आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

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

BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं/.I.T.A. No.2647/Mum/2017

(**निर्धारण वर्ष** / Assessment Year : (2009-10)

Elenjickamalil V. Thomas 212, Vardhaman Chambers, Sector-17, Vashi, Navi Mumbai – 400 703	**बनाम** / v.	DCIT 22(3) Mumbai
स्थायी लेखा सं /.PAN: AACPE7339L		
(अपीलार्थी/ **Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Prakash Pandit
Revenue by:	Shri D.G. Pansari (DR)

सुनवाई की तारीख/ **Date of Hearing** : **30.01.2019**
घोषणा की तारीख /**Date of Pronouncement** : **30.04.2019**

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member:

This appeal, filed by assessee, being ITA No. 2647/Mum/2017, is directed against appellate order dated 09.02.2017, passed by learned Commissioner of Income-Tax(Appeal)-26, Mumbai (hereinafter called "the CIT(A)") , the appellate proceedings before learned CIT(A) has arisen from the penalty order dated 12.03.2014 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 assessment year(AY) 2009-10.

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

> *"1. In the facts and circumstances of the case and in law, the learned CIT(A) erred in confirming the penalty levied by the A.O. on long term capital gain Rs.40,79,195/-*

and on income from other sources Rs. 3,00,000/- under section 271(1)(C) of the Income Tax Act 1961.

2. *The reasons given by the learned CIT(A) for confirming the penalty levied by the A.O. on long term capital gain Rs.40,79,195/- and on income from other sources Rs.3,00,000/- under section 271(1)(C) of the Income Tax Act 1961, are insufficient and contrary to the facts and evidence on record*.

3. *The Appellant craves leave to add, amend, alter, modify or omit any of the aforesaid grounds of appeal as occasion may arise or demand."*

3. The brief facts of the case are that the assessee is proprietor of M/s Vicky Electrical Corporation and M/s E.V. Homes. M/s Vicky Electrical Corporation is engaged in the business of Contractor and M/s E.V. Homes is engaged in the business of Builders and Developers.

4. This appeal filed by the assessee with tribunal is against penalty levied by the A.O under Sec. 271(1)(c) of the Act vide penalty orders dated 12.03.2014 , which was later challenged by the assessee by filing first appeal with learned CIT(A) who was pleased to partly allow relief to the assessee vide appellate order dated 09.02.2017.

4.2. There were three issues on which additions were made by the AO while framing assessment u/s 143(3) which were subject matter of penalty levied by the AO u/s 271(1)(c) of the 1961 Act , which are as under :

"(i) On account of income on completion of project –Rs.77,99,056/-
(ii) In respect of cash deposit –Rs.3,00,000/-
(iii) Short term capital gain on sale of depreciable assets – Rs. 99,01,531/-"

4.3 So far as quantum additions at 4.2 (i) and (iii) above are concerned the matter went upto Income Tax Appellate Tribunal, Mumbai and tribunal was pleased to adjudicate both the issues vide appellate order dated 18.05.2016 in ITA no. 199/Mum/2013 for assessment year 2009-10 , wherein one of us being Accountant Member was part of the Division Bench pronouncing the said appellate order dated 18.05.2016. We will see later in this order the decision taken by tribunal on both these issues against quantum additions vide appellate order dated 18.05.2016.

4.4 The first issue in quantum as to addition made by the AO to the income of the assessee was with respect to offering of income for taxation on 27 flats which were

been constructed by the assessee in Project Carmel at Kamothe, Raigad District , Maharashtra on plot of land bearing no. 12 , Sector-6, Kamothe , Raigad District , Maharashtra. The aforesaid plot of land was purchased by the assessee in AY 2006-07 and construction on the said plot started in AY 2007-08 and stated to be completed in financial year 2009-10. The AO made additions to the income of the assessee of Rs.77,99,076/- during the impugned assessment year in quantum on the ground that aforesaid income from said project was not offered for taxation by the assessee in the return of income filed with Revenue. The assessee had claimed that it is following percentage completion method of accounting for accounting revenue by following Accounting Standard AS-7 and AS-9 issued by ICAI with respect to said project and the income was offered for taxation in three years, viz. A.Y.(s) 2008-09, 2009-10 and 2010-11 and due taxes were paid to the Revenue on all these 27 flats being constructed in the Project Carmel at Kamothe. The tribunal in quantum accepted the percentage completion method followed by the assessee and offering to tax of income from 27 flats of Project Carmel at Kamothe in three AY's namely AY(s) 2008-09, 2009-10 and 2010-11 , subject to verification by the A.O. that infact the said income was offered to taxation by the assessee in aforesaid three years , by holding as under in ITA No.199/Mum/2013 for AY 2009-10 vide appellate order dated 18.05.2016:

> *"17. We have considered the rival contentions and also perused the material on record including case laws relied upon . We have observed that the assessee has constructed 27 flats in the Project known as 'Project Carmel' which the assessee was constructing on the plot of land bearing no 12 , Sector-6, Kamothe , Raigad District , Maharashtra. The plot was purchased by the assessee in the assessment year 2006-07 and construction on the said plot started in the assessment year 2007-08 and stated to be completed in the financial year 2009-10. The assessee is following percentage completion method of accounting for accounting revenue as stipulated vide accounting standards AS -7 and AS-9 prescribed by ICAI. The assesseee has stated to have disclosed the profit from this Project Carmel with respect to all 27 flats so constructed over the three years i.e. financial year 2007-08, 2008-09 and 2009-10 by following percentage completion method of accounting. The entire profit with respect to all 27 flats so constructed is stated by the assessee to have been duly offered for taxation with respect to Project Carmel and due taxes being paid to the Revenue by following percentage completion method of accounting . The assessee has received the occupation certificate on 30-03-2009 from CIDCO which is placed at paper book page 118-119. The assessee has deferred the sale to the assessment year 2010-11 with respect to 13 flats on the ground that construction and finishing work was not completed till 31st March, 2009 with respect to these 13 flats and the possession was also given with respect to these 13 flats in the financial year 2009-10 and 2010-11, although almost entire sales consideration has been received till 31-03-2009 with respect to these flats barring one flat where very little amount vis-à-vis total consideration has been received . The assessee has stated to have*

