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

BEFORE SHRI K.N. CHARY, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER

ITA Nos:- 6225 to 6229/Del/2016
(Assessment Years: 2007-08 to 2011-12)

M/s Excel Infotech Ltd., 910, Ansal Bhawan, 16 K.G. Marg, New Delhi-110001.	Vs.	ACIT, Central Circle-30, New Delhi.
PAN No: AAACE2098K		
APPELLANT		**RESPONDENT**

Assessee by : None
Revenue by : Ms. Nidhi Srivastava, CIT(DR)

PER BENCH

[A] These five appeals (ITA Nos.- 6225/Del/2016, 6226/Del/2016, 6227/Del/2016, 6228/Del/2016 and 6229/Del/2016) have been filed by the Assessee against the impugned appellate order dated 19.09.2016 passed by Learned Commissioner of Income Tax (Appeals)-31, New Delhi, [in short, "Ld.CIT(A)"] pertaining to Assessment Years 2007-08, 2008-09, 2009-10, 2010-11, and 2011-12 respectively. These appeals by Assessee are taken up together for the sake of convenience and brevity; and are hereby disposed off through this Consolidated Order. Grounds taken in these appeals

of Assessee are as under:

ITA No.- 6225/Del/2016

"1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in imposing penalty of Rs. 2,26,170/- and that too without assuming jurisdiction as per law and without considering the facts and circumstances of the case.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in imposing penalty of Rs. 2,26,170/- u/s 271(1)(c) is bad in law and against the facts and circumstances of the case.

3. That the assessee craves the leave to add, alter or amend the grounds of appeal at any stage and all the grounds are without prejudice to each other."

ITA No.- 6226/Del/2016

"1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in imposing penalty of Rs. 11,79,944/- and that too without assuming jurisdiction as per law and without considering the facts and circumstances of the case.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in imposing penalty of Rs. 11,79,944/- u/s 271(1)(c) is bad in law and against the facts and circumstances of the case.

3. That the assessee craves the leave to add, alter or amend the grounds of appeal at any stage and all the grounds are without prejudice to each other."

ITA No.- 6227/Del/2016

"1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in imposing penalty of Rs. 26,75,872/- and that too without assuming jurisdiction as per law and without considering the facts and circumstances of the case.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in imposing penalty of Rs. 26,75,872/- u/s 271(1)(c) is bad in law and against the facts and circumstances of the case.

3. That the assessee craves the leave to add, alter or amend the grounds of appeal at any stage and all the grounds are without prejudice to each other."

ITA No.- 6228/Del/2016

"1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in imposing penalty of Rs. 17,67,296/- and that too without assuming jurisdiction as per law and without considering the facts and circumstances of the case.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in imposing penalty of Rs. 17,67,296/- u/s 271(1)(c) is bad in law and against the facts and circumstances of the case.

3. That the assessee craves the leave to add, alter or amend the grounds of appeal at any stage and all the grounds are without prejudice to each other."

ITA No.- 6229/Del/2016

"1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in imposing penalty of Rs. 17,67,296/- and that too without assuming jurisdiction as per law and without considering the facts and circumstances of the case.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in imposing penalty of Rs. 17,67,296/- u/s 271(1)(c) is bad in law and against the facts and circumstances of the case.

3. That the assessee craves the leave to add, alter or amend the grounds of appeal at any stage and all the grounds are without prejudice to each other."

[B] The relevant portion of the aforesaid impugned consolidated appellate order dated 19.09.2016 of the Ld. CIT(A) is reproduced as under:

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3. **Brief facts and background of the case**

3.1 The appellant is a company engaged in the business of buying and selling computers and computer peripherals and software development. A search & seizure action was conducted at its premises and accordingly, proceedings were initiated u/s 153A. Notices u/s 153A were issued to the appellant for different assessment years and in response thereto, the returns of income were filed with the particulars as shown below:

A.Y.	2007-08		2008-09		2009-10		2010-11		2011-12	
Particulars	Date	Amount	Date	Amount	Date	Amount	Date	Amount	Date	Amount
Original Retrun filed under section 139(1)	15.11.07	60,70,699	19.05.09	1,06,34,350	30.09.09	60,37,990	15.10.10	1,59,46,840	21.03.13	2,18,56,370
Retrun filed under section 153A	14.07.14	60,70,700	24.11.11	60,70,700	19.10.11	60,37,990	15.11.11	1,89,63,360	-	-

3.2 The assessments were completed at the following income for the assessment years under consideration:

AY	Date of Assessment order	section	Income assessed (in Rs.)	Addition made u/s14A (in Rs.)
2007-08	22.03.2013	153A	98,55,810/-	7,53,690/-
2008-09	22.03.2013	153A	1,00,03,850/-	39,33,149/-
2009-10	22.03.2013	153A	1,49,57,570/-	89,19,576/-
2010-11	22.03.2013	153A	2,58,54,348/-	58,90,988/-
2011-12	26.03.2013	143(3)	2,77,47,354/-	58,90,988/-

3.3 Penalty proceedings under section 271(1)(c) of the Act were initiated for all the above said assessment years. The same were completed after affording an opportunity of being heard to the appellant. The penalty orders were passed on 22.03.2016 levying penalty for various years as under:

AY	Income concealed	100% (minimum) Penalty	300% (maximum) Penalty	Penalty Levied
2007-08	Rs.7,53,690/-	Rs.2,26,107/-	Rs.6,78,321/-	Rs.2,26,107/-
2008-09	Rs.11,79,944/-	Rs.35,39,834/-	Rs.89,69,301/-	Rs.35,39,834/-
2009-10	Rs.89,19,576/-	Rs.26,75,872/-	Rs.80,27,616/-	Rs.26,75,872/-
2010-11	Rs.58,90,988/-	Rs.17,67,296/-	Rs.53,01,889/-	Rs.17,67,296/-
2011-12	Rs.58,90,988/-	Rs.17,67,296/-	Rs.53,01,889/-	Rs.17,67,296/-

3.4 Aggrieved with the above, the appellant filed the appeals under consideration. In response to notices issued by this office, Shri Rohit Sharma, CA filed certain written submissions. The only issue, which came up for consideration during the appellate proceedings, is the levy of penalty u/s 271(1) (c) of the Act.

4. The facts of various years and the findings as recorded by the AO as per the impugned penalty orders are as under:

A.Y. 2007-08

" The assessee company had filed the original return on 15.11.2007, declaring total income of Rs.60,70,699/- this return was initially processed u/s 143(1), thereafter a notice u/s 143(2) was issued on 30.09.2009 for making assessment u/s 143(3). 24.12.2009 determining the total income of the assessee at Rs.98,55,810/ Two addition were made to the returned income- (a) long term capital gain and the short term capital gain were taken as business income, leading to addition of Rs. 30,31,416/- and (b) Disallowance of Rs.7,53,690/- was made u/s 14A. The assessment was completed on 24.12.2009 determining the total income at Rs 98,55,810/-

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2. Subsequently, proceedings were initiated u/s 153A of Act and the assessee was requested to file the return under this provision. The return was filed on 15.11.2011 declaring total income of Rs. 60,70,700/- . Further during the course of assessment proceedings A.O had made addition on account of sale of shares as business income instead of capital gain claimed by the assessee which has already been made in previous assessment order vide order u/s 143(3) of the I.T. Act 1961. dated 24.12.2009 and income was assessed at Rs 98,55,810/- along with disallowance of Rs. 7,53,690/- u/s 14A of the I.T. Act 1961 (ii) the long terms capital gain and the short term capital gain were taken as business income leading to addition of Rs. 30,31,416/- Hence the total capital gain is again treated as business income of the assessee as there is no finality attained on the issue and assessment is again made at the income of Rs.98,55,810/- already assessed as per order u/s 143(3) of the I.T. Act, 1961.

