आयकर अपीलीय अधिकरण,सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT
श्रीमती दिवा सिंह, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष
BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

S. No	आ.अ.सं./I.T.A No. & निर्धारण वर्ष /A Y:	अपीलार्थी Appellant	Vs.	प्रत्यर्थी/Respondent
1	2335/Ahd/2016 A.Y. 2013-14	The Income Tax Officer, Ward-1, Bardoli – 394 601.	Vs.	Giriraj Developers, R.S.No.377, 378/1, Block No.565, 566, Moje-Bagumbra, Tal. Palsana, Dist.Surat – 394 305. **[PAN: AAKFG 5807 D]**
2	2337/Ahd/2016 A.Y.2013-14	The Income Tax Officer, Ward-2(3)(4), Surat.	Vs.	Shree Developers, RS No.5/A+B, Block No.18, VIP Road,Bharthana, Vesu, Surat **[PAN: ABRFS 7509 J]**
3	2338/Ahd/2016 A.Y. 2013-14	The Income Tax Officer, Ward-2(3)(4), Surat.	Vs.	Shree Gokul Developers, Block No.336, F.P.39, Vesu, Surat. **[PAN: ACDFS 2431 E]**
4	2973/Ahd/2016 A.Y. 2013-14	Deputy Commissioner of Income Tax, Circle-2(3), Surat – 395 001.	Vs.	Shree Infra River View Heights, Padder Road, Mota Varachha, Dist – Surat. **[PAN: ABIFS 0698 F]**
5	2613/Ahd/2016 A.Y. 2013-14	The Income Tax Officer, Ward-2(3)(4), Surat.	Vs.	Vishwas Devepoers, Anand Vatika, Beside Satelite Row House, Mota Varachha, Surat. **[PAN: AAIFV 8793 R]**
6	2614/Ahd/2016 A.Y.2013-14	Deputy Commissioner of Income Tax, Circle-2(3), Surat – 395 001.	Vs.	Vishwas Corporation, RS No.78, block No.123, Kosad, Besides Garnala,Dist-Surat. **[PAN: AAIFV 8792 Q]**
7	2615/Ahd/2016 A.Y.2013-14	The Income Tax Officer, Ward-2(1)(4), Surat.	Vs.	Vishwas Hitech Infra Project Pvt. Ltd., Plot No.B 2/104, Indralok Residency, Satellite Road,Mota Varachha, Surat. **[PAN: AADCV 7018 B]**

निर्धारिती की ओर से **/Assessee by**	Shri Shehzad Y.Karanjia -CA
राजस्व की ओर से **/Revenue by**	Shri Srinivas T.Bidari - Sr.DR

सुनवाई की तारीख/ Date of hearing:	09.01.2019
उद्घोषणा की तारीख/Pronouncement on:	25.01.2019

आदेश **/O R D E R**

PER BENCH:

1. These appeals by seven assessee's are being decided by this common order as facts and circumstances and position of law in terms of the prayer made by the parties before the Bench remain identical in each of these appeals. These appeals have been filed by the Revenue pertaining to 2013-14 in the respective appeals which arise out of identical orders passed by the CIT(A)-4, Surat wherein the quashing of the penalty proceedings u/s.271(1)(c) has been assailed.

2. The grounds raised by Revenue in ITA No.2338/Ahd/2016 for A.Y. 2013-14 read as under :

> *"1. Whether on the facts and circumstances of the case and in Law, Ld.CIT(A) has not erred in deleting the penalty of Rs.1,06,60,500/- levied by the Assessing Officer u/s.271(1)(c) of the Act?*
>
> *2. Whether on the facts and circumstances of the case and in Law, finding of Ld.CIT(A) that the survey team/department has not built a case where the explanation of the assessee can be proved to be false or not bonafide, is not perverse as the Assessing Officer, during the course of assessment proceedings asked details of buyers from whom 'on-money' was received which the assessee willfully omitted to supply? Further, no entry of 'on-money' has been recorded in the account of any purchaser. Therefore, assessee did not discharge its initial onus as the explanation of 'on-money' was faulted by the Assessing Officer.*
>
> *3. Whether on the facts and in the circumstances of the case and in Law, Ld.CIT(A) has not erred in relying on the judgments to the effect that penalty can not be imposed merely because of change of head of income as the facts of instant case are different from one relied upon? In the instant case, the assessee furnished inaccurate particulars of its income."*

3. The ld.CIT-DR, Mr.Srinivas T.Bidari referring these Seven appeals submitted that he would be referring to the facts as recorded in ITA No.2338/Ahd/2016 which are identical in each of these appeals referring to the statements of facts filed by the ITO, Ward-2(3)(4), Surat and the findings recorded in the assessment year.