incurred expenses of Rs.31,79,171/- in the financial year 2009-10 towards these 13 flats as these flats were not finished by the end of the relevant previous year i.e. 2008-09 and details furnished to the Revenue during the assessment proceedings. The assessee has submitted that merely by receiving occupation certificate on 30/03/2009 , does not by itself mean that the project is complete as there are several other work which are done post receipt of this occupancy certificate dated 30-03-2009, such as applying for electrical connection, water connection, drainage connection etc and also finishing work is to be done in these flats to complete construction of these flats, as also there are other relevant factors to be kept in mind to book revenue as per percentage completion method apart from the occupancy certificate. Thus, the assessee had submitted that he acted bonafidely and voluntarily offered to tax the entire income of the Project Carmel with respect to all 27 flats so constructed spread in three financial years namely 2007-08, 2008-09 and 2009-10 and paid due taxes to the Revenue in these three year of his own volition by following percentage completion method as the project is completed in the financial year 2009-10 and not in the financial year 2008-09 as contended by the Revenue when the occupation certificate was received. The possession with respect to those flats which were not completed by the end of the previous year ended 31-03-2009 were given in the financial year 2009-10 and 2010-11, while the project was completed in financial year 2009-10. The assessee has placed possession letter's bearing dates of 2009-10 and 2010-11 in the paper book page 120-140. The assessee stated to have acted with a bona-fide belief that the income has to be offered to tax based on percentage completion method based on the stages of completion of the project and the receipt of the occupancy certificate is one of the relevant factors to be taken into account for determining the completion of the project but it is not the only or the sole relevant and conclusive factor for determining the completion of the project for booking revenue under the percentage completion method. It is stated that there were other works such as finishing work which were required to complete the project which was done in the financial year 2009-10 and the assessee has stated to have incurred Rs.31,79,171/- in the succeeding financial year 2008-09 to complete this Project Carmel , while the Revenue is considering the receipt of occupancy certificate on 30-03-2009 as conclusive to book the entire profit to tax backed with the plea that almost entire consideration is received by the assessee from the flat buyers. The same method of accounting being percentage completion method as followed by the assessee is stated to be consistently followed by the assessee and accepted by the Revenue in the past as well in the succeeding assessment years and even the assessments were framed u/s. 143(3) of the Act for the assessment year 2010-11 accepting the method of accounting followed by the assessee, which has not been disturbed by the Revenue in assessment year 2010-11.The said assessment order dated 01/03/2013 passed by the AO u/s 143(3) of the Act is placed in paper book page 82-84. We have observed that the Revenue has not rejected the books of accounts . Thus, keeping in view the peculiar facts and circumstances of the case and in the interest of substantial justice, we are setting aside this matter to the file of the A.O. with a direction to verify the contentions of the assessee that the entire profit from this Project Carmel with respect to all 27 flats so constructed is duly offered for taxation by the assessee albeit in the assessment year 2008-09, 2009-10 and 2010-11. In case the contention of the assessee is found to be correct that the entire profit of this Project Carmel with respect to all 27 flats so constructed is duly offered for taxation in these three years and the entire due taxes thereon are paid to the Revenue, then the addition so made of Rs.77,99,076/- by the Revenue in the impugned assessment year by the AO and as confirmed by the CIT(A) will stand deleted as in our considered view, then no prejudice is said to be caused to the Revenue as revenue impact is tax neutral and the Revenue would have got all its due taxes on this Project Carmel albeit in three assessment year i.e. 2008- 09,2009-10 and 2010-11. Our view is consistent with the decision of Hon'ble Supreme Court in the case of CIT v. Realest Builders and Services Limited(supra). We order accordingly."

4.5 The AO had in the meantime levied penalty u/s. 271(1)(c) of the 1961 Act on the said addition of Rs. 77,99,056/- to the income of the assessee in quantum, vide

penalty orders dated 12.03.2014 passed u/s 271(1)(c) of the 1961 Act. The learned CIT(A) accepted the contentions of the assessee in the first appeal filed by the assessee against the penalty order passed by the AO u/s 271(1)(c) of the 1961 Act by relying on the appellate order dated 18.05.2016 passed by tribunal in assessee's own case in quantum in ITA no. 199/Mum/2013 for AY 2009-10 and the penalty u/s 271(1)(c) of the 1961 Act levied by the A.O on the said addition of Rs.77,99,056/- was deleted by learned CIT(A) vide appellate order dated 09.02.2017, by holding as under:

> *"5.6.2. The ITAT Mumbai vide its order dated 18-05-2016 deleted the* ***addition of Rs.77,99,076/- made on account of income on completion of project*** *(para 17 of the order) subject to remarks that in case the contention of the assessee is found to be correct that the entire profit of the Project Carmel with respect to all 27 flats so constructed is duly offered for taxation in the three years i.e. AY 2008-09, 2009-10, and 2010-11 and entire due taxes thereon paid to the Revenue. Further, the ITAT also allowed the cost of improvement on the factory building amounting to Rs.48,22,390/- subject to limited verification in the ambit of calculation of total amount backed with account payee cheque by the AO."*

The learned CIT(A) deleted the penalty levied by the AO u/s 271(1)(c) with respect to offering of aforesaid income from 27 flats constructed by the assessee in Project Carmel at Kamothe in three years by following decision of ITAT, Mumbai dated 18.05.2016. Thus,in any case this issue is not before us in the appeal filed by the assessee of which we are presently seized of.

4.6 The next issue on which penalty u/s 271(1)(c) was levied by the AO is with respect to cash deposit of Rs.3,00,000/- by the assessee in its bank account. The AO made additions of Rs. 3,00,000/- being cash deposited in the bank as no plausible explanation was given by the assessee before the AO during assessment proceedings conducted by the AO u/s 143(3) read with Section 143(2) of the 1961 Act. The assessee filed first appeal before learned CIT(A) challenging addition of Rs.3,00,000/- on account of cash deposit in bank account made by the AO in quantum assessment. The assessee contended that this cash of Rs.3,00,000/- was received on the occasion of son's marriage but no evidences were filed by the assessee before the AO to prove that the aforesaid sum was infact received as cash gift on the marriage of son of the assessee. Since in quantum the assessee could not offer plausible explanation

