

आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।

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

**BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.6246 & 6247/Mum/2017
(निर्धारण वर्ष / Assessment Year : 2006-07 & 2007-08)

Punjab Sind Dairy Product P. Ltd., AG-2 Cama Industrial Estate, Walbhatt Road, Goregaon (W), Mumbai- 400063	बनाम/ v.	ACIT CENTRAL CIRCLE- 33,Room No. 32(3), Aayakar Bhavan, Mumbai-400020
स्थायी लेखा सं./PAN: AADCP5419Q		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:		Shri. K.K. Lalkaka (AR)
Revenue by:		Shri. D.G Pansari (DR)

सुनवाई की तारीख /**Date of Hearing** : 16.01.2019

घोषणा की तारीख /**Date of Pronouncement** : 26.03.2019

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member:

These two appeals, filed by Assessee, being ITA No. 6246 & 6247/Mum/2017, are directed against two separate appellate orders both dated 22.08.2017 in appeal no. CIT(A)-53/DCCC-5(2)/IT-123/2012-13 and CIT(A)-53/DCCC-5(2)/IT-124/2012-13 respectively, passed by learned Commissioner of Income Tax (Appeals)-53, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2006-07 & 2007-08 respectively, the appellate proceedings had arisen before learned CIT(A) from two separate penalty orders both dated 29.03.2012 passed by learned Assessing Officer (hereinafter called "the AO") u/s 271(1)(c)

of the Income-tax Act, 1961 (hereinafter called “the Act”) for AY 2006-07 & 2007-08 respectively.

2. Firstly , we shall take up appeal of the assessee for AY 2006-07. The grounds of appeal raised by assessee in memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called “the tribunal”) in ITA No. 6246/Mum/2017 for AY 2006-07 , read as under:-

“1. On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) has erred in sustaining penalty of Rs. 81,387/- levied by the Assessing Officer under section 271(1)(c) of the Act for the assessment year 2006-07.

1. On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) has erred in not following the decision of the Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory 359 ITR 565 which was later followed by the same court in CIT v. SSA's Emerald Meadows (ITA No. 380 of 2015) against which Special Leave Petition filed by the Revenue before the Supreme Court was dismissed by the Hon'ble Court finding no merits in the case. Further, Bombay High Court has followed the ratio of the same judgment in CIT v. Shri Samson Perinchery (ITA No. 1154 of 2004 Order dated 5th January, 2017).”

3. The brief facts of the case are that the assessee is doing business in dairy products. A search & seizure operation u/s. 132 of the 1961 Act was conducted by Revenue on 08.05.2007 at the residential premises of the Directors/related persons of Punjab Sind Paneer Group of cases. A survey action u/s. 133A was simultaneously conducted at various premises from where business was conducted by the assessee and members of its group . The residential premises of the assessee’s Directors was also covered in search operation. The assessment in the case of assessee was framed for the impugned assessment year by the AO vide assessment order dated 29.12.2009 passed by the AO u/s. 153A r.w.s. 143(3) of the Income Tax Act 1961. During the assessment proceeding conducted by the AO u/s 143(3) read with Section 153A , it was submitted by the

assessee that it does not maintain production records and it is engaged in the business of manufacturing and trading in dairy products. The Gross Profit shown by this assessee for the impugned assessment year was 20.45% as compared to last year's G.P of 20.58%.

4. During the course of search & seizure operations and assessment proceedings conducted thereafter by the AO , it was observed by the AO that the assessee was showing reasonably big quantities of sale of milk in its books of accounts but hardly any documentary evidences with respect thereto was found during search and survey operations . The statement of Mr. Jaswinder Singh Bajaj, Director was recorded u/s. 131 of the Act, on 08.05.2007 at factory premises and the relevant question no. 9 to 12 were recorded thereto , which are reproduced here under:-

"Q. No. 9: During the course of survey action at your premises, it is noticed that M/s, Punjab Sind Dairy Products Pvt. Ltd. is not having any inward register, production/consumption register and also outward register. You are requested to clarify if such registers are maintained and, If so, please produce the same?"

Ans. It is very difficult to maintain such registers and so I do not maintain such registers.

Q. No. 10: Please give details of all your dairy products and since your principal raw material is milk, please give details of yield ratio of each products vis-a-vis 1 litre of milk?"

Ans. We make all dairy products i.e. paneer, cream, mawa, ghee, Lassi and butter milk, shrikhand etc.. The yielding ratio cannot be ascertained as the clarification of these have been stated in earlier answers.

Q. No. 11: Please submit the quantitative details of purchase of milk in litre of A.Y. 2006-07 and 2007-08 alongwith quantitative details of all your products in litre/kgms.

Ans. I shall submit the details of purchase of milk at the earliest. I shall submit the sales register details at the earliest.

Q. No. 12: It Is once again requested that you should provide quantitative details of milk and quantitative details of sales?

Ans. We shall provide you all the details and prior to that we shall shown you all the registers and we shall give you details on your guidance."

4.2. The assessee did not produce books of accounts and vouchers before the Investigation Wing of the Revenue. Sale voucher of milk sale were not found during the survey at the assessee's premises or at various outlets of the assessee . Thus, the AO was of the prima-facie view that claim of the assessee that it is selling milk was found to be not correct and sale of milk is not proved. The assessee was asked by the AO to explain the same during the course of assessment proceedings conducted by the AO u/s 153A read with Section 143(3) of the 1961 Act. The assessee claimed that it is dealing in milk and milk products and its factory premises is situated at AG-2 Cama Industrial Estate, Walbhat Road, Goregaon (W), Mumbai 400063. The assessee also submitted that it has sales outlet at following locations:-

- 1. Bhulabhai Desai Road, next to American Embassy/ Breach Candy/ Mumbai-400 026.*
- 2. 622, Durga Niwas, Khar Pali Road, Khar (West), Mumbai - 52.*
- 3. BMC Stall, Outside Khar Telephone Exchange, Khar Pali Raod, Khar (West), Mumbai-52.*
- 4. Ishwar Sadan, Opp. Jewel Palace Hotel, Khar (West), Mumbai - 52.*
- 5. Juhu Stall at JVPD Scheme, Opp. OPTIONS, Juhu Vile Parle (West), Mumbai - 52.*
- 6. Kamdhenu Shopping Centre, Shop No. 50, Lokhandwala, Andheri (W), Mumbai -54,*

4.3. Thus , the AO observed that the assessee sells milk product from various outlets and the assessee buys milk and manufacture various products mainly paneer and sells them through these outlets.

However, it was observed by the AO that the assessee is not selling milk which remained unproved. The assessee has however consistently maintained that it is also selling milk. The statements of various staff members who were engaged in sales were also recorded by revenue which also reflected that the assessee is not selling milk through these outlets. However, undisputedly these outlets were found to be selling milk product. The assessee claimed that direct sales of bulk quantities were made wherein suppliers are instructed to supply directly milk to the buyers. It was also claimed that the milk was sold in early morning at around 6AM before the opening of sales outlet at 8.30 AM in small consumable packets. It was also claimed that the Director of the company namely Mr Jaswinder Singh Bajaj, his wife and his brother were also showing sale of milk in their respective return of income filed with the Revenue, the details of which were submitted. It was also claimed that complete movement of analysis of milk was submitted before the AO. It was submitted as that the sale has been made in the name of Punjab Sweet & Farsan during the impugned assessment year, the payment thereof was received in cheque from this party. It was claimed that the sale of milk was also made in cash. It was also claimed that books of accounts were produced before the AO which reflected sale of milk. It was claimed that sale of milk was made in the financial year 2006-07 in the name of Mr Amritpal Singh Nanda, Kay Bee Export and Punjab Sweet Farsan, the payments thereof for sale of milk was received by cheque from these parties, which was duly accounted for in the books of accounts. It was also claimed that in financial year 2007-08, sale of milk was made in the name of Asian Chemist Prop., Godrej Nature Basket-Kandivili, Kailash Parbat, Nanda Distributors, R.K. Shashank Diary and the amount was received in cash, which is duly accounted for in books of accounts. The assessee also submitted complete analysis of milk wherein it also included cash sales made by it for all these years. The clarificatory statements of employees were also submitted by the assessee who earlier gave statements before the

Revenue, wherein they clarified now that the assessee was also selling milk in early morning prior to opening of sales outlet and the said sales were directly accounted for by the factory. The AO had disbelieved the whole story of selling of milk as set out by the assessee and books of accounts were rejected by the AO u/s. 145(3) and it was held by the AO that the assessee has shown bogus sale of milk in its books of accounts in order to suppress production and sale of various milk products namely paneer , which led to suppression of profits and consequently income chargeable to tax declared in return of income with an intent to evade taxes . This led to estimation of income by the AO by applying higher G.P ratio to the sale of milk based upon profits earned on milk products dealt with by the assessee while framing assessment framed by the AO u/s 153A read with Section 143(3) of the 1961 Act vide assessment order dated 29.12.2009, which led to the additions to the income of the assessee to the tune of Rs. 14,13,628-/. Penalty proceedings u/s 271(1)(c) of the 1961 Act were also initiated by the AO.

