

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'ए', मुंबई।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री जी. मंजूनाथ, लेखा सदस्य, के समक्ष

**Before Shri JOGINDER SINGH, Judicial Member, and
Shri G. MANJUNATHA, Accountant Member**

**ITA NO.5946/Mum/2014
Assessment Year: 2008 - 2009**

Ajay Kumar Baid 1 st Floor, Chandra Mahal, 241, Princess Street, Mumbai 400 020	बनाम/ Vs.	Income Tax Officer 14(3)(1) Mumbai
(निर्धारिती / Assessee)		(राजस्व / Revenue)
P.A. No. AAAPB5350N		

निर्धारिती की ओर से / Assessee by	None
राजस्व की ओर से / Revenue by	Shri Rajesh Kumar Yadav-DR

सुनवाई की तारीख / Date of Hearing :	05/02/2018
घोषणा की तारीख/ Date of Pronouncement	05/02/2018

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The assessee is aggrieved by the impugned order dated 8th July 2014, of the learned first appellate authority, confirming the penalty of Rs 1,46,310/- imposed u/s.

271(1)(c) of the Income Tax Act, 1961 (hereinafter the Act) without properly appreciating the provisions of the Act.

2. During the hearing none was present for the assessee inspite of issuance of notices. It is noted that this appeal was filed by the assessee on 22.09.2014 and was adjourned on 11.04.2016. On that date none appeared for the assessee and registered notice was issued. On 28th June 2017 again registered notice was issued still nobody appeared for the assessee. Again on 30th October 2017 nobody appeared for the assessee and registered notice was issued for today i.e. 5th February 2018. The copies of the registered notices is available on record. The assessee neither appeared nor moved any adjournment petition. It seems that the assessee has nothing to say, therefore, we proceed to dispose of this appeal on the basis of the material available on record. Shri Rajesh Kumar Yadav, learned DR strongly defended imposition as well as confirmation of penalty and placed reliance upon the decision from Hon'ble Jurisdictional High Court in the case of Samson Maritime Ltd. vs. CIT (ITA No. 1718 of 2014) order dated 9th March 2017 and the observation made in the impugned order. The

crux of the argument is by placing reliance upon the impugned order.

3. We have considered the submissions of learned DR and perused the material available on record. The facts in brief are that the assessee declared income of Rs 6,86,500/- which was processed u/s. 143(1) of the Act. The case of the assessee was selected for scrutiny and, therefore, notice u/s. 143(2) was served upon the assessee. Again notice u/s. 142(1) of the Act along with questionnaire dated 18.10.2010 were issued to the assessee. The assessee attended the proceedings. The assessment was completed u/s. 143(3) determining the total income at Rs 13,30,040/- as against the returned income of Rs 6,86,500/-. An addition of Rs 6,43,540/- (undisclosed interest of Rs 1,03,430/- and undisclosed FDs of Rs 5,40,110/-) was made u/s. 69 of the Act. Penalty proceedings were initiated with the issuance of show cause notice u/s. 274 r.w.s. 271(1)(c) of the Act. The assessee in his computation of income and also in the balance sheet showed two minor children revealing that the interest received of Rs 1,03,430/- from M/s Ray Ban India Holdings Inc. (80,950/-) , Rs 13,549/-

from Union Bank of India and further Rs 8,931/- from Union Bank of India, Gujarat, which was not included in the income of the assessee. This fact was brought to the notice of the assessee. The assessee vide letter dated 2nd November 2010 stated that assessee has not received any interest income from the aforesaid parties/banks. On further verification, from the Bank statement, it was found that the interest amounting to Rs 22,480/- was earned by the assessee from FD of Rs 2,08,127/- claimed as received as gift from maternal grandmother and Rs 3,31,980/- claimed to from agricultural income by the wife of the assessee. The assessee did not substantiate the source of the investment and thus, the amount of Rs 5,40,110/- was added as unexplained investment to the income of the assessee. Penalty proceedings u/s. 271(1)(c) were also initiated. Penalty of Rs 1,46,310/- was added by the learned Assessing Officer and confirmed by the learned CIT(A). The assessee is in appeal before this Tribunal.

