आयकर अपीलीय अधिकरण "B" न्यायपीठ मुंबई में।

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

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER &
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.3708/Mum/2014
(**निर्धारण वर्ष /** Assessment Year : 2010-2011
आयकर अपील सं./I.T.A. No.1250/Mum/2013
(**निर्धारण वर्ष /** Assessment Year : 2010-2011

Shri Bharatkumar Maneklal Parikh, ARUNODAYA, 10th floor, Flat No. 1002 & 1003, Opp. New India Colony, C.D. Bariwala Marg, Andheri (W), Mumbai – 400 058.	**बनाम**/ Vs.	The ITO 14(1)(3), Mumbai.
स्थायी लेखा सं./ PAN : AACPP7754L		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No.4985/Mum/2014
(**निर्धारण वर्ष /** Assessment Year : 2010-2011
आयकर अपील सं./I.T.A. No.4986/Mum/2014
(**निर्धारण वर्ष /** Assessment Year : 2010-2011

The ITO 14(1)(3), Mumbai.	**बनाम**/ Vs.	Shri Bharatkumar Maneklal Parikh, ARUNODAYA, 10th floor, Flat No. 1002 & 1003, Opp. New India Colony, C.D. Bariwala Marg, Andheri (W), Mumbai – 400 058.
स्थायी लेखा सं./ PAN : AACPP7754L		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No.179/Mum/2013
(**निर्धारण वर्ष /** Assessment Year : 2010-2011
आयकर अपील सं./I.T.A. No.3709/Mum/2014
(**निर्धारण वर्ष /** Assessment Year : 2010-2011

Shri Ashokkumar Maneklal Parikh, ARUNODAYA, 10th floor, Flat No. 1002 & 1003, Opp. New India Colony, C.D. Bariwala Marg, Andheri (W), Mumbai – 400 058.	**बनाम**/ Vs.	The ITO 14(1)(3), Mumbai.
स्थायी लेखा सं./ PAN : AACPP7755M		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by	Shri Neelkanth Khandelwal & Ms. Hetal Panchal
Respondent by :	Shri Aarsi Prasad (D.R)

सुनवाई की तारीख /**Date of Hearing : 16-09-2015**
घोषणा की तारीख /**Date of Pronouncement : 21-10-2015**

I

आदेश / O R D E R

PER R.C. SHARMA, A.M. :

Out of these six appeals, two appeals being ITA Nos. 4985/Mum/14 & ITA No. 4986/Mum/14 for A.Y. 2010-11 are filed by the Revenue and four appeals being ITA Nos. 3708/Mum/14, ITA No. 1250/Mum/13, 179/Mum/13 and 3709/Mum/14 for A.Y. 2010-11 are filed by the assessee. These appeals filed by the assessee and Revenue are directed against separate orders passed by the ld. CIT(A) – 25 for the assessment year A.Y. 2010-11, in the matter of order passed u/s.143(3)/271(1)(c) of the Income Tax Act, 1961.

First, we shall take up assessee's appeals in ITA No. 1250/Mum/13 & ITA No. 179/Mum/13 for A.Y. 2010-11.

3. These are the appeals filed by the assessee against two separate orders of ld. CIT(A) – 25 dated 3-12-2012 and 29-11-2012 for the A.Y. 2010-11 in the matter of order passed u/s 143(3) of the Income Tax Act, 1961.

4. Common grounds are involved in both these appeals, therefore, these were heard together and disposed of by this consolidated order for the sake of convenience.

5. Facts in brief are that assessee is an individual and derives income from capital gains and other sources. During the year under consideration, return was filed declaring total income of Rs. 10,35,810/-. Along with return of income, assessee filed a letter dated 20th September, 2010 with the A.O. disclosing the fact of long term capital gain on surrender of lease hold rights not liable to tax as per the decision of Hon'ble Supreme Court in the case of K.P. Varghese. Advance tax was also paid on such capital gains. The return was processed u/s 143(1) of the Act determining refund of Rs. 1,98,47,869/- thereafter return was taken under scrutiny and during the course of scrutiny proceedings, the A.O. observed that the assessee had paid advance tax of Rs. 1.99 crores at the fag end of the year, however, no corresponding income was offered in the return of income. On perusal of statement of income, the A.O. observed that the assessee had shown long term capital gain of Rs. 10.83 lacs in respect of leasehold rights. The reason offered for showing loss under head of capital gains was as under:-