4. The ld.CIT(DR) submitted that the assessee has disclosed income OF Rs.3,45,00,000/- in the survey action conducted on the assessee on 27.12.2012. The assessee was required to give the relevant details of the persons from whom on-money was stated to have been received. It was his submission that the amount disclosed in the survey is an afterthought even though it was included in the income of the assessee under the head of business and profession but since details were not made available, the AO in the absence of relevant details held it taxable u/s.68 of the Income Tax Act. On the basis of this penalty proceedings have been initiated and the penalty has been levied. Inviting our attention to the penalty order and the reply of the assessee in the assessment

proceedings vide letter dated 20.07.2015 was considered and not accepted the same reads as under :

"1. At the time of survey and search proceedings in our group certain loose papers and documents were found and seized. In the loose paper found and seized duly Annexurised as A-2 page 2 to 5, A-3, page 2 to 8 and A-4 and page 2 and 3 there were details of the unaccounted On money income received by different concerns from booking of the project carried on by the assessee firm and other group concern during the financial year 2012-13 i.e. A.Y.2013-14.

In the statement recorded u/s.132(4) on 27.12.2012 in answer to question No.24, one of the partner of the firm Mr.Vijay Bharwad has replied that the pocket diaries annexurised as A-2 to A-4 consists of the details of unaccounted. On Money received by different concerns from booking of the project carried on by such concerns along with the total amount of unaccounted On Money project wise – firm wise.

Name of the concern	*Undisclosed business income for F.Y. 2012-13 (Rs.)*
Giriraj Developers (Project name Gokul Dham)	*2,05,00,000/-*
Shree Gokul Developers (Project name Gokul Platinum)	*3,45,00,000/-*
Shree Developers (Project name Gokul Paradise)	*1,01,00,000/-*
Total	*6,51,00,000/-*

Further in answer to question No. 24, he has further stated that the said unaccounted on money have not been reflected in the regular books of accounts and hence voluntary disclosure of Rs.651 lacs was done as undisclosed Business income for the financial year 2012-2013 the break up of which was also given as under :

Further the above concerns in which the disclosure is made is engaged in the business of development residential projects and there is no other source of income as is also evident from the books of accounts, audited financial statements, tax audit report and partnership deed.

Further, we have also paid the total tax along with interest thereon if any on the total amount of disclosure so made and have also filed the return of income. Further the assessee firm has also paid the service tax on the said amount of disclosure with the Service tax department."

5. The explanation was not accepted, the AO levied penalty summing up the points for arriving at his conclusion on which heavy reliance is placed by the Revenue. The relevant extract is reproduced hereunder :

"7. During the instant penalty proceedings, the assessee was requested to explain as to why the above mentioned income of Rs.3,45,00,000/- should not be considered as deemed income u/s.68 of the Act instead of income under the head of Business and profession as claimed by the assessee, in absence of any corroborating evidence to substantiate the claim. The assessee failed to offer any satisfactory and credible explanation about the nature and source of income of Rs.3,45,00,000/- disclosed at the time of survey u/s.133A. since assessee has treated this income as business income, the onus lies on assessee to substantiate its claim by submitting the name, address of person from whom these money/credits written on impounded book is received. Moreover, the fact remains that had survey proceedings not been carried out in the premise of the assessee this whole income would not have been shown as even business income which the assessee has shown now & is claiming it to be. Certainly the intent of assessee was to conceal this income & keep it out from the Books which amount to penalty proceedings.

Also, Assessee neither provided name & address of persons from whom this money was received nor given flat/shop/unit wise details against which the cash

received. The date of receipt written on impounded diary also did not match with the booking dates of flats/shops/unit. Thus, it is crystal clear that the assessee either wants to conceal the modus operandi of these receipts or purposely does not want to substantiate the source of these cash receipts."