4. If the observation made in the penalty order, leading to levy of penalty, conclusion drawn in the impugned order, material available on record, assertions made by the ld. DR,

if kept in juxtaposition and analyzed, there is no dispute to the fact that the assessee did not declare the interest income either in the return of the minor children or in the return of the assessee, being the guardian of the minor children. If the case would not have been selected for scrutiny, the interest income so earned would have gone tax free. It is also noted that the case of the assessee is covered by the ratio laid down by the Tribunal vide order dated 18/12/2015 (ITA No.1530/Mum/2015), wherein, it was held as under:-

“This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-34, Mumbai ('CIT(A)' for short) dated 24.12.2014, dismissing the Assessee's appeal contesting its assessment u/s.143(3) r/w s. 254 of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2004-05 vide order dated 24.12.2012.

2. The appeal, per its five grounds, raises a single issue, i.e., the validity in law of the disallowance of claim for deduction u/s.80-IB(4) of the Act in the facts and circumstances of the case. This is the second round before the Tribunal; it, in the first instance restoring the matter back to the file of the Assessing Officer (A.O.) with a view to allow one more opportunity to the assessee to substantiate its claim for deduction u/s. 80-IB. The assessee being, in view of the Revenue authorities, unable to improve its case in any manner in the set aside proceedings, confirmed the disallowance, so that, aggrieved, the assessee is in appeal. It would be in order to reproduce the relevant part of the said order by the tribunal (in ITA No. 7117/Mum/2007 dated 30.3.2011/PB pgs. 1-8):

'7 We have considered the rival arguments made by both the parties, perused the orders of the Assessing Officer and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. There is no dispute to the fact that the Assessing Officer disallowed the claim of deduction u/s

80IB on the ground that the notice u/s 133(6) sent to the parties, from whom the plant & machinery were purchased, were returned un-served. Further, the assessee had taken over the running unit of M/s Vinod Plastics. Therefore, in absence of verifiable evidence of installation of plant & machinery worth Rs.6,86,847/-, the benefit of deduction u/s 80IB claimed by the assessee was not allowable. Since there was no cooperation from the side of the assessee to the statutory notices, the Assessing Officer disallowed the claim of the assessee in the ex-parte order passed by him. It is the submission of the Id. counsel for the assessee that after the plant & machinery were purchased, it has no control over the seller. In our opinion, for claiming deduction u/s 80IB, the assessee must fulfil the conditions laid down in the provisions. His onus in the instant case was more since it had taken over a running unit namely M/s Vinod Plastics. It was all the more necessary on the part of the assessee to substantiate with evidence to the satisfaction of the Assessing Officer that it had purchased plant & machinery worth Rs. 6,86,847/-, which is more than 80% of the total value of the plant & machinery. The responsibility of the assessee increases when the notices were issued u/s 133(6) are returned by the postal authorities and the Ward Inspector deputed by the Assessing Officer also was unable to trace the parties at the given addresses by the assessee.

7.1 In the instant case, the assessee failed to discharge the onus cast on it. However, considering the totality of the facts of the case and in the interest of justice, we are of the considered opinion that the assessee may be given one more opportunity to substantiate with evidence to the satisfaction of the Assessing Officer regarding fulfilment of the conditions for claiming deduction u/s 80IB. We therefore, deem it proper to restore the mater back to the file of the Assessing Officer with the direction to give one more opportunity to the assessee to substantiate its claim of deduction u/s 80IB. The Assessing Officer shall decide the issue afresh and in accordance with law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. The ground raised by the assessee is accordingly allowed for statistical purpose.'