5. The matter with respect to quantum additions as were made by the AO which were later confirmed by learned CIT(A) , went up to tribunal and tribunal was pleased to dismiss the appeal filed by the assessee . The tribunal also disbelieved the contentions of the assessee that it was also engaged in the sale of milk and held against the assessee while adjudicating appeal of the assessee against quantum additions in ITA no. 7963& 7964/Mum/2010 for AY 2006-07 and 2007-08 vide common orders dated 22.01.2014 . Aggrieved by the aforesaid decision of the tribunal against quantum additions being confirmed by tribunal , the assessee filed an appeal u/s. 260A with Hon'ble Bombay High Court . The Hon'ble Bombay High Court also dismissed the appeal of the assessee by holding that no substantial question of law arises from the order of the tribunal, vide judgment dated 13.12.2016 in ITA no. 950 & 951 of 2014. The aforesaid judgment of Hon'ble Bombay High Court as well order of tribunal

against quantum additions are placed by the assessee on record in paper book filed with the tribunal, which is placed in file. Thus, in nutshell so far as quantum is concerned, the additions as were made by the AO reached finality except that on computational aspect, some error was noted by learned CIT(A) for which suitable directions were given by learned CIT(A) to the AO to make appropriate adjustment in computing additions to the income.

6. Thus, the above is the fate of the quantum assessment framed by Revenue for the impugned assessment year, wherein additions as were made by the AO were upheld by all the appellate authorities concurrently upto Hon'ble Bombay High Court. It is pertinent to mention at this stage that for AY 2008-09 similar situation arose but the tribunal based on the material on record was pleased to accept the contentions of the assessee and accepted that the assessee was engaged in the business of sale of milk in ITA no. 7965/Mum/2010, order dated 11.06.2015, mainly on the grounds that for this impugned assessment year 2008-09, the assessee has duly submitted the relevant records/evidences before the authorities below with respect to sale of milk. The assessee for AY 2008-09 produced registers and books of accounts which gave entire details of day to day purchases, production/consumption and sales before all the authorities including tribunal. It was also observed by tribunal while adjudicating appeal for AY 2008-09 that the AO has itself accepted sale of milk by the assessee for AY 2009-10 and 2010-11. Thus since factual matrix in the assessment year 2008-09 was different than in the assessment year 2006-07 and 2007-08. The tribunal held that principle of res-judicata are not applicable and relief was granted to the assessee.

7. The AO for the impugned assessment year invoked penalty provisions as are contained in Section 271(1)(c) of the 1961 Act and levied penalty of Rs. 81,387/- on the assessee vide penalty order dated 29.03.2012 passed by the AO u/s 271(1)(c) of the 1961 Act, by holding as under:-

“ 4. I have considered the submissions of the assessee. First issue related to rejection of books of account and estimation of income. During the course of Search and Seizure action it was noticed that the assessee did not maintain proper record regarding inward, outward, production and sale. Further, it was noticed that in order to show less profit the assessee was showing milk sold as milk in its books of accounts, whereas, the assessee was actually engaged in manufacture of dairy products. Statements of various persons manning the sales outlets of the assessee company were also recorded during the course of survey action at these outlets. They have stated that no milk is sold from the sales outlets. Therefore, the Assessing Officer had come to a conclusion that the assessee is not maintaining proper records and the book results are not reliable and liable to be rejected as provided by provisions of section 145(3) of the Income Tax Act, 1961. During the course of appeal and penalty proceedings also, the assessee has not been able to substantiate the claim of sale of milk and therefore, it is clear that the assessee has adopted the modus operandi of showing the milk purchased for processing at the dairy as sold through its sales outlets without any processing.

5. Secondly, According to the provisions of section 69A of the Income Tax Act 1961, the onus to prove genuineness of source of such money is entirely on the assessee. As the assessee has not been successful in discharging this onus, not only the assessee has made itself liable for taxation of this amount as an explained money, but also for penalty because of the failure to prove the source of possession of such excess cash.

7. The main emphasis of the Authorised Representative of the assessee in his reply to the show cause notice is on the issue relating to estimation of income by adopting gross profit percentage relating to the business of manufactures of Paneer and other dairy products. Several case laws are quoted by the Authorised Representative of the assessee. The same are discussed and distinguished as under:

i) The decision of C1T Vs B.S. Badve 138 ITR 682 (Mum.) relates to an assessee, whose books of accounts were destroyed in fire and the Assessing Officer had estimated income. In the present case, the books of accounts have been rejected, as the assessee has not been able to substantiate the entries made in the books of accounts. These entries relating to sale of milk were apparently

made to reflect a lower profit, as sale of Paneer would yield a higher profit.

ii) The decision of CIT Vs Metal Products of India 150 ITR 714(P&H) was delivered in favour of the assessee because, it was held by the Hon'ble Tribunal that the assessee has discharged the onus to produce books of accounts and the Dividend income was not accounted for, as it was assumed by the Firm, that the same is taxable in the hands of the Partners. In the present case the assessee has not been able to substantiate the entries made in the books of accounts. Therefore, this case law is also not applicable to the assessee's case.

iii) The decision of CIT Vs Ajay Hari Dalmiya 157 1TR 145 (DEL) relates to a case, where penalty was deleted in appeal, because no proper opportunity of being heard was provided to the assessee. This case law is also not applicable here, as proper opportunity of being heard has been given to the assessee.

iv) The case cited at 114 1TR 586 (Mad) pertains to section 28(1)(c) of the Indian Income Tax Act, 1922. On the other hand, the same high court of Madras in a recent judgement has held in the case of CIT Vs. E. V. Rajan (reported at 151 ITR 189) that penalty provisions under section 271(1)(c) are applicable even when assessment is made on basis of an estimate.

v) Finally the case of Hari Gopai Singh Vs CIT 258 ITR 85 (P&H) is relating to an assessee engaged in the business of sale of sweets, who did not maintain any books of accounts and the Assessing Officer had estimated his income. This case is clearly different from the present case, where the assessee has maintained books of accounts, but failed to substantiate the claim of sale of milk. Further, in the present case the books of accounts were rejected based on the finding of Search and Seizure action and statements recorded during the course of survey action.

7. Based on the above discussion, it is clear that in this case, furnishing of inaccurate particulars of income is clearly established. The assessee has concealed particulars of his income by furnishing inaccurate particulars relating to sale of milk. In view the above discussion, I am satisfied that the assessee is liable for penalty under section 271(1)(c) of the Income Tax Act, 1961. The amount of maximum and minimum penalty that can be levied is calculated as under:-

Income	Rs.	12,16,214/-
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<i>ought to be evaded</i>		
<i>Tax thereon</i>	<i>Rs.</i>	<i>81,387/-</i>
<i>Minimum Penalty</i>	<i>100%</i>	<i>81,387/-</i>
<i>Maximum Penalty</i>	<i>300%</i>	<i>2,44,161/-</i>

“

7.2 Thus, while levying penalty u/s 271(1)(c), the AO had held that assessee has concealed particulars of its income by furnishing inaccurate particulars of income relating to sale of milk , which led to levying of penalty by the AO of Rs 81,387/- u/s 271(1)(c) of the 1961 Act , vide orders dated 29.03.2012.