> "Lease Hold Rights is a capital asset yet it would not be a capital asset if it is an asset in the acquisition of which it is not possible to envisage a cost. In support of the same reliance is placed on the decision of Supreme Court in the case of CIT vs. B.C. Srinivasan Shetty reported in 128 ITR 294 wherein it has been held as under:-

> "The charging section and the computation provisions together constitute an integrated code. Where there is a case to which the computation provisions can not apply at all it is evident that such a case was not intended to fall within charging section. "

6. After considering the assessee's contention, the A.O. observed that provisions of section 55(2)(a) inserted by Finance Act 1994 w.e,f. 01/04/1995 which says that cost of acquisition in relation to certain capital assets enumerated in the provision itself is to be taken at NIL for the purpose of computing capital gains u/s 45 of the IT Act. This particular provision was brought on the statute book to nullify the effect of the Honble Supreme Court decision in case of CIT v/s B. C. Srinivasan Shetty reported in 128 ITR 294 wherein it was held that no capital gain is leviable in the case of self-generated assets involving no cost. In this way, it goes without saying that the decision of the Hon'ble Supreme Court in the case of CIT v/s B. C. Srinivasan Shetty reported in 128 ITR 294 is no longer applicable in view of the amendment made as above for which the Assessee did not feel tired in citing his various submissions. Further, the Assessee in his submission also stated that the provision of section 55(2)(a) of the IT Act is not applicable riding on the fact that the term leasehold right is not specifically mentioned in the provision u/s 55(2)(a) of the IT Act. The Assessee went on arguing that leasehold right is different than the tenancy right which was not the intention of the legislature to include in section 55(2)(a) of the IT Act.

7. The A.O. observed that the intention of the legislature was to bring almost all the self-generated assets to the ambit of capital gains taxable u/s 45 of the Act. The A.O. did not accept the assessee's contention that leasehold rights are not akin to the tenancy right, therefore, capital gain arose on sale of leasehold rights was held to be taxable u/s 55(2)(a) of the Act. The A.O. also observed that the wording of leasehold right must have

been embedded in the word tenancy right specially mentioned in section 55(2)(a) of the Act. By the impugned order the ld. CIT(A) confirmed the action of A.O. against which assessee is in further appeal before us.

8. Contention of ld. AR was as under :-

1.1 Section 55(2)(a) is a deeming provision and hence, has to be strictly construed

1.2 Interpretation of legal terms used in statute - (1958) 9 STC 353 (SC); AIR 1958 (SC) 560 - refer written submissions, para 1.12. The words "lease" , "leasehold rights" "tenancy rights" have been used separately in the Income-tax Act at different places - thereby meaning that the two words have different meaning –

(a) Section 55(2)(a) - "tenancy rights"
(b)Section 1941, Explanation (i) uses both words - lease and tenancy
(c)Section 33A - Explanation 5eiow sub-section (8) =leasehold rights or other right of occupancy in any land

(d)Similarly, in section 155 - Explanation below sub-section (5A) - leasehold rights or other right of occupancy in any land
(e)Section 139(1) first proviso (i) - ownership, tenancy or otherwise
(f)"Leasehold" - Section 269UE(l), proviso
Section 35D(3) - Explanation
(g)"Tenancy" - section 1941 Explanation (i) -lease, sub-lease, tenancy
(h)"Lease"
Section 269UA(t)
Section 44AE
Section 696A(a)(1)(iii)
(i)Section 54D, 54G - "right in land" - refer written submissions para 1.4 and 1.5
(j)Section 92B Explanation (ii)(i) - leasehold
(k)Section 33A - Explanation below sub-section (8)

The above are only instances where the two words have been used either separately or in the same clause Thus, the word "leasehold rights" is not alien to the Income-tax Act and the Legislature in its wisdom, having not included the words "tenancy rights" in section 55(2)(a), the same cannot be read into it inasmuch "as, if so done, it will amount to violation to the language.