6. Relying on the said para the ld.CIT-DR inviting our attention to the impugned order submitted that relief has been granted by the CIT(A) for the reasons set out in para 7 to 7.3 which is assailed by the Revenue. The relevant extract which is common in these group of cases is extracted hereunder for ready reference :

7. I have gone through the facts of the case, the penalty order, the assessment order, the submissions and the case law on the issue including that relied upon by the AO and the appellant. The appellant in the submissions has challenged the imposition of penalty on the technical ground of non-recording of satisfaction and has pleaded that the initiation penalty is not proper even u/s.271(1)(B) of the Act. It has also pleaded that penalty cannot be levied on merits too; pleading that the income in question was disclosed during the course of survey itself as income earned outside books of account from project, the income was duly introduced into the books of account, was disclosed in the return of income and the AO has only changed the head of income without making any addition on this issue.

7.1 The appellant in the submissions on the ground has challenged the imposition of penalty on the technical ground of non-recording of satisfaction and has pleaded that the initiation of penalty is not proper even u/s.271(1)(B) of the Act.
I have gone through the assessment order. The AO has given his interpretation as to how he feels that the appellant has not furnished accurate particulars of its income and has recorded his prima facie belief that the appellant has furnished inaccurate particulars of its income. The AO has also recorded that the penalty proceedings for the aforesaid default are being initiated separately. I am fully satisfied that the AO has clearly and in no uncertain terms has recorded his satisfaction. This argument of the appellant is not accepted.

7.2 As far as the imposition of penalty is concerned, the AO's case is basically built on the following premise:

a) *Although it has shown the income accepted during the course of survey in its returns, it has not been able to substantiate with details and evidences, the claim that it has been earned as business income from the project'. It is alleged that the appellant failed to give the details of persons to whom the residential plots at Gokuldham, Varachha were sold and the details of on money receipt and how exactly the income has been worked out.*
b) *In the absence of evidence to prove that the income has been earned from on money, and also as the firm as per the partnership deed is allowed to do other activities also; it cannot be accepted that the income has been earned from business of construction only.*
c) *The AO held that in absence of such details, the amount credited to the books of account (as income) is not explained and the addition of the income is required u/s. 68 of the Act. Consequently, the AO taxed it under the 'Income from Other Sources' as against it being declared as 'Business Income' during the course of survey as well as in the return of income.*
d) *The assessee would not have disclosed the impugned income if survey proceedings u/s. 133A were not conducted.*
e) *The appellant has not appealed against the order u/s. 143(3).*
f) *The AO held that in the above circumstances, the appellant has furnished inaccurate particulars of such income and went on to levy penalty @ 100% u/s. 271 (l)(c) for such default.*

7.3 *Considering the entire gamut of facts and circumstances, the following pertinent observations/decisions are made on the issue:*

a) *The total income returned and the assessed income is the same. The penalty u/s. 271(l)(c) of the Act starts from the furnishing of details of income in the return and not before that. This is clear from the scheme of the Act and has been held and observed time and again including in the following cases:*

i) ***The Hon'ble High Court of Rajasthan in the case of*** *CIT v. Unique Precured Retraders (2008) 13 DTR (Raj) 215.*

ii) *The Hon'ble Jurisdictional High Court of Gujarat in the case of* ***Principal CIT Vs. Valibhai Khanbhai Mankad 2015-TIOL 2164-HC-Ahm-IT*** *has held that penalty u/s. 271 (1) (c) cannot be levied when there is no dispute with regard to fact that the particulars of income disclosed during the course of survey were duly reflected in the return of income.*

iii) ***The Hon'ble High Court of Delhi in the case of*** *CIT Vs. SAS Pharmaceuticals (2011) 335 ITR 0259 (Del).*

The appellant had disclosed the incomes in the returns filed and paid taxes b) No penalty is leviable just because an issue was not appealed against the quantum order. Time and again it has been held that the penalty proceedings are separate from the assessment proceedings. This cannot be a ground for imposition of penalty. The AO has to independently establish its case for default u/s. 271(l)(c). ***The Hon'ble Supreme Court in case of CIT vs. Khoday Eswarsa & Sons 1972 CTR (SC) 295 : (1972) 83 ITR 369, the same position was reiterated. In that case, the Tribunal had stated that there might be justification for making additions in the original assessment order to the amount shown in the return, but those additions by themselves could not lead to the inference that the assessee had concealed its income or had deliberately furnished incorrect particulars. It was furthermore stated that cogent material or evidence is necessary before penalty can be levied. Another judgment which I would like to cite is the CIT vs. Koduri Papa Rao (1976) 102 ITR 834 (AP), a decision of the Andhra Pradesh High Court to the same effect.***

c) A survey action was carried out at the business premises of the appellant firm. The income declared in return of income filed by the appellant included the amount surrendered by the appellant during the course of survey operations conducted by the department at business premises. During the course of survey operations, certain incriminating documents were found and one of the partners of the assessee firm Shri Lavjibhai Dungarbhai Daliya declared addition income of Rs. 8,03,40,000/- for A.Y. 2013-14.

