आयकर अपीलीय अधिकरण "B" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI
BEFORE SHRI JOGINDER SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.5935/Mum/2014

(**निर्धारण वर्ष /** Assessment Year: 2005-06)

M/s. NSE. IT Ltd, Trade Globe, Ground Floor, Andheri Kurla Road, Andheri (E), Mumbai 400059	**बनाम**/ v.	DCIT 8(2), Mumbai
स्थायी लेखा सं./PAN : AABCN0159P		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri. Sunil Nahta
Revenue by :	Shri. T.A Khan(DR)

सुनवाई की तारीख **/Date of Hearing : 14-02-2018**

घोषणा की तारीख **/Date of Pronouncement : 28-03-2018**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 5935/Mum/2014 for assessment year 2005-06 is directed against the appellate order dated 03.06.2014 passed by learned Commissioner of Income-tax (Appeals)-17, Mumbai (hereinafter called "the CIT(A)") for assessment year 2005-06, appellate proceedings had arisen before learned CIT(A) from the penalty order dated 26.03.2012 passed by learned Assessing Officer (hereinafter called "the AO") u/s 271(1)(c) of the Income-tax Act, 1961 (hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

> *"The grounds of appeal set out below are without prejudice to each other*

1 (a). On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) erred in confirming penalty of Rs.1,29,880/- under section 271(1)(c) of the Income Tax Act, 1961 (the Act) and the reasons assigned for doing so are wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961, and the Rules made there under.

(b) The learned Commissioner of Income Tax (Appeals) erred in confirming that the appellant had furnished inaccurate particular of income and concealed its income by way of claiming set off of long term capital loss to the extent of Rs.3,27,524/- which the appellant suo-moto offered as LTCG in the return of income filed in response to notice u/s.148 of the Act.

(c) The learned Commissioner of Income Tax (Appeals) erred in confirming penalty without appreciating the following:

> *(i). the appellant has filed its return of income in response to notice u/s.l48 of the Act before receiving any communication of the recorded reasons from the learned assessing officer, wherein there was no set off of long term capital loss of Rs. 5,13,908/-. Thus. the claim was suo moto withdrawn on realizing bonafide mistake in original return of income*
>
> *(ii) Appellant has furnished all particulars of computation of long term capital loss in original assessment proceedings u/s143(3) of the Act.*
>
> *(iii). the computation error in the original return of income was bonafide human error.*

(d) The learned Commissioner of Income Tax (Appeals) erred in holding that addition made is on account of contumacious conduct of the appellant in which mens rea can be reasonably inferred without appreciating the fact that:

> *(i) There is no addition made by the Id A.O to the total income as declared in return of income filed in response to notice u/s. 148 of the act and before receiving the reasons for reopening*
>
> *(ii) The conduct of the assessee was bonafide as it has suo-moto rectified the mistake in the return of income filed in response to notice u/s. 148 of the act but before receiving any reasons for re-opening recorded by the Id. AO.*
>
> *(iii) The appellant over the years has paid average tax of Rupees one crore fifty lacs (approximately) and would not have furnished wrong particulars to get tax benefit of Rs 129,880/- and there is no history/precedence filing misleading/incorrect information in appellant's case.*

(iv) said claim of set out of capital loss was made due to the genuine human error while finalising the computation of income

(v) that the claim was a genuine human error as the same could not be noticed even by le ld AO though scrutiny assessment was done u/s 143(3) of the act vide order dated.05.12.2007.

and the reasons assigned by him for holding the same are wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961, and the Rules made there under.

2. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) erred in upholding the validity of the penalty order u/s 271(1) (c) which is time barred and reasons assigned by him for doing so are wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made thereunder.

The appellant craves leave to add, alter, amend and/or modify all or any of the above ground of appeal on or before the date of hearing."

3. The brief facts of the case are that the assessee is engaged in the business of development, maintenance and licensing of computer software and providing consultancy services in the area of hardware, application software and products for finance and capital market within and outside India. The assessee filed its return of income for the impugned assessment year on 21.10.2005 declaring total income of Rs. 5,76,54,770/- which was assessed u/s. 143(3) vide assessment order dated 05.12.2017, wherein the income assessed was Rs. 8,22,78,960/- . The case of the assessee was reopened u/s. 147 and notices u/s. 148 was issued to the assessee on 15.07.2009. The assessee filed return of income in response to notices u/s. 148 declaring total income of Rs. 5,80,13,941/- , wherein the assessee withdrew its claim of setting off of long term capital gain of Rs. 5,13,908/- from the long term capital loss of Rs. 6,47,13,206/- in respect of sale of 58,65,000/- equity share of M/s. Dotex International Ltd. to National Stock Exchange India Ltd. The National Stock Exchange of India Limited(NSE) is 100% holding company of the assessee company and also NSE is holding company of Dotex International Limited and consequently transaction of sale of shares of Dotex International Limited by the assessee to its holding

company NSE was hit by provisions of Section 47(v) of the 1961 Act and shall not constitute transfer . Thus, the entire long term capital loss of Rs. 6,47,13,206/- claimed by the assessee in respect of sale of 58,65,000 equity shares of M/s Dotex International Limited to NSE was not allowable to be carry forward which was germane to reopening of the concluded assessment u/s 147 of the 1961 Act . The assessee , therefore , while filing return of income u/s 147 have withdrawn the set off of long term capital gains of Rs. 5,13,908/- from the long term capital loss of Rs.6,47,13,206/- arising from sale of 58,65,000 equity shares of M/s Dotex International Limited to NSE . The AO passed assessment orders u/s. 143(3) r.w.s. 147 dated 06-07-2010 assessing income at Rs. 5,80,13,940/-. The AO invoked penalty proceeding u/s 271(1)(c) against the assessee for furnishing of inaccurate particulars of income u/s. 271(1)(c) of the Act in the assessment order passed u/s 143(3) r.w.s. 147 dated 06-07-2010 .