1.3 Further, consider this that the words "tenancy rights" in section 55(2)(a) is not added with the phrase "rights of similar nature" or "by whatever name called"

Legislature has not qualified the words "tenancy rights" in section 55(2)(a) by these phrases though the Legislature has used such phrases wherever they intended to enlarge the scope of the section, examples - (i) section 33A - Explanation below sub-section (8) - leasehold rights or other right of occupancy in any land (ii) in section 155 - Explanation below sub-section (5A) - leasehold rights or other right of occupancy in any land (iii) section 32 (l)(ii) - or any other business or commercial rights of similar nature

The only reason can be that the Legislature did not intend to enlarge the scope of the words "tenancy rights".

1.4 Stamp Act

Transfer by way of - (a) lease - covered by Entry 36 of the Schedule

(b) Tenancy rights - covered by Article 5 (g-d) of the said Schedule

Lease, leasehold rights, tenancy and tenancy rights are legal terms and if they have been used differently in different sections of Income-tax Act, it follows that the 2 carry different meanings.

1.5 (a) There is no cost of acquisition of leasehold rights - Cadell Weaving - 249 ITR 265 (Born) at page 270 - under the heading "Facts" and 273 ITR 1 (SC)

(b) Section 55(2)(a) only refers to "tenancy rights" , cost of acquisition of which is deemed to be 'nil' and does not refer to leasehold rights

(c) Leasehold rights not mentioned in the said section

(d) Basis of claim - refer letter to AO dated 8.8.2011 - page nos 62 to 66 of paper book

(e) Leasehold rights - no cost no capital amount paid, only annual payments.

Decisions
128 ITR 294 (SC) - B.c. Srinivasa Shetty - ratio of the decision
307 ITR 75 (SC) - PNB Finance Ltd - ratio of the decision

1.6 Refer section 55(1)(b) -leasehold rights not mentioned 137 ITR 493 (Bom)

Refer page no 66 of paper book for submissions.

The value of leasehold rights may fluctuate

The value of the rights may fluctuate with -

(i) the area of the land, development in the vicinity, future prospect,
(ii) any Government notification - declaring Special zone
(iii) any Government notification derecognising a particular area for any
future developments and so on

Thus, the value may fluctuate with every factor relating to business. There can be no account in value of factors creating fluctuation.

Thus, as the "leasehold rights" is not mentioned in section 55(1)(b), the "cost of improvement" cannot be ascertained and hence, again the computation provisions fail, and hence, the amount received on surrender of leasehold rights cannot be brought to tax - 137 ITR 493 (Born)

1. 7 Refer CIT(A) order Para 6, page 8

B.C. Srinivasa Shetty applies with full force to "leasehold rights" as it applied to "goodwill" - Integrated code - charging section and computation provisions - If computation provisions fail, charging section will not apply inasmuch as the "capital asset" was never intended to be taxed under the head "capital gains".

Thus, Sun Engg.-198 ITR 297 (SC) does not apply."

9. On the other hand, ld. DR relied on the orders of lower authorities and contended that leasehold rights are similar to tenancy rights, therefore, AO was justified in taxing the same as capital gains.