The survey team did not make further enquiries nor was it established that these represented any other income. It is not a case where it was found/established that the income'disclosed was not full and true. The department has not built a case where the explanation of the appellant has been proved to be false or not bona fide. Even the conditions of Explanation 1 of section 271(1)(c) are not applicable in such a case.

d) No penalty can be imposed where the income has been disclosed merely because of change of head of income. This has been held in numerous cases including

1) *The Hon'ble High Court of Delhi in the case of* ***CIT Vs. Amit Jain (2013) 351 ITR 0074*** *has held that merely because assessee has shown income in return as short term capital gain, which was assessed by AO as business income, it cannot amount to furnishing of inaccurate particulars for purpose of levy of penalty u/s.271 (1)(c).*

2) *The Hon'ble Mumbai Bench of the ITAT in the case of* ***ITO Vs. Roborant Investments (P) Ltd. (2006) 7 SOT 181 (Mumbai)*** *has held that the assessee having made full and complete disclosure, merely because income returned by assessee under a particular head was assessed by the AO under another head is not sufficient to impose penalty by invoking Expln. 1 to s. 271 (1)(c).*

In the totality of facts and circumstances of the case, the penalty u/s 271(1) (c) is held not imposable; where no additidn has been made to the total income assessed vis-a-vis the returned income with respect to the impugned income, the income as assessed was disclosed in the return filed u/s. 139(1) itself, it involves allegation of a mere change of head without any tax effect, no explanation has been proved bogus or mala fide. ***Therefore the penalty is directed to be deleted.***

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

7. The ld.CIT-DR in support of the departmental grounds assailing the quashing of the penalty order submitted that the relief granted by the

CIT(A) is contrary to the proposition of law as laid down by the Apex Court in the case of Mak Data Pvt. Ltd., 358 ITR 593 (SC). Accordingly it was his prayer that the impugned order may be set-aside and the penalty order may be upheld.

8. The ld.AR inviting our attention to the material available on record submitted that in the facts of the present case, the assessee has consistently accepted the fact that on-money has been received from the business of plotting / construction / development etc., of plots. It was his submission that in the related concerns no doubt various other objects may have been stated. However, it was consistently the fact on record that this was the only activity carried out by the assessee booking of plots at Vijay M.Bharwad. Referring to the replies of the assessee in each of these cases, it was submitted that the assessee in the course of the assessment proceedings has carried out business has consistently made out the case that the respective assessees were engaged in plotting etc., It was submitted that since there was no other business except this business thus merely because the AO did not accept the source of the income and changed the head of income from business income to income from other sources etc., the penalty provisions u/s.271(1)(c) are not attracted.

9. The ld.AR further submitted that the assessee has declared additional income in his original return of income and same was accepted without making any addition although by change of head, therefore there was no dispute with regard to the fact that particulars of income were reflected in the return of income. Therefore, no penalty should be levied when the return of income was accepted by the AO as has been held by the Hon'ble Jurisdiction of Gujarat High Court in the case of PCIT-1 vs Valibhai Khanbhai Mankad (Tax Appeal No.445/2015 dated 07.09.2015) wherein the Hon'ble High Court observed in para 5 as under:

> *"5. From the findings recorded by the Tribunal, it is evident that the factum of deletion of addition in respect of non-deduction of tax by the assessee was not controverted by the revenue. The Tribunal has further found that the penalty had been levied on the amount which was reflected in the original return as income. That it was an undisputed fact that the assessee had declared this income in his original return of income, although it was a belated return. The Tribunal was of the view that as per the provisions of section 271(1)(c) of the Act, penalty can be imposed if the assessee had concealed the particulars of income or has furnished inaccurate particulars of such income. That in the present case, there was no dispute with regard to the fact that the particulars of income were reflected in the return of income. Moreover, it was not the case of the revenue that the returns of income filed were invalid and in fact, the Assessing Officer had proceeded on the basis of the return filed by the assessee and particulars furnished therein. From the findings recorded by the Tribunal, it is evident that the Tribunal has found as a matter of fact that there was no concealment of particulars of income on the part of the respondent assessee and in fact, the Assessing Officer had proceeded on the basis of the return filed by the assessee and particulars furnished therein. Under*

the circumstances, in the absence of any concealment of the particulars of income or furnishing of inaccurate particulars of income on the part of the assessee, no infirmity can be found in the impugned order passed by the Tribunal in confirming the order passed by the Commissioner (Appeals) in deleting the penalty under section 271(1)(c) of the Act. In the absence of any infirmity in the impugned order passed by the Tribunal, it is not possible to state that the impugned order gives rise to any question of law much less, any substantial question of law so as to warrant interference. The appeal accordingly dismissed."

10. The ld.AR further submitted relying on decision in the case of DCIT, Circle-3, Surat vs. M/s.Suyog Corporation in ITA No.568/Ahd/2012 for A.Y. 2008-09 to the proposition that the moment the additions have been made in the taxable income of the assessee, even on account of disclosure made by the assessee during the course of survey proceedings then that amount would be considered as business profit of the assessee. Hence, the disclosure made by the assessee on the basis of material found during the course of survey pertaining to plotting / construction / development are related to only business income as the AO has not brought out anything contrary to the record that the income disclosed during the course of survey was from the other sources. The ld.AR contended that the assessee has disclosed the amount surrendered during the course of survey in the return of income, hence, the assessee has not concealed the particulars of its income and furnished inaccurate particulars of such income as per Clause (C) of section 271 of the Act makes it clear that the act of the concealment of or furnishing of inaccurate particulars is relatable only in respect of return being filed and as such in case where the such of filing of return has not been breached, there was no question of invocation of penal provisions of section 271(1)(c) of the Act. In support of this contention, the ld.AR has placed reliance in the case of ACIT, Circle-4, Surat vs. Jupiter Distillery 1555/Ahd/2009 dated 16.12.2011 wherein relying on the decision of CIT, Ahmedabad vs Reliance Petro Products Ltd [2010] 322 ITR 158 (SC), the penalty levied on the amount disclosed during the survey and included in the return of income was deleted. The ld.AR further placed reliance on the decision in the case of ITO vs Roborant Investments Pvt. Ltd [2006] 7 SOT 181.

11. Ld.AR also submitted that the reliance placed by the Revenue on the decision in the case of Mak Data Pvt. Ltd. vs. CIT [2013] 358 ITR 593 (SC), is misplaced in the present case. In the said case, a survey was

conducted more than 10 months before and the disclosure was made by the assessee later during the course of assessment proceedings. Therefore, the Hon'ble Supreme Court had held that the assessee had no intention to include the income found during the course of survey whereas in the facts of the present case the amount disclosed during survey was duly included in the original return of income filed after the date of survey. Therefore, the facts of the said case are distinguishable. Further, there is no difference in the return of income and the income assessed.

12. It was further argued that as per provisions of section 271(1)(c) in order to levy penalty there must on the amount of tax sought to be evaded by reason of concealment of income. In the facts of the case there is no difference in the return of income and assessed income and taxes paid. Therefore, the provisions of section 271(1)(c) are not attracted. Further, as per Explanation 4 to section 271(1)(c) there is a mechanism for calculation of penalty, according to which the penalty could be calculated with reference to the income of which tax sought to be evaded whereas in the present case the assessee has duly paid taxes along with while filing the return of income, therefore there was no evasion of tax sought to be evaded. The ld.AR also placed reliance on the following decisions in support of contentions i.e. CIT vs. Unique Precured Retraders [2008] 13 DTR (Raj-215), CIT vs SAS Pharmaceuticals [2011] 335 ITR 259 (Del), M/s.Sadbhava Builders vs ITO 1418/Ahd/2008, Ahmedabad Tribunal, CIT Vs. Amit Jain [2013] 351 ITR 74 (De)l, CIT vs Reliance Petro Products Pvt. Ltd., [2010] 322 158 ITR (SC) and other as per their comes law paper book.