The AO initiated penalty proceedings u/s 271(1)(c) and the assessee submitted during the course of penalty proceedings u/s 271(1)(c) , as under:-

> *" It will be appreciated that the assessee has filed revised return in response to notice u/s. 148 on suo motto basis by withdrawing its claim of set off of capital gain of Rs. 5,13,908/- from the long term capital loss of Rs. 6,47,13,206/- in respect of sale of 58,65,000/- equity shares of M/s. Dotex International Ltd. to M/s. National Stock Exchange of India Ltd. (NSE). The assessee had inadvertently set off long Term Capital Gains against said loss. However on noticing the said mistake assessee on suo motto basis revised its return of income. This is evident from the fact that the assessee has offered the said difference in income of Rs.3,27,524/- before obtaining any recorded reasons from the Ld. AO for reopening the assessment.*
>
> *Further there was no mala fide intention of claiming the said Long Term Capital loss and setting off said loss against any long term capital gain.*
>
> *This is not a case where any particulars of income or portion of income were concealed. The assessee has given full disclosure and explanations during the course of reassessment proceedings. The revised return of income filed by the assessee is accepted by department without any additions.*
>
> *2. In this context, it is to be stated that penalty u/s 271(1)(c) is leviable either for concealment of income or for furnishing of inaccurate particulars of income. The word 'concealment' denotes a deliberate, conscious attempt on the part of the assessee to hide his Income, while 'furnishing of inaccurate particulars of income' means furnishing of factually incorrect details and information about income. Such details*

are not in conformity with the facts or the truth. Accordingly, when an assessee has made a claim regarding a particular deduction and made a mention thereof in the return, he has disclosed the facts. Accordingly, the question of levy of penalty should not arise in such cases.

Thus, in the instant case the return of income filed in response to notice u/s 148 has been filed voluntarily before detection and conduct of assessee is bona fide therefore, penalty should not be leviable.

Further as the penalty proceedings is initiated in the re-assessment order, the return filed in response to notice u/s.148 should be taken as a base and as returned income is accepted as assessed income, no penalty u/s 271(1)(c) can be levied as there could be no concealment and furnishing of inaccurate particulars warranting levy of penalty.

It will be appreciated that it is settled principle that where the revised return is the outcome of voluntary action on the part of the assessee before any part of the suppression is detected, it may be possible to contend that there has been a bona fide mistake and the materials on record and the conduct of the assessee together may justify a conclusion of fact that the burden which lay on the assessee in view of the Explanation attached to section 271(1)(c) of the Act stood discharged. Thus, if the taxpayer has declared higher income in revised return of his own and there is nothing to prove that the taxpayer had concealed income malafiedly then no penalty can be levied.

4. Calculation of capital loss is obvious thing. However provision treating transaction of sale of capital asset from subsidiary to holding company not as transfer is peculiar/ special provision of Income Tax Act. However, the accountant of the assessee company made a mistake of computing the same. Further, apart from the assessee even the Ld. AO who framed the original assessment order made the mistake in overlooking the provisions of section 47(v). This can be at most can be described as human error and bonafide inadvertent error. Therefore, Penalty under 271(1)(c) cannot be levied for a "bonafide /inadvertent/ human error. Reliance in this regard is placed on:

a) Price Waterhouse Coopers Pvt. Ltd vs. CIT (Supreme Court)

The assessee filed a ROI together with the Tax Audit Report. In the Tax Audit Report, it was disclosed that an amount of Rs. 23 lakhs towards provision for gratuity was not allowable u/s. 40A(7). However, in the computation of income, the said amount was not disallowed. The AO also overlooked the item and omitted to make a disallowance. Subsequently, he reopened the assessment u/s 147, disallowed the expenditure and levied penalty u/s. 271(1)(c). The assessee explained that the omission to make a disallowance had occurred because it had a separate accounts department and there was "some confusion" and that the return was prepared by a non-CA and was signed by director who proceed on the basis that the return was correctly drawn up. The CIT(A), Tribunal and High Court affirmed the levy of penalty on the ground that since the assessee was a well known and reputed Chartered Accountant firm and a tax consultant, it was not expected to make such a mistake and that there had been a failure to discharge the strict liability to furnish true and correct particulars of income. On

appeal by the assessee to the Supreme Court, HELD reversing all the lower authorities:

"Notwithstanding the fact that the assessee is undoubtedly a reputed firm and has great expertise available with it, it is possible that even the assessee could make a "silly" mistake. The fact that the Tax Audit Report was filed along with the return and that it unequivocally stated that the provision for payment was not allowable u/s 40A(7) indicates that the assessee made a computation error in its return of income. Apart from the assessee, even the AO who framed the original assessment order made a mistake in overlooking the contents of the Tax Audit Report. The contents of the Tax Audit Report suggest that there is no question of the assessee concealing its income. There is also no question of the assessee furnishing any inaccurate particulars. All that happened in the present case is that through a bona fide and inadvertent error failed to add the provision for gratuity to its total income. This can only be described as a human error which we are all prone to make. The calibre and expertise of the assessee has little or nothing to do with the inadvertent error. That the assessee should have been careful cannot be doubted, but the absence of due care, in a case such as the present, does not mean that the assessee is guilty of either furnishing inaccurate particulars or attempting to conceal its income. Consequently, given the peculiar facts of this case, the imposition of penalty on the assessee is not justified. "

Though, in the instant case has not offered the addition suo-moto in the return filed in response to notice u/s.148, yet the Supreme Court deleted the penalty as the mistake occurred due to human error.

b) CIT v. Sania Mirza (AP.) (High Court)