8. Aggrieved by the penalty levied by the AO u/s 271(1)(c) of the 1961 Act vide orders dated 29.03.2012, the assessee filed first appeal before Ld. CIT(A) challenging penalty levied by the AO u/s 271(1)(c) of the 1961 Act. The Ld. CIT(A) also disbelieved the theory of sale of milk by the assessee and penalty levied by the AO was confirmed by learned CIT(A) vide appellate orders dated 22.08.2017, holding as under:-

“ 6. The first ground of appeal challenges the penalty order contending that the assessment order is bad in law and hence the penalty proceedings initiated is also void. Noting that the validity of the assessment order was challenged even before the Hon’ble ITAT which was dismissed, there is no merit in this contention and the ground is dismissed.

7. The second ground of appeal is on merits of the penalty levied. During the appellate proceedings, the appellant contended that during the assessment proceedings, computerized books of accounts were produced for verification and no defect was found relating to books of accounts. The AO has only estimated the difference in gross profit percentage on sale of milk products and gross profit percentage of sale of milk which works out to 27%. For this computation, the total purchase and sales has been adopted as per books of accounts. No expenses have been expressly disallowed. The correctness and completeness of books of accounts has not been questioned. The inference that there is no milk sales was

*purely based on the statements made by salesmen who however were not concerned with the sale of milk. The statement recorded U/S.133A does not empower any Income Tax Authority to examine any person on oath and such statements have no evidentiary value. Regarding the conclusion of the A.O. that the books of accounts were not produced before the Investigation Wing, it was submitted that computerized books of accounts were available and access to the computer was not denied by the appellant company. If the Investigation Wing did not make any efforts to open the computer and access the accounts, the appellant cannot be blamed. It was explained that on the basis of stock position of milk products, decision is made as to the quantum of milk required for production of milk products on that particular date. The excess quantity of milk not required for milk products is sold in retail to various purchasers in consumable packets or containers brought by the retail purchasers. The appellant has different retail outlets for selling milk. Such sales are through different outlets and casual employees are used to deliver the milk. Each batch is tested for its purity and if the batch is of substandard quality and not suitable for production of paneer, then it is set apart and sold as milk. The business of selling milk is done in the early morning and such transactions are in cash. It is therefore not necessary to bother about the name and address of the purchaser. Daily production is entered in loose production sheets and which are subsequently disposed-off after entering in the stock Register. Production Report is not maintained but Stock Registers are maintained. Sometime orders are received from customers in bulk quantities when suppliers are instructed to directly deliver the same to the purchasers. In such cases, the appellant company merely acts as middleman. During the assessment year in question Punjab Sweet & Farsan had ordered for bulk quantity of milk and 3 such invoices were filed in the Paper Book. Ledger account of Punjab Sweet & Farsan filed shows the payment received by cheque. If the AO was not satisfied about the genuineness of the sale of milk, he could have issue summons u/s.131 of the Act and verify the genuineness. The addition is made of surmises and conjectures. In the survey action no incriminating evidence has been detected in the hands of the appellant company. The undisclosed income is not found to be represented in any undisclosed assets. The Hon*ble ITAT did not go through all the material facts and passed an adverse order against the appellant. A miscellaneous application was also filed but was rejected by the Hon'ble ITAT. Reference was also made to the decision of the*

Hon'ble ITAT for A.Y.2008-09 wherein relief was granted to the appellant. Attention was invited to the observations of the Hon'ble ITAT in its order for A.Y.2008-09 where it was observed that the AO should have carried out the necessary enquiry for such buyers of milk which was not done.

8. In the course of appellate proceedings, the appellant was asked to file the status of appeal filed against the Hon'ble ITAT order for A.Ys. 2006-07 and 2007-08. The appellant filed the copy of the order Hon'ble Bombay High Court in ITA Nos.950 and 951 of 2014 dated 13.12.2016. A perusal of this High Court decision shows that the appellant had framed the following 2 Questions of Law:-

"1. Whether on the facts and in the circumstance of the case and in law, the Tribunal is right in maintaining rejection of books of account u/s. 145(3) of the Act for A.Ys.2006-07 and 2007-08 ?

2. Whether on the facts and in the circumstances of the case and in law, the Tribunal is correct in approving gross profit addition Rs.12,15,244/- for A.Y.2006-07 and Rs.16,11,580/-for A.Y.2007-08 ?"

In their decision, the Hon'ble Bombay High Court noted that the it was not the case of the appellant that it was not possible to maintain production register. The rejection of books of account was upheld by the HonTble High Court. The appellant also contended that the Tribunal in the subsequent A.Y.2008-09 in its order dated 11.06.2015 had accepted the books of accounts as maintained which had led to deletion of estimated undisclosed income and therefore the decision of the ITAT for AY 2006-07 and AY 2007-08 should be overturned. The Hon'ble High Court observed the Tribunal had distinguished its order passed for A.Y.2008-09 as under:-

"The Tribunal has decided the issue against the assessee on the premise and the ground that the books pertaining to production, issuance and consumption have not been maintained by the assessee. Such a ground for rejection of books of account are non-existent in this year, as we have already stated above that the books of accounts along with the register, which gives the entire details day-to-day purchase, production/consumption and sales have been not only maintained but were also filed before the AO as well as CIT(A). Another reason for

justifying the application of estimation of GP rate by the Tribunal was that the assessee has failed to submit any details in support of sale of milk. On the contrary, the assessee had stated before the AO as well as CIT(A) that bulk sale have been made through account payee cheques and secondly, day-to-day sales have been recorded, were also produced before the A.O. No specific defect or discrepancy has been highlighted by the AO nor any enquiry has been made. Further, we have also called for the records and books of account of the assessee to see the nature of entry and recording of transactions. Therefore, under such facts and circumstances prevailing in this year, the findings of the Tribunal in the earlier years will not apply in the impugned assessment year."

Thus the Hon'ble High Court held that in view of the aforesaid distinction in facts, it cannot be said that its order for the A.Y.2008-09 will apply to A.Ys.2006-07 and 2007-08. The facts are completely different in the earlier 2 assessment years. The assessee company had failed to produce the registers indicating production, issuance and consumption in A.Ys.2006-07 and 2007-08. The rejection of the books of account is a possible view on the facts and is not perverse or arbitrary. The Hon'ble High Court also rejected the contention that the estimation of profit is arbitrary. It held that estimation is on the basis of material on record and also statements made by the employees and director during the search and survey proceedings. Such an estimation is not perverse or wild. The appeal of appellant for A.Ys.2006-07 and 2007-08 was thus dismissed by the Hon'ble High Court.

9. A perusal of the Hon'ble ITAT Order for A.Y.2008-09 in ITA No,7965/Mum/2010 dated 11.06.2015 shows that the Authorised Representative admitted before the Bench that the ITAT had decided against the appellant in A.Ys.2006-07 and 2007-08. The Authorised Representative itself had pointed out that unlike in earlier year, in A.Y.2008-09, the assessee had not only produced the entire books of accounts and details but also the stock register, which gives the complete details of purchase of milk, milk processed for milk products, consumption of milk products and sale of milk not only quantity wise but also value wise (Page 8 of the ITAT order). Thus the appellant argued that the facts for the A.Y.2008-09 were different. The stock register produced showed the production, consumption and sales. In para 14 of the order, the Hon'ble ITAT has discussed in some detail the

stock register produced before the Bench. It was observed that the quantity and sales of milk was quite less as compared to the quantity used for manufacturing of various milk products. In the month of April 2007, the quantity of milk sold was 560 Ltrs. on 04.04.2007 and 481 Ltrs. on 30.04.2007. In the month of May 2007, there was only one instance of milk sold on 05.05.2007. However, from the month of June onwards, milk has been sold almost every day, though quantity sold was far less than the quantity of milk used for own consumption for production of various milk products.

10. At this stage, it is worth noting that the survey action took place around 08.05.2007 and it is possible that the appellant started maintaining records in different manner from June onwards which resulted in a different decision in the AY 2008-09. The Hon'ble Bombay High Court has already observed and noted that the ITAT in A.Y.2008-09 had decided the appeal distinguishing the facts and circumstances in earlier years. This has been clearly spelt out by the Hon'ble ITAT in its order for A.Y.2008-09 in Para 16 by stating that

"the Tribunal has decided the issue against the assessee on the premise and the ground that, the books pertaining to production, issuance and consumption have not been maintained by the assessee. Such a ground for rejection of books of account are non-existent in this year, as we have already stated above that the books of accounts along with the register, which gives the entire details day-to-day purchase. Production/consumption and sales have been not only maintained but were also filed before the AO as well as CIT(A). another reason for justifying the application of estimation of GP rate by the Tribunal, was that the assessee has failed to submit detail in respect of sale of milk to the tune of rs.12,54,254/-. Here, in this year, there is no such material that assessee has failed to submit any details in support of sale of milk."