13. We have heard the parties and perused the material available on record and gone through the above case laws. There is no dispute about the fact that there was a survey action u/s.133A, and the assessee offered additional income therein. The income so offered was duly declared in the return of income and the assessment was framed. Apart from his activity of plotting and development it was submitted that there was no other source of income. This position we find has not been disputed by the Revenue. The assessment of the assessee has also been completed u/s.143(3) duly accepting the declared income in the assessment order albeit with a change of head from business income to

income u/s.68. Now the question which arises for consideration is whether is whether there is any justification on the part of the AO to levy the penalty u/s.271(1)(c)? when there is no difference in the return of income and assessed income. For the sake of convenience the provisions of section 271(1)(c) are produced as under :

> *""Sec. 271(1) –If the Assessing Officer or the Commissioner (Appeals) [or the Commissioner] in the course of any proceedings under this Act, is satisfied that any person –*
>
> *(a)…….*
> *(b)…….*
> *(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or*
> *(d)…….*
> *He may direct that such person shall pay by way of penalty –*
>
> ***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."*

14. From the last portion of the section i.e." the amount added or disallowed in computing total income be deemed to represent the income in respect of which particulars have been concealed" would indicate that it is only the addition or disallowance to the total income that would represent the income for the purposes of levy of penalty within the meaning of Explanation-1 to section 271(1)(c). In other words, if no addition or disallowance is made in computing total income then there will not be any income which can be deemed as income in respect of which particulars have been concealed. Clause (c) to explanation-4 to section 271(1)(c) explains the amount of tax sought to evaded. It means the difference between tax on the total income assessed and the tax that would have been chargeable at such total income is reduced by the amount added. Since in the present case, the AO has not made any addition in the returned income, question of working out any tax sought to be evaded would not arise. For the sake of convenience we reproduce Explanation - 4 to section 271(1)(c) as under :-

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

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

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

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

Thus in general, where a case does not fall within clause (a) or clause (b) there cannot be any "tax sought to be evaded" if there is no addition to the returned income.

15. Thus the basis for levy of penalty is return of income. If any amount has been shown in the return of income, then it cannot be said that assessee has concealed any particular about that income or furnished inaccurate particulars in relation thereto. There cannot be any concealment prior to filing of return. Question of consideration whether assessee is liable for action under section 271(1)(c) would arise only when return of income is scrutinized by the AO and he finds some more items of income or additional income over and above what is declared in the return. If it is so, the assessee would be liable for action under section 271(1)(c) in respect of such items only which are discovered by the AO on the scrutiny of return of income or after carrying out investigation and discovering some more items of income not found declared or mentioned in the return of income. Prior to filing of return of income there is no concept of concealment or furnishing of inaccurate particulars.

16. The initial phrase used in section 271(1)(c) suggests that AO has to find in the course of any proceedings under this Act that assessee has concealed the particulars of his income or furnished inaccurate particulars of such income. In fact, the proceedings against the assessee would start only after return of income is filed by the assessee or after issuance of statutory notice against him such as under section 142(1) or u/s 143(2). Carrying out survey under section 133A is not at all any proceedings. Proceedings as used in section 271(1)(c) are statutory proceedings initiated against the assessee either by issuance of statutory notice or after filing of return of income. Survey u/s.133A or search under section 132 or issuance of notice u/s.133(6) for example, are only

means of collecting evidence against the assessee and are not equivalent to statutory proceedings. Another criteria of finding out ks to be seen whether it can be brought to a legal conclusion against the assessee by determining his right or liability. Merely carrying out survey under section 133A does not create any liability against the assessee which is created only through assessment proceedings or penalty proceedings. Therefore, the ld.DR is incorrect in his submission that survey being a proceedings and AO has discovered concealment during survey, therefore, the assessee is liable for penalty under section 271(1)(c).

17. We further find support from the reliance placed by the ld.AR on the decision in the case of PCIT vs. Valibhai Khanbhai Mankad [TIOL 2164-HC-AHM-IT [2015] wherein Hon'ble Gujarat High Court in para 5 the observed as under :