as to cash deposit of Rs.3,00,000/- in bank account ,the learned CIT(A) was pleased to confirm the addition of Rs.3,00,000/-. The assessee did not raise this issue before the Tribunal in appeal in ITA no. 199/Mum/2013 for AY 2009-10 against quantum assessment , which appeal was decided by tribunal vide orders dated 18.05.2016 and thus the said addition of Rs. 3,00,000/- being cash deposited in bank attained finality so far as quantum addition is confirmed. The assessee in penalty proceedings u/s 271(1)(c) also could not offer any plausible explanation before the A.O. as well as before the learned CIT(A) and only bald statements were made as to receipt of Rs.3,00,000/- as cash gifts on the occasion of marriage of son but however no details/evidences whatsoever was given with respect to these cash gifts of Rs.3,00,000/- received on the occasion of marriage of son. This cash gifts were stated to be deposited in bank. Even before us, the assessee has not offered any explanation supported by evidences as to receipt of cash gifts of Rs. 3,00,000/- on occasion of marriage of son , which cash it was claimed stood deposited in the bank account. The learned CIT(A) confirmed the penalty u/s 271(1)(c) of the 1961 Act on cash gift of Rs. 3,00,000/- as no explanation was forthcoming from the assessee , by holding as under vide appellate order dated 09.02.2017:

> *"5.7. Now penalty is required to be levied for disallowance of (i) Rs.3,00,000/- on account of cash deposits and (ii) Computation of Long Term Capital Gain of Rs.40,79,195/-. AO levied penalty on amount Rs.3,00,000/- on account of cash deposits in the form of Gifts received at the marriage of his son for want of evidence. At the time of assessment, the appellant had given explanation vide his letter dated 12-12-2011 in respect of cash deposits of Rs.10,66,000/- in the bank account maintained in Abhydaya Co-op Bank, the AO has accepted explanation to the extent of Rs.7,66,000/-. However, the AO was not satisfied about the gift of Rs.3,00,000/- deposited in the bank which was received from various persons at the occasion of appellant's son's marriage. It is submitted that the appellant has given explanation and the AO except for the reason that he is not satisfied that the said gifts are genuine and levied penalty thereon. Therefore, the same amounts to not accepting appellant's explanation which is debatable one. Therefore, penalty u/s.271(1)(c) of the Act in respect of cash deposit of Rs.3,00,000/- requires to be deleted. The CIT (A) upheld the addition as no evidence has been filed during appellate proceedings too and the appellant has accepted the CIT(A)'s order. It is pertinent to mention here that AO was not satisfied of gift claim of the appellant as no evidence was filed by him during assessment proceedings. His satisfaction is based for want of evidence and not from out of the blue. As the appellant, has accepted the CIT(A)s order on this issue, his plea that issue is debatable does not hold good. Penalty levied by the AO on this issue is upheld."*

Even before us, no explanation was offered by the assessee with respect to cash deposit of Rs. 3,00,000/- in bank account on merits of the issue and only bald statement is made that the said amount was received as gift in cash on the occasion of son's marriage. Apart from this bald statement , no further evidence/details are forthcoming from the assessee. The learned DR has strongly argued for confirming the penalty levied by the AO u/s 271(1)(c) on merits of the issue which was later confirmed by learned CIT(A). We donot find any reasons to believe the contentions of the assessee that the said sum was received on the occasion of marriage of son of the assessee as there is no evidence before us to accept this explanation and we have no hesitation in rejecting the same as it is not supported by any evidence whatsoever. Thus, so far as merit of the issue is concerned , we hereby confirm penalty as levied by the AO u/s 271(1)(c) of the 1961 Act on the cash deposit of Rs. 3,00,000/- in bank account, which stood later confirmed by learned CIT(A). We order accordingly.

4.7 The assessee has also challenged before the Bench while advancing arguments as to levy of penalty u/s 271(1)(c) on the said cash deposit of Rs. 3,00,000/- in bank account on the legal grounds that the notice dated 28.12.2011 issued by the AO u/s 271(1)(c) read with Section 274 of the 1961 Act is *stereo typed* printed notice in which either of the clauses as to whether penalty was invoked for furnishing of inaccurate particulars of income or for concealment of income was not struck off . The said notice is placed in paper book at page No. 8 and 9 and our attention is drawn to said notice. The assessee has referred to case laws to contend that penalty is not sustainable in the eyes of law as the appropriate column in the aforesaid penalty notice dated 28.12.2011 issued by the AO u/s 271(1)(c) read with Section 274 of the 1961 Act as to whether penalty proceedings are invoked for levying penalty for furnishing of inaccurate particulars of income or for concealment of income was not struck off. Thus, it is claimed that limb under which penalty proceedings were initiated u/s 271(1)(c) is not discernible from the notice dated 28.12.2011 issued by the AO u/s 271(1)(c) read with Section 274 of the 1961 Act. We have gone through the assessment order dated 28.12.2011 (penalty notice is also

dated 28.12.2011) passed by the AO u/s 143(3) of the 1961 Act and have observed that the AO invoked penalty proceedings u/s 271(1)(c) against the assessee on this issue of cash deposit of Rs. 3,00,000/- in bank on the grounds that the **assessee has concealed taxable income by furnishing inaccurate particulars of income**(para 5.4 /page 18 of the assessment order dated 28.12.2011) . The A.O. while passing penalty order dated 12.03.2014 on this issue of cash deposit of Rs. 3,00,000/- in bank account had also levied penalty u/s 271(1)(c) of the 1961 Act for **concealing the income and furnishing of inaccurate particulars of income (**para6 / page 7 of penalty order dated 12.03.2014). Thus, penalty proceedings were invoked under both the limbs and penalty was finally levied u/s 271(1)(c) on both the offences u/s Section 271(1)(c). Thus , the assessee was duly put to notice as to the charge levied against the assessee for this cash deposit of Rs. 3,00,000/- in bank account vide assessment order dated 28.12.2011 passed u/s 143(3) as to the penalty proceedings initiated against the assessee u/s 271(1)(c) with respect to both the offences under two limbs of Section 271(1)(c), which the assessee was called upon to meet on this issue in penalty proceedings u/s 271(1)(c) before the AO. Since , the charge stipulated against the assessee is with respect to both the limbs of Section 271(1)(c) which are clearly discernible from assessment order dated 28.12.2011 , there was no occasion for the AO to struck off either of the limbs of Section 271(1)(c) in the penalty notice of even dated viz. 28.12.2011 issued by the AO u/s 271(1)(c) read with Section 274 of the 1961 Act. The assessee was fully aware of the charge which it had to meet within penalty provisions as are contained in Section 271(1)(c) and the assessee duly participated in the penalty proceedings conducted by the AO u/s 271(1)(c) and submitted detailed explanations. It cannot be said that the AO levied penalty u/s 271(1)(c) for one limb while notice was issued for another limb of Section 271(1)(c) . Thus, with due respect decision of Hon'ble Bombay High Court in the case of CIT v. Samson Perinchery (2017) 392 ITR 4(Bombay) is not applicable to the factual matrix of the case. There may be situations which may warrant levy of penalty on both the counts. Even decision of Hon'ble Karnataka High Court in the case of CIT v. Manjunath Cotton & Ginning Factory(2013) 359 ITR 565(Karnataka) held that there could be situations which may warrant levy of penalty u/s 271(1)(c) of the 1961 Act

for both the offences as are stipulated under Section 271(1)(c), vide para 60 wherein Hon'ble High Court held as under:

> ***"60.*** *Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences...."*

The assessee did not raise this legal ground before the learned CIT(A) and also before us, no such specific ground of appeal was taken in memo of appeal filed with tribunal nor any additional ground of appeal was taken challenging levy of penalty u/s 271(1)(c) on legal grounds. However , arguments were advanced by both the parties on legal ground. Thus, keeping in view the relevance and importance of the challenge on legal grounds as to defect in notice u/s 271(1)(c) read with Section 274 of the 1961 Act which goes to the root of the matter , we have considered it appropriate and proper to adjudicate this issue in the interest of substantial justice. We donot find any prejudice caused to the assessee by non striking of the offences in the notice dated 28.12.2011 issued by the AO u/s 271(1)(c) read with Section 274 of the 1961 Act, keeping in view factual matrix of the case as discussed above. In our considered view decision of Hon'ble Bombay High Court in the case of CIT v. Smt. Kaushalaya (1995)216 ITR 660(Bom.) is relevant. Principles of natural justice were adhered to by Revenue. In any case, if there was any defect in notice dated 28.12.2011 issued by the AO u/s 271(1)(c) read with Section 274 of the 1961 Act, that is a curable defect within meaning of Section 292B and 29BB of the 1961 Act. Thus, keeping in view factual matrix of the ground, this legal ground is also adjudicated against the assessee. Thus, the assessee fails on both legal ground as well on merits of the issue with respect to deposit of cash of Rs. 3,00,000/- in bank account for which penalty as levied by the AO u/s 271(1)(c) which was later upheld by learned CIT(A) stood confirmed. The assessee fails on this issue and penalty levied by the AO u/s 271(1)(c) and as confirmed by learned CIT(A), stood confirmed by us vide this order. We order accordingly.

4.8 The third issue on which penalty was levied by the AO u/s 271(1)(c) was with regard to additions made to the income of the assessee in quantum on account of capital gains on sale of depreciable assets. The assessee has claimed to have sold factory premises at Nerul for a total consideration of Rs.1,16,00,000/- . The said factory premises was claimed to be depreciable asset existing in one of his proprietary concern , M/s Vicky Electrical Corporation . The assessee reported short term capital gains of Rs.33,14,640/- on sale of said factory premises. The assessee did not offer said short term capital gains to tax and claimed that it has acquired three shops for Rs. 53,00,000/- and the block of asset did not cease to exist and hence it was claimed that there is no liability to pay tax. The closing WDV as on 31.03.2009 was shown at Rs. 19,85,359/- . The assessee claimed that it acquired three shops from its proprietary concern M/s E.V.Homes in the project E.V.Regency

for which it made payments and it was claimed that these shops were not acquired through a book entry. The assessee explained that he was under a bonafide belief that the investment is made in the same block of assets and the said new additions by way of three shops will be added to block of asset and qualified for depreciation. The AO rejected the contention of the assessee and made additions to the income of the assessee by treating said transaction as sham transaction of acquiring three shops from his own proprietary concern . The assessee has also claimed that it made additions of Rs. 48,22,390/- to the factory premises by undertaking substantial structural repairs and modifications before its sale , which was also rejected by the AO. The matter went in appeal upto Tribunal in quantum so far as claim of additions to the tune of Rs. 48,22,390/- to the factory premises towards major structural repairs and modifications is concerned before its sale and the Tribunal was pleased to accept the contentions of the assessee that it has spent on improvement of the said factory premises at Nerul by way of major structural repairs and modifications, wherein the Tribunal allowed the benefit of such improvement subject to limited verification by the AO of the quantification of the amount spent on such improvement to factory premises at Nerul before its sale, in ITA no. 199/Mum/2013 vide orders dated 18.05.2016 for AY 2009-10 , by holding as under:

"10. We have considered the rival contentions and also perused the material available on record. We have observed that the assessee was the owner of the land and factory building at 32-A, Sector-1, Shirwane, Nerul, Navi Mumbai-400 706 with the leasehold rights in plot of size of 511.50 square meters , while the constructed area of the factory building was 255 sq. meters. The assessee has stated to have entered into an MOU dated 3rd September, 2007(stamp paper purchase date 17-08-2007 as the same is referred by this date in the orders of the authorities below) for the sale of the said land and factory building at Nerul for a total consideration of Rs. 1.16 crores. The said MOU dated 03-09-2007 (stamp paper purchase dated 17-08-2007) is placed by the assessee at page 85-86 of paper book filed with the Tribunal. As per clause 2 of the MOU dated 03-09-2007, the assessee was required to make the said building in a fit and proper usable conditions as the building structure required repairs and modification to suit the requirement of the buyer. The architect certificate dated 10-09-2007 is also placed by the assessee in the paper book page 89 filed with the Tribunal, which detailed in this architect certificate dated 10-09-2007 the extensive repair and modification work required in the factory building to avoid the building from collapsing. The architect has also certified that the beams and columns have developed cracks and water is seeping into the interiors of the building. The architect has also certified that the reinforcements are damaged severely. This architect certificate dated 10-09-2007 and the MOU dated 03-09-2007 are certified by the assessee in the paper book certificate that these documents were duly placed before the learned AO and the learned CIT(A) during the course of relevant proceedings before these authorities. The assessee has incurred these expenses for the extensive structural repairs and modifications in the factory building apart from repairs to the compound wall and leveling of plot, for which the assessee submitted the details/documents including invoices regarding the material cost and labour charges etc. incurred for these extensive structural repairs and modifications towards the factory building apart from repairs to the compound wall and leveling of plot, in terms of the MOU dated 03-09-2007. The payments for this work carried on by the assessee, have been stated to be made through banking channel by account payee cheque's and even the taxes were also stated to be deducted at source on these payments as covered by provisions of Chapter XVII-B of the Act. We have observed that the authorities below have made the addition merely on the basis of surmises and conjectures on suspicion by terming the invoices of material and labour submitted by the assessee as bogus and accommodation entries. No cogent incriminating material has been brought on record by the authorities below to prove that assessee has made bogus purchases except inspector report which is not sufficient to fasten the liability to tax on the assessee. The inspector report has merely submitted that two of the vendors from whom steel was bought by the assessee namely Payal Enterprsies and Bhumi Enterprises were found not existing at the addresses given in their invoices. The inspector report is placed at page 112 of paper book. We have seen from the invoices placed in the paper book that both these vendors namely Payal Enterprsies and Bhumi Enterprises are registered with VAT authorities and they have also charged Maharashtra VAT on the invoices issued to the assessee . Revenue has made no further enquiries with the VAT department or with the bankers of these two vendors as the payment were all made through account payee cheques. No further enquiry was conducted by the Revenue to bring on record cogent incriminating material to disprove and demolish the contentions of the assessee. The assessee in all dealt with fifteen parties as per details vide page 90 of paper book filed by the assessee with the Tribunal. Only enquiries were made through inspector with respect to four parties out of these fifteen parties , of which two were found non-existent at the given addresses. The enquiries with respect to the rest of the eleven suppliers were not even made by issuing notices u/s 133(6) of the Act. These material and labour suppliers, fifteen in number were not summoned u/s 131 of the Act, nor their statement were recorded. The information was not called by the Revenue from the buyer of the land and factory building by issuing summons/notices u/s 131/133(6) of the Act to verify the authenticity of the claim of the assesseee having undertaken extensive structural repairs and modification work to the factory building prior to its sale, nor the statement of the buyer of the afore-stated property was recorded. No technical expert such as DVO was appointed by the Revenue to enquire about the extensive structural repairs and modification claimed to be carried on by the

assessee to disprove and demolish the contentions of the assessee . No enquiry was even made with the office of the municipal authorities to ascertain the status of construction and structural repairs and modification of the factory building , if any carried on by the assessee in the impugned assessment year to disprove the contentions of the assessee. The case of the Revenue is based on the non-existence of two parties at the given addresses vide inspector report, which is not sufficient enough to come to the conclusion that the entire theory of extensive structural repair and modification of the factory building as brought out by the assessee is a farce , in-fact the reliance by the Revenue on the inspector report without conducting further probe to conclusively disprove and demolish the contentions of the assessee, has led the revenue conclusions fall into the realm of conjectures and surmises on suspicion which is not permissible. Suspicion howsoever strong cannot take the place of the proof is a settled proposition of law. Thus, in nut-shell, no proper and adequate enquiry has been conducted by the Revenue to rebut , disprove and demolish the contentions of the assessee as no cogent incriminating material has been brought on record by the Revenue against the assessee. The ground which has been taken by the ld. CIT(A) to reject the contention of the assessee such as MOU dated 3rd September, 2007 is entered on one hundred rupee stamp paper and it does not talk about any schedule of payment and only says that the entire balance payment will be made within a period of six months from the date of signing of the MOU are irrelevant de-hors fastening of the liability to tax on the assessee . Similarly to contend that the said MOU did not find mention in the deed of assignment dated 20-01-2009 and is merely an after-thought is based on surmises and conjectures on suspicion , while the MOU did talk of payment of Rs. 3 lacs vide cheque dated 15-10- 2007 which find mention in the deed of assignment dated 20-01-2009 . To contend that the MOU dated 03-09-2007 has preceded the permissions received by the assessee from CIDCO on 31/10/2008 is again of no-use to the Revenue as it is very probable that the tax-payer will first enter into a binding agreement with a serious buyer of the property who has also advanced some amount of money and then approach the CIDCO for seeking permission to sell the property. No cogent incriminating material has been brought on record by the authorities below to demolish the MOU dated 03-09- 2007 as an after-thought but rather the same is based on conjectures and surmises based on suspicion which is not permissible under the Act. The CIT(A) again enter into realm of conjectures and surmises based on suspicion by contending that the material and labour charges must have been used in building business of the other proprietary concern of the assessee namely E. V. Homes , while the invoices speak voluminously of the name of the concern of the assessee M/s Vicky Electrical Corporation as the vendee in the said invoices , which concern of the assessee namely, M/s Vicky Electrical Corporation owned the land and factory building and these invoices also reflected the address of the 32-A, Sector-1, Shirwane, Nerul of the said land and factory building for dispatch of material and rendering of labour services. The payments for these invoices are stated to be made by account payee cheques and tax was also deducted at source on these invoices where-ever applicable as per provisions of Chapter XVII-B of the Act. These cogent material brought on record by the assessee backed with the chain of events starting from signing of MOU dated 03-09-2007 and ending with deed of assignment dated 20-01-2009 , which comprised agreement to sell land and factory building for Rs.1.16 crores vide MOU dated 03-09-2007 with conditions agreed by the assessee to make the factory building fit and usable as the building required extensive structural repairing and modification to suit the buyers requirement, architect certificate dated 10-09-2007 pointing out deficiencies in the factory building structure to avoid the collapsing of building, invoices for material and labour expenses incurred by the assessee towards extensive repairs and modification to the factory building during the period April – November 2008 , payments of these invoices by account payee cheque's, deduction of tax at source on these payments where-ever applicable under Chapter XVII-B of the Act, permission vide approval dated 31-10-2008 from the CIDCO to sell the said land and building, receipt of payment from the same buyer starting from 15-10-2007 and ending on 01-01-2009 in all aggregating to Rs.1.16 crores as agreed in the MOU dated 03-09-2007 and finally execution of deed of assignment in favour of the same buyer vide deed dated 20-01-2009, which completes full chain of event of the transaction for sale of land and factory building for which necessary structural repairs and modifications were done by the