The assessee, a renowned professional international tennis player, received an award of Rs. 30 lakhs. This was disclosed in the statement of affairs filed with the ROI though not offered to tax. The AO accepted the ROI u/s 143(1). He later reopened the assessment u/s 147 at which stage the assessee offered the said amount to tax. The AO & CIT levied penalty u/s 271(1)(c) on the ground that the assessee had furnished inaccurate particulars of her income and concealed her income. However, the Tribunal cancelled the penalty on the ground that a "bona fide mistake" had been made on her behalf by her Advocate/Chartered Accountant and there was no concealment of income nor a furnishing of inaccurate particulars. On appeal by the department to the High Court, held, dismissing the appeal:

"There is nothing to suggest that the assessee acted in a manner such as to lead to the conclusion that she had concealed the particulars of her income or had furnished inaccurate particulars of income. As the amount of Rs.30,63,310 was shown by her in the return, it cannot be said that there was any concealment. As the amount was correctly mentioned, there is also nothing inaccurate in the particulars furnished by her. The only error that seems to have been committed was that it was not shown as a capital (sic) receipt. But as soon as this was pointed out, the error was accepted and the amount was surrendered to tax. This is not a fit case for imposition of penalty. "

ITAT PUNE Emilio Ruiz Berdejo v. Deputy Commissioner of' Income-tax IT Appeal no. 991 (Pune) of 2008

Wherein, it has been held that:

"The issue as to whether there was concealment of particulars of income on the part of the assessee so as to attract penalty under section 271(1)(c) depends on the acceptability of the explanation of the assessee that the mistake in this regard was inadvertent due to his ignorance of Indian Income-tax law, hence there was bona fide reason for the same.

Explanation 1 to section 271 (1)(c) depends on the acceptability of the explanation of the assessee that the mistake in this regard was inadvertent due to his ignorance of Indian income-tax law, hence there was bona fide reason for the same.

The penalty is not an automatic consequence of addition to income; penalty under section 271 (1)(c) can come into play only when the conditions laid down under that section are satisfied; concealment of income cannot be a passive situation and it implies that the person concealing the income is hiding, covering up or camouflaging an income; penalty is not leviable in case where assessee is able to provide a 'bona fide' explanation; and penalty is not leviable in cases where assessee made errors, under bona fide beliefs. In view of the above, Assessing Officer was not justified in levying penalty under section 271 (1)(c) and same is directed to be deleted. "

d) CIT vs. Societex- ITA 1190/2011 Delhi HC Held that No s. 27I(1)(c) penalty if wrong claim caused by "bona fide mistake" The AO levied s. 271 (1)(c) penalty in respect of two issues: (i) claim of depreciation in respect of properties that were assessed under the head "house property" and (ii) claim of deduction in respect of provision for income-tax. The CIT (A) & Tribunal deleted the penalty on the ground that the claim for deduction in respect of income-tax was a "human bonafide clerical mistake" as the assessee was a firm not having expert chartered accountants on its payroll. In appeal before the High Court, the department relied on Zoom Communication 327 ITR 510 and Escorts Finance 328 ITR 44 where it was held that as under no circumstances could an assessee have claimed provision for tax as a deduction, penalty was imposable. HELD by the High Court dismissing the appeal:

"As regards depreciation, the property was let out for the first time in the latter part of the A Y. As such, the benefit of inadvertence or mechanical or repetitive claim being made can be given to the assessee. As regards the provision for taxation, the assessee made a claim for deduction of the provision for the first time in the year under appeal. There was no history of furnishing such accurate particulars by the assessee for the previous years. Accordingly, s. 271 (1)(c) penalty is not leviable. "

e) CIT vs. Hans Christian Gass - ITA 2209/2010 Bombay HC Ignorance of law caused by complicated provisions amounts to "bona fide belief"

The assessee, a foreign national, was an employee of Sandvik AB, Sweden. He was deputed to India and appointed Managing Director of Sandvik Asia Ltd. In addition to the salary from Sandvik Asia, he received an amount from Sandvik AB, Sweden, being the difference between the tax rates in India and Sweden. In the ROI, the assessee did not offer the amount received from Sandvik AB to tax even though it was taxable in India. On being asked by the AO, the assessee offered the same to tax and paid tax thereon for all years including the earlier and subsequent AYs. The AO levied penalty on the ground that the assessee was assisted by tax experts and so ignorance of the law was no excuse. However, the Tribunal deleted the penalty on the ground that (i) there were multiple amendments to the statutory provisions (s. 10(b)(vii)) and the concept of grossing-up embedded therein is of a technical nature and out of the scope of common knowledge of the tax payers, (ii) the possibility of mistake by even tax experts cannot be ruled out; (iii) the assessee relied on the tax experts and signed the ROI, (iv) the conduct of the assessee in paying up the taxes for all the years including those that were beyond reassessment showed his bona fides, (v) the claim of bona fide belief need not be substantiated with documentary evidence but can also be substantiated by circumstantial evidence; (vi) penalty is not an automatic consequence of addition to income; (vii) concealment implies that the person is hiding, covering up or camouflaging an income; penalty is not leviable in case where assessee is able to provide a 'bona fide' explanation; penalty is not leviable in cases where assessee made errors, under bona-fide beliefs. On appeal by the department to the High Court, HELD dismissing the appeal:

In the ROI, the assessee had not offered the above reimbursed amount to tax under the bonafide belief that the same were not taxable. However, when a query was raised by the AO during the assessment proceedings, the assessee immediately offered that amount to tax for all the years. The penalty imposed u/s 271 (1)(c) by the AO was deleted by the ITAT after recording detailed reasons that it was a case of bonafide mistake and that there was no intention to evade tax. The discretion exercised by the ITAT in accepting the explanation given by the assessee is reasonable and we see no reason to interfere with the decision of the Tribunal which is based on finding of facts. "

5. Further no penalty can be levied if certain conditions are fulfilled, namely,

(i) if the assessee voluntarily and in good faith has made a full disclosure of his income before an investigation is set on foot by the Income-tax Officer in the concerned assessment or before the Income-tax Officer actually detects any concealment on the part of the assessee;

(ii) the assessee has co-operated in the inquiry into the assessment of income; and

(iii) that the assessee has either paid or made satisfactory arrangements for payment of the tax payable on the basis of his voluntary disclosure

If assessee voluntarily and under bonafide and honest act revised its retrun of income no penalty can be levied.