Thus, I find that the reliance on the ITAT decision for A.Y.2008-09 does not help the case of the appellant before me.

11. The Ld.AR filed a revised consolidated submission on 21.08.2017 for both the assessment years i.e. 2006-07 & 2007-08. In this submission it was contended that-

i. **Rejection of books of accounts:-**

Shri Swaranjit Singh Bajaj, Director of the company in his statement recorded on 08.05.2007 had stated that books are maintained in electronic form on Tally at mezzanine floor of registered office of the company (reference was made on Page 3 reproducing the submissions made by the assessee before the Hon'ble ITAT in its order dated 03.07.2014). The Survey Team did not extract the accounts from the computer, the production records were maintained on loose sheets and were not considered as books of account by the AO.

ii- **Evidence regarding sale of milk:-**

Reference was made to the last para on Page 17 of the ITAT's order for A.Y.2008-09 and on Page 22 of the same ITAT order for A.Y.2008-09 to claim that there were clinching evidence in the shape of invoices made to parties to whom goods were sold on credit and account payee cheques received.

iii. **Reliance on statement recorded of employees:-**

Heavy reliance has been placed on statement recorded of employees who were not concerned with the sale of milk. Sale of milk takes in the earlier hours of the morning at 6.00 a.m. at the factory site. No sale of milk can ever took place at 8.30 a.m. when the retail outlets open. Statements of employees were subsequently retracted as appearing on Pages 83 and 103 of the Paper Book. Statement recorded in survey operation has not evidentiary value.

iv. **No penalty on the basis of estimate:-**

It was contended that the addition was made on flimsy grounds and no penalty can be levied on the basis of estimate.

v. **ITAT order for A.Y,2008-09:-**

Heavy reliance was placed on the ITAT order for A.Y. 2008-09.

vi. **VAT Audit Report:-**

Attention was drawn to VAT Audit Report for A.Ys.2006-07 and 2007-08 to highlight that under the heading 'class of products in column no. 3 the word 'raw milk' is entered. In column 2 under the head 'sales under section 5' i.e. exempted category which includes milk the figure of

Rs.1,30,57,613/- is mentioned. Raw milk is included in the class of products sold.

vi. **Invalidity of notices issued u/s,271(1)(c):-**

It was contended that the facts u/s.274 of the Act should specifically state the grounds mentioned in section 271(1)(c) i.e. whether there was concealment of income and furnishing of inaccurate particulars of income. Issue of printed form where all grounds are mentioned could not satisfy the requirement of law. The assessee should know grounds which he has to read specifically. Taking up penalty proceedings under one limb and finding the assessee guilty on another limb is bad in law. Penalty proceedings are distinct from assessment proceedings. The AO has not clearly mentioned under which name the notice u/s. 271(1)(c) has been issued. The reliance was placed on Hon'ble Bombay High Court's decision in the case of CJT v Samson Perincherry 392 ITR 4 (Bom) in support of the contention.

viii. **High Court Order in appeal No.950 of 2014 and 951 of 2014:-**

It was stated that the Hon'ble Bombay High Court in its decision on the appellant's appeal against the order of the Hon'ble ITAT for A.Ys.2006-07 & 2007-08 held that the decision taken by the Tribunal is a possible view. This means that it may be correct or may not be correct and there is an element of doubt involved. No penalty can be levied on a doubtful decision.

12. I have already dealt with and rejected the reliance of the appellant on the ITAT order for AY 2008-09 as the facts are different. The rejection of books of accounts in the facts of the case has been upheld not only by Hon'ble ITAT but also Hon'ble High Court for AY 2006-07 and AY 2007-08. Hence this contention is also rejected.

13. It is noted that the appellant has claimed that there is almost daily sale of milk in cash of 800 to 1200 litres of milk. As much as 235680 litres are claimed as sales of milk during the year amounting to Rs 5235661/- Only 1590 litres sales is claimed to made to parties who are named as instances where invoice was presented before the assessing officer. Balance sales are in cash for which no verifiable details are available. The sales is through casual non-permanent employees. Thus, the veracity of contentions of appellant cannot be verified. Vouchers are not prepared. The purchase of milk during the year is reported to be 803980 litres. If the appellant's explanation

is accepted it means that as much as 30% of purchases are substandard. It is clear that these are after thoughts and were not shown with evidence at the time of search and survey action. The appellant's business is to manufacture and sell its dairy products through its various outlets. Appellant is now stating that it tests the milk received and that which is not fit for manufacturing dairy products, is sold as milk in retail. It has not given any evidence as to when testing is done nor shown any test reports. If the testing is done in the morning sales will not take place before 830 am. If the quality of milk is not satisfactory, it would take up with the milk suppliers and there will be some contemporaneous evidence regarding dispute or claim for rebate. None was shown.

14. The so called retraction statements of the employees are undated, identically worded, in the form of letter addressed to the assessing officer but not as notarized affidavits signed. Shri Jaswinder Singh Bajaj in his statement recorded u/s 131 on 9.5.2007 in answer to Q 8 and 9 has clearly stated that production records/ extraction details are not maintained nor is such recording of details feasible. Such standardized letters is an afterthought and is rejected.

15. It has been argued that penalty cannot be levied since the addition is based on estimates. Assessment on the basis of estimates is a well-accepted and established mode of determination of income where books of accounts are rejected. Levy of penalty on cases of estimates have been upheld (refer Chuharmal vs CIT 172 ITR 250 (SC), Addl. CIT vs Chandrakantha and another 205 ITR 607 (MP), CIT vs Md. Warasat Hussain 171 ITR 405 (Patna), A.M. Shah & Co. vs CIT 238 ITR 415 (Guj), CIT vs Krishnawamy and Sons 210 ITR 157 (Mad). Levy of penalty will depend on the facts of the case. Here, profits have been suppressed by showing sale of milk in cash in place of sale of milk products. The profit margins in sale of milk products is higher. By claiming sale of milk, lower profits is shown. The appellant is engaged in business of processing of milk to prepare and sell milk products. Evidences to support claim of sale of milk was not found in search and survey and was not furnished before the assessing officer. Thus, the claim and explanation is not shown to be bonafide and is not substantiated. Explanation 1 to section 271(1)(c) holds that the amount added is deemed to represent income in respect of which particulars have been concealed. The exception to the Explanation has not been made out. Thus penalty is attracted.

16. At the fag end of the appellate proceedings, the Ld AR has challenged the penalty further on the ground that the penalty notice is not valid since the assessing officer did not specify under which limb the penalty notice is issued i.e. whether there was concealment of income and furnishing of inaccurate particulars of income. Reliance was placed on Hon'ble Bombay High Court's decision in the case of CIT v Samson Perincherry 392 ITR 4 (Bom) in support of the contention.

17. It is noted that in the case of CIT vs Samson Perincherry the penalty was initiated for furnishing of inaccurate particulars of income whereas the penalty was levied for concealment of income. The Hon'ble Tribunal had relied upon the extract of the decision of the Hon'ble High Court of Karnataka in the case of CIT vs Manjunatha Cotton and Ginning Factory. The penalty in such facts was upheld.

18. In the recent decision dated 2.5.2017 in the case of Earthmoving Equipment Service Corporation vs DCIT, ITA No. 6617/Mum/2014 reported in (2017) 50 CCH 0099 Mum Trib the Hon'ble Mumbai ITAT though has deleted the penalty on merits, the contention raised by the appellant that the relevant clause was not appropriately marked in the notice issued u/s 274 and reliance placed on decision in the case of CIT vs Manjunatha Cotton and Ginning Factory was dismissed as follows.

