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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER

ITA No:- 1552/Del/2017
(Assessment Year: 2006-07)

Additional Commissioner of Income Tax, Special Range-7, New Delhi.	Vs.	M/s ONGC Videsh Ltd., 601, 6th Floor, Kailash Building, 26, K G Marg, New Delhi.
PAN No: AAACO1230F		
APPELLANT		**RESPONDENT**

Revenue by : Ms. Pramita M. Biswas, CIT(DR)
Assessee by : Shri C.S. Aggarwal, Senior Advocate and Ms. Nidhi Bansal, C.A.

ORDER

PER ANADEE NATH MISSHRA, AM

(A) This appeal has been filed by the assessee against the impugned appellate order dated 01.12.2016 passed by Learned Commissioner of Income-Tax (Appeals)-7, New Delhi, [in short, "Ld.CIT(A)"] pertaining to Assessment Year 2006-07. The Assessee has raised following grounds of appeal:-

> *"1. Whether Hon'ble Ld. CIT(A) was correct in deleting the penalty levied u/s 271(1)(c) Income Tax Act ignoring the circumstances and fact of the case that assessee has furnished inaccurate particulars of its income*

while claiming the expenditure for which neither the liability has arisen nor revenue has accrued.

2. *Whether claiming the expenditure for which neither the liability has arisen nor revenue has accrued does not construes to furnishing of inaccurate particulars of income.*

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."*

(B) Assessment Order dated 04.12.2009 was passed under Section 143(3) of Income Tax Act, 1961 ("I.T. Act", for short), wherein, interalia, addition of Rs. 149,31,02,715/- was made. The Assessing Officer ("AO", for short) held that this amount had accrued to the assessee though the assessee had not recognized this Revenue. The assessee's contention was, that pending the settlement of EPC contract, this amount had not accrued to the assessee. However, the AO rejected this contention of the assessee and made the aforesaid addition amounting to Rs. 149,31,02,715/-. Penalty proceedings were initiated by the AO under Section 271(1)(c) of I.T. Act in respect of the aforesaid addition of Rs. 149,31,02,715/-. The AO, however, held that if in appeal the assessee's claim of treating revenues as non-taxable on account of it being uncertain is accepted, then the provision made by assessee for the additional expense to the extent of Rs. 102,60,80,000/- should be disallowed on matching principles and on the same logic as for exclusion of revenues. In effect, therefore, the AO was of the view that if the aforesaid revenue amounting to Rs. 149,31,02,715/- is not held as taxable in the hands of the assessee, then, the corresponding expenses amounting to Rs. 102,60,80,000/- should be disallowed on matching principles. However, the AO did not initiate penalty proceedings under

Section 271(1)(c) of I.T. Act in respect of the aforesaid alternate stand of the AO that the aforesaid expenses amounting to Rs. 102,60,80,000/- is to be disallowed if the aforesaid revenue amounting to Rs. 149,31,02,715/- is not taxed in the hands of the assessee. The assessee filed appeal against aforesaid Assessment Order dated 04.12.2009 before the Ld. CIT(A). Vide his appellate order dated 24.02.2014, Ld. CIT(A) deleted the aforesaid addition of Rs. 149,31,02,715/-. However, the Ld. CIT(A) also agreed with the alternate stand of the AO holding that if the assessee's claim for treating revenues as non-taxable on account of it being uncertain is accepted, then the corresponding expenses to the extent of Rs. 102,60,80,000/- should be disallowed on matching principles. The dispute traveled to Income Tax Appellate Tribunal ("ITAT", for short). Vide order dated 01.07.2019 of Co-ordinate Bench of ITAT, Delhi in assessee's case for Assessment Year 2006-07 in ITA Nos.- 3150/Del/2014 and 3208/Del/2014, the order of Ld. CIT(A) was upheld on this issue. In effect therefore, as things stands today, pursuant to the aforesaid order dated 01.07.2019 of Co-ordinate Bench of ITAT, Delhi, the addition amounting to Rs. 149,31,02,715/- stands deleted, but the assessee's claim for expenses amounting to Rs. 102,60,80,000/- also stands disallowed.

