IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'F': NEW DELHI)

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER

ITA No:- 1531/Del/2017
(Assessment Year: 2008-09)

Assistant Commissioner of Income Tax, Circle- 21(2), New Delhi.	Vs.	M/s Resurgere Mines and Minerals India Ltd., 15, Morvi House, 28/30, Goa Street Ballard Estate, Mumbai - 400038
PAN No: AAACE0111B		
APPELLANT		**RESPONDENT**

Revenue by : Shri Surender Pal, Sr. DR
Assessee by : Shri Ved Jain, CA and Shri Ashish Jain, CA

ORDER

PER ANADEE NATH MISSHRA, AM

This appeal by Revenue is filed against the order of Learned Commissioner of Income Tax (Appeals)-7, ["Ld. CIT(A)", for short], New Delhi, dated 09.12.2016 for Assessment Year 2008-09, on the following grounds:

> *"1. Whether on the facts and circumstances of the case, the Ld. CIT(A) was correct in deleting the penalty imposed by the AO u/s 271(1)(c) of the Act by holding that there was a difference of opinion between the assessee and the AO regarding valuation of stock disregarding the fact that the assessee had valued its stock as per the correct method of accounting of stocks.*

2. Whether on the facts and circumstances of the case, the Ld. CIT(A) was correct in deleting the penalty imposed by the AO u/s 271(1)(c) of the I.T. Act by holding that disallowance u/s 14A of the I.T. Act was a debatable matter disregarding that the assessee had incorrectly computed the disallowance in contravention of Rule 8D of the I.T. Rules.

3. The appellant craves to be allowed to add any fresh ground(s) of appeal and / or Deleted or amend any of the ground(s) of appeal."

2. Assessment order dated 06.12.2010 was passed u/s 143(3) of the Income tax Act, 1961 (in short "the Act") determining the total income on Rs.94,52,99,610/- wherein separate additions amounting to Rs.1,69,57,108/- (on account of valuation of stock) and Rs.71,223/- (on account of disallowance u/s 14A of the Act r.w. Rule 8D of Income tax Rules) were made. The AO also passed penalty order dated 30.03.2014 u/s 271(1)(c) of the Act levying penalty amounting Rs.57,87,930/- in respect of the aforesaid two additions. The aforesaid additions were confirmed by CIT(A) vide here order dated 23.07.2011. The assessee filed appeal in ITAT against the aforesaid order dated 27.03.2012 vide ITA No.6600/Del/2014. The assessee's appeal in aforesaid appeal was disposed of vide order dated 22.12.2017 wherein the aforesaid addition of Rs.1,69,57,108/- was deleted. The addition amounting to Rs.71,223/- made u/s 14A r.w.Rule 8D was confirmed because the assessee did not press the grounds relating to this addition due to smallness of amount involved. A copy of the aforesaid order dated 22.12.2017 in assessee's aforesaid appeal in ITA No.6600/Del/2014 for AY 2008-09 was placed on record on behalf of the assessee during the appellate proceedings in the present appeal before us. Vide order dated 09.12.2016, the CIT(A) deleted the entire amount of penalty

u/s 271(1)(c) of the Act and allowed the assessee's appeal. The relevant portion of the order of CIT(A) is reproduced hereunder:-

4.1. On these grounds, the Ld. AR submitted as under:

"During the year under consideration the assessee company was engaged in the business of - extraction, processing and sale of minerals products, exploration at Nueqeon in Kheonijhar district and Mayutbhanj district of Orissa and export of iron ore fines. Further while preparing the tinenciels, the assessee has followed various accounting policies consistently and the same is duly disclosed in and procedures as prescribed by the various laws.

Assessee is consistently following uniform accounting policies since years and the same and the same is being duly disclosed by the assessee company in its balance sheet.

During the assessment proceedings the Id. AO asked assessee to furnish valuation of closing stock. Assessee vide its reply dated 6.12.2010 submitted the valuation of stock. On Perusal of the said reply the Ld AO noticed that the assessee company is following weighted Average method for valauation of stock. The Id. Assessing officer disregarded the method followed by the assessee irrespective of the fact that assessee do have the authority and right to choose as to what method for valuation of the closing stock to be adopted as conferred on him by the various laws provided that the said valuation leads to the true and fair view of the state of affairs of

the business, profession or vocation in the financial statements prepared and presented on the basis of such accounting policies.

The Ld. Assessing officer however disregarded all the explanations given and replies filed for and made an addition of Rs. 169,57108 on account of disallowance on account of valuation of stock.

In addition to this the AO has also made a additional disallowance of Rs. 71233/- under section 14A against the suo moto disallowance by the assessee of Rs. 29120/-.

The assessee then filed an appeal before the CIT(A) wherein the Ld. CIT(A) in his order dated 23.07.2013 upheld the additions made by the AO. However, the assessee being not satisfied with the decision of the CIT(A) has moved before the ITAT and has filed an appeal before the same which is still pending.

Now the Id. AO levied the penalty under section 271(1)(c) on both the additions. On going through the penalty order your honour will notice that the Id. AO has no where mentioned what made him believe that the assessee has done any concealment or furnished any inaccurate particular in the return of income. He has simply quoted the text of the addition made by him in the assessment order and quoted the judgment of Delhi High Court in the case of Zoom Communication Pvt. Ltd. (2010) 327 ITR 510.

Your honour the said judgment of Delhi High Court has nothing to do with the case of the assessee as the facts of the said case are different from that of the assessee company. In the said it was established that deduction claimed by the assessee in the profit and loss account are not in compliance with the provisions of the act. Accordingly, the court held that the penalty on unlawful claim cannot be avoided.

Your honour in the present case of the assessee no claim made in the return of income has been regarded as unlawful. The additions made by the AO are mere on the basis of difference of opinion and not account of violation of any provision of the act.

The power to impose penalty cannot be exercised if the AO is not satisfied about the existence of conditions specified in clause (a), (b), (c) of Section 271(1), before the proceedings are concluded.

In the assessee's case, the penalty proceedings have been sustained not on the basis of any defects in the books of accounts but for difference in the opinion in the AO and the assessee.

As the penalty proceedings are independent proceedings, though the finding in assessment proceedings are independent proceedings, these cannot be taken as res adjudicata.

Penalty on difference in value of stock applying FIFO as against weighted adopted by the assessee

On going through the reply of the assessee filed during the course of assessment proceedings your honour will agree that the assessee has no where concealed any particular of income and neither has furnished any inaccurate particulars of the income. Infact there arises only a difference of opinion between the two. The assessee has bonafidely followed the weighted average method of valuation of stock for years.

Your honor according to the Income Tax Act 1961, the penalty under section 271(1)(c) can be levied when the assessee has actually concealed the particulars of income. Mere suspicion of AO that the assessee has given wrong particulars or concealed its income is no ground to levy the penalty under section 271(1)(c) of the Act. Also additions made on the basis of difference of opinion between the AO and the appellant cannot lead to levy of penalty. In the present case the assessee has duly disclosed its income in returns of income filed and has calculated the income which as per the assessee is correct and is without any contention of concealing the income. It is not the case that the appellant has concealed some income. It is just that assessee was under a bonafide belief that the income so calculated is correct and the method used for calculating the value of stock is valid and accordingly the same was offered for taxation. Thus there can be no allegation that the assessee has

concealed the particulars of its income. There is no instance in the order passed by the Ld. AO wherein the Id. AO has mentioned any activity of the appellant which could conclude that there was some concealment of any facts. Also your honor the assessee has not furnished any inaccurate particulars. Thus the initiation of penalty proceedings is bad in law and against the facts of the case.