3. The parties were heard and the material on record perused. The first observation in the matter is that the assessment in the first round was framed u/s.144 of the Act, i.e., as a best judgment assessment. The assessee did not challenge the same, i.e., the invocation of section 144 by the assessing authority. The tribunal, nevertheless, in the interest of justice restored the matter back for a fresh decision in accordance with law, thereby effectively converting a section 144 assessment (dated 13.12.2006), which aspect of the assessment was not in dispute, into a section 143(3) assessment. The Hon'ble High Court in CIT vs. Rayala

Corporation P. Ltd. [1995] 215 ITR 883 (Mad) has clarified that this is impermissible in law. It stands explained that the assessing authority is the best judge of the situation. It is his best judgment and not of anyone else. The question as to whether he has committed any error in his judgment u/s. 144 of the Act can be decided only on the basis of the materials gathered by him and not on the basis of any materials that are later produced by the assessee. There cannot be a procedure where the best judgment of the A.O. is subject to discretion of the assessee to produce evidence/material at the appellate stage and, thus, convert the proceedings of the best judgment assessment into the proceedings of a regular assessment. The tribunals' order in the first round stands accepted, attaining finality, so that it is binding on the parties as well as the tribunal. This aspect is, however, emphasized only to underline that even as allowance of opportunity to the assessee to establish its case was not in dispute, the tribunal yet set aside the assessment so as to allow the assessee another, one last opportunity to substantiate his claim. This, despite it being of the opinion that the assessee had not discharged the onus cast on it, which was in the facts and circumstances of the case heavy in-as-much as it had taken over a running unit, M/s. Vinod Plastics and, further, the notices u/s.133(6) to the parties from whom machinery – constituting 88% of the total machinery - had been purchased, had come back unserved even at the new addresses supplied by the assessee. This is in fact the third round before the tribunal; it having dismissed the assessee's appeal earlier for non-prosecution vide its' order dated 09.7.2010, which was subsequently recalled.

The assessee in the set aside proceedings filed affidavits from partners and employees of the assessee-firm and even their friends. The same stand dismissed as being from interested parties. How could that, it is wondered, be faulted? How could the affidavits, furnished on its' own by the assessee, be regarded as evidence, particularly in the facts and circumstances of the case? The question is not of the goods (injection moulded plastic products) being not produced by the assessee, or of the Revenue not finding any defect in its books of account. A disallowance of a claim, for want of satisfaction of the condition of the relevant provision, is not predicated upon rejection of the books of account. The issue is the genuineness of the purchase of machinery, and which is to established by the assessee. It can rely on the books of account no doubt, but the entries therein, it is trite law, are not conclusive or determinative of the matter. The assessee having taken over a running unit, i.e., which was already in production, the production of goods is not denied or in dispute. But, having taken over a running unit, the assessee, yet, acquires machinery only for Rs.86,505/-, i.e., at a fraction of the total machinery required for production, purchasing the balance machinery costing Rs.6.87 lacs from outside – which is puzzling indeed. The assessee has in the said proceedings further clarified that it was not in a position to make available the current addresses of the parties. How, then,

can it assail the Revenue for holding that no improvement in its' case stands made by the assessee? Rather, that being the position, on what basis, it is wondered, did it seek indulgence by the tribunal for being allowed one more opportunity to establish its case. True, the assessee cannot exercise any control over the parties once the transaction is over, a point sought to be emphasized with reference to case law. However, in the present case, it needs to be noted, as was also by the tribunal on the earlier occasion, that the Ward Inspector had reported the parties to be untraceable, i.e., not existing at the given addresses (refer para 2 of the assessment order). This is definitely a different matter. Surely, the assessee could not be prejudiced where the corresponding party had shifted its' address or relocated, but the moot point in the present case is: Is it so? Where did the parties disappear? A party may shift address, but there would be a host of antecedents and evidences to show that it was existing at the given address during a particular period. The report by the Ward Inspector, which has not been challenged, completely indicts and disproves the assessee's case. Even the date (or approximate time) of change of address has not been specified. Why, inas-much as its registration under the various laws, including under the Act in the form of PAN; electricity connection, etc. would obtain, information on their current addresses would be available and could be sought from the relevant departments.