10. We have considered the rival contentions, carefully gone through the orders of authorities below and also the judicial pronouncements cited by the ld. A.R. and ld. D.R. as well as judicial pronouncements referred by the lower authorities in their respective orders. From the record, we found that in the return of income filed by the assessee, he has not offered capital gains of Rs. 10.83 crores received on sale of leasehold immovable property, however, a letter was filed by assessee along with the return of income wherein, facts were brought on record to the effect that since no cost was incurred in respect of leasehold rights acquired by the assessee, therefore, applying the principle laid down by the Hon'ble Supreme Court in case of B.C. Srinivasan Shetty (supra), capital gain is not liable to tax. The A.O. found that the assessee has paid advance tax of Rs. 1.99 crores but no corresponding income was offered in the return of income. On A.O.'s query as to why the assessee has not offered income of Rs. 10.83 crores, it was explained that the amount received on transfer of leasehold rights was not taxable because it was not possible to envisage the cost of acquisition and for this proposition, reliance was placed on the decision of Hon'ble Supreme Court in the case of CIT vs. B.C. Shinivasan Shetty, 128 ITR 294. It was held by the A.O. that the rulings of Hon'ble Supreme Court in the case of B.C. Shinivasan Shetty (supra) is no more applicable because necessary amendments have been made in the statute u/s 55(2)(a) of the Act w.e.f. 1-4-1995. It was the contention of the assessee that leasehold right which is a capital asset is not stated in section 55(2)(a) of the Act, therefore, it is not applicable. However, the A.O. did not accept the assessee's contention and came to the conclusion that "leasehold right" as claimed by the assessee is in the nature of "tenancy right". The A.O. also discussed the judicial pronouncements cited by the A.R. and concluded that provisions of section 55(2)(a) (ii) of the Act are applicable and computed the capital gains on transfer of leasehold rights. Even though "tenancy right" and "leasehold right" is not defined under Income Tax Act, but one has to understand the meaning of these terms in common parlance as well as legal

parlance. In common parlance, both the terms are interchangeable and has same meaning. The statutory definitions in other legislations explained that tenancy right includes lease right. Thus tenancy right is a wider and broader term capable of conceiving similar and such rights. Accordingly, we do not find any infirmity in the order of lower authorities for taxing the capital gains earned on transfer of leasehold rights. So far as expenses incurred on improvement is concerned, we direct the A.O. to consider the same as claimed by the assessee while computing capital gains u/s.45 of the Act..

11. In the result, both the appeals are allowed in part for statistical purposes.

Now, we shall take up revenue's and assessee's appeal with regard to imposition of penalty u/s.271(1)(c) of the Act.

12. In these appeals, the assessee is aggrieved by the decision of ld. CIT(A) in confirming the levy of penalty u/s 271(1)(c) of the Act by declining the application of decision of Hon'ble Supreme Court in the case of CIT vs. B.C. Srinivasan Shetty, 128 ITR 294. However, revenue is also aggrieved for deleting part of penalty by the CIT(A) with respect to deduction u/s.54EC.

13. Facts in brief are that the assessee filed his return of income on 20th September, 2010 declaring total income Rs 14,26,550, which consists only of interest income from various sources. On the same date, i.e. on the date of filing of the return of income, assessee filed a letter dated September 20, 2010 with the Assessing Officer giving the relevant information/contention regarding computation of total income attached to the letter. It is clearly mentioned in the letter :-

> " ..... in the Computation of Total Income, any profit/ gain arising on account of sale of leasehold rights in a property at Goregaon (W) vide Agreement at 18th December 2009 and conveyance dt. 18.3.2010 is not included .....

.... while filing the return in the Schedule AIR S.No. 7 has not been filled in since sale of leasehold right is not immoveable property. `

.... enclosed herewith a copy of the Computation of Total Income on the basis of which the aforesaid return of income is filed and you are requested to consider the same at the time of framing the assessment order. "

Further, a note was given at the end of the computation of total income forming part of return, which mentions the fact of sale of leasehold rights and the claim of the appellant that the same is not exigible to tax. The assessee also paid advance tax on the impugned gains so that he does not have to bear the burden of interest under section 234B in the eventuality of his claim not being accepted. The assessee during the course of assessment proceedings furnished among other details, the following:-

- Lease Agreement dated 8th February, 1952
- Sale Agreement dated 18th December, 2009
- Conveyance Deed dated 13th March, 2010

- Letter dated August 8, 2011 giving detailed reasons why receipt on sale of leasehold rights is not chargeable to capital gains tax.

- Letter dated August 11, 2011 giving details of various letters filed during the course of assessment proceedings.

- Letter dated September 12,2011 furnishing the Approved Valuer's Report.

However, the A.O. did not agree with the contention of the assessee on the ground that leasehold rights is different from tenancy right so as to make the assessee eligible to claim exemption from long term capital gain. Accordingly by declining the assessee's claim, the A.O. added the amount of capital gains

in the income of the assessee and also levied penalty u/s 271(1)(c) of the Act.