" 6. We have heard the rival contentions and perused the relevant material on record including cited case laws. So far as the legal grounds are concerned, a perusal of quantum order reveals that the penalty was initiated for furnishing of inaccurate particulars and finally the same was levied on the same ground. We find that the assesses was issued two show cause notices- one in the standard printed form u/s 274 dated 04/03/2013 as placed on Page No.-86 of the paper book and another dated 27/08/2013 by way of letter as placed in Page No. 92 of the paper book, We find that in the first notice, the relevant clause has not been ticked off and the second notice is simply a show cause notice. However, in the quantum order Ld. AO, after due deliberations, clearly initiated the penalty proceedings for furnishing of inaccurate particulars which shows due application of mind qua penalty proceedings. The penalty was finally levied on the same ground as well. Therefore, mere marking of relevant clause, in our opinion, on the facts of the case, has not caused any prejudice to the assessee particularly when the assessee voluntarily offered certain additions in the

quantum proceedings with a specific request to AO for not initiating the penalty against the same. The assessee very well knew the charges / grounds for which he was being penalized and he actively contested the penalty before the Ld. AO. At this juncture, we find that the provisions of Section 292B comes to the rescue of the revenue which cures minor defect in the various notices issued provided such notice in substance and effect was in conformity with the intent and purpose of the act. On overall facts and circumstances, we find that such condition was fulfilled in the instant case. We find that the revenue's Special Leave Petition [SLP] dismissed by the Apex court in CIT Vs. SSA'S Emerald Meadows [supra] confirmed the decision of Hon'ble High court, which in turn, relied upon the judgment rendered in CIT Vs. Manjunatha Cotton & Ginning Factory [359 ITR 565]. The decision rendered by Hon'ble Bombay High court in CIT Vs. Samson Perinchery [supra] also placed the reliance on this judgment. After perusing the ratio of the judgment rendered in CIT Vs. Manjunatha Cotton & Ginning Factory [supra-], we find that the assessee's appeal was allowed by Hon'ble High court after considering the multiple factors and not solely on the basis of defect in notice u/s 274. Therefore, we are of the opinion that the penalty could not be deleted merely on the basis of defect pointed by the Ld. AR in the notice and therefore, the legal grounds raised are rejected."

19. Now in the case before me, the penalty has been levied for furnishing inaccurate particulars of income. The appellant has vehemently contested the levy of penalty in the penalty proceedings. There is no evidence shown that the appellant had any difficulty in representing its case and has suffered on account of any lack of clarity as to the charge.

20. In the case of *K.P. MADHUSUDHANAN vs. COMMISSIONER OF INCOME TAX* reported in (2001) 251 ITR 0099, the Apex Court held that

"The Explanation to s. 271(1)(c) is a part of s. 271. When the ITO or the AAC issues to an assessee a notice under s. 271, he makes the assessee aware that the provisions thereof are to be used against him. These provisions include the Explanation. By reason of the Explanation, where the total income returned by the assessee is less than 80 per cent of the total income assessed under s. 143 or 144 or 147, reduced to the extent therein provided, the assessee is deemed to have concealed the particulars of his

income or furnished inaccurate particulars thereof, unless he proves that the failure to return the correct income did not arise from any fraud or neglect on his part. The assessee is, therefore, by virtue of the notice under s. 271 put to notice that if he does not prove, in the circumstances stated in the Explanation, that his failure to return his correct income was not due to fraud or neglect, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and, consequently, be liable to the penalty provided by that section. No. express invocation of the Explanation to s. 271 in the notice under s. 271 is, in our view, necessary before the provisions of the Explanation therein are applied."

21. *Here the assessing officer has dealt with at length the facts of the appellant's case and why the books of accounts were rejected. He has estimated the income. He has initiated the penalty expressly. This clearly shows his application of mind. In the penalty order also, the assessing officer has dealt with the facts clearly and specified his charge on which penalty is levied. Thus there is no ambiguity and the appellant is merely clutching at technicalities in the fag end of the appellate proceedings.*

22. *In the case of Manjunatha Cotton the Hon*ble High Court observed that*

"Concealment of income may arise in various ways. It may take various forms of manipulation of entries in accounts, non-disclosure of items of source that existed and income that has clearly been earned by the assessee in the previous year, claim of false deductions or losses, suppression of sales, camouflage of income as loans taken from third parties and claim of interest thereon as deduction, giving a colour of agricultural income to the otherwise taxable income, and unexplained investments that can be clearly attributed to concealed income."

There is nothing in the order of the Hon'ble Karnataka High Court to discern that only and solely for the reason that the relevant clause is not struck off in the notice u/s 274, when the facts resulting in formation of belief to initiate penalty is available in the assessment order, penalty imposed is to be quashed.

I therefore reject the legal challenge based on the notice issued u/s 274.

22. Though the assessing officer has levied the penalty as 100% of tax sought to be evaded, there appears to be error in such computation. The assessing officer is directed to verify and correct the amount of penalty computed.”

8.2. Thus in nutshell the Ld. CIT(A) confirmed the penalty levied by the AO u/s 271(1)(c) of the 1961 Act both on merits and on legal grounds, vide appellate order dated. 22.08.2017.

9. Aggrieved by the appellate order dated 22.08.2017 passed by learned CIT(A) , the assessee has now filed an appeal with tribunal. The contentions are raised by learned counsel for the assessee that assessee was dealing in milk and milk products. It was submitted that there was search & seizure operations conducted by Revenue on 08.05.2007. It was submitted that survey action u/s 133A was also conducted by Revenue simultaneously on 08.05.2007. It was submitted that the additions to the income was made in assessment framed by the AO on estimated basis wherein the income to the tune of 14.13 lacs was added on estimated basis as undisclosed income on account of alleged bogus sale of milk as the sale of milk as per the AO remained unproved , which was reduced by learned CIT(A) owing to computational error made by the AO. It was submitted that Gross Profit rate of milk product was applied to the sale of milk declared by the assessee to estimate higher profits. It was claimed that the assessee has declared sale of milk in its books of accounts and offered income from sale of milk to taxation in its return of income filed with tribunal. It was submitted that books of accounts were rejected by the AO u/s. 145(3) of the Act. It was submitted that the contentions of the assessee as to the claim of sale of milk were rejected by both Ld. CIT(A) as well tribunal . It was also submitted that Hon'ble Bombay High Court has dismissed the appeal against quantum assessment filed by the assessee u/s 260A by holding that no substantial question of law arose from the appeal filed by the assessee. It is also claimed that the notice issued u/s. 271(1)(c) r.w.s. 274 of the Income Tax Act was defective notice as relevant portion was not stuck off as to

whether the penalty was invoked for concealment of particulars of income or for furnishing of inaccurate particulars of income. Thus it was contended that there is a legal infirmity in the penalty notice issued by the AO and principals of natural justice were vitiated while issuing notice u/s. 271 r.w.s. 274 of the Income Tax Act, dated 29.12.2009 wherein no charge has been specified. Our attention was also drawn to said penalty notice dated 29.12.2009 which is placed in paper book filed by the assessee at page no. 1 & 2. Our attention was drawn to page no. 68 to 72 of the paper book wherein the contention raised by the assessee before Ld. CIT(A) are placed and prayer were made before the Ld. CIT(A) to delete the penalty. It was submitted that tribunal for AY 2008-09 in assessee's own case in ITA no. 7965/Mum/2010 vide order dated 11.06.2015 in quantum appeal has accepted that assessee has proved that it is engaged in business of selling milk and additions as were made by the AO as confirmed by learned CIT(A) in quantum were deleted. It was submitted that for AY 2009-10 and 2010-11, the AO has itself accepted that the assessee is engaged in sale of milk. It was submitted that mainly on four grounds additions were made in quantum, viz. firstly books of accounts were not produced before Investigation Wing. It was submitted in this context that complete books of accounts were available in the computers at the time of search and survey conducted on 08.05.2007, and the party who conducted search and surveys could have verified the same if they have opened the computers and seen the accounts maintained in electronic form in tally software. It was submitted that the Director Shri Swarnjit Singh Bajaj, Director made the statement u/s 131 on 08.05.2007 before the survey team that books of accounts were maintained in electronic form in tally software and are available in the mezzanine floor at Registered Office in the statement recorded u/s 131 during the course of survey action u/s. 133A on 08.05.2007 which is placed in paper book at page no. 73 onwards (Page no. 75/paper book). It was also submitted that quantum additions were made on the grounds that no documentary evidences were available

