22,15,91,170/- and further revised u/s 139(5) on 13-10-2007 reducing the total income to 21,60,99,680/-. Return was duly verified by the authorized signatory of the assessee.

b) In the verification of return the assessee has declared that **"to the best of my knowledge and belief. the information given in the return thereto is correct and complete and that the amount of total income and other particulars shown therein are truly stated and are in accordance with the provisions of the Income Tax Act, 1961, in respect of income chargeable to income tax the previous year relevant to the assessment year 2006-07.**

c) Pages 4 & 16 of the seized documents marked as TPS -9 indicates the difference between total sales and sales recorded in Regular Books in case of M/S D.D. International. Thus entries on those pages related to the previous year 2005-06 relevant to the A.Y. 2006-07.

d) Assessee admitted during the course of search that **expenditure under various heads were inflated to the extent of Rs. 4,79,05,925/- and the under-invoiced sale to the tune of Rs.19,25,388/-**, which was exposed from the seized documents and printout taken from the impounded laptop. These facts were neither recorded in the company's regular Books of a/cs nor in any regular books of a/cs of any other member of this Group. **This was undisclosed income of the assessee Co. which was within the knowledge of the concerned Authorised Signatory as on 25-**

11-2006 & 13-10-2007 when the original and revised returns were filed.

e) Thus, the assessee Co. has wilfully, deliberately and intentionally concealed the particulars of the income to the extent of Rs.4,99,00,000/- for the A.Y. 2006-07 while filing the original on return of income on 25-11-2006 and revised return on 13-10-2007.

f) Assessee admitted the undisclosed income only when the irrefutable evidences like pages 4 & 16 of the loose bunch marked TPS-9 and printout of laptop was found and seized/impounded by the Department in course of search/Survey.

g) Alleged voluntary disclosure u/s 132(4) stated to have been made with the sole intention to get the immunity from imposition of penalty u/s 271(1)(c) of the I.T Act is in contravention to explanation 5A to section 271(1)(c). That is why undisclosed income of Rs. 4.99 Crore was included in the return of income filed u/s 153A only in pursuant to search for the A.Y. 2006-07.

The submission of the assessee was considered and found to have no merit in the light of the provisions of the Explanation 5A to section 271(1)(c) inserted by the Finance Act 2007. The provisions are very clear that if any undisclosed income is found or declared after the date of search initiated u/s 132 on or after the 01-06-2007, then on the said assessee will be liable for penalty on the said income & investment not already declared in the return filed under Section 139(1) of the Act. **In this case, the assessee had filed return of income u/s 139(1) for the A.Y.2006-07 on 25-11-2006. But the income in question was not offered in the said return filed u/s 139(1). Accordingly, I am of the considered opinion that this is a fit case for imposition of penalty u/s 271(1)(c) read with Explanation -5A of the I.T. Act.**

9. The reasons recorded by the assessing officer in the penalty order for the **assessment year 2007-08**, is reproduced below :-

"The above submission has been carefully considered. The relevant facts of the case are reproduced below to ascertain whether the assessee had indeed declared voluntarily the undisclosed income of Rs. 10,63,00,000/- for the A.Y. 2007-08:

a) Original return was filed voluntarily u/s 139 on 31-10-2007 disclosing total income of Rs.127,24,13,150/- and was duly verified by the authorized signatory of the assessee.

*b) In the verification of return the assessee has solemnly declared that **"to the best of my knowledge and belief, the information given in the return thereto is correct and complete and that the amount of total income and other particulars shown therein are truly stated and are in accordance with the provisions of the Income Tax Act, 1961, in respect of income chargeable to income tax the previous year relevant to the assessment year 2007-08."***

*c) **Pages 3, 4 & 15 of the seized documents marked as TPS -9 indicates the difference between total sales and sales recorded in Regular Books.** Thus entries on those pages related to the previous year 2006-07 relevant to the A.Y. 2007-08.*

*d) **Assessee admitted during the course of search that expenditure under various heads were inflated** which was exposed from the seized documents and printout taken from the impounded laptop, Hard Disks etc. These facts were neither recorded in the company's regular Books of a/cs nor in any regular books of a/cs of any other members of the Group. This was undisclosed income of the assessee Co. which was within the knowledge of the concerned Authorised signatory as on 31-10-2007 when the original and revised returns were filed.*

e) **Thus, the assessee Co. has wilfully, deliberately and intentionally concealed the particulars of the income to the extent of Rs.10.63 Crores for the A.Y. 2007-2008** while filing the original return of income on 31.10.2007.

f) Apart from the above, the assessee has **intentionally furnished inaccurate particulars as discussed above namely**, Suspense and Advance of 139(1) on 31-10-2007. Rs. 603386/-, cash receipt from S.K Naredi for Rs.10,00,000/- while filing the original return u/s 139(1) on 31-10-2007.

g) Assessee admitted the undisclosed income only when the irrefutable evidences like pages 3, 4 & 15 of the loose bunch marked TPS-9, printout of laptop, Recordings of Computer Hard disk. Audited Balance Sheet for the A.Y. 2007-08 and other loose sheets which were found and seized/impounded by the Department in course of search/ Survey.

h) Alleged voluntary disclosure u/s 132(4) stated to have made with the sole intention to get the immunity from imposition of penalty u/s 271(1)(c) of the I.T Act is in contravention to explanation 5A to section 271(1)(c). That is why undisclosed income of Rs. 10.63 Crore was included in the return of income filed u/s 153A only in pursuant to search for the A.Y. 2007-08.