14. By the impugned order, the ld. CIT(A) confirmed the action of the A.O. in respect of levy of penalty u/s 271(1)(c). However, the CIT(A) deleted the penalty attributable to the amount of exemption available u/s.54EC. Aggrieved by this order of ld. CIT(A), both the assessee and revenue are in appeals before us.

15. It was contended by the ld. A.R. that it is well-settled by now that provisions dealing with penalty must be strictly construed. Penalties are to be construed within the term and language of the particular statute. Penalty provision should be interpreted as it stands and in case of doubt in a manner favourable to the taxpayer. If the Court finds that the language of a taxing provision is ambiguous or capable of more meanings than one, then the Court has to adopt the interpretation which favours the assessee, more particularly so where the provision relates to the imposition of penalty. He further relied on the following decisions:

CIT v. Vegetable Products Ltd. - (1973) 88 ITR 192,195 (SC)
C.A. Abraham v. ITO - (1961) 41 ITR 425 (SC)
CIT v. P.M. Shah - (1993) 203 ITR 792, 799 (Bom)
Birla Cement Works v. State of Rajasthan - (199494 STC 422, 432 (SC)

16. He further contended that penalty proceedings are distinct from assessment proceedings. Assessment proceedings and penalty proceedings are two separate and distinct proceedings. The fact that certain additions were made in the assessment proceedings would not automatically justify the Revenue to impose penalty under section 271(1)(c) (CIT v. Dharamchand L. Shah, (1993) 204 ITR 462,468 (Bom)]. As per the ld. A.R., imposition of penalty is discretionary - Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a

statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

Hindustan Steel Ltd. v. State of Orissa - (1972),83 ITR 26,29 (SC)
Indra & Co. v. Union of India - (1967) 64 ITR 664, 667 (Raj)
CIT v. Smt. Veerawali - (1976) 104 ITR 679 (Ori)

The word “may” in section on 271`(1) indicates that the authority concerned has a discretion either to levy penalty or not to levy a penalty, for this proposition reliance was placed on following pronouncements.

CIT vs. Maya Rani Punj – (1973) 92 ITR 394 (Del)

Poorna Biscuit Factory v. CIT – (1975) 99 ITR 41 (AP)

CIT vs. Prafulla Kumar Malik – (1976) 104 ITR 648 (Ori)

CIT vs. V.M. Modi & Sons- (1976) 102 ITR 548 (MP)

B. Muniappa Goundere vs. CIT – (1976) 102 ITR 787 (Mad)

The power to impose penalty has to be exercised judicially with due regard to all facts and circumstances of each case and cannot be exercised mechanically.

M.P. Laxman v. Agri. ITO - (1986) 157 ITR 1, 9 (Karn

Imposition of penalty is not mandatory - It is not mandatory under section 271 that a penalty must be imposed in every case. If the conditions laid down in the said section are established, then the authority concerned "may direct" that the person committing the default within the meaning of the said section pay the penalty imposed and for this purpose reliance was place don CIT vs. Bengal Iron Galvanising Works - (1987) 165 ITR 249,252-53 (Cal)

17. As per the ld. A.R. although penalty has been regarded as an additional

tax in a certain sense and for certain purposes, it is not possible to hold that penalty proceedings are essentially a continuation of the proceedings relating to assessment where a return has been filed (Jain Bros. v. Union of India, (1970) 77 ITR 107, 116 (SC)). For all practical purposes, proceedings for imposition of penalty, though emanating from proceedings for assessment, are independent aspects of the proceedings and, therefore, the Tribunal is justified in considering the evidence as disclosed from the records independently without in any way considering the earlier findings in the quantum appeal to be binding or conclusive, for this purpose reliance was placed on the decision of Hon'ble Delhi High Court in the case of CIT v. Chetan Dass Lachhman Dass - (1995) 214 ITR 726, 729.