3. In response to the addition of Rs. 98,55,810/- on account of disallowance u/s 14A of the Income Tax Act and capital gain, the assessee filed appeal before the Ld. CIT(A)- 33, New Delhi. The Ld. CIT (A)–33, New Delhi vide order dated 10/02/2014, in Appeal No. 125 to125 /12-13,/1148 to 1151 confirmed the addition of Rs. 7,53,690/- made by the A.O. and also deleted the addition in respect of capital gain. Therefore partly relief was given to assessee.

4. Thereafter, show cause notice dated 08/03/2016 was issued to the assessee to show cause as to why penalty u/s 271(1)(c) of the I.T. Act should not be levied in the case of assessee company and the date of 14/03/2016 was fixed for compliance. In response to the show cause notice the assessee filed the reply the pleading are as under.

(i) the assessing officer erred in initiating the penalty u/s 271(1)(c) on the same facts which had been considered in original assessment, in which no penalty was levied, (ii) The notice is bad in law, (iii) There is no concealment of particulars of income or furnishing of inaccurate particulars of income, as dividend income, other income/ loss and expenses have been duly and correctly recorded in the book of account, (iv) there is no intent and in any case all particulars have been correctly furnished, and (v) the addition is based upon a Rule (8)D , which is not applicable to the proceedings of this year.

5. Reply of the assessee has been considered but found not tenable in the facts of case. The assessee had filed return of income in response of notice u/s 153A at the same income on that of return filed u/s 139(1) where the addition of Rs. 7,53,690/- on a/c of disallowance u/s 14A and Rs.30,31,416/- on a/c of capital gain were made. Subsequently addition of Rs. 30,31,416/- has been deleted. Since the particulars of income furnished are not accurate in the return so penal provision of return u/s 271(1)(c) are applicable in this case for concealing the particulars of income notice u/s 271(1)(c) has rightly been initiated.. Hence the assessee is liable for levy of penalty u/s 271(1)(c) of the I.T. Act.

6. In the light of fact of the case as discussed above it is clear that the assessee has concealed the particulars of its income to the tune of the Rs. 58,90,988/- u/s 14A in accordance with provision of Rule 8D."

A.Y. 2008-09

"The assessee company filed the original return of income on 19.05.2009 declaring total income of Rs.1,06,34,350/-. This return was initially processed u/s 143(1) and thereafter a notice u/s 143(2) was issued on 22.09.2009 for making assessment u/s 143(3). The assessment was completed on 16.12.2010 determining the total income of the assessee at Rs.1,45,67,500/-. The only addition made in this assessment pertained to disallowance u/s 14A, computed at Rs. 39,33,149/- by application of the provisions contained in the section 14A and rule 8D No appeal was filed against this order before CIT (A).

Subsequently, proceedings were initiated u/s 153A of Act and the assessee was required to file the return under this provision. The return was filed on 24.11.2011 declaring total income of Rs. 60,70,700/-. During the course of assessment proceedings, it was explained that the difference in income returned in original return and return filed u/s 153A was on account of claim of carry forward of losses under the heads "Profits or Gains from Business of Profession" and " Capital Gains". This point was verified and it was found to be correct. Assessment u/s 153A was completed on 22.03.2013 computing the total income at Rs. 1,00,03,850/- In this assessment also addition of Rs.39,33,149/- was made u/s14A read with rule 8D. Thus, the addition which was made in the original assessment was repeated in re-assessment made u/s 153A On perusal of the records it was noticed that during the year the assessee has made investment of Rs.2,25,58,60,996/- in equity shares, The assessee has not attributed any expenditure towards dividend income which does not form part of total income as per computation of income filed. The assessee was asked to furnish details of expenses and show caused as to why expenses incurred to earn exempt income as dividend which do not form part of the total income may not be disallowed u/s 14A of the I.T.ACT,1961 as per rule 8D of I.T Act.1961.

In response, the Assessee vide his submissions dated 11/03/2011 submitted as under: "in this connection we want to draw your attention to the decision of Hon'ble Bombay High Court In the case of Godrej & Boyce Mfg. co. (2010)194 taxman 203.sub-section (2) of section 14A mandates that it is only when, having regard to the accounts of the assessee expenditure incurred in relation of income which is not included in the total income under the Act, that he can proceed to make the determination under the Rule.

The submissions of the assessee was duly considered but found not acceptable as the investment was made to earn dividend income and it is immaterial that the income has been received during the year or not as per section 14A of the I.T. Act 1961. Since no expenses had been attributed proportionate to the investment made so, it was not possible to determine the expense incurred for earning the divided income on investment made. Section 14A(2) and Rule 8D provides that the assessing officer has to compute such disallowance as per Rule 8D held in above paragraphs that assessee's claim in this regard, It had already been held in assessment order that assessee's claim of not disallowance of expenses in this regard was not acceptable. Therefore, disallowance of expenses in relating to income which does not farm part to total income was made as computed in accordance with provisions of Rule 8D which are as under.

S.No	Particular	Amount (Rs. in Crore)
1.	Direct Expenditure forth the dividend income	Nil
2	Interest not directly attributable to any income A X B/C	30.29
	A= Interest Expenditure = Rs. 57.12 B= Average Investment = Rs. 205.52 C = Average Total Assets = Rs, 387.54	
3.	0.5% of average value of investment OB = Rs. 1.85 CB = Rs. 225.58 Total = Rs. 227.43 Avg. = Rs. 113.71 0.5%of Avg = Rs, 0.56	0.56
	Total	30.85

But The assessee claimed total expenses of Rs. 39,33,149/- in P& L account hence disallowance u/s 14A was restricted to Rs. 39,33,149/- and penalty proceeding u/s 271(A)C was initiated for furnishing in accurate particulars of income.

Aggrieved to the disallowance of Rs. 39,33,149/- u/s 14A of the Income Tax Act, the assessee filed appeal before the Ld. CIT(A)-33, New Delhi. The Ld. CIT (A)–33, New Delhi vide order dated 10/02/2014, in Appeal No. 125 to125 /12-13,/1148 to 1151 confirmed the addition of Rs. 39,33,149/- made by the A.O. & dismissed appeal of the assessee.

3. Thereafter, show cause notice dated 02/03/2016 was issued to the assessee to show cause as to why penalty u/s 271(1)(c) of the I.T. Act should not be levied in the case of company and the date of 09/03/2016 was fixed for compliance. The notice was served through registered speed post No. ED11354385 6IN in response to the show cause notice the assessee filed the reply as under.

In this order Ld. Assessing Officer inter-alia mentioned that penalty proceedings u/s 271(1)(c) are initiated separately. However, it appears that he did not issue any notice u/s 274 are with section 271 concurrently with the issue of assessment order.

The arguments of the assessee for non levy of penalty are that (i) the assessing officer could not have initiated penalty u/s 271(1)(c) on the same fact which had been considered in original assessment, in which no penalty was initiated, (ii) The notice is bad in law, (iii) there is no concealment of particulars of income or furnishing of inaccurate particulars of income, as dividend income, other income/loss and expenses have been duly and correctly recorded in the book of account and (iv) There is no intent and in any case all particulars have been correctly furnished.