(B.1) The AO has passed penalty order dated 30.03.2015 under Section 271(1)(c) of Income Tax Act, in which the AO levied penalty amounting to Rs. 34,53,78,528/- on the aforesaid disallowance amounting to Rs. 102,60,80,000/-. Before levying this penalty, the AO issued notice to the Assessee. The relevant portion of the aforesaid

penalty order under Section 271(1)(c) of I.T. Act dated 30.03.2015 is reproduced as under:

In this case, original return was filed on 29th November 2006 at a returned income of Rs. 635,90,39,360/-. Subsequently, the assessee has filed revised return on 31.03.2008 and declared an income of Rs. 638,06,45,610/-. Assessment u/s 143(3) was completed on 04.12.2009 and income was assessed at Rs. 1106,41,03,850/- thereby making the following additions to the returned income of the assessee:-

1.	Depreciation on Participating Interest	=	Rs. 204,57,99,264/-
2.	Depreciation on Support Equipment	=	Rs. 1,94,58,972/-
3.	Disallowance of pre-acquisition expenses	=	Rs. 112,51,00,000/-
4.	Sudan pipeline – Addition to income in respect of claim made to Sudan Government not accepted by them	=	Rs. 149,31,00,000/-

2. Aggrieved by the above additions made, assessee filed appeal before Ld. CIT(A)-XVI who in his order dated 24.02.2014 in Appeal No. 140/09-10 has decided the appeal as under:-

1. Addition made on account of disallowance of depreciation on Participating Interest - issue decided in favour of assessee.
2. Addition made on account of disallowance of depreciation on Support Equipment - issue decided in favour of assessee.
3. Addition made on account of disallowance of pre-acquisition expenses - issue decided in favour of assessee.
4. Addition made to income in respect of claim made to Sudan Government not accepted by them has been reduced to Rs. 102,60,80,000/- as against the addition of Rs. 1,493,100,000/-

3. Thus, the only issue that survives for consideration for levy of penalty is addition made to income in respect of claim made to Sudan Government to the extent of Rs. 102,60,80,000/-.

4. A fresh show cause notice was issued on 05.03.2015. In response to which the assessee has submitted as under:-

"On the issue of claim made to Sudan Government not accepted by them – amount of addition has been reduced to Rs. 102,60,80,000/- as against the addition of Rs. 1,493,100,000/-

The Assessee was awarded contract for executing a multi-product pipeline project on Build, Own, Lease and Transfer (BOLT) from Khartoum Refinery to Port Sudan for the Ministry of Energy and Mining of the Government of Sudan (MEM) by entering into Pipeline Contract Agreement ('PCA') dated 30 June 2004. Copy of agreement is enclosed as Annexure 1 to this letter.

Subsequently, the Assessee invited tender for commissioning the above-said pipeline and the same was awarded to M/s Dodsal Engineering and Construction Pte. Ltd. (formerly known Dodsal Pte. Ltd.) ('EPC Contractor') vide agreement dated 31 August 2004. Copy of agreement is enclosed as Annexure 2 to this letter.

Further, the Assessee has also appointed ONGC as its consultant for managing the entire project of execution of Engineering, Procurement and Construction related work for the Project and had directed Dodsal to directly deal/correspond with the Engineering Services, Division of ONGC on all matters relating to the project. Copy of the agreement is enclosed as Annexure 3 to this letter.

Thereafter, the Company has entered into a participating agreement with Oil India Limited (A Government of India Enterprise), wherein Oil India holds 10% share in the project and balance 90% is held by the Assessee. Copy of such Participating agreement dated 10 November 2004 is enclosed as Annexure 4 to this letter.