assessee as contended, on the touch stone of preponderance of probabilities which cannot be simply brushed aside or demolished by the Revenue based on conjectures and surmises on suspicion , except through cogent incriminating material which revenue has failed to bring on record in the instant case. In our considered view, the assessee has duly discharged his burden cast under the Act and now it was for the Revenue to have brought on record cogent incriminating material and evidences to rebut and demolish the contentions of the assessee conclusively on the touchstone of preponderance of probabilities which the revenue could not do except by bringing on record inspector report that two of the parties are not existing on the addresses given on the invoices which is not sufficient enough to fasten the liability on the assessee as it does not prove that these purchases were bogus and are accommodation entries as set out above by Revenue . Even for the sake of argument it is assumed that the assessee has not obtained the approval from CIDCO for doing this major and extensive structural repair and modification work to the factory Building, this technical breach will not in itself disentitle the assessee from claiming the same under the Act as cost of improvement and more-so it is a case of major and extensive structural repair and modification to the existing factory building and not a case of construction of altogether new factory building. Hence, in our considered view, the additions of Rs. 48,22,390/- by disallowing the same as cost of improvement to the factory building cannot be sustained and we order deletion of the addition made by the A.O. and as sustained by the CIT(A). However, from the perusal of the invoices submitted by the assessee in the paper book filed with the Tribunal which are placed at paper book page 92-111, we have observed that the same totaled to Rs 38,18,517/-(excluding one invoice which is placed twice at page 100 and101 being Ritesh Transport of Rs.92,192/- bearing number 385 dated 31/05/2008)) against the expenses of Rs.48,22,390/- claimed by the assessee, to that extent , we are directing the AO to undertake limited verification before allowing the claim of the assessee after satisfying that complete invoices of Rs.48,22,390/-backed with account payee cheque payments as claimed by the assessee are on record with the Revenue duly reconciled to protect the interest of Revenue. We direct accordingly. "

4.9 Thus, with the allowability of additions of Rs. 48,22,390/- to the improvement of the factory building, the assessee's block of asset has substantial gone up while the short term capital gain of Rs.3,41,380/- on which penalty was levied by the AO was reduced to 'Nil'. However, there will be long term capital gains chargeable to tax of Rs. 40,79,195/-, which admittedly was not offered for tax arising on the sale of land underneath the factory building in the return of income filed by the assesee with Revenue. The said land was allotted to the assessee on leasehold basis by CIDCO on which the assessee paid leasehold premium . The learned CIT(A) after taking cognizance of the appellate order dated 18.05.2016 of the ITAT in quantum, in appeal against penalty levied by the AO u/s 271(1)(c) , had upheld levy of penalty u/s 271(1)(c) by holding as under:

"5.8. Further, AO has levied penalty on Long Term Capital Gain amounting to Rs.40,79,195/- and Rs.3,41,382/- under the head Short Term Capital Gain as not offered in the return of income. The appellant had adjusted the sale proceeds on sale of factory building from the Block of Assets and further added new asset for Rs.53,00,000/- on account of purchase of shops from his own proprietary concern namely M/s E.V. Homes. The AO held with regard to addition of Rs.53,00,000/- to the block of assets, that one cannot make a financial transaction

with himself. During the appellate proceedings against the penalty order also, the appellant has submitted the same working of adjustment in the block of assets instead of declaring STCG on sale of depreciable assets. Hence, it is clear that the appellant has furnished inaccurate particulars of income. Here again the plea of the appellant that issue is debatable does not hold good. The penalty on this issue is leviable as per law and has rightly been levied by the AO. However, the quantum of addition on account of STCG has changed to NIL after the effect of the Hon'ble Tribunal's order and penalty is upheld to the extent of tax effect on the LTCG addition for Rs.40,79,195/-.

5.9. Thus, on considering the entire gamut of facts related to this case in the light of the judicial decisions cited supra, I find that penalty levied on these two issues is upheld. Accordingly, the AO is directed to calculate the quantum of penalty @ 100% of the tax effect of the above two issues. Hence, the ground of appeal raised by the appellant are partly allowed."

4.10 Thus, the penalty u/s 271(1)(c) levied by the AO stood sustained by learned CIT(A) on long term capital gains of Rs. 40,79,195/- on the sale of land component in the factory building. The assessee merged both leasehold land and factory building constructed on the said land as one single asset viz Factory Building in its books of accounts as well while computing capital gains chargeable to tax in filing its return of income with Revenue. It is claimed that if the computation of capital gains as was done by the AO between short term capital gain on factory building and long term capital gain on land component is sustained then in that situation , the assessee w.d.v. of the Block of the depreciable assets being Building will go up than the wdv of the Block of Asset being Building adopted by the assessee on which depreciation was claimed since AY 2010-11 onwards till AY 2016-17 and hence the assessee will be entitled for claiming higher depreciation in the years to come post impugned assessment year on the higher w.d.v. of the Block of Asset of depreciable assets being Building. It was explained that the assessee was allotted land by CIDCO on leasehold basis for which lease premium was paid by the assessee. It was explained that the assessee is not the owner of said leasehold land allotted by CIDCO and CIDCO continued to be the owner of the said land. It was explained that the assessee constructed factory building on the said leasehold land. It was explained that the assessee had recorded in its books of accounts both the leased hold land and factory building as one asset by merging them under single block of asset viz. Building . This factory premises was rented on which income from house property by way of rent arose which was offered for taxation. No depreciation was claimed on the said factory premises for the AY 2008-09 and 2009-10. It is explained that now both the

components are broken into land and factory premsies separately to compute long term capital gains and short term capital gains respectively by authorities, to bring them to tax separately. It was explained that if the computation of capital gains is made in this manner then w.d.v. of depreciable asset as is existing in its books as on 31.03.2009 of Rs. 19,85,339/- will go up entitling assessee for higher depreciation in succeeding years while assessee was all along since AY 2010-11 till AY 2016-17 was claiming lower depreciation on lower w.d.v. of block of assets consisting of depreciable assets . The calculation under different scenario was submitted by the assessee,which is reproduced as hereunder:

"Submission on the proposition that no penalty leviable on not offering short term capital gain of Rs.3,41,382/- and long term capital gain of Rs.40,79,195/-

(i) During the year under assessment, the assessee has sold his factory premises on a CIDCO land for a consideration of Rs.1,16,00,000/- after the sale of the said factory premises the said assessee's block of depreciable asset was reflected as follows:

WDV as on 1.04.2008	Rs. 34,62,969/-
Add Improvement to the structure	Rs.48,22,390/-
	Rs.82,85,359/-
Less: Sale consideration	Rs.1,16,00,000/-
	Rs.-33,14,614/-
Add transfer of shops as a	
Capital asset from EV Homes	Rs.53,00,000/-
Wdv to be carried forward	**Rs.19,85,359/-**