The submission of the assessee was considered and found to have no merit in the light of the provisions of the Explanation 5A to section 271(1)(c) inserted by the Finance Act 2007. The provisions are very clear that if any undisclosed income is found or declared after the date of search initiated u/s 132 on or after the 01-06-2007, the assessee will be liable for penalty on the said income/investment not already declared in the return filed under section 139(1) of the Act. In this case, the assessee had filed return of income u/s 139(1) for the A.Y. 2007-08 on 31-10-2007. But the income in question was not offered in the said return filed u/s 139(1). Accordingly, I am of the considered opinion that this is a fit case

for imposition of penalty u/s 271(1)(c) read with Explanation -5A of the I.T. Act, 1961.”

10. Aggrieved with the aforesaid penalty orders under section 271(1)(c) of the Act, 1961, the respondent/assessee filed an appeal being Appeal No.352/CC-XVII/CIT(A), C-1/12-13 for the assessment year 2006-07 and appeal No.351/CC-XVII/CIT(A), C-1/12-13 for the assessment year 2007-08. Both the aforesaid appeals were dismissed by the Commissioner of Income Tax (Appeals), Central – 1, Kolkata.
11. Aggrieved with the aforesaid orders of the CIT(A), the respondent/assessee filed an appeal being ITA No.1434/Kol/11 for the assessment year 2006-07 and an appeal being ITA No.1535/Kol/11 for the assessment year 2007-08 before the Income Tax Appellate Tribunal, Bench “A”, Kolkata and both were allowed by order dated 23.3.2016 passed by the ITAT. The **Tribunal allowed an appeal holding as under –**

*3.6.5 It is clear from the aforesaid decision that on the facts of the present case that the **show cause notice u/s. 274 of the Act is defective as it does not spell out the grounds on which the penalty is sought to be imposed.** Following the decision of the Hon'ble Karnataka High Court, we hold that the orders imposing penalty in all the assessment years have to be held as invalid and consequently penalty imposed is cancelled.*

3.6.6. For the reasons given above, we hold that the levy of penalty in the present case cannot be sustained. We therefore cancel the orders imposing penalty on the assessee and allow the appeals of the assessee. In view of our above conclusions on the issue of defect in show cause notice u/s 274 of the Act, we are not dealing with the

other arguments made on merits of the orders imposing penalty on the assessee.

12. Aggrieved with the aforesaid order of the ITAT, the appellant/revenue has filed the present appeal.

Submissions

13. Learned **counsel for the appellant submits** that the penalty for both the assessment years was lawfully imposed by the assessing officer and it was correctly upheld by the CIT(A). The Tribunal has committed a manifest error on law and facts to set aside both the penalty orders. She submits that in view of the judgment of Hon'ble Supreme Court in K.P. Madhusudhanan Vs. Commissioner of Income Tax, Cochin (2001) 6 SCC 665 (para 10), the impugned order of the ITAT deserves to be set aside.
14. Learned **counsel for the respondent/assessee submits** that the assessing officer has failed to initiate penalty proceedings under section 271(1)(c) of the Act, 1961 during the course of assessment proceeding and has not recorded that the assessee has concealed his income.
15. Therefore, the penalty orders were quite illegal and have been lawfully set aside by the ITAT. He further submits that in the notice under Section 274 of the Act, 1961, the assessing officer has not recorded the grounds on which the penalty was sought to be imposed. Therefore, the notice under Section 271 (1)(c) of the Act, 1961 was defective. Consequently, the ITAT has not committed any error of law or fact to set aside both the penalties. In support of his submission, learned counsel for the respondent/assessee has **relied upon the following judgments:**

- i) (2013) 359 ITR 565 (Kar.) Commissioner of Income Tax & Anr. vs. Manjunatha Cotton & Ginning Factory (paragraphs 62 & 63);
- ii) (2023) 154 taxmann.com 433 (Cal) Principal Commissioner of Income Tax-II, Kolkata vs. Industrial Safety Project (P) Ltd. (paragraph 13);
- iii) Order dated 26.02.2019 in ITAT No.8 of 2019 Principal CIT-I, Kolkata vs. M/s. SRMB Srijan Ltd.;
- iv) Order dated 22.04.2019 in ITAT No.272 of 2017 Principal Commissioner of Income Tax, Central-II, Kolkata vs. Bijoy Kumar Agarwal;
- v) (2021) 434 ITR 1 (Bom.) Mr. Md. Farhan A. Shaikh vs. The Deputy Commissioner of Income Tax (Central), Circle-I, Belgaun & Anr.
- vi) (2005) 278 ITR 32 (Del.) Commissioner of Income Tax vs. Auto Lamps Ltd.

Discussion & Findings:

- 16. We have carefully considered the submission of the learned counsel for the parties and perused the paper book.
- 17. Before we proceed to examine the rival submissions of learned counsels for the parties, it would be appropriate to reproduce the relevant provisions of the Act, 1961 as under:

271. (1) If the [Assessing] Officer or the "[*] [Commissioner (Appeals)] [or the Commissioner] in the course of any proceedings under this Act, is satisfied that any person-

(a) [* * *]

(b) * * *

(c) **has concealed the particulars of his income** or [***] furnished **inaccurate particulars of [such income, or]**

(d) * * *

he may direct that such person shall pay by way of penalty-

(i) [* * *]

(ii) in the cases referred to in clause (b), "[in addition to tax, if any, payable] by him, "[a sum of ten thousand rupees] for each such failure:]

(iii) in the cases referred to in clause (c) "[or clause (d)], "[in addition to tax, if any, 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 fringe benefits] or the furnishing of inaccurate particulars of such income "[or fringe benefits].