During the relevant assessment year, the Assessee completed the execution of multi-product pipeline from Khartoum Refinery to Port Sudan for the Ministry of Energy and Mining of the Government of Sudan (MEM) and the same is certified by MEM as under:

12" X 741 km multi-product Export Pipeline has been successfully hydro-tested on 28/8/05. The WORKS have been completed and the Pipeline system, under the scope of works of ONGC Videsh Ltd as per the terms and conditions of the Pipeline Contract Agreement (PCA) dated 30/6/04, is ready for commissioning, and handover on 31/8/05 – 2 months ahead of contractual schedule of 31/10/05.

Copy of completion certificate issued by the Government of Sudan is enclosed as Annexure 5 to this letter. Further, on the basis of such certificate, the Assessee has also issued a certificate to the EPC Contractor acknowledging that the provided work/assignment has been completed.

Liability to EPC Contractor for claim made by them for additional work carried out and accepted/verified by the Assessee's consultant

The EPC Contractor encountered certain constraints such as the scarcity of water for hydro testing, port congestion etc. In order to complete the work within the schedule timelines, the EPC Contractor adopted various acceleration measures, including making arrangements for additional spreads, increased resources and airfreight by incurring significant expenditure.

In a letter dated 30 June 2005, the Assessee informed the EPC Contractor that variations in quantities of items indicated and / or identified in the Contract shall be settled on the As Built Data and / or Documents in accordance with the provisions and unit rates set forth in Annexure C of the Contract. The EPC Contractor was also requested to submit their detailed variation proposals based on the As Built Data and Documents.

Subsequently, on 14 August 2005, a meeting was held among the representatives of the Assessee and EPC Contractor to discuss the adjustment to the contract price consequent upon the alterations/variations to the scope of work undertaken by the EPC Contractor and the actions to be taken in relation thereto. Further, the EPC Contractor was advised by the Assessee to submit its variation proposals, alongwith relevant supporting documentation.

In compliance with the above advise, the EPC contractor executing the project on behalf of the consortium (i.e. the Company and Oil India Ltd.) claimed additional costs amounting to USD26,982,643, USD 8,894,325and USD 1,270,435 (aggregating to Rs. 1,659 million) vide its letters and invoice dated 1 December 2005 and 09 January 2006. Such letters/invoice were submitted with ONGC (consultant) for review and approval. Copy of letters and invoice are enclosed herewith as Annexure 6 to this letter. ONGC reviewed such claims and approved the claims of USD 26,982,643 and USD 1,270,435 with minor modifications and rejected the claim of USD 8,894,325. The same were communicated to the EPC Contractor vide its letters dated 25 May 2006 and 05 October 2007. Copy of the letters are enclosed as Annexure 7 to this letter.

Further, based on the advice of the consultant (ONGC), the Assessee has accounted for an amount of Rs. 1,026.08 million being the Assessee's share (90%) out of Rs. 1,140.08million in the books of accounts.

Further, the above facts have been adequately disclosed in the note 5 of schedule 27 of the annual report of the Assessee and the same are reproduced as under:

During the year, the Company completed the execution of the 12"X 741 Kms multi-product pipeline from Khartoum Refinery to Port Sudan for the Ministry of Energy and Mining of the Government of Sudan (MEM) on Build, Own, Lease and Transfer (BOLT) basis and handed over the same to MEM. The project has been implemented in consortium with Oil India Limited, Company's share being 90%.

The EPC Contractor executing the project has claimed additional costs aggregating to Rs. 1659.00 Million (Company's share being Rs. 1;493.10 Million), which have not been accepted by the Company as yet. However, part of the claims

has been forwarded to MEM for their approval for an aggregate amount of receivables from MEM Rs. 1,524.20 Million (Company's share being Rs. 1371.78 Million), while the balance claims may be forwarded to MEM after further verification. Pending settlement with the EPC Contractor, an amount of Rs. 1,026.08 Million, being the Company's share out of Rs. 1,140.08 Million has been provided as expenditure during the year based upon the advices received by the Company from its consultant. The Company's share of the balance amount has been shown as claims not acknowledged as debt. However, no revenue in this respect has been recognized pending final approvals by MEM.