Reliance can be placed on the following decisions:-

i) J.P. Sharma & Sons v. Commissioner of Income-tax (1985)151 ITR 333 (Raj) where high court of Rajasthan has stated that filing of revised return by assessee voluntarily was bona fide and honest act and, therefore, assessee could not be held guilty of deliberate concealment of income so as to levy penalty under section 271 (1)(c).

ii) Commissioner of Income-tax v Ahmed Tea Co. (P.) Ltd. where high court of Gauhati has held that "The detection was made by the Income-tax Officer in the assessment year 1965-66 and if the assessee felt that this income had to be included and so the assessee included by way of revised return before the assessment was taken up by the Income-tax Officer, it cannot be said that the assessee was guilty of concealment of this income. The onus in this case is on the department to prove that the assessee had deliberately concealed this income. There are no materials to hold that the assessee had deliberately or consciously concealed this income. "

iii). Commissioner of Income-tax v Amalendu Paul(1983) 13 Taxman 325(Cal)

The High Court of Calcutta has held that "It is well-settled that the onus of proving that the assessee concealed the particulars of his income or failed to disclose his income is on the revenue. In view of the facts and findings recorded by the Tribunal, it was evident that the assessee submitted the revised return showing the impugned cash credits as income from other sources as the same could not be proved, with a prayer that no penalty might be levied. Thus, the admission, if any, was a conditional admission and could not be relied upon for imposing penalty as an unconditional admission. "

Hence, relying on the above case laws your goodself would appreciate that as the assessee has on suo moto basis has filled the revised computation of income no penalty can be levied in instant case.

6. Without prejudice to above we have to state as under:

Section 275 contains the bar of limitation for imposing penalties which reads as under:

275. [(1)] No order imposing a penalty under this Chapter shall be passed-

[(a) in a case where the relevant assessment or other order is the subject-matter of an appeal to the Commissioner (Appeals) under section 246 [or section 246A) or an appeal to the Appellate Tribunal under section 253, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which the order of the Commissioner (Appeals) or. as the case may be. the Appellate Tribunal is received by the Chief Commissioner or Commissioner, whichever period expires later:

[Provided that in 'a case where the relevant assessment or other order is the subject-matter of an appeal to the Commissioner (Appeals) under section 246 or section 246A, and the Commissioner (Appeals) passes the order on or after the 1st day of June, 2003 disposing of such appeal, an order imposing penalty shall be passed before the expiry of the financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, are completed, or within one year from the end of the financial year in which the order of the Commissioner (Appeals) is received by the Chief Commissioner or Commissioner, whichever is later;]

(b) in a case where the relevant assessment or other order is the subject-matter of revision under section 263 [or section 264), after the expiry of six months from the end of the month in which such order of revision is passed;

(c) in any other case, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later.}

The assessee has preferred appeal against the order passed u/s 147 rws 143 only in respect of short credit of TDS. Additional income offered while filing revised Return of Income was not agitated. As, assessing officer has initiated penalty proceedings in respect of assesse's claim for carry forward and set off of Long Term Capital Loss against LTCG in its original Return of Income addition in respect of which is not agitated by the assessee, the assessing officer should have completed the said penalty proceedings within the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, or within six months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later. As the assessing officer has not done so, the initiation of penalty proceedings is time barred."

The AO observed that it is only in pursuance of the initiation of the reopening of the case u/s. 147 of Act that the assessee has revised return of income and also withdrew the carry forward and set off of brought forward of short term capital loss of Rs. 1,86,384/- which was earlier allowed inadvertently and hence the assessee withdrew its claim after being cornered by the revenue. The AO held the assessee had submitted inaccurate particulars of income and penalty was imposed u/s. 271(1)(c) of the Act. The AO while imposing penalty u/s 271(1)(c) relied upon Hon'ble Supreme Court decision in the case of Union of India v. Dharmendra Textile Processors & others 306 ITR 277, the Hon'ble Allahabad High Court decision in the case of CIT v. Rakesh Suri (2010) 233 CTR (AU) 184, the Hon'ble Delhi High Court

decision in the case of CIT v. Zoom Communication P. Ltd. 233 CTR 465 (Del), vide penalty order dated 26-03-2012 passed by the AO u/s 271(1)(c) of the 1961 Act.