Reply of the assessee has been considered but found not tenable to the facts of case. Penalty u/s 271(1)(c) was duly initiated by the A.O as per para 4.5 of the assessment order dated 22/03/2013. Further notice u/s 274 r.w.s.271 of the I.T. Act, dated 22/03/2013 was issued by A.O and case was fixed for 28.03.2013. Since the assessee furnished inaccurate particulars of income hence the assessee is liable for levy of penalty u/s 271(1)(c) of the I.T. Act.

5. In the light of facts of the case discussed above. It is clear that the assessee has concealed the particulars of its income to the tune of the Rs. 39,33,149/- u/s 14A in accordance with provision of Rule 8D."

A.Y. 2009-10

"The assessee company filed the original return on 30.09.2009 declaring total income of Rs.60,37,990/- This return was initially processed u/s 143(1) and thereafter a notice u/s 143(2) was issued on 22.09.2009 and assessment u/s 143(3). was completed on returned income.

2. Subsequently, proceedings were initiated u/s 153A of Act and the assessee was requested to file the return under this provision. The return was filed on 19.10.2011 declaring total income of Rs. 60,37,990/- During the course of assessment proceedings it was noticed that during the year, the assessee had made investment of Rs. 306.24 crore in equity shares. The assessee did not attribute any expenditure towards dividend income. The assessee was asked to furnish detail of expenses and show caused as to why expenses incurred to earn exempt income as dividend which do not form part of the total income may not be disallowed u/s14A of the I.T. Act 1961, as per Rule 8D.

In response, the Assessee vide his submissions dated 11/03/2013 submitted as under: "in this connection we want to draw your attention to the decision of Hon'ble Bombay High Court In the case of Godrej & Boyce Mfg. co. (2010)194 taxman 203.sub-section (2) of section 14A mandates that it is only when, having regard to the accounts of the assessee expenditure incurred in relation of income which is not included in the total income under the Act, that he can proceed to make the determination under the Rule.

3. The submissions of the assessee was duly considered but found not acceptable as the investment was made to earn the dividend income and it is immaterial that the income has been received during the year or not as per section 14A of the I.T. Act 1961. Since no expenses had been attributed proportionate to the investment made so, it was not possible to determine the expense incurred for earning the divided income on investment made. Section 14A(2) and Rule 8D provides that the assessing officer has to compute such disallowance as per Rule 8D, it had already been held in assessment order that assessee's claim for no disallowance of expenses in this regard was not acceptable.

Therefore, disallowance of expenses relating to income which does not form part of total income was made as computed in accordance with provisions of Rule 8D which are as under.

S.No.	Particular	Amount (Rs. in Crore)
1.	Direct Expenditure forth the dividend income	Nil
2.	Interest not directly attributable to any income A X B/C	Nil
	A= Interest Expenditure = Nil B= Average Investment = C = Average Total Assets =	
3.	0.5% of average value of investment OB = Rs. 225.58 CB = Rs. 306.24 Total = Rs. 531.82 Avg. = Rs. 265.91 0.5%of Avg = Rs, 1.32	1.32
	Total	1.32

But The assessee claimed total expenses of Rs.89,19,576/- in P& L account hence disallowance u/s 14A was restricted to Rs. 89,19,576/- and penalty proceeding u/s 271(1)(c) was initiated for furnishing in accurate particulars of income.

4. Aggrieved to the disallowance of Rs. 89,19,576/- on account of investment u/s 14A of the Income Tax Act, the assessee filed appeal before the Ld. CIT(A)-33, New Delhi. The Ld. CIT (A)–33, New Delhi vide order dated 10/02/2014, in Appeal No. 125 to125 /12-13,/1148 to 1151 confirmed the addition of Rs. 89,19,576/- made by the A.O. & dismissed appeal of the assessee.

5. Thereafter, show cause notice dated 02/03/2016 was issued to the assessee to show cause as to why penalty u/s 271(1)(c) of the I.T. Act should not be levied in the case of company and the date of 09/03/2016 was fixed for compliance. The notice was served through registered speed post No. ED11354380 8IN. In response to the show cause notice the assessee filed the reply as under.

6 In this order Assessing Officer inter-alia mentioned that penalty proceedings u/s 271(1)(c) are initiated separately. However, it appears that he did not issue any notice u/s 274 read with section 271 concurrently with the issue of assessment order.

7. The arguments of the assessee for non levy of penalty are that (1) the assessing and the Ld. CIT(A) erred in holding that disallowance u/s 14A was justified even in absence of any incriminating material found in the course of search and the, the A.O. could not have initiated penalty u/s 271(1)C (II) The assessment order is bad in law as the mandatory procedure prescribed u/ s14A(3) has not been followed and therefore, no penalty could be levied on the basis of an addition which is bad in law, (III) The notice is defective and therefore, it is bad in law, (IV) There is no concealment of particulars of income or furnishing of inaccurate particulars of income, as dividend income, other income/loss and expenses have been duly and correctly recorded in the books of account, (v) there is not intent and in any case all particulars have been correctly furnished, and (vi) in any case the addition is highly excessive as no expenditure has been allocated towards Taxable Income,

8. Reply of the assessee has been considered but found not tenable in the facts of case. The penalty u/s 271(1)(c) has been initiated by the A.O as per para 4.5 of the assessment order dated 22.03.2013. Further notice u/s 274 r.w.s 271 of the I.T. Act dated 22.03.2013 was issued by the A.O and case was fixed for 28.03.2013. Since the assessee furnished inaccurate particulars of income hence the assessee is liable for levy of penalty u/s 271(1)(c) of I.T. Act.

9. In the light of facts of the case as discussed above it is clear that the assessee has concealed the particulars of its income to the tune of the Rs89,19,576/- u/s 14A in accordance with provision of Rule 8D.

A.Y. 2010-11

"The assessee company had filed the original return on 15.10.2010, declaring total income of Rs.1,59,46,840/- this return was initially processed u/s 143(1) and thereafter a notice u/s 143(2) was issued on 30.09.2009 for making assessment u/s 143(3).and assessment was completed on returned income.

2. Subsequently, proceedings were initiated u/s 153A of Act and the assessee was requested to file the return under this provision. The return was filed on 15.11.2011 declaring total income of Rs. 1,89,63,360/- During the course of assessment proceeding it

was noticed that assessee company has made investment of Rs. 340.16 crore in equity shares The assessee has not attributed any expenditure towards dividend income The assessee was asked to file detail of expenses and show caused as to why expenses incurred to earn exempt income as dividend which do not form part of the total income may not be disallowed u/s14A of the I.T. Act 1961, as per Rule 8D.

In response, the Assessee vide his submissions dated 11/03/2013 submitted as under: "in this connection we want to draw your attention to the decision of Hon'ble Bombay High Court In the case of Godrej & Boyce Mfg. co. (2010)194 taxman 203.sub-section (2) of section 14A mandates that it is only when, having regard to the accounts of the assessee expenditure incurred in relation of income which is not included in the total income under the Act, that he can proceed to make the determination under the Rule.