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.

Explanation 2.- Where the source of any receipt, deposit, outgoing or investment in any assessment year is claimed by any person to be an amount which had been added in computing the income or deducted in computing the loss in the assessment of such person for any earlier assessment year or years but in respect of which no penalty under clause (iii) of this sub-section had been levied, that part of the amount so added or deducted in such earlier assessment year immediately preceding the year in which the receipt, deposit, outgoing or investment appears (such earlier assessment year hereafter in this Explanation referred to as the first preceding year) which is sufficient to cover the amount represented by such receipt, deposit or outgoing or value of such investment (such amount or value hereafter in this Explanation referred to as the utilised amount) shall be treated as the income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the first preceding year; and where the amount so added or deducted in the first preceding year is not sufficient to cover the utilised amount, that part of the amount so added or deducted in the year immediately preceding the first preceding year which is sufficient to cover such part of the utilised amount as is not so covered shall be treated to be the income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the year immediately preceding the first preceding year and so on, until the entire utilised amount is covered by the amounts so added or deducted in such earlier assessment years.

Explanation 3.--Where any person [***] fails, without reasonable cause, to furnish within the period specified in sub-section (1) of section 153 a return of his income which he is required to furnish under section 139 in respect of any assessment year commencing on or after the 1st day of

April, 1989, and until the expiry of the period aforesaid, no notice has been issued to him under clause (i) of sub-section (1) of section 142 Commissioner or section 148 and the Assessing Officer or the Commissioner (Appeals) is satisfied that in respect of such assessment year such person has taxable income, then, such person shall, for the purposes of clause (c) of this sub-section, be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under section 148.]

Explanation 4.- For the purposes of clause (iii) of this sub-section, the expression "the amount of tax sought to be evaded",-

(a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, means the tax that would have been chargeable on the income in respect of which particulars have been Concealed or inaccurate particulars have been furnished had such income been the total income;]

(b) in any case to which Explanation 3 applies, means the tax on the total income assessed [as reduced by the amount of advance tax, tax deducted at source, tax collected at source and self-assessment tax paid before the issue of notice under section 148];

(c) in any other case, means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished.]

Explanation 5.-*Where in the course of a [search initiated under section 132 before the 1st day of June, 2007], the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing*

(hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income,-

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein; or

(b) for any previous year which is to end on or after the date of the search,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, [unless,-

(1) such income is, or the transactions resulting in such income are recorded.-

(i) in a case falling under clause (a), before the date of the search; and

(ii) in a case falling under clause (b), on or before such date, in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the [Chief Commissioner or Commissioner] before the said date; or

*(2) he, in the course of the search, makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in [**] sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.]*

Explanation 5A.- Where in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of,-

- (i) any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income for any previous year; or
- (ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year,

which has ended before the date of search and, -

- (a) where the return of income for such previous year has been furnished before the said date but such income has not been declared therein; or
- (b) the due date for filing the return of income for such previous year has expired but the assessee has not filed the return,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.”]

Explanation 6.-Where any adjustment is made in the income or loss declared in the return under the proviso to clause (a) of sub-section (1) of section 143 and additional tax charged under that section, the provisions of this sub-section shall not apply in relation to the adjustment so made.]

Explanation 7.-Where in the case of an assessee who has entered into an international transaction defined in section 92B, any amount is added or disallowed in computing the total income under sub-section (4) of section 92C, then, the amount so added or disallowed 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 or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) [or the Commissioner] that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that section, in good faith and with due diligence.]

Section 271(1B) (inserted by Finance Act, 2008 (18 of 2008) with retrospective effect from 1.4.1989-

*(1B) 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).***

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 or Deputy Commissioner], where the penalty exceeds twenty thousand rupees,

except with the prior approval of the [Joint Commissioner.]

18. From perusal of the provisions afore-quoted, it is clear that if the assessing officer or the Commissioner (Appeals) or the Commissioner, **in course of any proceeding** under this Act is satisfied that any person **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 in addition to tax, if any, payable by him, a sum which shall not be less but which shall not exceed three times, the amount of tax sought to be evaded by reason of concealment of particulars of his income or the furnishing of inaccurate particulars of such income.
19. Explanation-5A as afore-quoted is a deeming provision that notwithstanding that such income is declared by him in the return of income **furnished on after the date of search**, he shall for the purposes of imposition of penalty under clause (c) of sub-section (1) of this section, **be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.**
20. In the present set of facts, undisputedly the search and seizure operation under Section 132 of the Act, 1961 was conducted on 23.11.2007. The **original return of** income under Section 139 of the Act, 1961 for the assessment year 2006-07 was filed by the assessee on 25.11.2006 disclosing total income of **Rs.22,15,91,970/-** which was **revised** by him under Section 139(5) of the Act, 1961 on **13.10.2007** disclosing total income of **Rs.21,60,97,680/-** and the **notice under Section 153A was issued to the assessee on 26.02.2009 and pursuant thereto, the**

assessee filed return of his income for the assessment year 2006-07 on 31.03.2009 declaring a total income of Rs.26,55,63,560/-.