An examination of the material on record also inspires little confidence. In the bill of M/s. Polyera Industries, Jogeshwari (W), Mumbai dated 07.4.2003 (PB pg. 9), as pointed out by the Id. DR, the assessee's name is overwritten. The bill states of the payment terms as 'Immediate', while the payments have been made only in July, 2006 (PB pg. 10). That is, a party selling goods on cash basis, yet allows, for no apparent reason, credit for 27 months; the assessee making the payment at the time when the assessment proceedings were on. The payment to the other party, M/s. Mewa Hydraulics, New Delhi, is again over an extended period - from July, 2004 (i.e., 15 months after the date of purchase - 15.4.2003) to March, 2006. How could, then, the assessee say that he was not aware of the whereabouts of the parties after the goods (machinery) was purchased? Why could the assessee, paying the parties, and thus in touch with them, not supply their address or even produce them before the A.O.? Rather, on the other hand, it is only where the parties have tremendous trust and confidence in each other, that credit, for years, is allowed. This 'fact', which is divorced from the business realities, nay, the terms of the contract itself, makes the transactions as highly suspect. Further, if the parties have once again changed their addresses, in-as-much as they were not found at the changed address supplied by the assessee, the question is: Which are these parties that change their addresses - a process that dislocates one completely, besides entailing prohibitive costs, ever so often? There is, in any case, no contemporaneous material evidencing the purchase, viz.

octroi, freight, transit insurance, insurance, etc. on record, or even expenditure by way of unloading and installation of the machinery.

The assessee's case remains wholly unproved, if not disproved. It has, rather, abused the process of law only with a view to gain time in the hope of a favourable verdict in-as-much as all it furnishes in the set aside proceedings in evidence is affidavits from self and related parties. The onus to prove its return, and the claims preferred thereby, is only on the assessee (refer: CIT vs. Calcutta Agency Ltd. [1951] 19 ITR 191 (SC)), which it has completely failed to. Reliance on case law; the matter being primarily factual, to be decided based on factual findings, is of little consequence. In fact, as regards the proposition of law, the Revenue has relied on case law, which has not been met by the assessee (refer para 2, pg. 4 of the assessment order). I, accordingly, confirm the assessment.

4. In the result, the assessee's appeal is dismissed."

5. Its our duty to analyze section 271(1)(c) of the Act, which is reproduced hereunder:-

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

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

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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 ⁴⁸[Principal Commissioner or] 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.

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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 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.

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(5) The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amendment) Act, 1989 shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year and

references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year.

6. Considering the provision of the Act, material facts available on record, and the ratio laid down in following cases, it can be concluded that it was a conscious act of the assessee to hide something from the Department. The ratio laid down in the following the cases, supports the case of the Revenue.

- I. CIT vs Satish Medical Agencies 277 ITR 394 (All.)
- II. Jyoti Laxman Konkar vs CIT 292 ITR 163 (Bom.),
- III. Deepak Construction Company vs CIT 293 ITR 285(Guj.)
- IV. CIT vs Mahavir Prasad Bajaj 298 ITR 109(Jhar.)
- V. D & H Secheron Electrods Pvt. Ltd. Vs CIT 281 ITR 421 (MP.)
- VI. Shri Nithyakalyani Textiles Ltd. Vs DCIT 282 ITR 154 (Mad.)
- VII. LMP Precision Engineering Company Ltd. Vs DCIT (330 ITR 93) (Guj.)
- VIII. CIT vs Deep Chand 336 ITR 292 (P & H)
- IX. Sathy Industries Corporation vs DCIT 338 ITR 243 (P &H)
- X. B.Damodar V.B. Jewellers vs JCIT 353 ITR 206 (Karna.)
- XI. Standard Hind Company vs CIT (2014) 361 ITR 370 (All.)
- XII. Bajrang Glass Emporium vs CIT (2014) 361 ITR 376 (All.)
- XIII. Indus Engineering Company vs ACIT (2010) 323 ITR 302 (Bom.),