3. The submissions of the assessee was duly considered but found not acceptable as the investment was made to earn the dividend income and it is immaterial that the income has been received during the year or not as per section 14A of the I.T. Act 1961, Since no expenses had been attributed proportionate to the investment made so, it was not possible to determine the expense incurred for earning the divided income on investment made. Section 14A(2) and Rule 8D provides that the assessing officer has to compute such disallowance as per Rule 8D, it had already been held in assessment order that assessee's claim for no disallowance of expenses in this regard was not acceptable. Therefore, disallowance of expenses relating to income which does not form part of total income was made as computed in accordance with provisions of Rule 8D which are as under:

S.No	Particular	Amount (Rs. in Crore)
1.	Direct Expenditure forth the dividend income	Nil
2.	Interest not directly attributable to any income A X B/C	Nil
	A= Interest Expenditure = Nil B= Average Investment = C = Average Total Assets =	
3.	0.5% of average value of investment OB = Rs. 306.24 CB = Rs. 340.16 Total = Rs. 646.40 Avg. = Rs. 323.20 0.5%of Avg = Rs, 1.616	1.616
	Total	**1.616**

But The assessee claimed total expenses of Rs.58,90,988/- in P& L account hence disallowance u/s 14A was restricted to Rs. 58,90,988/- and penalty proceeding u/s 271(1)(c) was initiated for furnishing in accurate particulars of income.

4. Aggrieved to the disallowance of Rs. 58,90,988/- on account u/s 14A of the Act. The assessee filed appeal before the Ld. CIT (A)-33, New Delhi. The Ld. CIT (A)–33, New Delhi vide order dated 10/02/2014, in Appeal No. 125 to125 /12-13,/1148 to 1151 confirmed the addition of Rs. 58,90,988/- made by the A.O. and dismissed appeal of the assessee.

5. Thereafter, show cause notice dated 02/03/2016 was issued to the assessee to show cause as to why penalty u/s 271(1)(c) of the I.T. Act should not be levied in the case of company and the date of 09/03/2016 was fixed for compliance. The notice was served through registered speed post No. ED11354380 8IN in response to the show cause notice the assessee filed the reply as under.

6. In this order Assessing Officer inter-alia mentioned that penalty proceedings u/s 271(1)(c) are initiated separately. However, it appears that he did not issue any notice u/s 274 r.w.s 271 concurrently with the issue of assessment order.

7. The arguments of the assessee for non levy of penalty are that (1) the assessing and the Ld. CIT(A) erred in holding that disallowance u/s 14A was justified even in absence of any incriminating material found in the course of search and thus, the A.O. could not have initiated penalty u/s 271(1)C (II) The assessment order is bad in law as the mandatory procedure prescribed u/s 14A(3) has not been followed and therefore, no penalty could be levied on the basis of an addition which is bad in law, (III) The notice is defective and therefore, it is bad in law, (IV) There is no concealment of particulars of income or furnishing of inaccurate particulars of income, as dividend income, other income/loss and expenses have been duly and correctly recorded in the book of account, (v) there is not intent and in any case all particulars have been correctly furnished (vi) in any case the addition is highly excessive as no expenditure has been allocated towards Taxable Income,

8. Reply of the assessee has been considered but found not tenable to the facts of case. Penalty u/s 271(1)(c) was dully initiated by the A.O as per para 5 of the assessment order dated 22/.02.2013. Further notice u/s 274 r.w.s 271 of the I.T. Act dated 22.03.2013 was issued by A.O and case was fixed for 28.03.2013 Since the assessee furnished inaccurate particulars of income hence the assessee is liable for levy of penalty u/s 271(1)(c) of the I.T. Act.

9. In the light of fact of the case as discussed above it is clear that the assessee has concealed the particulars of its income to the tune of the Rs.58,90,988/- u/s 14A in accordance with provision of Rule 8D.

A.Y. 2011-12

" The assessee company had filed the original return on 21.03.2013, declaring total income of Rs.2,18,56,370/- This returned was initially processed u/s 143(1)

Subsequently, proceedings were initiated u/s 143(3) of Act notice u/s 143(2) and 142(1) of the income Tax Act. 1961. Were issued along with a questionnaire dated 21.03.2012. During the course of assessment it was notice that assessee has made investment of Rs. Nil in equity shares, hence disallowance of expenses related to earn exempt income which do not form part of the total income of the assessee u/s14A of the I.T Act. 1961 are attracted. The assessee has not attributed. Any expenditure towards dividend income which does not part of total income as per computation of income filed. The assessee was asked to file detail of expenses and show caused as to why expenses incurred to earn exempt income as dividend which do not form part of the total income may not be disallowed u/s14A of the I.T. Act 1961, as per Rule 8D.

*In response, the Assessee vide his submissions dated **11/03/2013** submitted as under:*
"in this connection we want to draw your attention to the decision of Hon'ble Bombay High Court In the case of Godrej & Boyce Mfg. co. (2010)194 taxman 203.sub-section (2) of section 14A mandates that it is only when, having regard to the accounts of the assessee expenditure incurred in relation of income which is not included in the total income under the Act, that he can proceed to make the determination under the Rule.

1. *The submissions of the assessee was duly considered but found not acceptable as the investment was made to earn the dividend income and it is immaterial that the income has been received during the year or not as per section 14A of the I.T. Act 1961, Since no expenses had been attributed proportionate to the investment made so, it was not possible to determine the expense incurred for earning the divided income on investment made. Section 14A(2) and Rule 8D provides that the assessing officer has to compute such disallowance as per Rule 8D it had already been held in assessment order that assessee's claim for no disallowance of expenses in this regard was not acceptable. Therefore, disallowance of expenses relating to income which does not form part of total income was made as computed in accordance with provisions of Rule 8D which are as under:*

S.No	**Particular**	**Amount (Rs. in Crore)**
1.	Direct Expenditure forth the dividend income	Nil
2.	Interest not directly attributable to any income A X B/C	Nil
	A= Interest Expenditure = Nil B= Average Investment = C = Average Total Assets =	
3.	0.5% of average value of investment OB = Rs. 340.16 CB = Rs. 0 Total = Rs. 340.10 Avg. = Rs. 170.08 0.5%of Avg = Rs, 85,04,000/-	85,04,000
	Total	**85,04,000**

But The assessee claimed total expenses of Rs.58,90,988/- in P& L account hence disallowance u/s 14A was restricted to Rs.58,90,988/- and penalty proceeding u/s 271(1)(c)was initiated for furnishing in accurate particulars of income.

3. Aggrieved to the disallowance of Rs.58,90,988/- on investment u/s 14A of the Act. The assessee filed appeal before the Ld. CIT (A)-33, New Delhi. The Ld. CIT (A)–33, New Delhi vide order dated 10/02/2014, in Appeal No. 125 to125 /12-13,/1148 to 1151 confirmed the addition of Rs.58,90,988/- made by the A.O. & dismissed appeal of the assessee.

4. Thereafter, show cause notice dated 02/03/2016 was issued to the assessee to show cause as to why penalty u/s 271(1)(c) of the I.T. Act should not be levied in the case of company and the date of 09/03/2016 was fixed for compliance. In response to the show cause notice the assessee filed the reply as under.
In this order Ld. Assessing Officer inter-alia mentioned that penalty proceedings u/s 271(1)(c) are initiated separately. However, it appears that he did not issue any notice u/s 274 are with section 271 concurrently with the issue of assessment order.