Your honour it is not a case here where the assessee has adopted an unlawful method to value its inventory. The weighted average method is a recognised method of valuation and therefore the same cannot be regarded as baseless. Accordingly, the penalty cannot be levied for the difference on account of new method adopted by the AO.

Your honor further reliance is placed on following case laws where it is held that no penalty can be imposed on disallowance on account of valuation of stock:

In the case of CIT vs. J.H. PARABIA (TRANSPORT) (P) LTD. HIGH COURT OF GUJARAT (2006) 284 ITR 0361 it was held as under:

> *7. As can be seen from the question raised and referred, the entire submission of Revenue and the basis of levy of penalty gets summarised in the frame of the question. However, in light of the facts found by the Tribunal, and in absence of any evidence to show that such findings are incorrect in any manner whatsoever, it is not possible to accept the contention raised on behalf of the applicant-*

Revenue. It is not possible to state that the method of accounting adopted by the assessee was such that it did not reflect the position correctly considering the fact that for three years the same had been accepted by the Department. Once this was the position, the bona fides of the assessee could not be doubted.

In the case of Rajiv Kumar Garg Vs.ITO (ITAT Delhi), ITA No. 519/Del/2014 it was held as under:

2. Mere fact that the addition has been accepted or is confirmed in quantum proceedings cannot be conclusive of penalty imposition.

3. The Hon'ble Calcutta High Court in case of Durga Kamal Rice Mills Vs. CIT (2004) 265 ITR 25 (Cal.) has held that quantum proceedings are different from penal proceedings. The Hon'ble Kerala High Court in CIT Vs. P.K. Narayanan (1999) 238 ITR 905 (Ker.) has held that despite the addition being confirmed by Tribunal in quantum proceedings, the penalty can still be deleted by the Tribunal, if the facts justify.

4. The addition has been made only on the basis of estimate made by the A.O. It is settled legal position that when income is estimated, then there can be no question of imposing penalty u/s 271 (l)(c) of the Act.

5. The Hon'ble Delhi High Court in CIT Vs. Aero Traders Pvt. Ltd. (2010) 322 ITR 316 (Del.) has held that no penalty v/e 271(1)(c) can be imposed when income is determined on estimate basis.

a) Hon'ble Punjab and Haryana High Court in Harigopal Singh Vs. CIT (2002) 258 ITR 85 (P&H) b) Hon'ble Gujarat High Court in err Vs. Subhash Trading Co. 221 ITR 110 (Guj.)

6. It is apparent that the bedrock of instant penalty is the estimate of valuation of closing stock, the same cannot be sustained. The penalty is thus, ordered to be deleted.

In the case of ACIT vs, Agrawal Enterprises IT Appeal No. 1201(Pune) of 2009 it was held as under by the ITAT:

Weighted average method is a recognized method and it cannot be branded as something abnormal or baseless. It is a case where assessee has been following a consistent method of valuation of closing stock for the last 16 years. Reliance on the principle of cost or market price whichever is less, for determining the closing stock as per cost, the assessee has been employing the weighted average cost method. The approved AS-2 for valuation of inventories also make it clear that 'the cost of inventories is to be determined by following the FIFO method or the weighted average cost method.

> *Undisputedly, it is not a case of change of method of valuation in the case of assessee but the method of valuation which has consistently been followed for the last so many years. Under these circumstances, we fully concur with the finding of the learned CIT(A) that the method of valuation of stock followed by the assessee was an accepted method in consonance with the law as well as Accounting Standard and therefore, there is no reason to discard the same. We thus do not find reason to interfere with the first appellate order on the issue which is a speaking order supported with the decisions relied upon by him. The same is upheld. Ground No. 2 is accordingly rejected.*

In the case of Lakshmi Jewellery vs CIT, 1988 (2) TMI59 - Hon'ble ANDHRA PRADESH High Court held as under

> *There is force in the submission of Mr. Satyanarayana that while valuing the closing stock for ascertaining the profits, the assessee went by his usual method adopted in the past years and did not think that the Income-tax Officer would act in a manner different from what he did in the past years. As long as an inconsistent behaviour on the part of the assessee is not shown in the method of valuation of closing stock adopted for 1973-74 assessment, the Revenue would not be justified in attaching any blame on the*

assessee or for the matter of that of having concealed income by undervaluing the closing stock.

We need not reiterate the principles governing the levy of penalty under section 271(1)(c) of the Act as these are too well-settled. If we may refer to the most celebrated judgment of the Supreme Court in this matter in C!T v. Anwar AIi[1970] 76 ITR 696, the requirement tor levying a penalty under section 271 (1)(c) is that the Revenue must straightaway discharge its obligation to prove concealment positively. If there is no evidence on the record except the explanation given by the assessee which explanation is either found to be false or is unacceptable to the Revenue, it does not follow that escapement has been established. The finding given in the assessment proceedings for determining or computing the tax is not conclusive. It may be good evidence and it is open to the assessee to establish his case during the course of penalty proceedings even though the assessment as such has been accepted.

In the case of R Madhavan Nair Versus Commissioner Of Income-Tax, Kerala. 1972 (1) TMI 22 - KERALA High Court held that

Apart from the rejection of the explanation of the assessee, there was no material whatever available before the authorities to come to the conclusion that the value of the 471 bags of raw nuts with the bank represented the income of the assessee. Nor was there any clear evidence in the case or for that matter any finding that the

valuation given by the assessee was a deliberate under-valuation in order to conceal the particular income. The Tribunal in its order used the words deliberately undervalued ". But this we do not understand as a finding sufficient to discharge the burden that is cast on the department by section 271 (l)(c). The matter is concluded by the decision of the Supreme Court in Commissioner of Income-tax v. Anwar Ali. That too was a case where the assessee's explanation regarding the sum of Rs. 87,000 which he had admittedly deposited in a bank was rejected, and the amount added as his income in the assessment proceedings. When action for imposition of penalty was taken under section 271(1)(c) it was contended that the ingredients that should be satisfied for the application of the section had not been made out. This contention was accepted by the Supreme Court and their Lordships came to two conclusions : the first of the conclusions is :

"The section is penal in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest. "

Having said so, they proceeded to deal with the next question and we shall extract the paragraph dealing with this question:

'The next question is that when proceedings under section 28 are penal in character what would be the nature of the burden upon the department for establishing that the assessee is liable to payment of penalty. As has been rightly observed by Chagla C. J. in Commissioner of Income-tax v. Gokuldas Harivallabhdas, the gist of the offence under section 28(1)(c) is that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income and therefore, the department must establish that the receipt of the amount in dispute constitutes income of the assessee. If there is no evidence on the record except the explanation given by the assessee, which explanation has been found to be false, it does not follow that the receipt constitutes his taxable income. "

Their Lordships proceeded to state:

" Another point is whether a finding given in the assessment proceedings that a particular receipt is income after rejecting the explanation given by the assessee as false would, prima facie, be sufficient for establishing, in proceedings under section 28, that the disputed amount was the assessee's income. It must be remembered that the proceedings under section 28 are of a penal nature and the burden is on the department to prove that a particular amount is a revenue receipt. It would be perfectly legitimate to say that the mere

fact that the explanation of the assessee is false does not necessarily give rise to the inference that the disputed amount represents income. It cannot be said that the finding given in the assessment proceedings for determining or computing the tax is conclusive. However, it is good evidence. Before penalty can be imposed the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars.