7. Likewise in the case of CIT vs Somani Evergree Knit Ltd. (2013) 352 ITR 592 (Bom.), there was excess claim of depreciation. Rectification was made by the assessee during assessment proceedings and the mistake was bona fide. In that situation, the Hon'ble jurisdictional High Court took a decision that penalty is not leviable. However, in the present appeal, as discussed above, there is conscious concealment of income by the assessee, by making a wrong claim, furnishing of inaccurate particular of income, resulting into concealment of such income, therefore, being on different facts, the decision relied upon is not applicable to the facts of the present appeal.

8. In the case of CIT & Anors. Vs S.L. N. Traders (2012) 341 ITR 235, the explanation of the assessee was accepted by the CIT(A) as well as by the Tribunal. Whereas, in the present appeal, the ld. Assessing Officer, the Ld. Commissioner of Income Tax (Appeal) as well as the Tribunal has not accepted the explanation of the assessee.

9. Now, we shall deal with the case, in the case of MAK DATA P. LTD. vs. COMMISSIONER OF INCOME TAX (2013) 263 CTR (SC) 1: (2013) 358 ITR 593 (SC) : (2013) 94

DTR (SC) 379. The relevant observation/decision made by Hon'ble Apex Court is reproduced hereunder for ready reference and analysis:-

"6. We have heard counsel on either side. We fully concur with the view of the High Court that the Tribunal has not properly understood or appreciated the scope of Explanation 1 to Section 271(1) (c) of the Act, which reads as follows :

"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."

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. 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 TAXPUNDIT.ORG 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.

Assessee has only stated that he had surrendered the additional sum of Rs.40,74,000/-with a view to avoid 7 litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department. Statute does not recognize those types of defences under the 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.

We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. AO during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer 8 deeds duly signed, have been impounded in the course of survey proceedings under Section 133A conducted on 16.12.2003, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year.

The AO in our view, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under Section 271 read with Section 274 of the Income Tax Act, 1961.

*The AO has to satisfy 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 vs. Dharmendra Textile Processors* (2008) 13 SCC 369 and *CIT vs. Atul Mohan Bindal* (2009) 9 SCC 589.*

The principle laid down by this Court, in our view, has been correctly followed by the Revenue and we find no illegality in the department initiating penalty proceedings in the instant case. We, therefore, fully agree with the view of the High Court. Hence, the appeal lacks meri and is dismissed. There shall be no order as to costs."

10. During hearing before us the learned DR relied upon the decision from Hon'ble jurisdictional High Court in the case of Samson Maritime Limited vs. CIT (supra), wherein it was held as under:

This Appeal under Section 260A of the Income Tax Act, 1961 (the Act), challenges the order dated 18th June, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 18th June, 2014 is in respect of Assessment Year 2007- 08.

2 The Revenue urges the following question of law, for our consideration:

“ Whether on the facts and in the circumstance of the case and in law, the Tribunal was right in upholding imposition of penalty under Section 271(1)(c) of the Act on a finding that the appellant had concealed its income and/or furnished inaccurate particulars of its income in respect of the apportionment of foreign exchange fluctuation loss between the Tonnage Income and Non-Tonnage Income while filing the return of income for A. Y. 200708.?”

3 The appellant assessee is engaged in shipping business. The Appellant assessee is assessed to tax under Chapter XIIG of the Act to the extent its income is earned from vessels, satisfying/ qualifying the requirements thereof (tonnage income). So far as the income from other vessels i.e. non qualifying vessels (non-tonnage income) is concerned, the same is subjected to tax under the head *“Profit & Gain from its Business or Profession”*. Thus, classifying its income as tonnage business and non-tonnage business. During the subject Assessment Year, the appellant assessee had suffered foreign exchange loss in respect of its tonnage business which is taxable under Chapter XIIG of the Act. However, the above foreign exchange loss of Rs.9.37 lakhs was debited to compute its non-tonnage income while bringing it to tax under Profit & Gain from business or profession.