Likewise, **for the assessment year 2007-08**, the assessee filed **original return of income** under Section 139 of the Act, 1961 **on 31.10.2007** disclosing total income of **Rs.127,24,13,150/-**. **After the search and seizure operations on 23.11.2006** and pursuant to the notice dated 26.02.2009 under Section 153A of the Act, 1961, the respondent/assessee **filed return of income for the assessment year 2007-08 on 31.03.2009** declaring **total income of Rs.138,39,05,410/-**. Thus, the Explanation-5A creating a deeming clause of “concealment of particulars of income” is fully attracted on facts of the present case for both the assessment years.

21. We have carefully perused both the assessment orders for the assessment years 2006-07 and 2007-08. From the **assessment order for the assessment year 2006-07**, it is evident that the respondent/assessee, due to seizure of various documents etc. during search and seizure operation under Section 132, on account of strong and un rebuttable evidences of huge concealment of income, had admitted concealed income in his return under Section 153A filed on 31.03.2009, after about 28 months of filing of the revised return. The assessing officer has specifically added Rs.4,99,00,000/- in the income disclosed by the assessee in his returns, on account of “under-invoiced of sales”, and “inflated expenditures” as per seized documents – as discussed. The assessing officer initiated penalty proceedings and observed that “show cause notice under Section 274 for imposing

penalty under Section 271(1)(c) read with Explanation-5A of the Act, has been issued separately.”

22. Likewise in the **assessment order for the assessment year 2007-08** the assessee filed original return of income on 31.10.2007 i.e. about one month before the search dated 23.11.2007 in which concealed income of Rs.13,16,25,370/- was detected. Then he filed return under Section 153A on 31.03.2009 admitting the aforesaid concealed income. The assessing officer discussed in detail the undisclosed concealed income of the assessee amounting to Rs13,16,25,370/- which was admitted by the assessee. In the assessment order, the assessing officer specifically mentioned that “penalty proceedings under Section 271(1)(c) has been initiated and show cause notice under Section 274 for imposing penalty under Section 271 (1)(c) read with Explanation-5A of the Act is being issued separately.”
23. Concluding portions of the findings of undisclosed/concealed income recorded by the Assessing Officer in the Assessment order for A.Y. 2007-08 are as under:-

Assessment Year 2006-07

“Under invoicing of sales, and not genuine expenditure as per seized document – as discussed: Rs.4,99,00,000/-”

Assessment Year 2007-08

“The undisclosed income as per seized/impounded documents of the assessee for the year, as per discussions made in the earlier paragraphs, is as under:

SI.	Particulars	Undisclosed Income (Rs.)
1.	Under invoicing of sales as per TPS-9 (Chaibasa) pages – 3,4,15 & 16	43,02,020
2.	Undisclosed income as per SK-2	19,00,000
3.	Inflation of expenses as per HBS-7	4,06,57,915
4.	Undisclosed income as per SKN-20	5,29,53,306
5.	Undisclosed income in view of SKN-20 for the remaining period of the previous year	3,17,71,984
6.	Miscellaneous Undisclosed income as per disclosure petition of the assessee	40,145
Total undisclosed income for A.Y. 2007-08		13,16,25,370

”

24. Thus, from perusal of the assessment orders for both the assessment years, i.e., 2006-07 and 2007-08 it is evident that **the assessing officer has specifically noted concealment of particulars of income and the income so concealed was admitted by the respondent/assessee** as he was having no explanation. The concealment was supported by documentary evidences. The specific amount of undisclosed income was added in the income disclosed by the assessee in his returns. The penalty proceedings itself was initiated by the assessing officer while passing the assessment order. **The issuance of notice under Section 274 of the Act, 1961 was in fact, a consequence of the initiation of**

penalty proceedings by the assessing officer during the course of assessment proceedings.

25. In ***D.M. Manasvi vs. Commissioner of Income Tax, Gujarat-II, Ahmedabad*** reported in **1973 (3) SCC 207** (paragraphs 8, 10 & 11), the Hon'ble Supreme Court observed that issuance of notice to assessee under Section 274 is a consequence of prima facie satisfaction reached by the assessing officer in the assessment proceedings regarding concealment of particulars of income or furnishing of inaccurate particulars of income and held as follows:

“8. The fact that notices were issued subsequent to the making of the assessment orders would not, in our opinion, show that there was no satisfaction of the Income-tax Officer during the assessment proceedings that the assessee had concealed the particulars of his income or had furnished incorrect particulars of such income. What is contemplated by clause (1) of Section 271 is that the Income Tax Officer or the Appellate Assistant Commissioner should have been satisfied in the course of proceedings under the Act regarding matters mentioned in the clauses of that sub-section. It is not, however, essential that notice to the person proceeded against should have also been issued during the course of the assessment proceedings. Satisfaction in the very nature of things precedes the issue of notice and it would not be correct to equate the satisfaction of the Income-tax Officer or Appellate Assistant Commissioner with the actual issue of notice. The issue of notice is a consequence of the satisfaction of the Income-tax Officer of the Appellate Assistant Commissioner and it would, in our opinion, be sufficient compliance with the provisions of the statute if the Income-tax Officer or the Appellate Assistant Commissioner tallied about the matters referred to in clauses (a) to (2) of sub-section (1) of Section 271 during the course of proceedings under the Act even though notice to the person proceeded against in pursuance of that satisfaction is issued subsequently. We may in this context refer to a decision of five judges Bench of this court in the case of Commissioner of Income-tax v. 5. V. Angidi Chattiar,