Copy of the relevant page of the Annual report is enclosed as Annexure 8 to this letter.

Since the claim made/expenditure incurred by EPC Contractor was revenue in nature and represent liability already incurred, the assessee has claimed deduction of expenses in the return of income. Also, the Assessee has specifically mentioned the facts of such claim in clause 6of the notes to the computation of income attached to its return of income and the same is reproduced below:

During the year, the company completed the execution of multi-product pipeline from Khartoum Refinery to Port Sudan for the Ministry of Energy and Mining of the Government of Sudan (MEM). The project has been implemented in consortium with Oil India Limited, Company's share being 90%. The EPC Contractor executing the project on behalf of the consortium has claimed additional costs aggregating to Rs. 1659 Million. Pending settlement with the EPC Contractor, an amount of Rs. 1,026.08 Million, being the company's share out of Rs. 1,140.08 Million has been provided as expenditure during the year based upon the advices received by the Company from its consultant.

The company has forwarded to MEM claims of Rs. 1524.20 Million (Company's share being Rs. 1493.10 Million) which have not been accepted by MEM. Accordingly, the company has not considered any revenue in its Profit & Loss Account for the FY 05-06.

Copy of the notes to the computation of income is enclosed as Annexure 9 to this letter.

From the above, your goodself may appreciate that the Assessee has not concealed any particulars of income or furnished any inaccurate particulars of income before the tax authorities, accordingly, the penalty under section 271(1)(c) of the Act should not be levied on the Assessee.

Arbitration

The Assessee had issued a letter on 31 July 2008, wherein, the EPC Contractor has been communicated that its claims have been assessed quantitatively by Engineering Services (ES), ONGC and such claims are now being legally scrutinized in totality for their admissibility. (Copy of letter is enclosed as Annexure 10 to this letter).

Upon receipt of the above letter wherein the claims of the EPC Contractor were legally scrutinized, the EPC Contractor initiated arbitration proceedings against the Assessee, vide its letter dated 26 December 2008, since these amounts of claims had been assessed and admitted by the Company/consultant earlier. Copy of letter and arbitration petition is enclosed as Annexure 11 to this letter. In such arbitration petition, it has been categorically mentioned that:

The contents of this letter were absolutely contrary to the admission of amounts due and payable to Dodsal set forth in letters dated May 25, 2006 and October 5, 2007, read with the letter dated November 2, 2007. Further, the additional works undertaken by Dodsal were duly certified by OVL. The amounts payable to Dodsal have already been assessed and confirmed through the above referenced letters dated May 25, 2006; October 5, 2007 and November 2, 2007. Any further assessment suggested in OVL's letter dated July 31, 2008 is not warranted in light of OVL's prior admissions and is obviously intended only to delay the payment of the Aggregate Amount.

Keeping in view that the aforesaid arbitration has initiated on 26 December 2008, your goodself may appreciate that there was no dispute in relation to claim raised by EPC Contractor and approval by the consultant of the Company till the date of filing of the tax return for the AY 2006-07 (both original and revised). Further, the Company has also issued the certificate of completion of work to the EPC Contractor. Accordingly, the liability had been crystallized in the financial year 2005-06 amounting to Rs. 1,026.08 million and claimed as revenue expenditure. Further, we wish to highlight that no dispute had arisen even till the date of filing of revised return of income, accordingly, the claim of the Assessee was bonafide and allowable as revenue deduction.

In the financial year 2014-15, the arbitrator has awarded certain amount to Dodsal, however, the same has not been accepted by the EPC Contractor and the Assessee and both the parties have filed appeal before the Hon'ble Delhi High Court.