18. Further contention of the A.R. was that mere making of the claim, which is not sustainable in law by itself will not amount to furnishing of inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to furnishing inaccurate particulars of income. Therefore, as per the ld. A.R. merely because the assessee claimed the impugned receipt as not chargeable to tax, which claim was not accepted by the Assessing Officer or was not acceptable to him, that, by itself, would not attract the penalty under section 271(1)(c). If the contention of the revenue was accepted, then in case of every return where the claim made is not accepted by the Assessing Officer for any reason, the assessee would be slapped with penalty under section 271(l)(c). That would clearly not be the intendment of the legislature. Our attention was invited to the observations of the Apex Court in Sree Krishna Electricals v. State of Tamil Nadu (2009) 23 VST 249 while dealing with penalty proceedings in Tamil Nadu General Sales Tax Act are apt, the Court had found that the authorities below that there were some incorrect statements made in the return. However, the said transactions were reflected in the accounts of the assessee. The Apex Court observed thus :

> "So far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the appellant's account books. Where certain items which are not included in the turnover are disclosed in the dealer's own account books and the assessing authorities include these items in the dealer's turnover disallowing the exemption, penalty cannot be imposed. The penalty levied stands set aside".

19. He further invited our attention to the penalty order and contended that the A.O. has initiated the penalty proceedings for furnishing inaccurate particulars of income, however, in the entire order of penalty, the A.O. does not specify which particulars are inaccurate and, hence, the A.O. has not discharged his burden, hence, the impugned order is bad in law. As per the ld. A.R. the A.O. has levied the impugned penalty also for the reasons that since the assessee has paid advance tax, there was no reason available with the assessee for nurturing a belief that the amount received is a capital receipt not chargeable to tax. On absolutely similar facts, the Hon'ble Delhi High Court in the case of Ravindra Bahl (42 taxmann.com 404) has deleted the penalty under section 271(1)(c). The ld. CIT(A) also in para 4.4 of his order considers the aforesaid issue and states that "I feel that certainly the assessee had envisaged that in case his return is selected for scrutiny, he would get a saving grace from penalty on the basis of said letter filed with A.O. and the payment made of the advance tax including on the likely addition to be made in assessment. The assesee submitted that the ld. CIT(A) is absolutely right in observing thus. It was further contended by the ld. A.R. that the A.O. wrongly applied the decision of Hon'ble Apex Court in the case of Dharmendra Textiles (306 ITR 277) in so far as the A.O. has relied on some sentences of the decision of the Hon'ble Apex Court without understanding the true import of the decision. Courts have time and again reiterated that reliance cannot be placed on some sentences of a decision and has to be read in the context.

20. As per the ld. A.R. the ld. CIT(A) takes a without prejudice contention to

state that if the receipt on surrender of leasehold rights is held to be not taxable by the higher appellate forum then the receipt should be brought to tax under section 10(3) of the Act. Thus, the CIT(A) also is not sure of the taxability of the receipt, then why the appellant should be slapped with the impugned penalty if he makes a claim by disclosing all relevant particulars. Further, the fact that the CIT(A) has taken a without prejudice contention also means that he is not too sure of his view of taxability of the impugned some and it also means that he is alive to the fact that two views are possible, under such circumstances, the impugned penalty cannot be sustained.

21. On the other hand, the contention of the ld. D.R. was that the assessee has wrongly claimed that transfer of leasehold rights is not taxable insofar as leasehold rights are different from tenancy rights. The ld. D.R. further argued that as to why the assessee paid advance tax on gains arising on surrender of leashold rights and claimed a refund of such tax paid by claiming the same to be not chargeable to tax. He further relied on the order of the ld. CIT(A) on para 4.6 stating that only a small percentage of cases are selected for scrutiny and penalty should be levied in such cases where the escapement of income is on illogical grounds and contended that the assessee took his chances that his case may not get selected in scrutiny and hence, the gains may skip the tax.