Shah, J., speaking for the court, while dealing with Section 28 of the Indian Income-tax Act, 1922, observed:

"The power to impose penalty under Section 28 depends upon the satisfaction of the Income-tax Officer in the course of proceedings under the Act; it cannot be exercised if he is not satisfied about the existence of conditions specified in clauses (a), (b) or (s) before the proceedings are concluded. The proceeding to levy penalty has, however, not to be commenced by the Income-tax Officer before the completion of the assessment proceedings by the Income-tax Officer. Satisfaction before conclusion of the proceeding under the Act, and not the issue of a notice or initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction."

10. We are also not impressed by the argument advanced on behalf of the appellant that the proceedings for the imposition of penalty were initiated not by the Income-tax Officer but by the Inspecting Assistant Commissioner when the matter had been referred to him under Section 274(2) of the Act. The proceedings for the imposition of penalty in terms of sub-section (1) of Section 271 have necessarily to be initiated either by the Income-tax Officer or by the Appellate Assistant Commissioner. The fact that the Income-tax Officer has to refer the case to the Inspecting Assistant Commissioner if the minimum imposable penalty exceeds the sum of rupees one thousand in a case falling under clause (c) of sub-section (1) of Section 271 would not show that the proceedings in such a case cannot be initiated by the Income-tax Officer. The Income-tax Officer in such an event can refer the case to the Inspecting Assistant Commissioner after initiating the proceedings. **It would, indeed, be the satisfaction of the Income-tax Officer in the course of the assessment proceedings regarding the concealment of income which would constitute the basis and foundation of the proceedings for levy of penalty.**

11. There is also no force in the submission made on behalf of the appellant that the Income-tax Officer, before feeling satisfied regarding the necessity of initiating proceedings for imposition of penalty and before issuing, the consequential notice should have issued another notice to the assessee and held a preliminary enquiry regarding the necessity of initiating proceedings. Such a course, in our opinion, would result in mere duplication of the procedure without any advantage to the parties. A similar contention was advanced in a case relating to

initiation of proceedings under Section 34 of the Indian Income-tax Act, 1922, and was repelled by the Judicial Committee in the case of Commissioner of Income-tax v. Mahaliram Ramjidas, in the following words:

*"Therefore, a construction of Section 34 which requires a quasi-judicial enquiry to be held before the powers under the section can be operated result in mere duplication of procedure and in two enquiries of the same kind, into the same matter, conducted by the same official, and without any advantage to the parties. A construction so unreasonable and unpractical ought not to be preferred when another construction is open. Accordingly, their Lordships are of opinion that **the Income-tax Officer is not required by the section to convene the assessee, or to intimate to him the nature of the alleged escapement, or to give him an opportunity of being heard, before he decides to operate the powers conferred by the section.**"*

It may also be observed that what is contemplated by Sections 271 and 274 of the Act is that there should be, prima facie, satisfaction of the Income-tax Officer or the Appellate Assistant Commissioner in respect of the matters mentioned in sub-section (1) before he hears the assessee or gives him an opportunity of being heard. The final conclusion on the point as to whether the requirements of clauses (a), (b) and (c) of Section 271(1) have been satisfied would be reached only after the assessee has been heard or has been given a reasonable opportunity of being heard."

26. **In Mak Data Private Limited v. Commissioner of Income Tax – II (2014) 1 SCC 674 [paragraphs 9 to 13]**, Hon'ble Supreme Court considered the provisions of Section 271(1)(c) and Section 274 of the Act, 1961 in the context of surrender of income after search and seizure and after observing that surrender of income is concealment as the surrender was not voluntary, and held as under:-

"9. The AO, in our view, shall not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace",

"avoid litigation", "amicable settlement", etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. The **Explanation to Section 271(1) raises a presumption of concealment**, when a difference is noticed by the AO, between reported and assessed income. **The burden is then on the assessee to show otherwise, by cogent and reliable evidence.** When the initial onus placed by the Explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.

10. **The assessee has only stated that he had surrendered the additional sum of Rs. 40,74,000 with a view to avoid litigation, buy peace and to channelise the energy and resources towards productive work and to make amicable settlement with the Income Tax Department. The statute does not recognise those types of defences under Explanation 1 to Section 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the appellant assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.**

...