In the present case, it was neither suggested before the High Court nor has it been contended before us that, apart from the falsity of the explanation given by the assessee, there was cogent material or evidence from which it could be inferred that the assessee had concealed the particulars of his income or had deliberately furnished inaccurate particulars in respect of the same and that the disputed amount was a revenue receipt. "

It has not been contended before us that, apart from the rejection of the explanation of the assessee as false, there was any material before the authorities justifying the conclusion that the value of 471 bags of raw nuts pledged with the bank represented the income of the assessee or that the amount representing the difference in the value of the closing stock by the adoption of a

higher valuation of the closing stock by the assessing authorities represented the assessee's income. We therefore think that the matter must be governed by the decision of the Supreme Court in Commissioner of Income-tax v. Anwar Ali. This decision has been again referred to with approval by the Supreme Court in a recent pronouncement in Commissioner of Income-tax v. Khoday Eswarsa and Sons. We therefore answer the question in the negative, that is, in favour of the assessee and against the department. We make no order as to costs. "

Penalty on disallowance under section 14A

Your honour the Id. AD has made additional disallowance under 14A rejecting the calculation done by the assessee without giving any basis of the same.

It is to be noted that every addition/disallowance must not give rise to imposition of penalty. If that be so penalty would have been made compulsory on all additions/ disallowances made in the assessment proceedings without looking into the facts of the case. But this is not the case. Penalty proceedings are separate from assessment proceedings and are quasi criminal. Penalty cannot be blindly imposed. Assessing officer has to prove the malice intention of the assessee or furnishing of some inaccurate particulars. Here in the case of the appellant the Id. AO has failed to do so.

In the case of CIT vs. Reliance Petro Products (P) Ltd. (2010) 322 ITR 158 the honorable Supreme Court of India held as under:

"10. It was tried to be suggested that Section 14A of the Act specifically excluded the deductions in respect to the expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. It was further pointed out that the dividends from the shares did not form the part of the total income. It was, therefore, reiterated before us that the Assessing Officer had correctly reached the conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to

the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1) (c). If we accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the Legislature. "

In the case of Espire Infolabs Private Limited vs. ITO ITA No. 4190-4191/Del/2013, the Honorable ITAT (Delhi) held as under:

In our opinion, merely because certain disallowance is made under Section 14A rejecting the assessee's contention that no disallowance is called for would not be sufficient to levy the penalty under Section 271 (1)(c). There is no allegation of the Revenue that the assessee furnished any details which are found to be false or inaccurate. Merely because some disallowance is computed as per the formula prescribed under Rule SO, it cannot be presumed that the assessee has concealed the income or furnished inaccurate particulars of income. While taking this view, we derive support from the decision of Hon'ble Apex Court in the case of CIT Vs. Reliance Petroproducts Pvt.Ltd. - 322 ITR 158.

In the case of Nalwa Investment Limited I. T.A. No.380S/0/2010 for assessment year 2005-06, dated 29.10.2010 the Honorable ITAT(Delhi Bench) held as under:

"No computation of disallowance was made u/s 14A as no disallowance was made in the return of income. However, the accounts have been audited and the return was accompanied by the tax audit report. The latter did not suggest any disallowance u/s 14A. Therefore, it can be inferred that all expenses were claimed in full as the auditors did not suggest disallowance of any part of the expenditure relating it to the dividend income. Thus, it can be concluded that the claim was made on the basis of tax audit report. There is no allegation by the AO that there was any collusion between the auditor and the assessee to enhance the loss in' the return of income by ignoring the provision contained in section 14A. Therefore, it can be said that the assessee has furnished an explanation which is bona fide. In regard to proposition at (c) above, the finding of the Id. CIT(A) is that the disallowance is disputable. The section, as it existed at the time of filing the return, does contain a provision for disallowance of expenditure which is related to non-taxable income. Therefore, it is expected of any assessee to attempt at segregating expenditure which is related to such a claim. No attempt has been made in this behalf. However, it is also a fact that such segregation is beset with lot of problems as the issue has finally been laid to rest by introduction of Rule 80 in the Income-tax Rules in the year 2008. The assessee did not have benefit of this rule when it filed the return of income. Therefore, even in absence of any attempt on the part of the assessee, it can be said that questions of disallowance and its quantification are quite disputable and

can lead to bona fide difference in opinion between the assessee and the authorities. In such a situation, the levy of penalty will not be justified. "

In the case of ACIT vs. Jindal Equipment Leasing and Consultancy Services Ltd. 2012 51 SOT 133 (Delhi) (URO) the honorable ITAT (Delhi Bench) following the above judgments held as under:

6. We have considered the facts of the case and rival submissions. We find that the assessee had claimed expenditure, which was incurred in the course of business, a part of which was disallowed by the Assessing Officer on a proportionate basis by allocating it towards the earning of dividend income. The facts are in pari-materia with the facts of the case of Nalwa Investments Limited (supra), in which the penalty pertained to a subsequent year, being assessment year 2005-06. The provision contained in section 14A was applicable to the assessee. It was inter alia mentioned that allocation of expenses is beset with a lot of problems and the issue was laid to rest by introduction of Rule 80, in the year 2008. Therefore, even in absence of any attempt on the part of the assessee to segregate the expenditure, it can be said that the questions of disallowance and its quantification are contentious, which leads to the inference that the difference of opinion between the assessee and the authorities is bonafide. Respectfully following this decision, it is held that the learned CIT (A) was right in deleting the penalty.

Your honor the issue in the case of the assessee of disallowance of claim under section 14A is highly debatable one. The issue being debatable no penalty can be levied as such. In this regard reliance has been placed on the following judgments:

In the case of CIT vs. Jindal Equipment Leasing and Consultancy Services Ltd. ITA no. 68/2012, the Honorable High Court of Delhi in its order dated 03/02/2012 held as under:

"6. The CIT (Appeals) and the tribunal have considered the aforesaid explanation given by the assessee to justify their claim why no disallowance was mandated under Section 14A in the present case. They have accepted that the explanation given by the assessee was genuine and bona fide. The contention of the respondent assessee may have been rejected in the quantum proceedings but when deciding whether or not penalty for concealment should be imposed, the justification and explanation why the assessee had made the claim, is to be examined. Disallowance under the said section have been subject matter of debate and different views have been expressed. A legal contention which was plausible and merited consideration was raised. Accordingly, the appellate authorities have applied the explanation to Section 271(1)(c) of the Act. Looking at the nature of explanation offered and the provision in question i.e. Section 14A, which was incorporated by the Finance Act, 2001 with retrospective effect from 1st April, 1962, we do not think in the present

case any substantial question of law arises in view of the factual matrix involved. Accordingly, the appeal is dismissed."