Before CIT(A-26) Mumbai assessee's alternative submissions was as follows:

Land Component as valued by	
The stamp duty authorities	Rs.66,59,973/-
Less: Indexed cost of the land	
(17,04,998 x 582/389)	Rs.25,80,778/-
Long Term Capital Gain	Rs.40,79,195/-
WDV of the factory as on 1/04/2008	Rs.17,57,972/-
Add: Improvement to the structure	Rs.48,22,390/-
	Rs.65,80,362/-
Less: Sale consideration being the	
Proportionate cost of the building	
(1,16,00,000-66,59,973)	Rs.49,40,027/-
	Rs.16,40,335/-
Add: Transfer of shops as a capital	
Asset from E.V. Homes	Rs.53,00,000/-
WDV to be carried forward	Rs.69,40,335/-

After CIT(A)-26, Mumbai order assessee's block of assets on which penalty is levied will look as follows:

Land Component a valued by	
The stamp duty authorities	Rs.66,59,973/-
Less: Indexed cost of the land	
(17,04,998 x 582/389)	Rs.25,80,778/-
Long term capital gain	Rs.40,79,195/-
WDV of the factory as on 1/04/2008	Rs.17,57,972/-
Add: Improvement to the structure	
(challenged before ITAT)	Rs.17,57,972/-
Less: Sale consideration being the	
Proportionate cost of the building	
(1,16,00,000 – 66,59,973)	Rs.49,40,027/-
	Rs.-31,82,100/-
Add: Transfer of shops as a capital	
Asset form E.V. Homes	Rs.28,40,673/
WDV to be carried forward	Rs.3,41,382/-

After ITAT order the block will look as follows:

Land components as valued by	
The stamp duty authorities	Rs.66,59,973/-
Less: Indexed cost of the land	
(17,04,998 x 582/389)	Rs.25,80,778/-
Long term capital gain	Rs.40,79,195/-
WDV of the factory a on 1/04/2008	Rs.17,57,972/
Add: improvement to the structure	Rs.48,22,390/
Less: Sale consideration being the	
Proportionate cost of the building	
(1,16,00,00 – 66,59,973)	Rs.49,40,027/
Add: Transfer of shops as a capital	
Asset from E.V. Homes	Rs.28,40,673/
WDV to be carried forward	**Rs.44,81,008/**

Further the assessee is claiming depreciation from year to year right upto A. Y. 2016-17 on Rs. 19,85360/- being WDV reflected in A. Y. 2009-10, though in view of the ITAT Order the assessee is entitled for depreciation on 44,81,008/- *Therefore it is submitted that the assessee has disclosed all the details of his income including the fact of sale of factory for a consideration. Depreciation was claimed by treating the asset as depreciable asset on the footing that depreciable asset merges with the lease premium and the assessee is not a owner of the land. Calculation made by the A. O. in respect of short term capital gain on sale of depreciable asset was rejected by the CIT(A) and the alternate submission of the assessee of bifurcation of consideration received on sale of the lease component treating part of the transaction as long term capital gain was accepted by the CIT(A) and ITAT has also modified the order of the CIT(A) by confirming assessees action that there was improvement to the structure. Therefore the penalty levied by the A.O. is on the issue which is not free from debate because the long capital gain is calculated on an asset which is not owned by the assessee and in view of the alternate submission after ITAT order WDV has increased which has entitled*

the assessee to claim higher depreciation (pl be noted that the assessee till this date has not claimed higher depreciation on the enhanced WDV) Therefore Penalty u/s. 271(1)(c) on account of assessee accepting long term capital gain of Rs. 40,79,195/- requires to be deleted as the assessee has demonstrated beyond doubt that the issue is debatable one and there is no adverse tax implication to the revenue as the assessee is not claiming higher depreciation on the enhanced WDV, though he is entitled to claim the same."

4.11 We have observed that there is no merit in the contention of the assessee as the assessee whose accounts are audited by a qualified chartered accountant could not have merged lease premium paid to CIDCO on plot of land with cost of construction of the factory building as one asset under the same block of asset viz. Building . This is against the basic and fundamental principles of accounting. No depreciation on land is allowable and It is clearly an fundamental error/mistake on the part of the assessee to treat land as part of Block of Asset viz. Building which is a depreciable asset. This merged asset consisting of both leasehold land along with factory building was sold during the impugned assessment year for an aggregate consideration of Rs. 1,16,00,000/- . The assessee made computation of capital gains based on the premise that both leasehold land and factory building are merged assets in its books of accounts viz. Building and return of income was filed with Revenue showing capital gains as 'Nil' , because the assessee had claimed that new shops were purchased by it which became part of the same block of assets viz. Building which absorbed the gains made on sale of land and factory building keeping in view provisions of Section 32 read with Section 50 of the 1961 Act as Block of Asset viz. Building did not ceased to exist. The computation of income so made by the assessee of capital gains earned on sale of land and factory building at Nerul as merged asset while filing its return of income with Revenue was clearly erroneous dehors provisions of the 1961 Act. No doubt the assessee showed lower w.d.v. as on 31.03.2009 which was carried to succeeding years on which it continued to take lower depreciation in succeeding years as wdv of Block of asset was lower but the fact remains that the assessee could not have a formed belief that land would form part of the cost of factory building for claiming depreciation or for computing capital gains chargeable to tax . This is completely an erroneous action on the part of the assessee who is supported by a qualified chartered accountant and whose accounts are audited to treat land as part of block of asset viz. building and is against the basic

fundamentals of the accounting as the land could not be a depreciable asset which could form part of the Block of Asset viz Building. The Revenue on its part did not get the Revenue which it was legitimately entitled to on long term gains arising on sale of land component by the erroneous accounting done by the assessee. We have also observed that this land and factory building was rented out by the assessee in financial year ending 31.03.2008 and no depreciation was claimed for AY 2008-09(pb/page 49 and 68) . The decision of Hon'ble Delhi High Court in the case of CIT v. N.G.Technologies Limited reported in (2015) 370 ITR 7(Delhi) is relevant and applicable, wherein Hon'ble Delhi High Court held as under:

> ***"16.*** *We have examined the aforesaid reasoning but are unable to accept the said finding. All claims or deductions wrongly made cannot be treated as bona fide and protected by Explanation 1 to section 271(1)(c) of the Act. Whether or not the conduct of the assessee was legitimate or mere legerdemain would depend upon facts of each case, nature and character of the claim, whether the legal provision applicable was capable of two interpretations, whether the claim/exemption was plausible and conceivable, etc. In cases where interpretive skills and divergent views are plausible, penalty for concealment should not be imposed. The assessee need not be asked to pay penalty if he has taken a particular legal stand and preferred an interpretation in his favour. However, at the same time, the interpretation put forward or the claim made should not be banal or a ruse, per se or ex facie incorrect or wrong. Platitudinous conduct or claim is not a bona fide conduct.*
>
> ***17.*** *In the facts of the present case, it is noticeable that the assessee had claimed loss on account of sale of plant and machinery, i.e., the fixed assets, in the profit and loss account. This should not have been obviously claimed. It was without any debate and discussion a capital loss. The claim cannot be explained and justified by any argument and reasoning. The claim was positively and meaningfully incorrect and contrary to the principles of straight forward and primary accountancy. It is true and correct that an assessee would normally rely upon the legal opinion of a chartered accountant, who is required to audit accounts of the company and also submit an audit report but penalty cannot be deleted on guise or pretence of legal opinion as a smokescreen and facade. The claim or the entry in the present case was contrary to the elementary and well-known the basic principles of accountancy. The present case is not a case of a debatable issue relating to legal or accountancy principle which could have been interpreted differently.*
>
> ***18.*** *It is mandatory and compulsory for a company to get their accounts audited from a chartered accountant, who is required to submit an audit report to be filed with the return. We cannot, therefore, accept the contention of the assessee as universal and comprehensive that all claims howsoever untenable, once certified by a chartered accountant or the directors of the company, cannot be made a subject matter of penalty proceedings. This will be stretching and making the requirement to prove bona fide conduct illusionary and ineffective and would fail to, check and stop fanciful and incredible claims. It is noticeable that most of the income-tax returns are accepted without scrutiny or regular assessment and self-compliance of tax provisions is a rule required to be followed. The view, which we have taken, is in consonance with the ratio expounded in Reliance Petroproducts (P.) Ltd. (supra).*

19. *The second aspect, which arises for consideration, is whether the revised return was filed voluntarily and before the notice of the inaccurate particulars by the Assessing Officer. The factum of filing a revised return to rectify an earlier mistake is an important and relevant factor to determine whether the conduct of the assessee was bona fide. The Tribunal, in the impugned order, has held that the revised return was filed before any specific query was raised by the Assessing Officer. The Tribunal at the same time observed that the Assessing Officer had directed the assessee to file tax audit report, depreciation chart, details of all exemptions and deductions as well as details of addition to fixed assets but no question had been raised about deduction in respect of the assets. The aforesaid reasoning by the Tribunal accepts the fact that the assessee had been asked to furnish details of fixed assets and details of all deductions were called. Noticeably, in the assessment order, the Assessing Officer has recorded the following facts :*

(i) The case was taken up for scrutiny assessment by issue of notice under section 143(2) dated October 12, 2007, which was duly served on the respondent-assessee within the prescribed statutory time limit.

(ii) the assessee was asked to furnish the following details :

"Furnish the details of all exemptions and deductions claimed. Also justify as to why the same should not be accepted by the Department."

The assessment order specifically records that one of the deductions claimed was debit of Rs. 2,33,07,349 recorded in schedule 16 "general expenses" of the profit and loss account being loss on account of sale of the fixed assets. Specific reference has been made in the assessment order to this note. Thereafter, vide the notice under section 142(1) dated February 1, 2008, the assessee was asked to furnish the aforesaid details.

(iii) On February 18, 2008, the assessee was asked about the reason for regular loss. It was submitted by the authorised representative of the assessee that there was a massive fire in the factory premises on May 11, 2003, and, thereafter, the business had closed down. The assessee was asked to furnish evidence of fire loss and insurance claim received. The case was fixed for reply on February 29, 2008. The authorised representative was confronted on allowability of loss on sale of plant and machinery and besides other details were sought to justify loss along with supporting evidence.

(iv) Subsequently, a chartered accountant appeared and filed reply dated March 10, 2008, along with supporting evidence on sale of the plant and machinery and its incorporation in the depreciation chart, etc. On March 10, 2008, the authorised representative of the assessee informed that they had filed a revised return on March 8, 2008, in which they had not claimed loss on sale of fixed asset in the profit and loss account.

(v) On the basis of the revised return, the taxable income was declared at a positive figure of Rs. 33,62,974 as against the loss declared of Rs. 1,89,44,380 in the original return.

20. *Therefore, it is clear to us that the assessee had not filed revised return voluntarily but had filed the revised return after the Assessing Officer confronted the assessee and they were asked to explain how and why the loss on account of sale of fixed assets was claimed in the profit and loss account. The said loss, capital in nature and could not have been claimed in the profit and loss account.*

> ***21.*** *In view of the aforesaid discussion, we answer the substantial question of law in favour of the Revenue and against the respondent-assessee. We uphold levy of penalty by the Assessing Officer under section 271(1)(c) of the Act. The appeal is disposed of. No costs."*

We are of the view that explanation offered by the assessee cannot be considered to be a bonafide and it will not take the assessee out of clutches of penalty provisions as are contained in Section 271(1)(c) of the 1961 Act read with Explanation 1 to Section 271(1)(c) of the 1961 Act. Thus, on merits of the issue, we are of the considered view that the authorities below has rightly levied the penalty by invoking provisions of Section 271(1)(c) of the 1961 Act on this issue. Thus, the assessee fails on merits of the case. So far as legal challenge by the assessee as to defect in notice dated 28.12.2011 issued by the AO u/s 271(1)(c) of the 1961 Act, we have already adjudicated the same in para 4.7 of this order against assessee while adjudicating issue of cash deposit of Rs. 3,00,000/- in bank, which shall be applicable with equal force to penalty levied by the AO u/s 271(1)(c) on this issue also, which penalty was later confirmed by learned CIT(A). Thus, penalty levied u/s 271(1)(c) on this issue stood confirmed. We order accordingly.

5. In the result, appeal of the assessee in ITA no. 2647/Mum/2017 for AY 2009-10 is dismissed as indicated above.

Order pronounced in the open court on 30.04.2019

Sd/-	Sd/-
(Mahavir Singh)	(Ramit Kochar)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 30.04.2019
Ps. Rohit

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-

4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**