Claim raised on MEM not accepted by legal department of Sudan Government and hence not includible in income:

On receipt of the claim of additional expenditure incurred by EPC Contractor, the Assessee, through its consultant, evaluated such claims and forwarded counter claim to its customer, MEM, Sudan though it was not covered by terms of contract and hence was subject to the acceptance by Sudan Government. Till the finalization of the books of accounts, the Assessee had forwarded a claim of USD 34,128,976 to MEM [equivalent to Rs. 1,524.20 million (Appellant's share being Rs. 1,371.78 million)] vide its letter dated 17 April 2006. Subsequently, claims of USD 11,878,586 and USD 169,147were also made by letter dated 06 July 2006. Copy of the letters are enclosed as Annexure 12 to this letter.

Further, in the letter dated 06 July 2006, Assessee has mentioned the details of the claims made by the EPC Contractor and the amount admissible from such claims. The Assessee did not receive any acceptance/confirmation from the customer, MEM, till the date of finalization of the books of account for the relevant assessment year. Accordingly, the Assessee could not consider any revenue on this

account in its books of account since the Assessee cannot be said to have acquired any right to receive such income till the time the claim is accepted by MEM.In this regard, the Assessee has placed reliance on the following judicial precedents:

- *E D Sassoon & Co. Ltd. Vs. CIT (26 ITR 27) (SC)*
- *CIT v Hindustan Housing and Land Development Trust Ltd.: 161 ITR 524,530 (SC)*
- *CIT v Bharat Petroleum Corporation : 202 ITR 492 (Cal)*
- *Godhra Electricity v CIT: 225 ITR 746 (SC)*

Subsequently, the Assessee received a response from MEM vide letter dated 09 December 2006, wherein it has been mentioned that MEM had sought an opinion from its legal department and legal department of MEM wasof the view that Assessee is not legally entitled to claim the amount from MEM. The response of the legal department is reproduced as under:

Referring to the above mentioned Subject and after review and study of the Contract signed between MEM and OVL and the related documents, I would like to convey to you that the Contractor is not entitled to any amount under his claims for additional amounts, as the alleged variations were not approved by the Owner before implementation of the works the subject of the variations. In addition the required procedures under the contract for both, variations approval or claims were not followed. However, the high standard of performance and early completion by of the project the Contractor (OVL) is appreciated and high valued and could be a matter of consideration at your company's own discretion and consideration, without any legal obligation to do the same.

Copy of the letter is enclosed as Annexure 13 to this letter.

Thereafter, there has been a series of communication with MEM to process the payments of the additional claim raised by the Assessee.

Arbitration

In the absence of approval and processing of payments, the Assessee has invoked arbitration proceedings against its customer, MEM vide its letter dated 14 May 2009 and the same is pending till date. Copy of letter dated 14 May 2009 intimating MEM for invocation of arbitration proceedings is enclosed as Annexure 14 to this letter. In view of the same, your goodself may appreciate that no right of receiving any income has arisen in the hands of the Assessee till date.

The Hon'ble CIT(A) has deleted the addition made on account of non-recognition of income by observing that:

There is no legal entitlement to the claim to the contractor as well as to the appellant. Neither the claim of the EPC Contractor has been accepted by the appellant company nor has the claim of the appellant company been accepted by MEM. In view of the above neither revenue is recognizable in the hands of EPC Contractor nor it can be recognized in the hands of the appellant company. The principle which the appellant applied to claim that revenue is not recognizable, by the same principle the liability has not crystallized and has not arisen in its hand.

In other words neither the liability has arisen in the hands appellant company nor revenue has accrued

In view of the above, the additional expense of Rs. 1,026.08 million provided as expenditure by the appellant on this account calls for disallowance as no liability as arisen in the hands of the appellant. Further, since revenue did not accrue or arise in the hands of the appellant, therefore, the addition of Rs. 1,493.10 million made by the AO cannot be justified. The cause laws relied on by the AR not applicable in the instant case because the contractor is not legally entitled to the additional claims and liability claimed by EPC Contractors which is pending in arbitration tribunal is not accepted by the appellant. In view of the above, the addition made by the AO is reduced from Rs. 1,493.10 million to Rs. 1,026.08 million. The appeal is partly allowed in this ground.