4 Thereafter, on 14th January, 2009, the Assessing Officer issued a notice under Sections 142(1) & 143(2) of the Act, calling various details/ information as set out in the annexure

thereto. This included information regarding details of expenses debited in its Profit & Loss Account and expenses incurred on account of foreign exchange. Thereafter, the appellant assessee responded to the same and by order dated 24th December, 2009, the Assessing Officer determined the appellant assessee to an income of Rs.2.58 Crores under Section 143(3) of the Act. This was after adding the foreign exchange loss of Rs.9.37 lakhs which had been incorrectly debited while computing its non- tonnage income. The order of the Assessing Officer records that this was done after it was found on verification that no foreign exchange loss was incurred in respect of non-tonnage income. Besides, initiating penalty proceedings under Section 271(1)(c) of the Act.

5 Thereafter, order dated 30th June, 2010, was passed by the Assessing Officer, imposing a penalty under Section 271(1)(c) of the Act, wherein it specifically records the fact that though there were no transaction in foreign currency resulting in foreign exchange loss, in case of non-tonnage income, yet the appellant assessee had debited exchange loss to its non-tonnage business only to reduce its non-tonnage income being offered to tax. Therefore, by an order dated 30th June, 2010, the Assessing Officer imposed a penalty of Rs.3.09 lakhs being 100% tax sought to be evaded by debiting foreign exchange loss of Rs.9.37 lakhs to determine its non-tonnage income.

6 Being aggrieved, the appellant assessee carried the above issue of penalty in appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By order dated 15th July, 2012, the CIT(A) dismissed the assessee's appeal. This, by holding that there was a deliberate attempt on the part of the assessee to furnish inaccurate particulars so as to reduce its taxable income. The Explanation of mistake offered for the same by the appellant was not found to be satisfactory even by the CIT(A).

7 Being aggrieved, the appellant assessee filed a second appeal to the Tribunal against imposition of penalty. By the impugned order dated 18th June, 2014, the Tribunal upheld the imposition of penalty under Section 271(1)(c) of the Act. This by negating the assessee's contention before it that allocating/ debiting the foreign exchange loss to determine its non-tonnage income, was a mistake and the mistake had been voluntarily disclosed by the appellant during the assessment proceedings. The contention of the appellant was not accepted as the so called disclosure was made by the appellant only after it received notices under Section 142(1) & 143(2) of the Act, calling for various details. Moreover, the Explanation

offered by the appellant for having debited foreign exchange loss to determine non-tonnage loss, was not found to be satisfactory by the Assessing Officer as well as by the CIT(A). The impugned order of the Tribunal also placed reliance upon the decision of the Apex Court in **MAK Data P. Ltd., v/s. Commissioner of Income Tax Act, 1961 (hereinafter the Act) 358 ITR 593**, that voluntary disclosure itself does not release the assessee from penal consequences.

8 The grievance of the appellant assessee before us is that it had itself brought its mistake of debiting the loss on account of foreign exchange fluctuation to determine its Non-Tonnage income to the notice of the Assessing Officer. This, according to him, is stated in its Affidavit dated 23rd June, 2010 filed during the penalty proceedings before the Assessing Officer. However, the above affidavit as filed by the appellant during penal proceedings, has been ignored by all the authorities including the Tribunal while passing the impugned order. It is submitted that the above fact itself would justify dropping of any penal proceedings against appellant assessee. It was also submitted before us that debiting of the foreign exchange loss to arrive its non-tonnage income, was a mistake and no penalty be imposed for the mistake committed. Reliance was placed upon the Apex Court's decision in **Price Waterhouse Coopers (P) Ltd., v/s. CIT 348 ITR 306** to contend that mistakes made by an assessee cannot be the basis for imposition of penalty. In the above view, it is submitted that the appeal be admitted.