regarding sale of milk during the course of search and survey operations. Our attention was drawn to assessment order passed by the AO u/s 143(3) read with Section 153A, dated 29.12.2009. It was submitted that complete details were furnished during assessment proceedings including production of books of accounts and stock registers . It is also submitted that additions were made on the basis of statement's of salesmen which were recorded by Revenue, wherein these sales personnel averred that no milk is sold from the sales outlets, which is the third reason for disbelieving the sales of milk. It is claimed that the said salesmen later clarified by filing a letter before the AO that the sales of milk were made from sales outlet before opening of the outlets and hence they were not aware of the said sale of milk taking place in morning at 6AM by employing casual workers while sales outlets opens at 8.30AM. It is claimed that entire accounting of sale of milk was done at factory. It is also submitted that the fourth reasons for disbelieving sale of milk is that the production and consumption record were not maintained. It was submitted that stock records were maintained while only production records were maintained in loose sheets. It was claimed that said stock records as well books of accounts were produced before the authorities below. It was submitted that VAT audit report was filed before learned CIT(A) which is placed in paper book at page no. 175 to 191 and it was claimed on the basis of declarations made before VAT authorities that assessee is dealing in milk also. It was submitted that income was computed by estimating profits by the AO on the premise that sales of milk was bogus and an higher G.P. ratio as was applicable to milk products was applied. It was submitted that penalty u/s 271(1)(c) of the 1961 Act cannot be levied in the cases when income is estimated. Our attention was drawn to judgment of Hon'ble Delhi High Court in the case of CIT v. Aero Traders Private Limited (2010) 322 ITR 316(Delhi), judgment of Hon'ble Madhya Pradesh High Court in the case of CIT v. Shivnarayan Jammalal & Co. (1996) 232 ITR 311(MP). It was submitted that the decision relied by

the Department were not applicable as they relates to pre-amended period.

9.2. It was submitted by Ld. DR on the other hand that no proper sale vouchers evidencing sale of milk was found during search and survey operations and the claim of the assessee of selling milk is not correct. The assessee has not produced books of accounts , vouchers etc. before the Investigation Wing. Our attention was drawn to para 4 of penalty order to contend proper records and books of accounts were not maintained. It was submitted by learned DR that it is only because of search and survey operations conducted by Revenue, that it was detected that the assessee is suppressing profits by mis-declaring sale of milk products as sale of milk . It was submitted that for AY 2008-09 , the tribunal has come to the conclusion that assessee is able to prove sale of milk which is as per the factual matrix prevailing in that year as the assessee produced production records along with stock records and books of accounts before all the authorities in AY 2008-09 but for instant year under consideration, the assessee failed to prove sale of milk and the tribunal has upheld the appellate order of learned CIT(A) that the assessee has failed to prove sale of milk. It was contended that even Hon'ble Bombay High Court has dismissed the appeal of the assessee for the impugned assessment year by holding that no substantial question of law arose from the order of the tribunal. So far as legal grounds are concerned regarding non striking of the relevant clause in a notice issued u/s. 274 r.w.s. 271(1)(c) of the 1961 Act, it was submitted that non striking of notice is a procedural aspect and the entire proceeding cannot be vitiated mainly on the reasons that the relevant clause is not struck off in the notice issued u/s. 274 r.w.s. 271(1)(c) of the Act. Reliance was placed on the decision of the Hon'ble Bombay High Court in the case of CIT v. Smt. Kaushlya (1995) 2016 ITR 660 , decision of Hon'ble Bombay High Court in the case of Maharaj Garage & Co. v. CIT (2018) 400 ITR 292(Bom.) , decision of Mumbai-tribunal in the case of

Trishul Enterprises v. ACIT in ITA no. 384 & 385/Mum/2014 order dated 01.02.2017 (wherein one of us namely learned Judicial Member was part of the Division Bench who pronounced the order) and decision of Mumbai-tribunal in the case of Shri Mahesh M. Gandhi v. ACIT in ITA no. 2976/Mum/2016, order dated 27.02.2017 (wherein one of us namely learned Accountant Member was part of the Division Bench who pronounced the order).

9.3 The Ld. AR in the rejoinder submitted that he is placing reliance on the decision of Mumbai-tribunal in the case of Orbit Enterprises v. ITO , in ITA No. 1596 & 1597/Mum/2014 , vide common order dated 01.09.2017. The learned counsel for the assessee reiterated that books of accounts were maintained in electronic form in tally software programme and were available at the time of search and survey operations on 08.05.2007 at the mezzanine floor of the registered office which was also brought to the notice of survey team by Director Mr. Swaranjit Singh Bajaj while recording statement u/s 131 on 08.05.2007 and infact it is for the search and survey party to have taken initiative to see the available records and books of accounts more-so they were duly informed about the existence of the books of accounts in electronic form in tally software and if they have not taken action to see the book of accounts during search and survey operations , then assessee cannot be faulted for their inaction. Our attention was drawn again to statement of the Director Mr.Swaranjit Singh Bajaj recorded u/s 131 on 08.05.2007 which is placed in paper book/refer page 75 wherein he submitted that books of accounts are maintained in electronic form in tally software and are available at mezzanine floor of the Registered Office. It was reiterated that the assessee was not selling milk through retail outlets but it was directly sold and/or sold through small consumable packs in morning from sales outlet at 6AM through casual employees before opening of sales outlet at 8.30AM. It was submitted that salesmen posted at sales outlet correctly stated that milk was not sold through sales outlet as

they were not aware that the milk was sold in the morning at 6AM through casual workers before opening of sales outlet at 8.30AM. It was claimed that accounting for the sales of milk from sales outlet in the morning at 6AM was accounted for in the books of accounts maintained at factory . Our attention was drawn to page no. 145-174 of the paper book wherein detail of purchase of milk , sale of milk and analysis of sale and purchase of milk is placed which it is claimed was duly submitted before the authorities below. It was submitted the purchase of milk was not rejected by the AO. It was submitted that there is no justification for estimating profit of the assessee without bringing on record any incriminating material. It was submitted that ITAT in AY 2008-09 in assessee's own case vide orders dated 11.06.2015 in ITA no. 7965/Mum/2010 has duly accepted the contentions of the assessee that it is selling milk apart from selling milk products. It was claimed that the AO has itself accepted in AY 2009-10 and 2010-11 that the assessee is engaged in selling milk as well milk products. It was also submitted that the decision of Hon'ble Tribunal in the case Mahesh M. Gandhi(supra) and Trishul Enterprises(supra) are old orders while in the latest orders in the case of Orbit Enterprises(supra), the penalty u/s 271(1)(c) was deleted on legal ground that notice u/s 271(1)(c) read with Section 274 was not properly struck off as to whether penalty proceedings u/s 271(1)(c) are invoked for furnishing of inaccurate particulars of income or for concealment of income and this order of the tribunal ought to be followed. It was submitted that if two views are possible than the view which favours assessee has to be followed. The reliance is placed by learned counsel for the assessee on the judgment of Hon'ble Supreme Court in the case of CIT v. Vegetable Products Limited (1973) 88 ITR 192(SC).

10. We have considered rival contentions and perused the material on record including cited case laws. We have observed that the assessee is engaged in the business of diary products. A search &

seizure operation u/s. 132 of the 1961 Act was conducted by Revenue on 08.05.2007 at the residential premises of the Directors/related persons of Punjab Sind Paneer Group of cases. A survey action u/s. 133A was simultaneously conducted at various premises from where business was conducted by the assessee and members of its group on 08.05.2007 . The residential premises of the assessee's Directors was also covered in the aforesaid search operation. During assessment proceedings conducted by the AO u/s 143(3) read with Section 153A of the 1961 Act, it was submitted by the assessee that it does not maintain production/consumption records and it is engaged in the business of manufacturing and trading in dairy products. The Gross Profit shown by the assessee for the impugned assessment year was 20.45% as compared to last year's G.P of 20.58%. During the course of search & seizure operations and assessment proceedings conducted thereafter by the AO , It was observed by the AO that the assessee was showing reasonably big quantities of sale of milk in its books of accounts but hardly any documentary evidences with respect thereto was found during search and survey operations . The statement of Mr. Jaswinder Singh Bajaj, Director was recorded u/s. 131 of the Act, on 08.05.2007 at factory premises and the relevant question no. 9 to 12 were recorded thereto , which are reproduced here under:-

"Q. No. 9: During the course of survey action at your premises, it is noticed that M/s, Punjab Sind Dairy Products Pvt. Ltd. is not having any inward register, production/consumption register and also outward register. You are requested to clarify if such registers are maintained and, If so, please produce the same?"