22. We have considered the rival contentions and carefully gone through the orders of authorities below and deliberated on the judicial pronouncements referred by lower authorities in their respective order as well as cited by ld. A.R. and ld. D.R. during the course of hearing before us. We have also carefully gone through the justifications filed by the ld. A.R. during the quantum proceeding so as to distinguish the leasehold rights from the tenancy rights. For the year under consideration, the assessee has filed his return of income on 20th September, 2010. On the very same date, the assessee has filed a letter with the A.O. giving the relevant information to the

effect that capital gain accruing on account of sale of leasehold rights in the property situated at Goregaon was not included in the computation on the plea of self generated assets. Furthermore, a note was given at the end of the computation of total income placed in the return of income so filed to the effect of sale of leasehold rights and the claim of the assessee that the same is not exigible to tax. Such note was as per the advice of the Chartered Accountant of the assessee and the assessee has also paid advance tax on the transactions of sale of leasehold rights and on the advice of Chartered Accountant the same to be not chargeable to tax, accordingly advance tax was claimed as refund. Even during the course of assessment proceedings, the assessee has furnished following details:-

- Lease Agreement dated 8th February, 1952
- Sale Agreement dated 18th December, 2009
- Conveyance Deed dated 13th March, 2010

- Letter dated August 8, 2011 giving detailed reasons why receipt on sale of leasehold rights is not chargeable to capital gains tax.

- Letter dated August 11, 2011 giving details of various letters filed during the course of assessment proceedings.

- Letter dated September 12,2011 furnishing the Approved Valuer's Report.

23. There is no dispute to the well settled legal position that penalty proceedings are distinct from assessment proceedings. The fact that certain additions were made in the assessment proceedings by declining assessee's claim would not automatically justify the Revenue to impose the penalty u/s 271(1)(c) of the Act. Vide letter dated 20th September, 2010 filed along with the return of income, the details of sale of leasehold rights was brought to the notice of the A.O. and it was not something which has been unearthed by the A.O. It was an admitted position in the instant case that no information given

in the return was found to be incorrect or inaccurate. Hence the assessee could not be held guilty of furnishing inaccurate particulars of income. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing of inaccurate particulars of income, therefore, it must be shown that the conditions u/s 271(1)(c) of the Act exist before the penalty is imposed. For this proposition, reliance was placed on the judgment of Hon'ble Supreme Court in the case of Reliance Petroproducts Ltd. 322 ITR 158 (SC) wherein it was propounded that "the word 'particulars' must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. The word 'inaccurate' is preceded by the word 'particulars' and hence, read in conjunction they would mean not accurate, not exact or correct, not according to truth or erroneous." Even during the assessment proceedings, the asessee has filed all his particulars to the effect that leasehold rights are different than the tenancy right. Even though the A.O. was not agreeing with the justification given by the assessee for not offering the capital gain arose on sale of self generated asset but the assessee has tried to justify its claim on the basis of decision of Hon'ble Supreme Court in the case of B.C. Srinivasa Shetty (supra). Merely because the assessee's claim on the impugned receipts is not chargeable to tax which claim was not accepted by the A.O. by itself would not attract the penalty u/s 271(1)(c) of the Act. If the contention of the Revenue was accepted, then the case of every return where the claim made is not accepted by the A.O. for any reason, the assessee would be slapped with penalty u/s 271(1)(c) of the Act. That would clearly not be the intendment of the legislature. Furthermore, nowhere the A.O. has stated what is false in the claim of the assessee. However, the taxability of receipt on surrender of leasehold rights is not an "open-and-shut case", it is an arguable caseand debatable matter and it cannot be termed as 'false claim'. Even during the quantum proceedings before the Tribunal, the assessee has given detailed arguments regarding his claim and has distinguished all the case laws cited by the A.O./CIT(A).

24. The Hon'ble Delhi High Court in the case of Ravindra Bahl (42 taxmann.com 404) has deleted similar penalty u/s 271(1)(c) of the Act by observing as under:-

> "I feel that certainly the assessee had envisaged that in case his return is selected for scrutiny, he would get a saving grace from penalty on the basis of said letter filed with A.O. and the payment made of the advance tax including on the likely addition to be made in assessment. The assessee submitted that the ld. CIT(A) is absolutely right in observing thus."

25. From the documents placed on record, we find that the assessee acted in a bona fide manner and held a belief that the claim is not frivolous. It is trite law that when an assessee makes a claim under a bona fide belief, penalty u/s 271(1)(c) of the Act is not leviable, for which reliance has been placed on following decisions:-

Petals Engineers Pvt. Ltd.	264 CTR (Bom) 577
Genesys International Corporation Ltd.	147 ITD 693 (Mum).