9 From the record it is clear that the notice under Sections 142(1) and 143(2) of the Act were issued to the appellant on 14th January, 2009. The notice also contains an annexure, seeking details of expenses debited to Profit and Loss Account, along with details of foreign exchange expenses. Even according to the appellant, the alleged mistake on its part was pointed out by a letter dated 23rd September, 2009 during assessment proceedings where it stated that it had committed a mistake in debiting foreign exchange loss to its determine non-tonnage income, when in fact, no foreign exchange loss was involved in respect of its non-tonnage business. Thus, it is clear that so called mistake as claimed by the appellant assessee, was only after notices dated 14th January, 2009 were issued under Sections 142 and 143 of the Act. It was only an attempt to pre-empt the Revenue finding out the appellant had furnished inaccurate particulars. Therefore, it cannot be said that it was voluntary disclosure. In fact, the Apex Court in MAK Data (P) Ltd., (supra) has observed that “ *The Assessing Officer, 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 its conduct.” The Apex Court has also further observed that *“It is trite law that the voluntary disclosure does not release 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.”* In the peculiar fact of the present case, the so called voluntary disclosure was only after the Assessing Officer initiated proceedings under Section 142 of the Act. Thus, it was not a voluntary disclosure. In fact, the Assessment Order dated 24th December, 2009 under Section 143(3) of the Act also records the fact of verification by the Assessing Officer, leading to a finding that the appellant assessee had debited foreign exchange loss to arrive its non-tonnage income. This order was accepted and no grievance in respect of the same being found by the Assessing Officer, was made by the appellant assessee. It is only in penalty proceedings that this issue is raised for the first time. Further, the appellant assessee besides stating it is a mistake, has not offered any explanation. Therefore, the explanation under Section 271(1)(c) of the Act was not found to be satisfactory by the authorities under the Act and penalty imposed and sustained.

10 Reliance placed by the appellant assessee upon the decision of the Apex Court in Price Waterhouse Coopers (P) Ltd., (supra), is inappropriate in the facts of the present case. In the above case, the Apex Court noted the fact that Tribunal had itself come to a finding that there was a silly mistake on the part of the assessee in not having added the provision for gratuity to its total income even when the documents accompanying the return of income, did show that provision for gratuity is not allowable as deduction under Section 40(7) of the Act. Thus, it was only a computation error in the return of income. In the present facts, none of the authorities including the Tribunal have found the debit of foreign exchange loss to its non-tonnage business was made on account of a mistake. Nor can it be classified as an computation error after complete disclosure. Thus, the aforesaid decision does not assist the appellant assessee.

11 We note that all the three authorities have come to a finding of fact, adverse to the appellant, that the so called voluntary disclosure was not voluntary, but made only in response to notices under Sections 142 and 143 of the Act. This finding of fact is not shown to be perverse and/or arbitrary, warranting

interference. In view of the above, the question as framed does not give rise to any substantial question of law.

11. We find that in the aforesaid order the Hon'ble Jurisdictional High Court duly considered the decision from Hon'ble Apex Court in Mak Data Pvt Ltd vs. CIT 358 ITR 593 (SC), Price Waterhouse Coopers (P) Ltd. vs. CIT 348 ITR 306 (SC) and thereafter reached to a particular conclusion. In the present appeal before us the interest income earned from Fixed Deposits was never disclosed by the assessee thus, there is furnishing of inaccurate particulars of such income leading of concealment of income, thus, we find no infirmity in the conclusion of the learned CIT(A). Resultantly, the appeal of the assessee is dismissed.

12. Finally the appeal of the assessee is dismissed.

This Order was pronounced in the open court in the presence of learned DR at the conclusion of the hearing on 5th February, 2018.

Sd/-

(G. Manjunatha)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : /02/2018

SA

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

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

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

आदेशानुसार/ BY ORDER,

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