12. **The AO has to satisfy itself whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing.** The scope of Section 271(1)(c) has also been elaborately discussed by this Court in *Union of India v. Dharamendra Textile Processors and CIT v. Atul Mohan Bindal.*"

27. In the present set of facts, the respondent assessee has concealed particulars of true income in his returns and it is only after the search and seizure operation was conducted and voluminous documentary evidences came in the hands of the Income Tax Department evidencing concealment of income by the assessee only then he surrendered certain amounts as undisclosed income in the return under Section 153A filed much subsequent to the search and seizure. **Therefore, disclosure of income was not voluntary but it was on account of concealed income detected by the Income Tax Department.** As observed by Hon'ble Supreme court in Mak Data Private Limited (supra), the law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he has to be absolved from penalty. The assessing officer has to satisfy only whether the penalty proceeding is to be initiated or not during the course of assessment proceedings. He is not required to record his satisfaction in a particular manner or to reduce it in writing, as held in Mak Data Private Limited (supra). In the present set of facts, the assessing officer has recorded his satisfaction in the assessment order and initiated penalty proceedings under Section 271(1)(c) of the Act, 1961 for concealment of particulars of income by the respondent assessee. He also directed for issuance of notice. The issuance of notice under Section 274 of the Act, 1961 was merely a consequence of the penalty proceeding initiated by the Assessing Officer during the course of assessment proceedings. **The assessee was well aware of the fact of concealment of particulars of income by him,**

which was well discussed in both the assessment orders by the assessing officer.

28. Language of the Explanation 5A to Section 271(1) of the Act, 1961 is plain and unambiguous. It applies to cases where, in the course of search initiated under Section 132 or after the 1st day of June 2007, the assessee is found to be the owner of any asset as mentioned in clauses (i) or (ii) representing his income in any previous year which has ended before the date of search and where the return of income for such previous year has been furnished before the date of search but such income has not been declared therein; or the due date for filing the return of income for such previous year has expired but the assessee has not filed the return, then, **notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purpose of imposition of a penalty under Clause (c) of sub-section (1) of Section 271, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.** The judgment of Hon'ble Supreme Court in Mak Data Pvt. Ltd. (supra) is also on the same line. The respondent assessee could not lead any evidence that Rs.4,99,00,000/- for A.Y. 2006-07 and Rs.10.63 crores for A.Y. 2007-08 detected as concealed income in search dated 23.11.2007 were either disclosed in his original or revised returns of income or were not his concealed income, rather he admitted it as his undisclosed income attracting penalty under clause (c) of sub-section (1) of Section 271 of the Act, 1961.

Legal Fiction

29. **Section 271(1B)** as afore-quoted was inserted by Finance Act, 2008 (18 of 2008) with retrospective effect from 01.04.1989, which specifically provides that where any amount is added or disallowed in computing the total income or loss of the assessee in any order of assessment or re-assessment of the 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 proceeding under the said clause (c)**. In the present set of facts, the Assessing Officer has not only recorded detailed findings of undisclosed income of the assessee while passing the assessment order but also clearly mentioned under-invoicing of sales by the assessee in the books for the assessment year 2006-07 [Rs.19,25,388/-] and for the assessment year 2007-08 [Rs.43,02,020/-]. Expenditures under various heads were inflated to the extent of Rs.4,79,05,925/- in A.Y. 2006-07 which were not genuine business expenditures and were admitted by the assessee to be so. The assessing officer also clearly observed in the assessment order for the **assessment year 2006-07 that the undisclosed income of Rs.4,99,00,000/- found from the seized/impounded documents have been declared by the assessee in the return filed under Section 153A for the assessment year 2006-07**. Thus, the undisclosed income has been clearly admitted by the assessee. **In Mak Data Private Limited (supra), Hon'ble Supreme Court has clearly observed that surrender of**

income after search is not voluntary but concealment. The deeming provision as provided in sub-section (1B) was inserted by the Parliament on account of certain judgements after taking note of the judicial pronouncement, as observed by the Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory (supra) [relied by the respondent assessee], as under:-

“... After taking note of the judicial pronouncements in this regard, the Legislature thought it fit to insert section 271(1B), which reads as under:

"271. (1B) 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)."

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."

30. Thus, sub-section (1B) of Section 271 creating a legal fiction deserves to be given full effect. In **Builders Association of India and others etc. etc. v. Union of India and others etc. etc. AIR 1989 SC 1371 (paragraph 36)** a Constitution Bench of Hon'ble Supreme Court held that **when the law creates a legal fiction, such fiction should be**

carried to its logical end. There should not be any hesitation in giving full effect to it. In **Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd. & Ors. JT 2002 (10) SC 55 (paragraph 23)**, Hon'ble Supreme Court held that **when a legal fiction is created, it must be given full effect.** Similar principle has been laid down by Hon'ble Supreme Court in **M. Venugopal v. Divisional Manager, Life Insurance Corporation of India, Machilipatnam A.P. & Anr. JT 1994 (1) SC 281**, **Indian Oil Corporation v. Chief Inspector of Factories & Ors. etc. (1998) 5 SCC 738**, **Voltas Limited, Bombay v. Union of India & Ors. 1995 SCC (Supp) 2 498**, **Harish Tandon v. Additional District Magistrate, Allahabad, U.P. & Ors. (1995) 1 SCC 537**, **G. Viswanathan etc. v. Hon'ble Speaker, Tamil Nadu Legislative Assembly, Madras & Anr. (1996) 2 SCC 353**, **Prafulla Kumar Das & Ors. v. State of Orissa & Ors. JT 2003 (9) SC 477 [paragraph 47]** and **Ashok Leyland Ltd. v. State of Tamil Nadu & Anr. JT 2004 (1) SC 289 [paragraphs 64-70]**.