In the case of CIT vs. Liquid Investment and Trading Co. ITA No. 240/2009 the Honorable High Court of Delhi vide its order dated 05/10/2010 held as under:

"Both the CIT(A) as well as the ITAT have set aside the penalty imposed by the Assessing Officer under Section 271(1)(c) of the Income Tax Act, 1961 on the ground that the issue of deduction under Section 14A of the Act was a debatable issue. We may also note that against the quantum assessment where under deduction under Section 14A of the Act was prescribed to the assessee, the assessee has preferred an appeal in this Court under Section 260A of the Act which has also been admitted and substantial question of law framed. This itself shows that the issue is debatable. For these reasons, we are of the opinion that no question of law arises in the present case. "

In the case of ACIT vs. AT Invofin India Pvt. Ltd. ITA no. 4479/Del/2013, the Honorable ITAT Delhi Bench held as under:

11. In the present case also, as we have already pointed out as there was a difference of opinion as regards to the working of disallowance u/s 14A of the Act. The assessee disallowed suo-moto a sum of 16,020/- while the A.O worked out the disallowance at 41,10,546/- which was more the total claim of the expenses at 32,06,595/-. Therefore, merely on this basis that

the claim of the assessee was not accepted by the A. 0 it cannot be said that the assessee either concealed the income or furnished inaccurate particulars of income. Therefore, by keeping in view the ratio laid down by the Hon'ble Apex Court in the case of CIT Vs Reliance Petro Products Pvt. Ltd. (supra), we are of the view that the Ld. CIT(A) was fully justified in deleting the penalty levied by the A.O u/s 271(1)(c) of the Act:

We do not see any infirmity in the impugned order of the Id. CIT(A) and accordingly do not see any merit in this aspect of the department.

In the' case of Trans Asia Consultant Pvt. Ltd. vs. ACIT ITA No. 141/Del/2013, the Honorable ITAT Delhi Bench held as under:

14. The ITAT Delhi 'F' Bench in the case of DCIT vs Nalwa Investments Ltd. (supra) cancelled the penalty imposed on the assessee pertaining to the disallowance u/s 14A of the Act. The relevant observations and findings are as under:-

15. In view of above, we observe that the authorities below have not recorded any finding that the explanation offered by the assessee before the Assessing Officer was found to be false and in this situation, the decision of Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt. Ltd. (surpa) comes into play to rescue the assessee from penalty.

Respectfully following the above decision, we hold that if the contention of the revenue is accepted, then in the case of Shri Manish Jain where the

claim is not accepted by the Assessing Officer for any reason, the assessee will invite the penalty u/s 271 (l)(c) of the Act which is not the intention of the legislature. Accordingly, sole ground of the assessee is allowed and penalty order as well as impugned order is set aside by deleting the penalty.

In view of the above judgment, it is can be concluded that the stand taken by the Id. AO is totally incorrect and same is liable to be deleted. Mere rejection of claim does not mean concealment

Your honour will endorse that the Id. AD has taken all the details, on the basis of which the disallowances have been made, either from the return of income filed by the assessee or from the Balance Sheet and the Profit and Loss Account attached with that.

It is thus beyond the rarest stretch of imagination of the assessee that if every detail has been taken from the papers filed by the assessee then how can the Id. AD reach a conclusion that the assessee has concealed the particulars of its income. It is just that while making the addition the Id. AO has grossly ignored the facts of the case and material brought on record by the assessee.

Your honour will appreciate that when called upon the assessee has given the explanation and that explanation was a bona fide one. Accordingly the case is not covered by Explanation 1 to section 271 (1)(c) of the Act. Your honour will endorse that on going through the assessment order it is

clearly evident that the Id. AO has made the addition on the basis of not being satisfied by the explanation filed by the assessee. Now, by every chance this cannot be a ground for initiating the penalty under section 271(1)(c) of the Act. The Id. AO has failed to bring out the fact that the assessee willfully concealed the particulars of its income or furnished inaccurate particulars.

Your honour will appreciate the decisions delivered by various courts in the following cases where they have specifically held that mere rejection of certain claims for expenses/ deductions does not mean that there was concealment of income on the part of the assessee.

i) .J.K Jajoo vs. CIT (1990) 181 ITR 410, 412(MP) [mere rejection of claim for expenses would not mean that there was concealment of income]

ii) CIT vs. University Printers, (1991) 188 ITR 206(AII) [mere rejection of the explanation of the assessee would not mean that there was concealment of income]

iii) CIT vs. Nepani Biri Co. Trust, (1991) 190 ITR 402, 403(AII) [where the difference between the income returned and the income assessed was due to 'disallowance of expenditure claimed by the assessee]

iv) CIT vs. Dhamchand 1. Shah,(1993) 204 ITR 462, 468-69(Bombay) [penalty cannot be sustained merely on the grounds that certain additions

were made and the same were accepted by the assessee without invoking the Explanation to Section Uls 271 (1)(c)].

v) CIT vs. Inden Bislers (1999) 240 ITR 943, 946, 947 (Madras)[tribunal was held - justified in canceling the penalty where it has recorded a finding that the additions . have' been made because a particular expenditure was not justifiable from a commercial point of view and that there was no evidence of concealment of income). Thus the action of the assessing officer in levying the penalty is bad in law and the penalty is liable to be deleted otherwise same will create undue hardship on the assessee. Penalty and assessment proceedings are two different things The power to impose penalty cannot be exercised if the AO is not satisfied about the existence of conditions specified in clause (a), (b), (c) of Section 271(1), before the proceedings are concluded.

In the assessee's case, the penalty proceedings have been sustained not on the basis of any defects in the books of accounts but for some error which has been accepted by the assessee.

As the penalty proceedings are independent proceedings, though the finding in assessment proceedings are independent proceedings, these cannot be taken as res adjudicata. Reliance is placed on the following cases:-

(i) Consideration that arise in penalty proceedings are different from those that arise in assessment proceedings.

a. 169 ITR 782 (All) Banaras Textiles

b. CIT vs Govind Gokhale 178 ITR 509 (Ker).

c. Hotels a Allied Traders vs CIT 221 ITR 619 (Kar)

(ii) Finding recorded in Asstt. Order constitute good evidence but cannot be reported in conclusion.

a. Anantharam Veerasinghani a Co. vs err 123 ITR 457

b. CIT vs Ishtiaq Hussain 232 tm 673 (All).

(iii)Finding contained in the Asstt. Order would not be of any use. AO is required to record its own findings in penalty order.

a. CIT vs Ratnam (1995) Tax LR 504,506

b. CIT vs Chetan Dass Lachman Dass 214 ITR 726 (Del)

c. CIT vs J K Synthetics Ltd 219 tm 267 (Del).

Thus the levy of penalty is bad in law specifically with respect to the fact that the assessing officer has been unable to depict that the appellant has failed to disclose certain particulars.

Your honour assessee is innocent and has always co-operated with the department in all legal proceedings. Merely if some disallowances are made on the basis of various assumptions drawn by the Id. AO the assessee could not be asked to be held liable for penalty. Your honor in the

case of CIT vs Reliance Petro Products 322 ITR 158 (SC) it was held that S. 271 (1) (c) penalty cannot be imposed even for making unsustainable claims. In the said case The assessee claimed deduction u/s 36 (1) (iii) for interest paid on loan taken for purchase of shares. The AO disallowed the interest u/s 14A and levied penalty u/s 271 (1) (c) on the ground that the claim was unsustainable. The penalty was deleted by the appellate authorities. On appeal by the department to the Supreme Court, HELD dismissing the appeal:

"(i) S. 271 (1) (c) applies where the assessee "has concealed the particulars of his income or furnished inaccurate particulars of such income". The present was not a case of concealment of the income. As regards the furnishing of inaccurate particulars, no information given in the Return was found to be incorrect or inaccurate. The words "inaccurate particulars" mean that the detail$ supplied in the Return are not accurate, not exact or correct, not according to truth or erroneous. In the absence of a finding by the AO that any details supplied by the assessee in its Return were found to be incorrect or erroneous or false, there would be no question of inviting penalty u/s 271 (1)(c).