Ans. It is very difficult to maintain such registers and so I do not maintain such registers.

Q. No. 10: Please give details of all your dairy products and since your principal raw material is milk, please give details of yield ratio of each products vis-a-vis 1 litre of milk?"

Ans. We make all dairy products i.e. paneer, cream, mawa, ghee, Lassi and butter milk, shrikhand etc.. The yielding ratio cannot be ascertained as the clarification of these have been stated in earlier answers.

Q. No. 11: Please submit the quantitative details of purchase of milk in litre of A.Y. 2006-07 and 2007-08 alongwith quantitative details of all your products in litre/kgms.

Ans. I shall submit the details of purchase of milk at the earliest. I shall submit the sales register details at the earliest.

Q. No. 12: It Is once again requested that you should provide quantitative details of milk and quantitative details of sales?

Ans. We shall provide you all the details and prior to that we shall shown you all the registers and we shall give you details on your guidance."

The assessee did not produce books of accounts and vouchers before the Investigation wing of the Revenue. Sale voucher of milk sale were not found during the survey operations conducted u/s 133A of the 1961 Act at the assessee's premises or at various outlets of the assessee . Thus, all the authorities including tribunal in quantum have concurrently disbelieved the claim of the assessee that it is selling milk which was found by them to be not correct and sale of milk was held not to be proved. However, Shri Swaranjit Singh Bajaj, Director made the statement u/s 131 on 08.05.2007 before the survey team that books of accounts were maintained in electronic form in tally software and these books of accounts are available in the mezzanine floor at Registered Office, which statement is placed in paper book at page no. 73 onwards (Page no. 75/paper book). Despite being brought to the notice of survey team about existence of books of accounts available in electronic form in tally software, the survey team did not sought to examine these books of accounts nor these books of accounts were impounded by survey team. It was claimed that the Productions records were kept in loose sheets but as such proper

production/consumption records were not maintained. However, stock registers were maintained which were produced before the AO during assessment proceedings. The quantum additions were made on the grounds that no documentary evidences were available regarding sale of milk during the course of search and survey operations. The assessee had consistently claimed that it is dealing in milk and milk products and its factory premises is situated at AG-2 Cama Industrial Estate, Walbhat Road, Goregaon (W), Mumbai 400063. The assessee had also claimed that it has sales outlet at following locations:-

1. *Bhulabhai Desai Road, next to American Embassy/ Breach Candy/ Mumbai-400 026.*
2. *622, Durga Niwas, Khar Pali Road, Khar (West), Mumbai - 52.*
3. *BMC Stall, Outside Khar Telephone Exchange, Khar Pali Raod, Khar (West), Mumbai-52.*
4. *Ishwar Sadan, Opp. Jewel Palace Hotel, Khar (West), Mumbai - 52.*
5. *Juhu Stall at JVPD Scheme, Opp. OPTIONS, Juhu Vile Parle (West), Mumbai - 52.*
6. *Kamdhenu Shopping Centre, Shop No. 50, Lokhandwala, Andheri (W), Mumbai -54,*

The authorities have concluded that the assessee sells milk product from various outlets and the assessee buys milk and manufacture various products mainly paneer and sells them through these outlets. However, it was concluded by the authorities that the assessee is not selling milk which remained unproved. The tribunal also disbelieved the theory as set out by the assessee of selling milk. The tribunal sustained the additions in quantum appeal wherein appeal of the assessee stood dismissed in ITA no. 7963 & 7964/Mum/2010 for AY 2006-07 & 2007-08 respectively, vide common order dated 22.01.2014, by holding as under:-

“13. Ground no.4 relates to merits of addition of Rs. 12,15,244/- confirmed by the CIT (A) as per the estimations discussed above. We have already extracted the finding of the AO as well as the CIT (A) in the preceding paragraphs of this order. So far as, we have not only upheld the validity of the search assessment but also confirmed the act of rejection of books of accounts. Once the books of accounts are rejected under the provisions of section 145(3) of the Act, best judgment’ assessment becomes a follow up activity of the AO. In this case, AO has made certain errors while making additions which are subsequently corrected by the CIT (A), determining the GP at 23.23%.

14. This is a case where allegation of use of milk for dairy products was not substantiated, by the fact that there is no sale of milk as evidenced by way of filing bills. The AO / CIT (A) have categorically stated that the assessee failed to submit the details in support of the sale of milk to the tune of 12,15,244/-. Thus, the said assessee’s failure clubbed with the statements of the employees given on oath became relevant. The arguments relating to the retraction of the said statements by the employees are not sustainable considering the fact that the retraction was done in undated letters without giving sustainable reasons for such retraction. Therefore, in principle, the allegation of the Revenue on utilization of milk for making of the milk products by the assessee is sustainable. Accordingly, the sustenance of addition of 12,15,244/- by the CIT (A) does not call for any interference. The allegation that the additions are made without any help of incriminating material is not sustainable considering the fact that there are multiple statements of the employees together with circumstantial evidences of no supporting registers showing the consumption details of milk constitutes incriminating information pertaining to the business affairs of the assessee in general and milk and dairy products in particular. Accordingly, ground no.4 raised by the assessee is dismissed.

The Hon’ble Bombay High Court was also pleased to dismiss the appeal of the assessee as in the opinion of Hon’ble Bombay High Court, no substantial question of law arose from the order of the tribunal, and the finding of facts as recorded by the tribunal were upheld by Hon’ble Bombay High Court in ITA no. 950 of 2014 with ITA no. 951 of 2014, vide judgment dated 13.12.2016, by holding as under:-

“ 2. The learned Counsel for the appellant-assessee urges only the following two questions of law for our consideration:

“ (1) Whether on the facts and in circumstances of the case and in law , the Tribunal is right in maintaining rejection of books of accounts under Section 145(3) of the Act for Assessment Years 2006-07 and 2007-08?

(2) Whether on the facts and in circumstances of the case and in law, the Tribunal is correct in approving gross profit addition Rs. 12,15,244/- for Assessment Year 2006-07 and Rs. 16,11,580/- for Assessment Year 2007-08?”

(i) In our view, the concurrent finding of facts rendered by the authorities under the Act that the appellant-Assessee had failed to produce the Registers indicating Production, Issuance and Consumption. Thus the view to reject books of account for the Assessment Years 2006-07 and 2007-08 is a possible view on facts. Therefore it cannot be said to be perverse and/or arbitrary.

(j) In the above view, Question No.(1) does not give rise to a substantial question of law. Thus, not entertained.

(g) In the above view,we find that the view taken by th authorities under the Act is a possible view, Therefore, the Question No. 2 as formulated, does not give rise to any substantial question of law. Thus, not entertained.

6. Accordingly, both Appeals dismissed . No order as to costs.”

The assessee has however consistently maintained that it is also selling milk. The statements of various staff members who were

engaged in sales were also recorded by revenue during search and survey operations wherein these sales personnel averred in their statement before Revenue that the assessee is not selling milk through these outlets. However , undisputedly these outlets were found to be selling milk product. The assessee claimed that direct sales of bulk quantities of milk were made wherein suppliers are instructed to supply directly milk to the buyers. It was also claimed that milk was also sold from factory. It was also claimed that the milk was sold in early morning at around 6AM from sales outlet through casual workers before the opening of sales outlet at 8.30 AM in small consumable packets. It was also claimed that the Director of the company namely Mr Jaswinder Singh Bajaj, his wife and his brother were also showing sale of milk in their respective return of income filed with the Revenue, the details of which were submitted . It was also claimed by the assessee that complete movement of analysis of milk was submitted before the AO . It was submitted that the sale of milk has been made in the name of Punjab Sweet & Farsan during the impugned assessment year , the payment thereof was received in cheque from this party. It was claimed that the sale of milk was also made in cash during the impugned assessment year. It was also claimed that books of accounts were produced before the AO which reflected sale of milk and realisation of proceeds of sale of milk. The stock registers/records as well books of accounts were also produced before the AO during assessment proceedings. However , these books of accounts and stock records were not produced before the investigation wing of the Revenue and now during assessment proceedings , the claim of the assessee for sale of milk being reflected in books of accounts and stock records was rejected as afterthought. It was claimed that sale of milk was made in the financial year 2006-07 in the name of Mr Amritpal Singh Nanda , Kay Bee Export and Punjab Sweet Farsan , the payments thereof for sale of milk was received by cheque from these parties, which was duly accounted for in the books of accounts. It was also claimed that in financial year