The arguments of the assessee for non levy of penalty are that (i) The assessment order is bad in law as the mandatory procedure prescribed u/s 14A(2) has not followed and therefore, no penalty could be levied on the basis of an addition which is bad in law, (ii) The notice is defective and therefore, it is bad in law, (iii) There is no concealment of particulars of income or furnishing of inaccurate particulars of income, as dividend income, other income/loss and expenses have been duly and correctly recorded in the book of account, (iv) there is not intent and in any case all particulars have been correctly furnished (v) in any case the addition is highly excessive as no expenditure has been allocated towards taxable Income and therefore penalty cannot be levied on the basis of tax attributable to the amount added u/s14A and (vi) the maximum amount which could have disallowed u/s14A stand at Rs. 48,500/- and therefore , penalty on any other higher amount cannot be levied.
Reply of the assessee has been considered but found not tenable in the facts of case. Penalty u/s 271(1)(c) was dully initiated by the A.O as per para 5 of the assessment order dated 26/.03.2013 further notice u/s 274 r.w.s 271 of the I.T. Act dated 26.03.2013 was issued by A.O and case was fixed for 05.04.2013 Since the assessee furnished inaccurate particulars of income hence the assessee is liable for levy of penalty u/s 271(1)(c) of the I.T. Act.

5. In the light of fact of the case as discussed above it is clear that the assessee has concealed the particulars of its income to the tune of the Rs.35,58,231/- u/s 14A in accordance with provision of Rule 8D. As Rs. 2 lack already been disallowance Suo Moto by assessee."

5. During the proceedings before me, the appellant filed the following written submission:

A.Y. 2011-12

"2. The facts of the case are that the appellant company had filed the return on 21.03.2013 declaring total income of Rs.2,18,56,370/-. Statutory notices were issued and assessment u/s 143(3) was completed on 26.03.2013 at total income of Rs. 2,77,47,354/-. In this assessment, an addition of Rs. 58,90,988/- was made u/s 14A read with rule 8D. The assessing officer computed the amount of disallowance under rule 8D at Rs. 85,04,000/-, being 0.50% of the average investment. However, the disallowance was restricted to Rs. 58,90,988/-, representing the stated claim of total expenses made by the appellant.
3. Aggrieved by this order, the appellant filed appeal before the Ld. CIT(A). It was submitted that the appellant had suo-motu disallowed a sum of Rs. 2,00,000/- under section 14A, which was reasonable having regard to the examination of the books of account. It was further submitted that assessing officer did not follow the procedure laid

down u/s 14A(3) before invoking rule 8D. This will be clear from the show cause notice dated 21.03.2013 issued to the appellant, which does not make any mention of the proposal to disallow any amount u/s 14A. In the assessment order, in paragraph no. 4, it is mentioned that the appellant did not attribute any expenditure towards earning dividend income, therefore, it was asked to file details of expenses as per rule 8D. The assertion that no amount has been disallowed by the appellant is factually incorrect. It is also clear from the assessment order that the books of account were not examined with a view to ascertain whether the claim of disallowance of Rs. 2,00,000/- was correct or not. The A.O. straight away issued a direction to file the detail of expenses as per rule 8D, which is in contradiction with the decision Hon'ble Delhi High Court in the case of Maxopp Investments Ltd. vs. CIT, ITA No. 687/2009 dated 18.11.2011 and Bombay High Court in the case of Godrej and Boyce Manufacturing Co. Ltd., (2010) 328 ITR 81 (Bom), with which Hon'ble Delhi High Court concurred in the case of the aforesaid Maxopp Investments Ltd. It was also submitted that it would be naïve to assume that the whole of the expenditure was incurred for earning dividend income while as a matter of fact the appellant has declared income/loss under the heads relating to business, capital gains and house property also. Accordingly, it was requested that the disallowance may be deleted. It was also submitted that the claim of total expenditure in the return after taking in to account suo-motu disallowances was only Rs. 37,02,740/-. After considering various submissions, the Ld. CIT(A) passed the appellate order on 10.02.2014, which is a consolidated order for A.Ys. 2008-09 to 2011-12. He dismissed the ground relating to disallowance u/s14A for all these years subject to the verification that the amount of disallowance should not exceed the expenditure claimed by the appellant. According to the appellant total expenditure of Rs. 37,02,740/- only was claimed. The Ld. Assessing Officer has not verified this fact till date and the appeal effect has not been given.

4. It is submitted that the order of the Ld. CIT(A) suffers from legal infirmity which came to light on pronouncement of the decision in the case of Joint Investment Ltd. vs. CIT in ITA No. 117/2015 dated 25.02.2015 by the Hon'ble Delhi High Court. It has been held that the amount to be disallowed u/s 14A cannot exceed the amount of exempt income. In this case, such income amounts to Rs. 2,48,500/- and therefore, the maximum amount which could have been disallowed under this provision cannot exceed Rs. 2,48,500/-. After taking into account the suo-motu disallowance of Rs.2,00,000/-, the addition to be made by the ld. A.O. should not have exceeded Rs.48,500/-. As mentioned earlier, the appellant has filed an application on 31.03.2016 for rectification of this appellate order before you on this issue. This application is pending. Prior to this application, the appellant had filed appeal before the ITAT on 09.06.2014, which is pending for disposal.

5. In the assessment order, the Ld. Assessing Officer inter-alia mentioned that penalty proceedings u/s 271(1)(c) are initiated separately. However, he did not issue any notice u/s 274 read with section 271 concurrently with the issue of assessment order. Instead, the assessing officer issued notice u/s 271AAA on 26.03.2013 in which the defaults in respect of failure to comply with provisions u/s 142(1)/143(2), concealment of particulars of income or furnishing inaccurate particulars of income and undisclosed income in the case of search have been listed. One more notice dated 02.03.2016 was issued stating inter-alia that you are given an opportunity to show cause as to why penalty u/s 271(1)(c) should not be imposed. The appellant filed a written reply dated 14.03.2016 in which a number of jurisdictional issues were taken. The merits of the case were also submitted. But the ld. A.O. did not properly consider those submissions and levied minimum penalty of Rs. 17,67,296/- by way of a summary and non-speaking order. The

appellant is now in appeal before you against this order. With this brief background, the grounds taken in appeal are discussed hereunder. With these facts, the appellant proceeds to discuss various grounds taken in appeal.

Ground No. 1 (i)

6. The ld. A.O. issued the notice of penalty on the basis of the addition of Rs. 58,90,988/- to the returned income by making a disallowance u/s 14A. However, from the facts and law stated above, it is clear that no further addition could have been made u/s 14A, apart from the suo-motu disallowance of Rs. 2,00,000/- made in the computation of income without following the procedure laid down under section 14A(2). In any case, the disallowance could not have been in excess of Rs. 2,48,500/-, which means that a maximum further addition of Rs. 48,500/- only could have been made. Thus, the orders of the Ld. Assessing Authority and the Ld. CIT(A) are bad in law as they are not in conformity with decision of Hon'ble Delhi High Court in the case of Joint Investments Limited. If the correct procedure as laid down in section 14A(2) had been followed, there would have been no noticeable addition to the returned income and therefore there would have been no occasion to make remarks in the assessment order to the effect that the appellant furnished inaccurate particulars of income and penalty proceedings u/s 271(1)(c) are initiated separately. Having made these remarks, the ld. A.O. did not issue notice u/s 274 read with 271 and it is the contention of the appellant that omission to issue this notice was deliberate as the assessing officer was conscious of the fact that neither particulars of income have been concealed nor any inaccurate particulars have been furnished. Accordingly, it is requested that the notice of penalty may be cancelled on this ground.