31. In **Sadashiv Dada Patil v. Purushottam Onkar Patil (D) by LRs. JT 2006 (9) SC 64 (paragraphs 27 to 30)**, Hon'ble Supreme Court observed that legal fiction should not be extended beyond the scope thereof or beyond the language by which created. It cannot be pushed too far to result in enormous or absurd position. **In the present set of facts, we find that the legal fiction created either by Explanation 5A or by Section 271(1B) of the Act, 1961 has been neither extended beyond the said provision nor beyond the language by which it has been created.**

32. In **Commissioner of Commercial Tax, Ranchi and Another v. Swarn Rekha Cokes and Coals Pvt. Ltd. and Others** 2004 (136) STC 57 SC (paragraph 29), Hon'ble Supreme Court observed **the Court should ascertain the purpose for which the legal fiction is created and having done so to assume all those facts and consequences which are incidental or inevitable corollaries to give effect to the fiction. When the law requires that an imaginary state of affairs should be treated as real, then, unless prohibited from doing so, one must also imagine as real the consequences and incidents which, if putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.**
33. In **Bangaru Laxman v. State (Through CBI) and Another** (2012) 1 SCC 500 (paragraphs 20-24) and **State of Madhya Pradesh and Others v. Lafarge Dealers Association and Others** (2019) 7 SCC 584 (paragraphs 15-29), Hon'ble Supreme Court again observed that a deeming provision is a legal fiction and an admission of non-existence of the fact deemed. Therefore, while interpreting the provision creating a legal fiction, the Court has to ascertain the purpose for which the fiction is created. We have already discussed the purpose for which the legal fiction either in Explanation 5A or sub-section (1B) of Section 271 has been created.

Principle of Construction/Interpretation of Statute

34. A fiscal statute has to be interpreted on the basis of language used therein and not dehors the same. No words ought to be added or deleted.

Only the language used in the statute ought to be considered so as to ascertain proper meaning and intent of the legislation. The court is to ascribe natural and ordinary meaning to the words used by the legislature and the court ought not, under any circumstances, to substitute its own impressions and ideas in place of legislative intent as is available from a plain reading of the statutory provisions, vide **Orissa State Warehousing Corporation V. Commissioner of Income Tax (1999) 4 SCC 197 (Para 40)**. When the language is plain and unambiguous and admits of only one meaning, no question of construction of a statute arises, that the Act speaks for itself vide **State of Uttar Pradesh and Ors. V. Dr. Vijay Anand Maharaj AIR 1963 SC 946 and Arul Nadar vs Authorised Officer, Land Reforms (1998) 7 SCC 157 (para 5)**. It is well known principle of construction of a statute that when the language used in the statute is unambiguous and on a plain grammatical meaning being given to the words in the statute, the end result is neither arbitrary nor irrational nor contrary to the object of the statute, then it is the duty of the court to give effect to the words used in the statute as the words declare the intention of the law making for best vide **Jagdish Ch. Patnaik & Ors. V. State of Orissa & Ors. 1998 4 SCC 456 (para 24)**. In *Molar Mal (Dead) Through LRS v. Kay Iron Works (P) Ltd.* reported in (2000) 4 SCC 285 (Para 12,15) Hon'ble Supreme Court observed that normally the courts will have to follow the rule of literal construction which rule enjoins the court to take the words as used by the legislature and to give it the meaning which naturally implies. An exception to this rule is that when an application of literal

construction of the words in the statute leads to absurdity, inconsistency or when it is shown that the legal context in which the words are used or by reading the statute as a whole it requires a different meaning. In view of these settled principles of law, provisions of the Explanation 5A to Section 241(1) has to be given full effect.

35. It is settled law that in interpreting a statute, **every effort should be made to give effect to each and every word used by the legislature.** Presumption is that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. **A construction which attributes redundancy to the legislature will not be accepted except for compelling reasons such as obvious drafting errors** vide **Nathi Devi v. Radha Devi Gupta JT 2005 (1) SC 1 (paragraphs 12-15) : (2005) 2 SCC 271.** **There cannot be any scope for Courts to undertake exercise to read something into the provision which the legislature in its wisdom has consciously omitted vide 2009 (242) ELT 162 (paragraphs 14 and 15) [State v. Parmeshwaran Subramani]. Court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. Court can iron out fabric but cannot the change the texture of fabrics. It cannot enlarge the scope of legislation or intention when language is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation.** Intention of legislation must be gathered from the language used. Legislative intention must be found from the provision. When negative words are used, provision shall be mandatory.

Every clause in a statute be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statute.

36. There is no ambiguity in section 271(1)(c) or section 271(1B) or in Explanation 5A to sub-section 1 of section 271(c). Therefore, this Court cannot assume something which is not expressed or which shall stand in conflict with the aforesaid provisions. A plain reading of the aforesaid unambiguous provisions lead to an irresistible conclusion that if an assessee falls within the four corners of the legal fiction created by section 271(1B) and the Explanation 5A and the assessing officer has recorded his satisfaction of concealment of particulars of income during the course of assessment proceedings then the penalty proceedings cannot be said to be bad.
37. In the present set of facts **the assessing officer has noted in the assessment order the concealment of particulars of income by the respondent/assessee.** Notices were also directed to be issued as has been observed in the assessment orders. Once, in the assessment order the assessing officer has mentioned concealment of particulars of income by the assessee, the notice under section 274 is merely consequential. The respondent/assessee was well aware of the grounds of concealment of income recorded in the assessment order which he admitted. Section 274 of the Act prohibits imposition of penalty unless the assessee has been heard or has been given a reasonable opportunity of being heard. It is admitted fact of the case that the respondent/assessee was heard by