4. Aggrieved by penalty order dated 26-03-2012 passed by the AO u/s 271(1)(c) of the 1961 Act, the assessee carried the matter in an appeal filed before the learned CIT-A who rejected the contentions of the assessee vide appellate order dated 03-06-2014 , by holding as under:-

> "*1.3 Decision*
>
> *1.3.1 I have carefully considered the submissions and contention of the Ld. AR of the appellant and also carefully gone through the facts and explanation given by the Ld. AR of the appellant as well as the Ld. AO. I find that in the case of Kanbay Software (P) Ltd vs. DCIT (2009) 122 TT] (Pune) 721, the Hon'ble Tribunal held that there can be three distinct mutually exclusive situations in the case of an addition to income. In the first scenario, the addition made could be on account of contumacious conduct of the assessee in which mens rea is established or can be reasonably inferred. As far as this situation is concerned, penalty was always leviable under s. 271(1)(c). In the second scenario, while the addition is made to the returned income, neither is it established, or can be reasonably inferred, that the addition made to the income is on account of contumacious conduct of the assessee nor is it established, or can be reasonably inferred, that the assessee's conduct and explanation is bona fide. In such a situation, in the light of Hon'ble Supreme Court's judgment in the case of Dilip N. Shroff (supra), penalty under s. 271(1)(c) could not have been levied since the onus of establishing mens rea of the assessee could not have been discharged in such a situation. However, as the law stands now and in the light of the Hon'ble Supreme Court's judgment in the case of Dharamendra Textile Processors (supra), penalty under s. 271(1)(c) will be leviable since it is not necessary for the tax authorities to establish mens rea of the assessee. That is the area in which legal position has changed. However, there is still a third scenario in which an addition is made to the income but it is established, or can be reasonably inferred, that assessee's conduct and explanation is bona fide. These are the situations in which the assessee is able to establish his innocence. In such a situation, in accordance with the undisputed scheme of s. 271(1)(c), neither the penalty was leviable prior to Hon'ble Supreme Court's judgment in the case of Dilip N. Shroff (supra), nor is it leviable after the Dharamendra Textile Processors' case (supra). I am of the view that the case of the appellant falls in the first scenario i.e the addition made is on account of contumacious conduct of the appellant in which mens rea can be reasonably inferred. As far as this situation is concerned, penalty was always leviable under section 271(1)(c).*
>
> *1.3.2 I find that appellant had filed the return of income on for AY 2005-06 on 21.10.2005 declaring total income of Rs.5,76,54,770/- alongwith Tax Audit Report and audited financial statements. The notice u/s 143(2) was issued on 31.10.2006 and the assessment u/s. 143(3) of*

the I.T. Act, 1961 was completed vide order dated 05.12.2007 assessing the total income at Rs.8,22,78,960/ - by making various additions and disallowances. Against the same, the appellant has filed an appeal before CIT(A) wherein the appellant obtained substantial relief and the total income was re- determined at Rs.5,76,86,417/- vide order giving effect to appellate order. Subsequently, the case was re-opened u/s 147 of the Income Tax Act, 1961 and notice u/s 148 was issued to the appellant on 15.07.2009. In response to the said notice appellant filed the return of income wherein it offered the additional income of Rs.3,59,171/-. It is a fact that appellant has filed revised return in response to notice u/s.148 withdrawing its claim of set off of capital gain of Rs.5,13,908/- from the long term capital loss in respect of sale of 58,65,000 equity shares of M/s. Dotex International ltd. to M/s. National Stock Exchange of India Ltd. (NSE). The appellant stated that it did so suo motto but I don't think so as the explanation of the appellant is far from correct, there is a proper issue of notice and its only then such a claim was revised though there is no time available to the appellant to do so. The plain statutory language of two clauses, i.e., (A) and (B) of Expln. 1 to s. 271(1)(c) get referable to two separate and independent situations. The first cl. (A) contemplates failure to offer an explanation or offer of an explanation which is found to be false. At the other end, the second situation covered by cl. (B) relates to a position that the assessee is not able to substantiate the explanation offered by him. Thus it is quite clear that the two situations are independent and separate. Initially the consequence is provided in the language of Expln. 1; it created what is known as "deeming situation". It would thus be seen that the amount added or disallowed in the above process of computation is deemed to represent the income in respect of which particulars have been concealed. In other words the addition of the amount or otherwise disallowance of the amount in the computation of total income would assume a deemed character of concealment by reason of Expln. 1. Therefore, the statutory requirement of s. 271(1)(c) requires satisfaction of the officer as regards concealment gets understood in the light of above deeming situation.

1.3.3 So far it relates to contention of Authorised Representative that as revised return was filed before detection by the Revenue, therefore, no penalty should be levied, it may be observed that when an assessee files a revised return in fact it is admitted that original return was not correct and complete and it is intended to be substituted by a revised return which according to the assessee, is correct and complete. It is quite possible and natural that in submitting a return and disclosing full particulars of income in the return some bona fide omission or some wrong statement may have occurred. In order to obviate this possibility, legislature enacted s. 139(5) enabling the assessee to furnish a revised return. But to come under the said provision, the omission or wrong statement that might have occurred or crept in (i) must be bona fide and (ii) must have been discovered by the assessee himself. Where revised return is made by assessee on his own volition before concealment was detected in the course of assessment proceedings, conduct of assessee has to be taken note of. Sec. 139(5) applies only to cases of omission or wrong statement and not to cases of concealment or false statements. Thus s. 139(5) has application to limited category of cases, namely, where in the original return there was an omission or any wrong

statement. The very word "omission" denotes an omission bona fide. Equally, the words "wrong statement" will not take in "a statement known to be false to the person who made statement". However, the word "discovered" coming in s. 139(5) makes it clear that at the time of discovering only a person who has furnished return finds out that an inadvertent omission or an unintended wrong statement had crept in the return filed by him. If a person who filed return was aware of the falsity of statement and incorrectness of the particulars of income even at the time when he filed original returns, there was no question of that person subsequently discovering existence of omission or creeping in of wrong statement in the return already filed by him. In other words, return filed so as to include concealed income cannot be treated as revised return because omission to file the correct income in the original return cannot be said in such circumstances to be due to any bona fide mistake or omission. Onus is, therefore, on assessee to show that omission or wrong statement was discovered subsequent to filing of the original return. This onus can be discharged with reference to material aspects to be brought on record by assessee.