2007-08 , sale of milk was made in the name of Asian Chemist Prop., Godrej Nature Basket-Kandivili, Kailash Parbat, Nanda Distributors, R.K. Shashank Diary and the amount was received in cash, which is duly accounted for in books of accounts. The assessee also submitted complete analysis of milk wherein it also included cash sales made by it for all these years. The sales personnel gave statements at the time of survey that no milk was sold through sales outlet. But later, the clarificatory statements of these sales employees were also submitted by the assessee before AO, wherein they clarified now that the assessee was also selling milk in early morning at 6AM through casual workers prior to opening of sales outlet at 8.30AM and the said sales were directly accounted for by the factory. The AO has not made any investigations as to the installed capacity of the factory for processing of milk and production of milk products vis-a-vis processing of milk and production of milk products reflected in books of accounts. No discrepancies in the stock of milk and milk product as maintained at factory and/or sales outlet has been brought on record by the AO. The clarificatory statements of the sales personnel given before the AO clarifying their statements recorded on 08.05.2007 that sales of milk took place at 6AM from outlets before the sales outlet open at 8.30 AM through casual labours were rejected by the AO. However, the AO did not re-examine these sales personnel's who retracted their original statements vide clarificatory letter. The AO did not recorded statements of production personnel who were engaged in processing milk and producing milk products to unearth truth. The assessee has also claimed that sale of milk was also made directly from factory in bulk wherein the suppliers were directed to sell to the buyers. It is also claimed that the sale of milk was also made from factory premises. It is claimed that when the milk procured was found after testing not fit to be used for producing milk products, the assessee used to sell milk instead of using the said milk for producing milk products, which is a possible and plausible and no incriminating material/evidence to rebut these explanations are brought on record

by the AO more-so the milk is perishable commodity having shorter shelf life and cannot be retained for longer duration. Thus, it is a plausible and possible view that milk not found suitable for milk products after testing was sold as milk itself. About 30% of the milk procured was sold as milk itself by the assessee which cannot be said unconscionable by any standards and could be a plausible and possible view. The ITAT while adjudicating appeal for AY 2008-09 has accepted that the assessee has sold milk also apart from milk products based on production records, books of accounts and other material brought on record by the assessee . For AY 2008-09, no doubt the assessee produced production records but for this year under consideration before us, books of accounts were produced along with stock records. It was claimed that the production records were maintained but in loose sheets. For AY 2009-10 and 2010-11 , the AO itself accepted that the assessee is also engaged in sale of milk. For the instant year under consideration , the authorities had disbelieved the whole story of selling of milk as set out by the assessee and books of accounts were rejected u/s. 145(3) and it was held that the assessee has shown bogus sale of milk in its books of accounts in order to suppress production and sale of various milk products, which as per authorities led to suppression of profits and consequently suppression of income chargeable to tax declared in return of income with an intent to evade taxes . This led to estimation of income by the AO by applying higher G.P ratio to the sale of milk based upon profits earned on milk products dealt with by the assessee while framing assessment framed by the AO u/s 153A read with Section 143(3) of the 1961 Act vide assessment order dated 29.12.2009, which led to the additions to the income of the assessee to the tune of Rs. 14,13,628-/. Penalty proceedings u/s 271(1)(c) of the 1961 Act were also initiated by the AO. The additions as were made by the AO in quantum assessment based on preponderance of probabilities which was upheld upto by Hon'ble Bombay High Court is no-doubt a justifiable view so far as quantum additions are concerned but to

fasten liability to penalty u/s 271(1)(c) which albeit is a civil liability stands on higher pedestal and requires cogent evidences of furnishing of inaccurate particulars of income or for concealment of particulars of income which in-fact was not brought on record by the AO to justify levy of penalty u/s 271(1)(c). Hon'ble Bombay High Court while adjudicating appeal u/s 260A filed by the assessee for AY 2006-07 has held that no substantial question of law arises as the view adopted by authorities below is one of the plausible view and cannot be termed as perverse view. Merely because quantum additions are upheld by appellate authorities as one of the possible view will not automatically lead to levying of penalty u/s 271(1)(c) is a well settled position of law and the AO ought to have brought on record cogent incriminating material to show that the assessee had infact furnished inaccurate particulars of income or had concealed its particulars of income in the return of income filed with the Revenue, before fastening liability to penalty u/s 271(1)(c) of the 1961 Act. The AO could not brought on record any cogent material/evidences to conclusively prove that the milk was diverted toward production of milk products and the production of milk products was camouflaged as sale of milk with a view of suppress profit and evade taxes . The additions have been made on preponderance of probability by estimating of profits by treating sale of milk being unproved and applying GP ratio of milk products , but no enquiry was made by the authorities as to the installed capacity of the factory to process milk and produce milk products vis-a-vis production achieved during the period or to prove that milk was diverted for producing milk products but sales were camouflaged as sale of milk. No correlation of electricity consumed, raw material consumed, labour employed, milk processed, milk products produced etc were done to prove that milk was never sold as such but were infact used for producing milk products but camouflaged in books of accounts as sale of milk. There is no evidences on record to show that any excess stock of milk product was found from factory outlet or the sales outlet vis-a-vis records

maintained by the assessee. The books of accounts were available at the time of survey on 08.5.2007 but survey team who conducted survey u/s 133A did not examine the same on 08.05.2007 and neither impounded the available books of accounts. If the survey team would have examined or impounded the said books of accounts on 08.05.2007 i.e. at the time of survey, it would have unravel the truth. The said books of accounts along with stock records were produced before the AO during assessment proceedings however it is a matter of record that the assessee did not produce these books of accounts before the investigation wing. It was claimed that production records were kept in loose sheets but proper production records were not maintained. The assessee however submitted purchase and sale of milk record before the AO as well analysis of purchase and sale of milk was submitted before the AO. No discrepancy was found by the AO in these record except that the whole story of sale of milk was disbelieved. The assessee has also brought on records VAT audit report before learned CIT(A) to substantiate that the assessee was engaged in the sale of milk but that was also rejected. The books of accounts might not have been produced before investigation wing or proper productions/ consumption records were not kept could be sufficient to reject books of accounts u/s 145(3) and to estimate profits based on premise that sales of milk was not proved on the touchstone of preponderance of probabilities but is not sufficient to fasten liability to penalty u/s 271(1)(c) of the 1961 Act as in penalty proceedings, the assessee has come out with a bonafide explanations and its burden stood discharged but it was for the AO to have rebut the contentions of the assessee and brought on record clinching evidence that the assessee furnished inaccurate particulars of income or concealed the particulars of income while filing return of income with the Revenue, which in our considered view as per detailed discussions above the AO failed to bring on record clinching evidence justifying leviability of penalty u/s 271(1)(c) of the 1961 Act. Thus, in our considered view as per our detailed discussions in this order, the

penalty levied by the AO u/s 271(1)(c) is not sustainable in the eyes of law and we order deletion of the penalty levied by the AO u/s 271(1)(c) which was later confirmed by learned CIT(A). The assessee succeeds in this appeal. Since we have decided the leviability of penalty u/s. 271(1)(c) on merits in favour of the assessee, we refrain from deciding the leviability of penalty u/s. 271(1)(C) on legal grounds. We order accordingly.

11. In the result, appeal of the assessee in ITA no. 6246/Mum/2017 for AY 2006-07 is allowed.

12. Since the facts in ITA no. 6247/Mum/2017 for AY 2007-08 are similar to the facts in ITA no. 6246/Mum/2017, our decision in ITA No. 6246/Mum/2017 for AY 2006-07 shall apply mutatis mutandis to appeal in ITA no. 6247/Mum/2017 for AY 2007-08.

13. In the result, appeals of the assessee in ITA No. 6246/Mum/2017 for AY 2006-07 and appeal of the assessee in ITA No. 6247/Mum/2017 for AY 2007-08 are allowed.

Order pronounced in the open court on 26.03.2019.

आदेश की घोषणा खुले न्यायालय में दिनांक: 26.03.2019 को की गई

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 26.03.2019

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