(ii) The argument of the· revenue that "submitting an incorrect claim for expenditure would amount to giving inaccurate particulars of such income" is not correct. By no stretch of imagination can the making of an incorrect claim in law tantamount to furnishing inaccurate particulars. A mere

making ot the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. If the contention of the Revenue is accepted then in case of every Return where the claim made is not accepted by the AO for any reason, the assessee will invite penalty u/s 271(1)(c). That is clearly not the intendment of the Legislature.

(iii) The law laid down in Dilip Shroff 291 ITR 519 (SC) as to the meanings of the words "conceal" and "inaccurate" continues to be good law because what was overruled in Dharmendra Textile Processors 306 ITR 277 (SC) was only that part in Dilip Shroff where it was held that mens rea was an essential requirement for penalty u/s 271 (1)(c)."

Your honor in the case of CIT vs Mahanagar Telephone Nigam Limited ITA No. 626/2011 the AO imposed penalty u/s. 271(1)(c) on the ground that the assessee had filed "inaccurate particulars" by wrongly (i) claiming deduction for contribution to a 'staff welfare fund' despite the bar in s. 40A(9) and the qualification of the auditors and (ii) claiming depreciation on vehicles at 25% though the prescribed rate was 20%. The assessee argued that despite s. 40A(9), the payment to the fund was allowable as "business expenditure" and that the higher depreciation was claimed on the basis that the vehicles were "plant & machinery" despite the lower rate prescribed for vehicles in the Rules. The CIT (A) & Tribunal deleted the penalty. On appeal by the department, HELD dismissing the appeal:

"There is no finding by the AO that the assessee furnished inaccurate particulars and that its explanation was not bonafide. Accordingly, the imposition of penalty u/s 271(1.)(c) was a "complete non-starter". A mere erroneous claim made by an assessee, though under a bonafide belief that, it was a claim which was maintainable in law cannot lead to an imposition of penalty. The claim for deduction was made in a bona fide manner and the information with respect to the claims was provided in the return and documents appended thereto. Accordingly, there is no furnishing of "inaccurate particulars". Making of an incorrect claim for expenditure does not constitute furnishing of inaccurate particulars of income (Reliance Petroproducts 322 ITR 158 (SC) followed)"

It is therefore requested before you honour to kindly delete the penalty levied by the Id. AO as neither the appellant has furnished inaccurate particulars nor it has concealed its income.

Even otherwise the addition made bv the AQ is not sustainable in law

Your honour the Id. AO has made two disallowances vide his order dated 06/12/2010 i.e. 1. Valuation of stock on FIFO basis rejecting the weighted average followed by the assessee thereby making addition of Rs. 16957108/-

2. Disallowance under section 14A of Rs. 71223/-.

The above additions made by the Id. AO are not tenable in law and on the facts of the case.

Valuation of stock;

Your honour the assessee is into the business of extraction, processing and sale of Iron ore. The main product of the assessee company is Calibrated Lump Ore(CLO). The other products are lump ore and size ore. The CLO is processed out of the Run of Mine(ROM) which extracted out of the big rock using the explosives. The said Run of Mine is passed through series of crushers and processed until the particles are smaller than 19mm. The said particles of 19mm are termed as CLO which is the ultimate product of the assessee company.

The ROM, Calibrated Lump Ore(CLO) and other products is measured in tons/ metric tons. Accordingly, the assessee adopted weighted average method for valuation of the same. The Id. Ao during the course of assessment proceedings doubted the methodology adopted by the assessee and proposed to value the ROM using FIFO method of valuation. Accordingly, he worked out the value of stock on the basis of FIFO method and added differential amount of Rs. 1,69,57,108/- in the hands of assessee and treated the same as undervaluation of stock.

Your honour the Id. AO simply rejected the method of valuation adopted by the assessee without giving any reason as to why the same is not suitable method for valuation. He has worked the monetary difference in the value

of the closing stock as per the two methods. In para no. 4 of the assessment order the Id. Ao has shown an example that the closing value of the stock of ROM is less than cost of production due to the credit of low priced opening stock. Your honour here it important to point here that the difference worked out by the AO is only for the closing stock. He has not done the similar calculation for the opening stock. Accordingly, the gross profit of the company is substantially effected by the by the modified value of closing stock. The method of valuation has to be applied for both closing and opening stock otherwise the profit and loss a/c will not give the true picture. Accordingly, the under valuation of stock worked out by the AO is fundamentally incorrect and against the facts of the case.

Even otherwise the undervaluation depicted by the AO is incorrect as the Id. AO has picked up stock at a single point of time and valued it using other valuation method. The working as done by the AO if done at a particular point of time will always show a difference in the value of stock. Your honour the Id. AO has easily ignored the fact that the weighted average method of valuation has been adopted by the since its incorporation i.e. 24/03/1987. Accordingly, the impact of change in method of valuation (under/over valuation), if any, is to be worked out then it has to be done from the very beginning. The AO cannot select a particular point of time from where it has to be applied as the value of stock at particular point of time has a cumulative effect of method followed over the number of years.

Furthermore the weighted average method of valuation is also recognised method of valuation. The Accounting Standard- 2 of ICAl on Valuation of Inventory suggests both weighted average and FIFO method as' fair/good method of valuation. Moreover, various judicial forums have acknowledged the use of weighted average method of accounting and criticized the adoption of other method by the AO at particular time and working the difference accordingly.

Accordingly, we pray before your honour that the addition of under valuation of stock worked out by the AO is itself not tenable in law and accordingly the same cannot in any away form basis for levying the penalty for concealment or furnishing of inaccurate particulars.

Disallowance under section 14A:

Your honour the Id. AO has computed a disallowance of Rs. 1,00,343/- under 14A as against the suo moto disallowance of Rs. 29,120/- done by the assessee itself. The Id. AO has rejected the disallowance done by the assessee without giving any reason for the same.

Your honor as per the provisions of section 14A r.w.r. 8D of the I. T.Rules, that the having regard to the books of accounts maintained by the assessee if the assessing officer is not satisfied with the any of the following claims of the assessee:

a) Expenses incurred in relation to income which does not form part of the total income or,

b) No expenses incurred in relation to income which does not form par to the total income.

Then the assessing officer being not satisfied with the claim of the assessee shall determine such expenses with help of the methods prescribed under the act i.e. Rule 8D of the I T Rules. Meaning thereby, the assessing officer cannot adopt the methodology given in Rule 80(2) unless satisfaction as to the claim of the assessee is recorded. The satisfaction is not simply stating that the claims of the assessee are not acceptable. The assessing officer must make reference to the books of accounts of the assessee while recording such satisfaction.