1.3.4 The fact whether revised return would absolve the omission in the first return could well be a question of law. In such cases the general view is that where such revised return is purely voluntary, there could be no case for penalty as was found in CIT vs. Ramdas Pharmacy, CIT vs. Sri Rajaram Cloth Stores and CIT vs. Raja Corpn. The issue as to whether such return is voluntary would be a question of fact. It was so held in Badshah Prasad vs. CIT and Badri Prasad Om Prakash (1987) 163 ITR 440 (Raj). But revised return did not save the taxpayer where the finding was otherwise or such finding in favour of the taxpayer could not be supported on the basis of materials available as was held in Amjad Ali Nazir Ali vs. CIT, CIT vs. J.K.A. Subramania Chettiar, Addl. CIT vs. Radhey Shyam, Nandlal Kanaiyalal vs.CIT and CIT vs. K. Mahim. In CIT vs. Mohd. Mohtram Farooqui (2002) 177 CTR (Raj) 434 it was held that disclosure of income in the revised return after seizure of unexplained cash from the assessee cannot be said to be a voluntary disclosure and, therefore, levy of penalty under s. 271(1)(c) was justified in the absence of satisfactory explanation for the seized cash. Similarly in the case of M.S. Mohammed Marzook (Late) (Represented by L/H) & Am. vs. ITO (2006) 283 ITR 254 (Mad) in which revised return was filed after search and omission or wrong statement in the original return was not bona fide or due to inadvertence or mistake on the part of assessee, penalty was held to be justified.

1.3.5 In CIT vs. C. Ananthan Chettiar (2004) 192 CTR (Mad) 164 assessee having offered no explanation at all for disclosure of additional income after seizure of jewellery and cash during the search except to assert that he has disclosed the said income only to buy peace with the Department, the Hon'ble Madras High Court held that Tribunal erred in setting aside the penalty under section 271(1)(c). In Ravi & Co. vs. Asstt. CIT (2004) 271 ITR 286 (Mad) it was held that the though the assessee has filed a revised return, unless the assessee can show that the same was filed voluntarily, penalty was imposable for concealment of income. In CIT vs. Dr. A. Mohd. Abdul Khadir (2003) 183 CTR (Mad) 543 : (2003) 260 ITR 650 (Mad) penalty under s. 271 (1) (c) was held justified in spite of filing of revised return when such revised return

could not be said to be voluntary in view of facts that it was filed after search operations had taken place and after the accountant of assessee had made admission about concealment. In P.C. Joseph & Bros. vs. CIT (2000) 158 CTR (Ker) 104 it was held that where the surrender of income in the revised return is not voluntary but is as a result of detection by assessing authority, the filing of revised return is of no consequence. Simply because assessee agreed to addition of concealed income after detection thereof by spreading the amount over four years and filed returns in response to notice under s.148 offering additional income, it cannot escape penalty under s. 271(1)(c). Similar view has been taken in Deepak Construction Company vs. CIT (2007) 208 CTR (Guj) 444 in which it was held that Since AO had detected concealment of income by the assessee before show-cause notice, assessee was not entitled to benefits of the Amnesty Scheme in respect of additional income declared by it in the revised return which was filed pursuant to aid show cause notice and, therefore, levy of penalty under s. 271(1)(c) was justified. In Jyoti Laxman Knokar vs CIT (2007) 209 CTR (Bom) 5 to assessee had filed revised return disclosing additional income after discrepancy was detected in the stock during survey under s. 133A and the AO accepted the revised return but imposed penalty under s. 271 (1) (c) on the basis that said income had been suppressed by the assessee. It was held that imposition of penalty was justified since revised return had been filed under compulsion arising from detection during survey. In Smt. B. Indira Rani vs. CIT (2003) 183 CTR (Ker) 399 : (2003) 263 ITR 525 (Ker) since assessee had made disclosures in respect of unexplained investments in vehicles and immovable properties only after a search was conducted at her premises without offering any acceptable explanation, Tribunal was justified in holding that there was concealment irrespective of the fact that the additions made in the assessments were only of income from other sources.

1.3.6 The fact that the concealed income is shown in the revised return will not obliterate the offence in the original return. Such an issue was specifically dealt with and decided against the assessee in Kumar Jagdish Chandra Sinha vs. CIT TC50R.570, S.R. Arulprakasam vs. Smt. Prema Malini Vasan, ITO and Dayabhai Girdharbhai vs. CIT and CIT vs. A. Sreenivasa Pai (2000) 242 ITR 29 (Ker). Where assessee had concealed income even in revised return and his explanation had been found to be false on facts, penalty under s. 271(1)(c) was justified. [New United Construction Co. vs. CIT (2004) 270 ITR 214 (Jharkhand)]. Where original return is neither under s. 139(1) or under s. 139(2) but is a return filed under s. 139(4) which could not have been revised under s. 139(5) as held by the Supreme Court in the case of Kumar Jagdish Chandra Sinha vs. CIT (1996) 133 CTR (SC) 143, the assessee cannot get any advantage or benefit of revised return filed by him in relation to imposition of penalty for concealment in the original return filed under s. 139(4). This was also held by Allahabad High Court in Smt. Kusum Jaiswal vs. CIT (2005) 193 CTR (All) 651. In view of the foregoing, I don't find the revised return filed by the appellant is suo moto but it was only after the detection by the revenue that it was forced to revise the return, the penalty is thus exigible in the case of the appellant.