Ground No. 1(ii)

7. The ld. A.O. issued the notice u/s 271AAA, which made mention of defaults u/s 142(1)/143(2), concealment of particulars of income or furnishing inaccurate particulars of income and undisclosed income found in the case of search. This notice clearly exhibits that the Ld. Assessing Officer was not clear at that time whether the appellant had committed default under this or that provision and therefore, he issued a totally vague notice in this matter. Coming to the notice issued on 02.03.2016, it is submitted that this notice is also vague as it does not specify whether it is in respect of concealment of particulars of income or furnishing inaccurate particulars of income. It is submitted that no penalty can be levied on the basis of such a notice. In this connection, reliance is placed on the decision of Mumbai Tribunal in the case of Shri Hafeez S Contractor vs. Assistant Commissioner of Income tax in ITA No. 6222 and 6223/MUM/2013 for A.Ys. 2007-08 and 2008-09 dated 02.09.2015. In this case, the appellant had sought the setting a side of the penalty on the ground that since A.O. had not specified the charge, the notice issued was bad in law. In this connection, he relied on the decision of Karnataka High Court in the case of CIT vs Manjunatha Cotton and Ginning Factory, (2013) 35 Taxmann.com 250 to the effect that the notice should be clear as to which limb is invoked for levy of penalty and the position being unclear here, the penalty is not sustainable. Therefore, considering the same we are of the opinion that the ground raised by the appellant should be allowed on technicalities. It is submitted respectfully that the facts of our case are much stronger as a number of defaults have been mentioned in the notice which have not been committed by the appellant. On the issue of levy of penalty u/s 271(1)(c), the facts of the two cases are in pari-materia.

Therefore, in view of the decision of Karnataka High Court and Mumbai Tribunal in this matter, it is requested that the notice of penalty may be cancelled on this technical ground and the appeal may be allowed.

Ground No. 1(iii)

8. Without prejudice to the aforesaid grounds, the appellant-company also wishes to state its case on merits. Simply speaking, its case is that penalty u/s 271(1)(c) is not leviable on merits because it has neither concealed particulars of income nor furnished inaccurate particulars of income. The assessing officer computed disallowance on the basis of the facts which were submitted by the appellant along with the return of income. In this connection, the facts are that the appellant had shown gross receipts of Rs. 3,05,78,604/-. Expenditure of Rs. 37,58,231/- was debited to the accounts under the head 'personnel expenses' and Rs. 16,36,110/- under the head 'administrative, selling and other expenses'. In the course of assessment proceedings, all these figures were found to be correct and accordingly in the assessment order none of these figures was changed. It is clear from these facts that the appellant neither concealed any particular of income nor furnished inaccurate particulars of income. The disallowance of a sum of Rs. 58,90,988/- was made by invoking the formula prescribed under rule 8D. However, this is only a legal disallowance, which does not lead to any inference of concealment of particulars of income or furnishing inaccurate particulars of income. In any case, such a disallowance could not have exceeded the sum of Rs. 48,500/-. Therefore, the penalty is not leviable.

9. Reliance is placed on the decision of the Delhi Tribunal in the case of Nalwa investments Ltd., in which it was held that the question of disallowance under section 14A and its quantification are quite disputable and can lead to bona-fide difference of opinion between the assessee and the authority. In such a situation the levy of penalty will not be justified. The same decision has been arrived at in the case of Jindal Equipment Leasing and Consultancy Services Ltd. The appellant relies on these decisions and also the judgments quoted in the aforesaid decisions to argue that penalty cannot be levied even in respect of disallowance u/s 14A.

10. Coming to other decisions, strong reliance is placed on the decision of Delhi High court in the case of New Holland Tractors (India) ltd. Vs CIT 25-09-2014 and the cases referred in this judgement in respect of levy of penalty. As per paragraph-24, the question before the court was- whether on the facts and the circumstances of the case, the tribunal was correct in law in holding that penalty u/s 271(1)(c) of the Income- tax Act, 1961, was exigible on the assessee? In paragraph no. 26, the Hon'able court referred to the dictionary meaning of the word 'inaccurate' to be not accurate; not exact or correct. Referring to the decision of Supreme Court in the case of Reliance Petroproducts Ltd., it was mentioned that 'particular' means detail or details of a claim or separate items of an account. It has been mentioned that ad-hoc addition per se without other corroborating circumstances may not reflect 'furnishing inaccurate particulars'. The addition made in this year is on ad-hoc basis without any further or corroborating circumstance. Therefore, no penalty can be levied in this case. Even if the disallowance has some basis, the penalty is not leviable as per decisions mentioned in paragraph 9. Accordingly, it is prayed that the penalty may be dropped on merits.

Ground No. 1(iv)

11. The Delhi Court also referred to the decision of Dilip N Shroff Vs CIT on page 14 of the judgement, in which it was held that mens- rea was necessary for attracting penalty u/s 271(1)(c), which means that the revenue has to show that the assessee furnished inaccurate particulars with deliberate intent. The facts of this case show that the particulars furnished by the appellant were found to be correct in assessment proceedings. Therefore, the question of levy of penalty does not arise in this case.

12. The appellant also wants to discuss the decision of Hon'ble Supreme Court in the case of CIT vs. Reliance Petroproducts Private Limited, in which the meaning of the words 'inaccurate' and 'particulars' have been discussed in detail. Referring to Webster's Dictionary, it is mentioned that the word 'inaccurate' means not accurate, not exact or correct, not according to truth, erroneous, as an inaccurate statement, copy or transcript. Further, the word 'particulars' means the details supplied in the return. Therefore, when these words are read in conjunction, it transpires that the details filed in the return should be not accurate, not exact or correct, not according to truth or erroneous. Coming to the facts of the case, it is an accepted fact that the details filed in the return are accurate, correct and according to truth, and no change has been made in the assessment order in respect of the details. Therefore, relying on this decision, it is argued that the penalty is required to be set aside.

Ground Nos. 1(v) and (vi)

13. In the alternative and without prejudice to the aforesaid submissions, it is pointed out that the whole of the expenditure has been disallowed and no expense has been attributed to the taxable income. This conclusion is patently absurd because some expenditure will have to be attributed to the taxable income also. It has also been submitted earlier that further disallowance could not have exceeded the sum of Rs. 48,500/- by taking into account the decision of Joint Investments Ltd. Therefore, it is argued that the penalty cannot be levied with reference to the amount added u/s 14A. Accordingly, it is prayed that the penalty may be deleted.

14. Two more points are brought to your kind notice. Firstly, the A.O. did not furnish exact finding regarding the default committed by the appellant. In paragraph no. 6, the ld. A.O. furnished the finding that the appellant furnished inaccurate particulars of income. However, in paragraph no. 9, it has been held that the appellant concealed particulars of income u/s 14A read with rule 8D. Secondly, the order is non-speaking as the submissions of the appellant have not been rebutted point-wise in any manner. Such an order cannot be sustained in law as it violates principles of natural justice. Therefore, it is urged that the penalty may be deleted.