the assessing officer who passed the penalty order. The submissions made by the respondent/assessee before the assessing officer in penalty proceedings, have been noted by the assessing officer which have also been reproduced by us above. Thus, it is undisputed that the respondent/assessee has been heard. Under the circumstances, when a satisfaction has been recorded by the assessing officer during the assessment proceedings, consequential notice under section 274 was issued to the respondent/assessee and the respondent/assessee has been afforded an opportunity of being heard then the Tribunal has committed a manifest error of law and facts and has completely misdirected itself to set aside the penalty orders on the ground that “the grounds for imposition of penalty were not mentioned in the show cause notice under section 274 of the Act and thus, the show cause notice was defective”. The conclusion of the Tribunal is also in conflict with the law laid down by Hon’ble Supreme Court in D. M. Manasrei (supra) and Mak Data Pvt. Ltd. (supra).

38. Learned Counsel for the assessee respondent has relied upon certain High Courts judgment which we now proceed to examine. In **Manjunatha Cotton And Ginning Factory (Supra)** heavily relied by learned counsel for the respondent assessee, **Karnataka High Court held** that “Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c)” and “the assessee should know the grounds which he has to meet specifically”. We find that in the present set of facts, notice under Section 274 for penalty under Section 271(1)(c) of the Act, 1961 was issued by the Assessing Officer to the

respondent assessee to afford him opportunity of hearing for concealment of particulars of income. Details of un-disclosed/concealed income have been well mentioned in the Assessment Order of the respondent assessee and being well aware of it, the respondent assessee made specific submission in penalty proceedings which we have reproduced above. Thus, essential requirements of Section 271(1)(c) read with Section 274 have been complied with. Law in this regard has been well explained by Hon'ble Supreme Court in D. M. Manasri (supra) and Mak Data Pvt. Ltd. (supra) which are binding precedent. Any observation in the above noted Karnataka High Court judgment contrary to the judgments of Hon'ble Supreme Court, is not a good law. Hon'ble Supreme Court in **CIT v. SSA's Emerald Meadows (2016) 73 Taxmann.com 248** dismissed the SLP in limine. The next judgment relied by learned counsel for the respondent assessee is the judgment of this Court in Principal Commissioner of Income Tax-2 v. Industrial Safety Products (P) Ltd. (2023) 154 Taxmann.com 433 (Cal.) which relates to penalty proceedings under Section 271AAB and on facts this Court found that no substantial question of law was involved. The next relied upon judgment is of this Court in **ITAT 8 of 2019 decided on 26.02.2019** by which the appeal was dismissed on the ground that unless the charge against the assessee was specific, the same cannot be maintained. In the present set of facts, the charge against the assessee was specific that he has undisclosed income/concealed his income. Detail facts in this regard were mentioned in the assessment order. Pursuant to notice under Section 274, the assessee submitted specific

reply in penalty proceedings under Section 271(1)(c). Thus, the aforesaid order of the coordinate Bench is distinguishable on facts. The next relied upon order is of this Court in **Principal Commissioner of Income Tax, Central-2 Kolkata v. Bijoy Kumar Agarwal (ITAT No. 272 of 2017)** by which appeal was dismissed on the ground that the notice under Section 271(1)(c) does not specify which of the two contraventions, the assessee is guilty of. In the present set of facts, the notice under Section 274 for imposition of penalty under Section 271(1)(c) of the Act, 1961 was issued to the respondent assessee for concealment of particulars of income/undisclosed income which were well mentioned in the Assessment Order. The assessee made specific submissions before the assessing officer in penalty proceedings which have been reproduced above. Neither there was any allegation of breach of principles of natural justice nor it has been violated. Thus, the aforesaid order in Bijoy Kumar Agarwal's case is distinguishable. The next relied upon judgments are the judgment of Bombay High Court in Mr. Mohd. Farhan (supra) and Delhi High Court in Auto Lamps Ltd. (supra) which are not only distinguishable on facts but also are not binding on this Court.

39. For all the reasons afore-stated, the impugned order the Income Tax Appellate Tribunal dated 23.3.2016 in ITA No.1434/Kol/11 for the assessment year 2006-07 and in ITA No.1535/Kol/11 for the assessment year 2007-08 is hereby set aside. **The Appeal (ITA No.66 of 2018) is allowed.** The substantial question of law is answered in favour of the revenue and against the assessee and it is held that when the Assessing Officer has recorded in the Assessment order the particulars of

concealed income/undisclosed income of the assessee and on that basis initiated penalty proceeding under section 271(1)(c) of the Act, 1961, then consequential notice under Section 274 issued by assessing officer to the assessee to afford him opportunity of hearing, is specifically a notice for penalty for concealment of particulars of income/undisclosed income. Such a notice complies with the principles of natural justice and is a valid notice under Section 274 of the Act, 1961

40. The matter is remanded to the Income Tax Appellate Tribunal with direction to decide the ITA No.1434/Kol/2011 and ITA No.1535/Kol/2011 on merit, in accordance with law, within three months, after affording reasonable opportunity of hearing to the parties, without being influenced by any of the observations made in this order on merits of imposition of penalty upon the respondent assessee.

(SURYA PRAKASH KESARWANI, J.)

I agree

(RAJARSHI BHARADWAJ, J.)

Sd/S.Kumar/As.