Furthermore, Courts have time and again held that where two views are possible, penalty u/s 271(1)(c) of the Act is not leviable, reliance may be placed on :

Shervani Hospitalities Ltd.	261 CTR(Del) 449
Deban International Ltd.	2 DTL 140 (Del) and
Harshvardhan Chemicals & Minerals Ltd.	186 CTR (Raj.) 552

26. There is no dispute to the fact that before filing of return of income, an opinion was taken by his Chartered Accountant that the impugned receipt may not be chargeable to tax and hence, the claim was made that the same is not chargeable to tax. The assessee, being a layman surely cannot interpret the complex Indian Income-tax Laws and has followed the advice of his Chartered Accountant. Reliance is placed on the following decisions where

penalty levied on the assessee was deleted on the fact that he followed the advice of a professional tax expert:-

T. Ashok Pai	292 ITR 11(SC)
Dilip N. Shroff	291 ITR 519 (SC)
Lachman Chaturbhuj Java	132 ITR 631 (Bom)
Shyam Gopal Charitable Trust	290 ITR 99 (Del)
Deepak Kumar	232 CTR (P&H) 78
Sania Mirza	259 CTR (AP) 386

State of Kerala v. Krishna Kurup Madhava Kurup air 1971 Ker. 211

The Supreme Court in Concord of India Insurance Co. Ltd. v. Smt. Nirmala Devi [1979] 118 ITR 507, has held that legal advice given by the members of the legal profession may sometimes be wrong and even as pronouncement on questions of law by Courts are sometimes wrong. An amount of latitude is expected in such cases for, to err is human and laymen, as litigants are, may legitimately lean on expert counsel in legal as well as in other departments, without probing the professional competence of the advice. The Court must, of course, see whether, in such cases there is any taint of mala fides or element of recklessness or ruse. If neither is present, legal advice honestly sought and actually given, must be treated as sufficient cause for deletion of penalty. The Court went on to hold that assessee ought not to be made to suffer penalty for having acted upon an advice of its chartered accountant and not filing the income-tax returns in time. The Court should not be understood as laying down a general proposition that in all cases where the assessee fails to file returns in time and attributes the failure to an advice by its chartered accountant, that by itself constitutes a sufficient cause. Each case would have to be tested on its merits by the authorities concerned or the Court, as the case may be, for coming to a conclusion that sufficient grounds have been made out for not imposing a penalty for the failure.

27. With regard to the ld. D.R.'s contention that the assessee has paid advance tax to cover up the liability that may be fastened on him in the eventuality of the contention not finding favour of the Department, we found

that the assessee was alive to the fact that his contention may not sail through and hence, paid advance tax to keep the chargeability of interest under the Act good bay. Furthermore, we find that had there been no refund, the case would not have been selected for scrutiny as has now been done due to there being huge refund of Rs 1,89,33,487 and has also been monitored by the CIT as claimed by the Ld DR, though he has not produced any documents to suggest that the case of the appellant has been selected otherwise then by CASS and has been monitored by the CIT. Thus, strategically, the better option with the assessee was to pay advance tax and claim the receipt as not chargeable to tax, thus the assessee pursued this line of thought and acted in a bonafide manner.

28. In view of the above discussion, we can safely conclude that there was full disclosure and no suppression of fact. The bonafide explanations supported by judicial pronouncements were also furnished by the assessee for treating the leasehold rights as different from tenancy rights so as to exclude the same from the taxable capital gains. Accordingly, we are of the opinion that it is not a fit case for impose the penalty u/s 271(1)(c) of the Act.

29.. In the result, appeals of the assessee are allowed, whereas appeals of the Revenue are dismissed.

Order pronounced in the open court on 21st October, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांकः 21/10/2015 को की गई ।

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

मुंबई Mumbai; दिनांक Dated **21/10/2015**

व.नि.स./ RK , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT (A)– concerned, Mumbai
4. आयकर आयुक्त / CIT, concened –- Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai C Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**