15. In a nutshell, the arguments of the appellant for non levy of penalty are that- (i) the assessment order is bad in law as the mandatory procedure prescribed u/s 14A(2) has not been followed and therefore, no penalty could be levied on the basis of an addition which is bad in law, (ii) the notice is defective and therefore, it is bad in law, (iii) there is no concealment of particulars of income or furnishing of inaccurate particulars of income, as dividend income, other income/loss and expenses have been duly and correctly declared in the return, (iv) there is no intent and in any case all particulars have been correctly furnished, (v) the addition is highly excessive as no expenditure has been allocated

towards taxable income and therefore, penalty cannot be levied on the basis of tax attributable to the amount added u/s 14A, (vi) the maximum amount which could have been disallowed u/s 14A stands at Rs. 48,500/- and therefore, penalty on any other higher amount cannot be levied, and (vii) the order is bad in law as it is in violation of natural justice.

16. In view of the aforesaid facts and submissions, it is prayed that the penalty order may be set aside in toto."

5.1 Similar submissions were filed for all the years under consideration.

6. I have carefully considered the findings recorded by the ld. AO as per the impugned penalty orders and also the assessment orders, the submissions made by the appellant, the position of law and the facts of the case on record. As per the impugned orders, the ld. AO levied a concealment penalty on the disallowances u/s 14A. The facts of the case in brief are that during the assessment proceedings, the ld. AO observed that the assessee had made huge investments on which significant amount of exempt income in the form of dividend was earned. The disallowance of corresponding expenditure made by the appellant was not found adequate by the ld. AO. Therefore, in view of the facts and circumstances of the case, invoking the provisions of section 14A and Rule 8D, he disallowed various sums for the assessment years under consideration which were confirmed by the CIT(A), XXXIII, New Delhi on the basis of detailed reasons given in the appeal orders. The ld. AO thereafter, levied concealment penalty on the aforesaid disallowances.

6.1 During the appellate proceeding before me against the impugned penalty orders, the ld. AR repeated the arguments taken in the quantum proceedings, which as mentioned above, have already been adequately countered by the ld. CIT (A). Hence, the same are liable to be rejected. I am, therefore, of the considered opinion that a disallowance u/s 14A was required to be made as per the calculations given by the AO in the assessment orders as the disallowance made by the appellant suo-motu was inadequate. Therefore, by not making the adequate disallowances, the appellant became guilty of furnishing inaccurate particulars of income and accordingly the ld. AO righty levied a penalty u/s 271(1)(c).

6.2 Before me, the ld. AR argued that the in view of certain decisions, which in fact came after the assessment order was passed, the quantum of disallowance u/s 14A should have been much less and accordingly the penalty u/s 271(1) (c) should have been levied at such reduced amounts for the assessment years under consideration. In this regard, I am of the considered opinion that the quantum once determined and confirmed cannot be tinkered with in the penalty proceedings. Reliance it this regard is placed on the decision of Hon'ble M.P. High Court in the case of V.V. Shrivastava as reported in 122 ITR 908.

6.3 The appellant has relied upon the judgement of Hon'ble ITAT, Delhi in the case of Nalwa Investment Ltd. However, in this case no disallowance u/s 14A was made by the appellant or by the auditors. Moreover, the assessment year was 2005-06 when rule 8D was not enacted which led Hob'ble ITAT to hold that the segregation of expenditure related to tax free income would be disputable and lead to bonafide difference in opinion. In the case of Jindal Equipment also the Assessment Years involved were 1999-2000 and 2001-2002 i.e. prior to enactment of rule 8D, hence the quantification of the disallowance was not possible . The facts in the case under consideration are quite different as discussed earlier.

6.4 In the case of **CIT v Dharmendra Textiles Processor (2007) 295 ITR 244 (SC),** the Supreme Court, in the context of section 11AC of the Central Excise Act has held that the view in the case of Dilip N. Shroff is not correct. It has held that penalty u/s 271(1)(c) is a civil liability and the willful concealment is not an essential ingredient for attracting civil liability unlike the matter of prosecution u/s276C. While considering an appeal against an order made u/s 271(1) (c), what is required to be examined is the record which the officer imposing penalty had before him and if that record can sustain the finding that there has been concealment, that would be sufficient to sustain the penalty.

6.4.1 The Explanation 1 to section 271(1)(c) shifts the onus of proof from the AO to the assessee instead of the AO being under an obligation to establish the mala fides of the assessee, the onus is now on the assessee to establish his innocence and righteous conduct. As a matter of fact, as a result of the Explanation 1 to section 271(1)(c) in its present form, the burden of proof has been entirely shifted to the assessee and it is this paradigm shift which is one of the most important features of rule of evidence in civil proceedings as distinct from criminal proceedings.

6.4.2 Therefore, the observations made by the Supreme Court in Dharmendra Textiles (supra) case only re emphasizes the paradigm shift on burden of proof as brought about by the Explanation 1 to section 271(1)(c). The observation made in Dilip N. Shroff case, on the need for the tax authorities to establish mens rea before a penalty can be imposed, were contrary to this school of thought and to that extent, therefore, the Larger Bench overruled the Dilip N. Shrooff case.

6.5 The reliance in this regard is placed on the decision of Hon'ble Delhi High Court in the case of **M/s Ambience Hospitality Pvt. Ltd. (ITA No.1264/2011)** whereby it was held by their lordships that it was obvious that the assessee had furnished accurate particulars in the return for assessment year 2007-08. The claim for depreciation on land was wrong as the same cannot be claimed. This is a well settled principle, and not a debatable question/proposition. It is an accepted position, that the appellant assessee did not revise the return even when the return for Assessment Year 2008-09 was filed. The explanation of the assessee that the claim was a bona fide error has been examined by the Tribunal and it was found that the assessee has not been able to discharge the onus placed under the explanation to Section 271(1) (c) of the Act. Keeping in view the factual matrix, the levy of concealment penalty was upheld.

6.6 In the case of **Commissioner of Income-tax v. Harparshad and Company Ltd. (328 ITR 53)**, it has been held by the Hon'ble Delhi High Court that the findings given in assessment proceedings are relevant and have probative value. Where the assessee produces no fresh evidence or presents any additional or fresh circumstance in penalty proceedings, he would be deemed to have failed to discharge the onus placed on him and the levy of penalty could be justified. Even if there is no concealment of income or furnishing of inaccurate particulars, but on the basis thereof the claim which is made is ex facie bogus, it may still attract penalty provision. It has further been observed that the Explanations appended to section 271(1)(c) of the Act entirely indicate the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The object behind enactment of section 271(1)(c) read with the Explanations indicate that the section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Willful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under section 276C of the Act.

6.7 In the case of **Commissioner of Income-tax V. Escorts Finance Ltd. 328 ITR 44, Hon'ble Delhi High Court** has held that merely because information was available in the tax audit report that would not absolve the assessee. Even if there was no concealment of income or furnishing of inaccurate particulars, but on the basis thereof the claim which was not made was ex facie bogus, it could attract penalty provision. It was not a case where two opinion about the applicability of a particular section or provision of law were possible. Therefore, it could not be a case of a bonafide error on the part of the assessee. The Hon'ble Jurisdictional High Court further held that in such circumstances, it was thus, not a "wrong claim" preferred by the assessee, but was a clear case of "false claim" and therefore, penal provisions were clearly attracted.