1.3.7 Further, the Ld. AR of the appellant submitted that section 275 which contains the bar of limitation for imposing penalties. The

appellant has preferred an appeal against the order passed u/s. 147 r.w.s 143 only in respect of short credit of TDS. Additional income offered while filing revised Return of Income was not agitated. As, assessing officer has initiated penalty proceedings in respect of additional income offered in the returned income which is not agitated by the appellant, the assessing officer should have completed the said penalty proceedings within the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty-has been initiated, or within six months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later. In the instant case the ld. AO has initiated penalty proceedings vide order dated 06.07.2010. Accordingly, in terms of provisions of section 275 the ld. AO was required to have passed the order u/s. 271(1) (c) by 31.3.2011. As the assessing officer has not done so, the initiation of penalty proceedings is time barred. I find no merit in the arguments of the Ld. AR as the appellant has appealed against the order passed by the Ld. AO u/s 147 read with section 143(3) of the Act and the order of the Ld. CIT(A)-17 was received by the Ld. AO only one 23-02-2012, the order in question is well within time, this ground thus hold no merit and is accordingly dismissed.

2. In the result, the appeal is dismissed."

5. The assessee carried the matter in appeal before the tribunal by filing second appeal. It was contended by Ld. Counsel for the assessee before the tribunal that penalty u/s. 271(1)(c) of the Act was levied on the assessee to the tune of Rs. 1,29,880/- . It was submitted that notice u/s. 148 was issued and the assessee declared the income in return of income filed in pursuance to notice issued u/s 148 on which purportedly penalty has been levied u/s 271(1)(c). it was submitted that original return of income was filed on 21.10.2005 u/s. 139(1) declaring income of Rs. 5,76,54,770/- which was scrutinised by Revenue which led to an assessment order was framed u/s. 143(3) on 05.12.2007 assessing income at Rs. 8,22,78,960/- . It was submitted that subsequently the assessment of the assessee was reopened u/s. 147 vide notice issued on 15.07.2009 and the assessee filed return of income on 07-09-2009 in pursuance to notice issued u/s 148 on 15-07-2009. It was submitted that reasons for reopening of the concluded assessment were provided on 10.09.2009 to the assessee and on 06.07.2010 assessment was framed u/s. 143(3) r.w.s. 147 accepting return of income filed in response to notice issued u/s 148 . It was contended that assessee has declared the said income suo moto in return of income filed in pursuance to notice u/s 148 on which purportedly penalty was levied u/s 271(1)(c) . It was submitted that penalty proceedings were initiated u/s.

271(1)(c) and difference of Rs. 3,27,524/- was considered for levying penalty u/s. 271 (1)(c) on the grounds that the assessee has furnished inaccurate particulars of income which was suo-moto disallowed by the assessee in the return of income filed in pursuance to notice issued u/s 148 . The difference was on account of long term capital gain of Rs.5,13,908/- which was sought to be adjusted against long term capital loss to the tune of Rs. 6,47,13,206/- on sale of shares of Dotex International Limited to NSE Limited , the said Dotex International Limited is subsidiary of NSE Limited and also assessee is 100% subsidiary of NSE Limited and hence by virtue of Section 47(v), the same is not treated as transfer and hence long term capital loss was not allowable on sale of shares. The assessee submitted that the assessee did not set off long term capital gains against the said long term capital loss in the return filed in pursuant to notices u/s 148, however , the assessee set off short term capital loss of Rs. 1,86,384/- against this long term capital gains of Rs. 5,13,908/- which was allowed by the AO and hence the difference was Rs. 3,27,524/- on which purportedly penalty was levied u/s 271(1)(c). Our attention was drawn to the assessment order of the AO passed u/s. 143(3) as well as the assessment order passed in reassessment proceedings u/s. 143(3) r.w.s. 147 . It was submitted that in the original return of income there was a bonafide error which was rectified by the assessee in the return of income filed in pursuance to notice u/s. 148. The assessee relied upon decision of Hon'ble Madhya Pradesh High Court in the case of CIT v. Suresh Chandra Mittal (2000) 241 ITR 124 (MP), which was affirmed by Hon'ble Supreme Court in (2001) 119 Taxman 433 (SC) in CIT v. Suresh Chandra Mittal . The assessee also relied upon the tribunal decision in ITA no. 327/Del/2014 in the case of Meeta Gutgutia v. ACIT in ITA no. 327/Del/2014 dated 31.03.2016 . It was submitted that income was offered voluntarily in the return of income filed in pursuance to notice u/s. 148 . It was submitted that reasons for re-opening of the concluded assessment u/s 147 were supplied post filing of the return of income in pursuance to notice u/s. 148. The assessee also relied upon the decision of the Hon'ble Bombay High Court in the case of CIT v. Nalin P Shah HUF reported in (2013) 40 taxmann.com 86(Bom.), order dated 04.03.2013.

The Ld. DR on the other hand submitted that assessee has sought set off of long term capital gain against loss arising from the sale of the shares to holding company which is not to be treated as transfer u/s. 47(v) of the Act and hence loss was not allowable at all, he drew our attention to the order of the learned CIT-A and submitted that assessee has furnished inaccurate particulars of income in the original return of income filed with the revenue and it is only when the assessee was confronted by Revenue , the assessee came forward and declared the income in the return of income filed with the revenue in response to notice issued by the AO u/s. 148 wherein the set off long term capital gain was not sought as was sought in return of income filed u/s 139(1). It was submitted that even in proceedings conducted by Revenue u/s 143(3) r.w.s. 143(2) , the assessee did not came forward to disclose the said income. The learned DR drew our attention to the decision of Hon'ble Supreme Court in the case of Mak Data Private Limited v. CIT (2013) 358 ITR 593(SC) and submitted that penalty will be levied u/s 271(1)(c) even if the said income is declared in the return of income filed in pursuance to notices issued u/s 148 . It was submitted that no challenge has been made by the assessee to the issuance of notice u/s. 148.

The assessee relied upon the decision of the Hon'ble Supreme Court in the case of CIT v. Reliance Petroproducts Private Ltd. reported in (2010) 322 ITR 158(SC) and also decision of Supreme Court in the case of Price Water Coopers P. Ltd. v. CIT reported in (2012) 348 ITR 306(SC), and also relied upon the decision of Bombay High Court in the case of CIT v. Somany Evergreen Knits Ltd. in ITA no. 1332 of 2011 order dated 21st March 2013.