In this regard it is important to refer to the recent judgment of High Court of Delhi in the case of CIT vs. Taikisha Engineering India Limited ITA 115/2014 & 119/2014 dated 25/11/2014 where the court has discussed in length the relevance the statutory requirement of recording of satisfaction by the assessing officer. The court held as under:

"Section 14A of the Act postulates and states that no deduction shall be allowed in respect of expenditure incurred by an assessee in relation to income which does not form part of the total income under the Act. Under sub Section (2) to Section 14A of the Act, the Assessing ·Officer is required to examine the accounts of the assessee and only when he is not satisfied

with the correctness of the claim of the assessee in respect of expenditure in relation to exempt income, the Assessing Officer can determine the amount of expenditure which should be disallowed in accordance with such method as prescribed, i.e. Rule 8D of the Rules (quoted and elucidated below). Therefore, the Assessing Officer at the first instance must examine the disallowance made by the assessee or the claim of the assessee that no expenditure was incurred to earn the exempt income'. If arid only if the Assessing Officer is not satisfied on this count after making reference to the accounts, that he is entitled to adopt the method as prescribed i.e. Rule 80 of the Rules. Thus, Rule BDis not attracted and applicable to all assessee who have exempt income and it is. not compulsory and necessary that an assessee must voluntarily compute disallowance as per Rule BD of the Rules. Where the disallowance or _nil' disallowance made by the assessee is found to be unsatisfactory on examination of accounts, the assessing officer is entitled and authorised to compute the deduction under Rule 80 of the Rules. This pre-condition and stipulation as noticed below is also mandated in sub Rule (1) to Rule 80 of the Rules.

The above judgment of Delhi High Court clearly interprets the provisions of law given in section 14A(2) and Rule 80(1), as to mandatory recording of satisfaction by the assessing officer before exercising/ adopting the methodology given in sub rule (2) of the Rule 80.

Your honour in the present case of the assessee the Id. AO in his assessment order has no where discussed as to why the claim of the assessee of suo moto disallowance of Rs. 29,120/- is not satisfactory having regard to its books of accounts.

Moreover, while calculating the value of investment in the working as per Rule 80(2) he has wrongly taken the value of investments in subsidiary companies of Rs. 1904.5 lacs.

Your honor, it must be noted here that the amount of investment made by the appellant company in its subsidiary was not made for the purpose of earning exempt income but to exercise control and ownership over it. The said investment has been duly disclosed in the audited balance sheet of the appellant company for the year under consideration.

In this regard reliance is being placed on the following:

1. G.E. Capital Services India And Others Versus Addl. CIT, Rage 12, New Delhi And Others I. T.A. No. 2897/0el/2007, I. T.A. No. 2807/0el/2007 Dated - 10 June 2015 ITAT Delhi

2. Garware Wall Ropes Limited vs, Addl.CIT ITA No. 5408/Mum/2012 judgment dated 15/01/2014

3. EIH Associated Hotels Limited Vs. DCIT , Company Circle 11(1), ITA No. 1503/MDS/2012

4. M/s.J M Financial Limited vs. Additional Commissioner of Income Tax (ITA No. 4521/Mum/2012 dated 26 march 2014)

5. Interglobe Enterprises Ltd. Vs. OCIT, Circle-11, ITA No. 1362 & 1032/Del/2013

In all the above judgments, it has been categorically held that investment in subsidiary company or group concern cannot be regarded as investment income of which does not form part of the total income.

In view of the above the addition made by the AO is otherwise not tenable in law and accordingly, the same cannot be basis of levying of penalty under section 271 (1)(c). "

4.2. I have carefully considered the penalty order and written submissions filed by the Ld. AR. The AO levied penalty u/s 271 (1)(c) on quantum addition of RS.1,69,57, 108/- on account of rejection of books of accounts u/s 145 of the Act to the extent of method of valuation of closing stock adopted by the appellant. The AO rejected the weighted average value method adopted by the appellant and adopted the FIFO method resulting in difference in valuation at RS.1,69,57,108/- which was added to the total income. Further, penalty u/s 271(1)(c) was also 1evied on additional disallowance of Rs.71,223/- u/s 14A read with Rule BD. The impugned additions were confirmed by the Ld. CIT(Appeals) vide her order dated 23.07.2011. Pursuant thereto the AO issued a show cause notice dated 10.03.2014 but no reply was filed by the appellant Penalty was

levied by the AO relying on the judgement of the Hon'ble Delhi Court in the case of CIT vs. Zoom Communication Ltd. 327 ITR 510. The AO held that the appellant had evaded tax by filing inaccurate particulars and thereby concealing its income of RS.1,70,28,321/- and levied a penalty of Rs.57,87,930/-.

4.3. It is evident that penalty is levied on addition resulting out of rejection of method of valuation of closing stock. The appellant had been consistently following weighted average method for valuation of stock. The AO however, substituted the FIFO method of valuation in place of the weighted average method and rejected the books of accounts of the appellant to this extent Consequential addition due to the substitution of the valuation method resulted in the impugned addition of Rs.1,69,57,108/-. The impugned addition arose only because the AO was of the opinion that the valuation method adopted by the appellant was not acceptable. All the facts were available in the return of income and in the submissions filed before the AO. Weighted average method is also an accepted method of valuation of stock and the appellant had been following the same consistently over the years. It is not the case of the AO that there is any suppression of information or furnishing of inaccurate particulars with the intent to conceal income. These are critical prerequisites for invocation of penal proceedings within the meaning of section 271 (1)(c) of the Act.

4.4. Further, it is for consideration whether penalty for concealment must be imposed as the quantum is decided against the appellant It is a settled legal position that penalty proceedings and quantum proceedings are separate and distinct. It is equally a settled legal position that the explanation offered in the penalty proceedings has to be considered separately and independently in the matrix of requirements of the penal provisions. As per opinion expressed by the Hon'ble Supreme Court in CIT vs. Anwar Ali, 76 ITR 696 findings in assessment order may constitute good evidence but it does not follow that penalty for concealment u/s 271 (1)(c) is mandatory whenever an addition or disallowance is made. The appellant has stated that the AO has not given any finding that the details submitted by the appellant were incorrect or false. The appellant had clearly not concealed or furnished inaccurate details. The details were on record but there was a difference of opinion between the appellant and the AO regarding valuation of closing stock.

4.5. In the case of Commissioner of Income-tax v. Inden Bislers (1990) 240 ITR 943, 947 (Mad), it was observed:

> *"A finding of fraud is a serious matter in any context against any person and should not be lightly recorded in the absence of proper evidence in support of that finding. The mere fact that certain amounts claimed by the assessee had been disallowed and treated as income does not necessarily lead to the conclusion that the*

assessee was guilty of fraud or willful neglect. The fact that the Explanation to section 271(1)(c) of the Income-tax Act, 1961, requires the assessee to show that there was no fraud or willful neglect does not in any way enable the Revenue to contend that there is a presumption of fraud or neglect without adducing any evidence, whatever to substantiate such assertion. "

4.6. The Hon'ble Supreme Court in the case of CIT vs. Reliance Petroproducts (P) Ltd. observed as under:

"A glance at the provisions of section 271(1)(c) of the Income-tax Act, suggest that in order to be covered by it, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The meaning of the word "particulars" used in section 271(I)(c) would embrace the details of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision cannot be invoked By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything depend upon the return filed by the assessee, because that is the only document where the assessee can furnish the

particulars of his income. When such particulars are found to be inaccurate, the liability would arise. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, not according to the truth or erroneous.

Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271(1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing of inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars.

4.7. In view of the facts of the case and the rulings referred above, penalty u/s 271 (1)(c) with reference to the addition of Rs.1,69,57, 108/- on account of valuation of stock is clearly not leviable as the appellant had disclosed all material facts and charge of furnishing of inaccurate particulars and concealment of income do not survive. Levy of penalty with reference to the impugned amount is not warranted.

4.8. The other item in respect of which penalty is levied is additional disallowance of Rs.71,223/- u/s 14A read with Rule 80. Disallowance u/s 14A has been a debatable and a contentious issue and there are numerous rulings by the Hon'ble Courts and Tribunals regarding its

application. In CIT vs. Liquid Investments (ITA No. 240/2009 dated 05.10.2010), the Hon'ble Delhi High Court held as under:

> *"Both the CIT(A) and the ITA T have set aside the penalty imposed by the Assessing Officer under Section 271(1)(c) of the Income Tax Act, 1961 on the ground that issue of deduction under Section 14A of the Act was a debatable issue. We may also note that against the quantum assessment where deduction under Section 14A of the Act was prescribed to the assessee, the assesseee has preferred an appeal in the Court under Section 260A of the Act which has also been admitted and substantial question of law has framed This itself shows that the issue is debatable.*

4.9. The Hon'ble Tribunal in the case of Manish Jain Prop., New Delhi vs. ACIT in ITA No. 5999/Del/2012 & C.O. 4/0/2013 had held:

> *9. Even on merits, we find that Ld. Commissioner of Income Tax (A) has passed a reasonable order. The penalty in this case has been levied on account of disallowance made in accordance with Rule 8D read with section 14A. There has been no concealment or furnishing of inaccurate particulars by the assessee in this case. The disallowance has been made by computing the sums which were duly disclosed in the return and accounts of the assessee. We find that Section 271(l)(c) postulates imposition of penalty for furnishing of inaccurate particulars and concealment of income. Hence, in our*

considered opinion on the facts and circumstances of this case the assessee's conduct cannot be said to be contumacious so as to warrant levy of penalty. Hence, we hold that there is no infirmity in the order of the Ld. Commissioner of Income Tax (A) and the same deserves to be upheld.

10. While coming to the aforesaid conclusion, we place reliance from the Apex Court decision rendered by a larger Bench comprising of three of their Lordships in the case of Hindustan Steel vs. State of Orissa in 83 ITR 26 wherein it was held that "An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act, or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute. "

11. We further place reliance upon the Hon'ble Apex Court decision in the case of CIT vs. Reliance Petro Products Ltd. in Civil Appeal No. 2463 of 2010. In this case vide order dated 17.3.2010 it has been held that the law laid down in the Dilip Sheroff case 291 ITR 519 (SC) as to the meaning of word 'concealment' and 'inaccurate' continues to be a good law because what was overruled in the Dharmender Textile case was only that part in Dilip Sheroff case where it was held that mensrea was a essential requirement of penalty u/s 271(l)(c). The Hon'ble Apex Court also observed that if the contention of the revenue is accepted then in case of every return where the' claim is not accepted by the Assessing Officer for any reason, the assessee will invite the penalty u/s 271(1)(c). This is clearly not the intendment of legislature.

12. In the background of the aforesaid discussions and precedents, we do find any infirmity in the order of the Ld. Commissioner of Income Tax (A), accordingly, we uphold the same.

4.10. The bonafides of the appellant can be seen from the fact that all details were furnished. There was no concealment of material facts. There was no intention of the appellant to conceal income and evade tax and mislead the revenue.

4.11. In view of the judicial pronouncement referred above and the totality of facts and circumstances, the appellant had furnished an explanation,

which is bonafide. Therefore, there is no furnishing of inaccurate particulars of income or deliberate attempt to conceal income. The rigors of the provisions of section 271 (1)(c) are clearly not attracted in this case. In view thereof, penalty levied u/s 271(1)(c) of the Act of Rs.57,88,000/- is deleted."

3. The present appeal before us is filed by Revenue against the aforesaid impugned order dated 09.12.2016 of the CIT(A). In the course of appellate proceedings in the present appeal, a synopsis was filed from the assessee's side; the relevant portion of which is reproduced as under:-

2. "In the present case, there were two additions made by the AO on which penalty of Rs. 57,88,000/- was levied. First addition was made on account of valuation of stock amounting to Rs. 1,69,57,108/- and second addition is of Rs. 71,223/- u/s 14A read with rule 80 of IT rules.

3. The addition of Rs. 1,69,57,108/- made by the AO on account of valuation of stock is deleted by Hon'ble ITAT in the order passed dt. 22.12.2017 bearing ITA No. 6600/De1l2014. Relevant finding of Hon'ble tribunal is at Page No.6 Para 6 of the ITAT Order.

4. The addition of Rs. 71,223/- on account of section 14A was not dealt in the order due to smallness of the amount (Page No. 4 Para 3 of IT AT Order). However assessee had a good case on merits and the addition made by the AO is untenable in law.

5. In the present case, assessee had made suo-motto disallowance of Rs. 29,120/- under section 14A of the Income Tax Act whereas AO computed the total disallowance of Rs. 1,00,343/- (Rule 80(iii) of Rs. 22,798/- and Rule 80(ii) of Rs. 77,545/-) and thus difference of Rs. 71,223/- was added in the hands of the assessee.

6. The AO, while ignoring the computation of the assessee, has not given any proper reasoning and has merely rejected the same Section 14A(2) of the Act requires the AO to first examine the accounts of the assessee and then record his satisfaction in this regard, which has not at all been done by the AO in the present case.

7. It is a settled law that the AO has to first examine the records of the assessee, and only after arriving at the dissatisfaction as to the correctness of the claim of assessee in respect of expenditure incurred in relation to exempt income, that he can resort to the provisions of section 14A read with Rule 80. Reliance in this regard is placed on the following judgements:

i. Maxopp Investment Ltd. Versus Commissioner of Income Tax, New Delhi 2018 (3) TMI 805 - SUPREME COURT OF INDIA

ii. Godrej & Boyce Manufacturing Company Ltd. v. DCIT [2017] 394 ITR 449- Supreme Court

8. Secondly, own funds being more than the investment made by the assessee no disallowance under section 14A is called for. In the present case, own funds are of Rs. 22,591 Lacs whereas investment is RS.191 0

Lacs, therefore, disallowance under section 14A cannot be made. In this regard, reliance is placed in the case of CIT v. Reliance Industries Ltd. Civil Appeal No. 10 of 2019 dated 02.01.2019 wherein Hon'ble Supreme Court held that

> *"Insofar as the first question is concerned, the issue raises a pure question of fact. The High Court has noted the finding of the Tribunal that the interest free funds available to the assessee were sufficient to meet its investment. Hence, it could be presumed that the investments were made from the interest free funds available with the assessee. The Tribunal has also followed its own order for Assessment Year 2002-03. In view of the above findings, we find no reason to interfere with the judgment of the High Court in regard to the first question. Accordingly, the appeals are dismissed in regard to the first question. Insofar as the second question is concerned, the issue, it is common ground, is governed by the decision of this Court in Plasti blends India Limited Vs. Additional Commissioner of Income Tax, Mumbai and Another (2017) 9 SCC 685."*

9. Reliance is also placed in the case of Hon'ble High Court of Punjab and Haryana in the case of CIT v. Max India Ltd. in ITA No. 186 of 2013 dated 06.09.2016

> *"Merely because the interest free funds with the assessee have decreased during any period, it does not follow that the funds borrowed on interest were utilized for the purpose of investing in*

assets yielding exempt income. If even after the decrease the assessee has interest free funds sufficient to make the investment in assets yielding the exempt income, the presumption that it was such funds that were utilized for the said investment remains. There is no reason for it not to. The basis of the presumption as we will elaborate later is that an assessee would invest its funds to its advantage. It gains nothing by investing interest free funds towards other assets merely on account of the interest free funds having decreased. In that event so long as even after the decrease thereof there are sufficient interest free funds the presumption that they would be first used to invest in assets yielding exempt income applies with equal force."