6.8 In the case of **CIT vs. Zoom Communications Private Limited (327 ITR 510), Hon'ble Delhi High Court** held that if the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim in not found to be bonafide, it would be difficult to say that he could still not be liable to penalty under section 271(1)(c) of the Act. While distinguishing the judgment of Hon'ble Apex Court in the case of CIT v. Reliance Petroproducts P. Ltd. [2010] 322 ITR 158 (SC), Hon'ble Delhi High Court made the following observations:

- *It is true that mere submitting a claim which is incorrect in law would not amount to giving inaccurate particulars of the income of the assessee, but cannot be disputed that the claim made by the assessee needs to be bonafide. If the claim besides being incorrect in law is malafide, Explanation 1 to section 271(1) would come into play and work to the disadvantage of the assessee.*
- *If the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim is not found to be bonafide, it would be difficult to say that he would still not be liable to penalty under section 271(1)(c) of the Act.*
- *We cannot lose sight of the fact that the assessee is a company which must be having professional assistance in computation of its income,, and its accounts are compulsorily subjected to audit. In the absence of any details from the assessee, we fail to appreciate how such deductions could have been left out while computing the income of the assessee company and how it could also have escaped the attention of the auditors of the company.*
- *A general proposition as enunciated by the Tribunal, that no person would ever claim the amount of income tax as deduction with a view to avoid payment of tax. One cannot lay down a hard and fast rule in this regard and every case must be decided considering the facts and circumstances in which such a deduction is claimed, coupled with as to whether the explanation offered by the assessee for madding the claim, is shown to be bonafide or not.*
- *As per the Supreme Court judgment in the case of CIT v Reliance Petro Products Pvt. Ltd (322 ITR 158), it has been held that so long as the asessee has not*

concealed any material fact or the factual information given by his has not been found to be incorrect, he will not be liable to imposition of penalty under section 271()1(c) of the Act, even if the claim made by him is unsustainable in law, provided that he either substantiates the explanation offered by him or the explanation, even if not substantiated, is found to be bonafide. If the explanation is neither substantiated nor shown to be bonafide, Explanation 1 to section 271(1)(c) would come into play and the assessee will be liable to for the prescribed penalty.

- *In the case of Reliance Petro Products Private Limited, the addition made by the AO the respect of other interest claimed as a deduction under section 36(1)(iii) of the Act was deleted by the CIT(A) though it was later restored, by the Tribunal, to the AO. The appeal filed by the assessee against the order of the Tribunal, to the AO. The appeal filed by the assessee against the order of the Tribunal was also admitted by the High Court. It was, in these circumstances, that the Tribunal come to the conclusion that the assessee had neither concealed the income nor filed inaccurate particulars thereof. In recording this finding, the Tribunal felt that if two views of other claim of other assessee were possible, the explanation offered by it could not be said to be false. This, however, is not the factual position in the present case. The facts of the present case are clearly distinguishable.*

With the aforesaid observation it was held that the AO had correctly levied penalty under section 271(1)(c).

6.9 Hon'ble P & H High Court in the case of **Gopal Krishan Kwatra [ITA No. 135 of 2011 (O&M) date of decision: 26.05.2011]** dealt with the issue of legality of penalty imposed by the Assessing Officer under section 271(1)(c) of the Act and upheld by the appellate authorities on the addition made by treating the alleged gifts received by the assessee to be not genuine and bonafide transaction. It was observed by their lordships that no perversity or illegality could be pointed out by the learned counsel for the appellant in the findings recorded by the Tribunal holding the gift to be bogus. In view of the above, the appeal was dismissed and the penalty was claimed.

6.10 It may further be mentioned here that the ratio of the decision of the Hon'ble Delhi High Court in the case of **PSB Industries India Pvt. Ltd.** pronounced on July 11, 2011 in ITA No.792 of 2011 is distinctly applicable on the case under consideration. While distinguishing the judgment in the case of **Commissioner of Income Tax Vs. Reliance Petro Products Pvt. Ltd. [322 ITR 158]**, which has been relied upon by the appellant, it has been held that had the assessee kept in mind the provisions of Section 23 of the Act, which it was supposed to, the assessee would have found that the sum for which the property might reasonably be expected from year to year is adjustment than the sum disclosed in the Lease Agreement. In a case like this, we are of the view that explanation of the assessee was not *bona fide*. Explanation 1 to Section 271(1)(c) of the Act would be fully applicable and the AO was justified in imposing the penalty which was upheld upto the Tribunal level. In view of the above, the reliance placed by the appellant on the decisions cited in the written submission has not been found to be correct.

6.11 In the case of **Harish P. Mashruwala**, it was held by **Hon'ble Bombay High Court** vide order dated 22nd September,2011 that in the case under consideration, the penalty was imposed not because the amount offered by the assessee has been assessed under a heading other than the heading declared by the assessee, but the penalty has been levied on account of the fact that the declaration made by the assessee regarding the source from which the income and Rs.17,00,000/has been earned has been found to be incorrect. Thus, the decisions relied upon by the counsel for the assessees are distinguishable on facts. In this view of the matter, once the declaration made in the return of income itself is found to be incorrect, it would obviously amount to furnishing inaccurate particulars of income and consequently the provisions of Section 271(1)(c) of the Act would be attracted.

6.12 The ratio of the aforesaid decisions is clearly applicable in the instant case where the appellant has been found to be guilty of furnishing inaccurate particulars of income. The decisions relied upon by the appellant are clearly distinguishable both on facts and law as discussed earlier. Under these circumstances and placing a strong reliance on the decisions of various High Courts and other authorities as cited above, I hold that ld. AO has correctly levied penalty under section 271(1)(c) of the Act for the five Assessment Years under consideration. The ground no. 1 of all the appeals under consideration accordingly stand dismissed.

[C] These present appeals has been filed by the assessee against the aforesaid impugned consolidated appellate order dated 19.09.2016 of the Ld. CIT(A). At the time of hearing before us, Revenue was represented by Ms. Nidhi Srivastava, the learned Commissioner of Income Tax (Departmental Representative) ["Ld. CIT(DR)", for short]. However, none was present from the assessee's side. A hearing was earlier fixed on 25.11.2019 also, and even on that date none was present from the assessee's side. In the absence of any representation from assessee's side, at the time of hearing before us, we heard the Ld. CIT(DR); who relied upon the aforesaid impugned consolidated appellate order dated 19.09.2016 of the Ld. CIT(A). After perusal of the materials on record, we find that the Ld. CIT(A) has passed speaking order on merits. Relevant portion of the impugned order of the Ld. CIT(A) has already been reproduced in foregoing paragraph **[B]** of this order. We find that the Ld. CIT(A) has given detailed reasons for his decision on merits in the aforesaid impugned consolidated appellate order dated 19.09.2016 of Ld. CIT(A). During appellate proceedings in Income Tax Appellate Tribunal ("ITAT", for short) no material has been brought for our consideration to persuade us to take a view different from the view taken by the Ld. CIT(A) in the impugned order on merit. After hearing the Ld. CIT(DR) and after perusal of materials on record, and further, in view of the foregoing discussion, we decline to interfere with the aforesaid impugned consolidated appellate order dated 19.09.2016 of Ld. CIT(A), and accordingly, these appeals are dismissed.

[D] Before we part; **we explicitly clarify that the assessee will be at liberty to approach ITAT for restoration of the appeals in accordance with Proviso to**

Rule 24 of Income Tax (Appellate Tribunal), Rules, 1963. If the assessee does approach ITAT for restoration of the appeals in ITAT, the matter will be considered in accordance with law having regard to the facts and circumstances.

[E] In the result, appeals filed by Assessee are dismissed.

Order pronounced in the open court on

(K.N. CHARY) **JUDICIAL MEMBER**	**(ANADEE NATH MISSHRA)** **ACCOUNTANT MEMBER**

Dated:
Pooja/-

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	