> *"5. From the findings recorded by the Tribunal, it is evident that the factum of deletion of addition in respect of non-deduction of tax by the assessee was not controverted by the revenue. The Tribunal has further found that the penalty had been levied on the amount which was reflected in the original return as income. That it was an undisputed fact that the assessee had declared this income in his original return of income, although it was a belated return. The Tribunal was of the view that as per the provisions of section 271(1)(c) of the Act, penalty can be imposed if the assessee had concealed the particulars of income or has furnished inaccurate particulars of such income. That in the present case, there was no dispute with regard to the fact that the particulars of income were reflected in the return of income. Moreover, it was not the case of the revenue that the returns of income filed were invalid and in fact, the Assessing Officer had proceeded on the basis of the return filed by the assessee and particulars furnished therein. From the findings recorded by the Tribunal, it is evident that the Tribunal has found as a matter of fact that there was no concealment of particulars of income on the part of the respondent assessee and in fact, the Assessing Officer had proceeded on the basis of the return filed by the assessee and particulars furnished therein. Under the circumstances, in the absence of any concealment of the particulars of income or furnishing of inaccurate particulars of income on the part of the assessee, no infirmity can be found in the impugned order passed by the Tribunal in confirming the order passed by the Commissioner (Appeals) in deleting the penalty under section 271(1)(c) of the Act. In the absence of any infirmity in the impugned order passed by the Tribunal, it is not possible to state that the impugned order gives rise to any question of law much less, any substantial question of law so as to warrant interference. The appeal accordingly dismissed."*

18. We further note that the ld.AR has placed reliance in case of CIT vs Amit Jain [2013] 33 taxmann.com 178 (Del) wherein the Hon'ble Delhi High Court has held in para 3 as under :

> *"3. This court notices that the Tribunal, while upholding the order of the Appellate Commissioner, relied upon the decision in CIT v. Reliance Petroproducts (P.) Ltd. [2010] 322 ITR 158/189 Taxman 322 (SC). Furthermore, the record reveals that the amount in question, which formed the basis for the Assessing Officer to levy penalty-was in fact truthfully reported in the returns. In view of this circumstance, that the Assessing Office chose to treat the income under some other head cannot characterize the particulars or reported in the return as an "inaccurate particulars" or as suppression of facts. The court is also conscious of the decision of the Supreme Court in Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 where it was held that it is up to the Assessing Officer to interpret the return and discern as to which head of income the amount had to be brought to tax"*

19. Therefore, in the light of ratio of above decision no penalty is leviable wherein even in the change of heads of income is made by the AO during the course of assessment proceedings.

20. The ld.DR has relied on the judgment of Mak Data Pvt. Ltd. vs. CIT [2013] 358 ITR 593 (SC), however, same is not applicable in the present case as in that case the survey was conducted more than 10 months before filing of returns and the disclosure was made by the assessee later during the course of assessment proceedings, whereas in the present case the amount disclosed during survey was duly included in the original return of income filed after the date of survey. Therefore, the facts of the said case are distinguishable. Further, there is no difference in the return of income and the income.

21. In the light of above facts and circumstances and case laws we are of the considered opinion that it is not a case of furnishing inaccurate particulars of income, as in the Income Tax Return, particulars of income have been duly furnished and the surrendered amount of income was duly reflected in the Income Tax Return nor there is a tax sought to be evaded on the basis of return of income as the assessee has not evaded any tax on the return income. The Hon'ble Delhi High Court in the case of SAS Pharmaceuticals [2011] 335 ITR 259 (Del) has considered the expression in the course of any proceedings under this Act appearing in section 271 of the Act and held that the said expression cannot have reference to the survey proceedings. It has also held that penalty proceedings would depend upon the return of income filed by the assessee.

22. In the light of above facts and case laws relied by the ld.AR, we find no reason to interfere with the order of ld.CIT(A) and we accordingly confirm the same. Accordingly, the grounds of appeal as raised by the Revenue are therefore dismissed. The finding in this case is mutatis mutandis apply to all the group of Seven Appeals mentioned in above table at page 1, accordingly all the grounds in respect of above Seven Appeals are dismissed.

23. In the result, all the Seven Appeals of various assessee's as listed above table at page 1 filed by the Revenue are dismissed.

24. The order pronounced on 25-01-2019.

Sd/-	**Sd/-**
(श्रीमती दिवा सिंह/DIVA SINGH)	**(ओ.पी.मीना/O.P.MEENA)**
(न्यायिकसदस्यतथा/JUDICIAL MEMBER)	**(लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER)**

सुरत/ **Surat,** दिनांक **Dated:** 25th January, 2019/*S.Gangadhara Rao, Sr.PS*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / **TRUE COPY** / /

Assistant Registrar, Surat