Reliance in this regard is placed on the following catena of judgements:

i. CIT versus HDFC Bank Ltd in ITA No. 330 of 2012 dated 23 July 2014 (Bombay High Court) 1[2014] 366 ITR 505 (Bombay)

ii. Gujarat High Court in the case of CIT v. Suzlon Energy Ltd. (2013) 354 ITR 630

iii. H.T. Media Ltd. vs Principal Commissioner of Income Tax-IV, New Delhi-[2017] 399 ITR 576 (Delhi)

iv. ITAT Delhi in the case of NATH BROS. EXIM INTERNATIONAL LTD. VERSUS THE ACIT, ITA No. 5547/De1/2012, C.O.No.95/DeI/2013 And ITA.No.6030/Del/2015

v. ITAT Delhi in the case of CHINA TRUST COMMERCIAL BANK VERSUS ADIT, INTERNATIONAL TAXATION, ITA No. 1257/Del/2011 order dated 26.12.2017

10. In addition to the above, disallowance under section 14A being a debatable issue, penalty under section 271(1)(c) is not leviable. Reliance in this regard is placed on the following judgements.

i. CIT v. Jindal Equipment Leasing and Consultancy Services Ltd. ITA NO. 68/2012 (Del) (HC) Relevant finding is as under:

"6. The CIT (Appeals) and the tribunal have considered the aforesaid explanation given by the assessee to justify their claim why no disallowance was mandated under Section 14A in the present case. They have accepted that the explanation given by the assessee was genuine and bona fide. The contention of the respondent assessee may have been rejected in the quantum proceedings but when deciding whether or not penalty for concealment should be imposed, the justification and explanation why the assessee had made the claim, is to be examined. Disallowance under the said section have been subject matter of debate and different views have been expressed. A legal contention which was plausible and merited consideration was raised. Accordingly, the appellate authorities have applied the explanation to Section 271(1)(c) of the Act. Looking at the nature of explanation offered and the provision in question i.e. Section 14A, which was incorporated by the Finance Act, 2001 with

retrospective effect from 1st April, 1962, we do not think in the present case any substantial question of law arises in view of the factual matrix involved. Accordingly, the appeal is dismissed."

ii. CIT v. Liquid Investments Ltd. ITA No. 240112009 (Del) (HC)

iii. PTC INDIA LTD VERSUS ACIT, CIRCLE-14 (1) , NEW DELHI, DCIT, CIRCLE-14 (1) , NEW DELHI AND DCIT, CIRCLE-14 (1), NEW DELHI VERSUS PTC INDIA L TD.- 2019 (1) TMI 674 - ITAT DELHI

iv. MIS. MOHAIR INVESTMENT AND TRADING COMPANY (P) LIMITED VERSUS DCIT, CIRCLE 5 (1) , NEW DELHI- 2015 (12) TMI 299 -ITAT DELHI

11. Thus, in view of the above penalty levied by the AO is unsustainable and is to be deleted."

4. At the time of hearing before us, Ld. Counsel for the assessee reiterated the submissions made in the aforesaid synopsis. The Ld. Departmental Representative (in short "DR") did not dispute the facts, submissions and contentions contained in this synopsis. However, Ld. DR contended that the penalty levied in respect of aforesaid addition amounting to Rs.71,223/- towards disallowance u/s 14A r.w. Rule 8D should be confirmed. For this purpose, he submitted that any addition made in the assessment order should invariably lead to imposition of penalty u/s 271(1)(c) of the Act. Regarding penalty levied in respect of the aforesaid addition of Rs.1,69,57,108/-, Ld.DR relied on the order of the AO.

5. We have heard both sides. We have considered materials on record carefully. As far as the penalty levied in respect of aforesaid addition of Rs.1,69,57,108/- is concerned, we note that this addition has already been deleted by order of Co-ordinate Bench of ITAT in aforesaid ITA No.6600/Del/2014. Since the quantum addition already stands deleted, the penalty levied u/s 271(1)(c) of the Act has no legs to stand. When the quantum addition stands deleted, the corresponding penalty levied u/s 271(1)(c) of the Act is unsustainable. In coming to this conclusion, we are guided by the decision of Hon'ble Supreme Court in the case of K.C.Builders vs ACIT [2004] 135 taxmann 461 (SC) in which the Hon'ble Supreme Court held that "where the additions made in the assessment order, on the basis of which penalty for concealment was levied, are deleted there remains no basis at all for levying the penalty for concealment, and therefore, in such a case no such penalty can survive and the same is liable to be cancelled." Therefore, the penalty levied u/s 271(1)(c) of the Act in respect of the aforesaid addition of Rs.1,69,57,108/- is held to be untenable and the order of the CIT(A) on this issue is upheld.

5.1. As far as the penalty levied in respect of the aforesaid addition of Rs.71,223/- u/s 14A r.w. Rule 8D is concerned, we find that the Ld.DR has not disputed the facts, submissions and contentions contained in the aforesaid synopsis filed from the assessee's side during the appellate proceedings in ITAT. In the facts and circumstances of this case, therefore, and having regard to the synopsis filed from assessee's side, we reject the contention of the Ld.DR that every addition made in assessment order should invariably lead to penalty

u/s 271(1)(c) of the Act. For this purpose, we take guidance from the order of the Hon'ble Supreme Court in the case of CIT vs Reliance Petro Products Pvt.ltd. [2010] 189 taxmann 322 (SC) in which the Hon'ble Supreme Court held that "a mere making of claim, which is not sustainable in law by itself, will not amount to furnishing inaccurate particulars regarding income of the assessee." After careful perusal of the afore-said synopsis filed from assessee's side, and after careful perusal of the order of CIT(A) in this issue, relevant portion of which is already reproduced earlier in this order; we are of the view that, in the facts and circumstances of the case, no interference from our side is warranted in the order of the Ld.CIT(A) deleting the penalty u/s 271(1)(c) of the Act in respect of the aforesaid addition of Rs.71,223/- u/s 14A r.w. Rule 8D. Accordingly, the order of Ld.CIT(A) on this issue is also upheld.

5.2. In view of the foregoing, all the grounds of appeal filed by the Revenue are dismissed. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 18th day of July, 2019.

Sd/-	Sd/-
(KULDIP SINGH)	**(ANADEE NATH MISSHRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 18.07.2019
* Pooja & Amit *
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	