6. We have considered rival contentions and have perused material on record including case laws relied upon by rival parties. We have observed that the assessee is engaged in the business of development, maintenance and licensing of computer software and providing consultancy services in the area of hardware, application software and products for finance and capital market within and outside India. The assessee filed its return of income u/s 139(1) for the impugned assessment year on 21.10.2005 declaring total income of Rs. 5,76,54,770/- which was assessed u/s. 143(3) vide

assessment order dated 05.12.2017 passed u/s 143(3), wherein the income assessed was Rs. 8,22,78,960/- . The case of the assessee was reopened by Revenue u/s. 147 and notices u/s. 148 was issued to the assessee on 15.07.2009. The assessee filed return of income in response to notices u/s. 148 declaring total income of Rs. 5,80,13,941/- , wherein the assessee withdrew its claim of setting off of long term capital gain of Rs. 5,13,908/- against the long term capital loss of Rs. 6,47,13,206/- in respect of sale of 58,65,000/- equity share of M/s. Dotex International Ltd. to National Stock Exchange India Ltd. . The National Stock Exchange of India Limited(NSE) is 100% holding company of the assessee company and also NSE Limited is holding company of Dotex International Limited and consequently transaction of sale of shares of Dotex International Limited by the assessee to its holding company NSE Limited was hit by provisions of Section 47(v) of the 1961 Act which shall not constitute transfer and consequently losses are not allowed as per provisions of the 1961 Act. Thus, the entire long term capital loss of Rs. 6,47,13,206/- claimed by the asserssee in respect of sale of 58,65,000 equity shares of M/s Dotex International Limited to NSE was not allowable as per provisions of the 1961 Act which was germane to reopening of the concluded assessment u/s 147 of the 1961 Act. The assessee withdrew its claim of allowability of long term capital loss of Rs. 6,47,13,206/- being hit by provisions of Section 47(v). The assessee therefore while filing return of income u/s 147 have also withdrawn the set off of long term capital gains of Rs. 5,13,908/- from the long term capital loss of Rs.6,47,13,206/- arising from sale of 58,65,000 equity shares of M/s Dotex International Limited to NSE . The assessee however sought to adjust short term capital loss of Rs. 1,86,384/- against long term capital gain of Rs. 5,13,908/- which was allowed by the AO in reassessment order passed u/s 147 r.w.s. 143(3) wherein returned income was accepted by the AO vide orders dated 06-07-2010 . The AO invoked penalty proceeding u/s 271(1)(c) against the assessee for furnishing of inaccurate particulars of income u/s. 271(1)(c) of the Act in the assessment order passed u/s 143(3) r.w.s. 147 dated 06-07-2010 w.r.t. net long term capital gain of Rs. 3,27,524/- (net after adjustment of short term capital loss of Rs. 1,86,384/- against long term capital gains of Rs. 5,13,908/-) . No doubt the assessee has claimed the said set off of long term capital gain against the long term capital loss on sale of shares of Dotex International Ltd. to its holding company NSE in the

original return of income filed u/s 139(1) but assessee on coming to know of said error has suo-moto disallowed/withdrawn the same without being confronted by the Revenue , in the return of income filed in pursuant to notice u/s 148. The reasons for reopening of the concluded assessment u/s 147 was supplied by Revenue to the assessee only after the assessee filed its return of income in pursuance to notice u/s 148. Thus assessee has , thus, demonstrated its bona-fide by withdrawing the said claim of set off long term capital gains in the return of income filed pursuant to notice u/s.148. In the original return of income , the assessee made this legal claim of set off of long term capital gains against long term capital loss arising from the sale of shares of Dotex International Limited to its 100% holding company NSE Limited which was hit by provisions of Section 47(v) of the Act as it will not constitute transfer which claim stood withdrawn by the assessee itself , but every legal claim which is filed and which is not allowed by the Revenue does not automatically lead to the levy of penalty u/s 271(1)(c) rather in the instant case on coming to know of the inadmissibility of the said claim of set off by virtue of Section 47(v), the assessee itself disallowed the said claim before being confronted by the Revenue while filing return of income in pursuance to notice u/s 148, the decision of the Hon'ble Supreme Court in the case of Reliance Petroproducts Private Limited(supra) is applicable and in fact the assessee voluntarily withdrew the said claim in the return of income filed and hence no penalty is exigible u/s 271(1)(c) under these circumstances as explanation offered is genuine and bonafide . Thus, in our considered view no penalty u/s 271(1)(c) is exigible in this case and more so the total income of the assessee as is filed in the original return of income filed u/s 139(1) stood at Rs. 5,76,54,770/- , while the set off of long term capital gain which was sought to be adjusted was only to the tune of Rs. 5,13,908/- and against that short term capital loss was allowed by the AO to the tune of Rs. 1,86,384/- , which lead to the net figure of Rs.3,27,524/- which was subject matter of penalty proceedings u/s 271(1)(c) which is miniscule amount vis-a-vis the total income declared by the assessee and in our considered view , the penalty u/s 271(1)(c) of Rs. 1,29,880/- as is levied by the AO and confirmed by learned CIT(A) is hereby ordered to be deleted. We order accordingly.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 28.03.2018

आदेश की घोषणा खुले न्यायालय में दिनांकः 28.03.2018 को की गई ।

Sd/-	Sd/-
(JOGINDER SINGH)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, dated: 28.03.2018

Nishant Verma
Sr. Private Secretary

copy to…

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench
6. Master File

// Tue copy//

BY ORDER
DY/ASSTT. REGISTRAR
ITAT, MUMBAI