While adjudicating the matter, the CIT(A) has categorically mentioned that since the income did not accrue or arise in the hands of the Assessee, therefore, the addition of Rs. 1,493.10 million cannot be justified and accordingly has deleted the addition made in the assessment order. However, the Hon'ble CIT(A) also disallowed the expenditure claimed by the Assessee on account of claims of the EPC Contractor by stating that the liability to pay is pending in arbitration tribunal. In this regard, we wish to submit that till the time of filing of original as well as the revised return of income, arbitration was not pending, rather the Assessee had in principal approved the expenses claimed by the EPC Contractor. Accordingly, your goodself may appreciate that the Assessee has made full disclosures and elaborate legal submissions and cannot be said to have either concealed any income or furnished any inaccurate particulars of income, therefore, penalty should not be imposed on the Assessee.

Further, Assessee submitted that the admission or rejection of a claim is a subjective exercise and whether a claim is accepted or rejected has nothing to do with furnishing of inaccurate particulars of income. What is a correct claim and what is an incorrect claim could be a matter of perception.

Various judicial precedents have held that legislature intends to levy penalty only in cases where there is a concealment of income or furnishing of inaccurate particulars of income with a malafide intention so as to evade taxes. This view and understanding of the intent of legislature is supported by landmark decision of Supreme Court in the case CIT vs Reliance Petroproducts Pvt. Ltd. [2010] 322 ITR 158 (SC). In the said ruling, an addition in respect of interest expenditure was made during the course of assessment proceedings. This interest expenditure was on account of interest on loans taken for acquiring shares in another company.

The Supreme Court while deciding the matter in favor of assessee, held that there is "no finding by the AO that any details supplied by the assessee in its Return were found to be incorrect or false. Such not being the case, there would be no question of inviting the penalty under Section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee....

.....It was tried to be argued by the AO 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. In the relevant case, 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"

The principle which emerges from Reliance Petroproducts case is that making a claim which is disallowed by the Assessing Officer would not tantamount to furnishing of inaccurate particulars or concealment of income.

The Hon'ble court in the said ruling further observed that:

"In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars."

The above principles have been followed in the following cases:

- *CIT, New Delhi vs. M/s Dharampal Premchand Ltd [2010-TIOL-654-HC- DEL]*
- *CIT vs. Vijay Kumar Jain [325 ITR 378] Chhatisgarh HC*

In the above, facts of the case, your goodself may appreciate that the facts in respect of the claim of the Assessee have been fully disclosed in the note 5 of schedule 27 of the annual report of the Assessee. Also, the Assessee has specifically mentioned the details of such claim in the notes to the computation of income. Further, the Assessee has also filed the relevant documents with the tax authorities during the course of assessment and appeal proceedings. In view of the above, it is submitted that Assessee had fully disclosed all the relevant particulars and facts and there was no concealment of income.

Further, we wish to submit that the expenditure incurred by the Assessee is in the nature of revenue expenditure and the liability has also crystallized liability during the year. Keeping in view that the expenditure has crystallized and is revenue in nature the same is allowable under section 37 of the Act as per Apex Court rulings in the case of Empire Jute Co. Ltd. vs. CIT 124 ITR 1 (SC), CIT vs. Associated Cement Companies Ltd. 172 ITR 257 (SC), and Alembic Chemical Works Co. Ltd. vs. CIT 177 ITR 377(SC). In view of the same, your goodself may appreciate that no inaccurate particulars were furnished by the Assessee and the claim made was bonafide.

Therefore, it shall be arbitrary to conclude that Assessee had furnished inaccurate particulars of income. Accordingly, we humbly plead that penalty should not

imposed on the Assessee as there is neither any concealment of income nor furnishing of any inaccurate particulars of income.

Further, explanation 1 to section 271(1)(c) of the Act deals with deeming provisions with regard to levy of penalty. Explanation 1 to sec 271(1)(c) of the Act is reproduced as under:

"Where in respect of any facts material to the computation of the total income of any person under this Act,--

such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Commissioner to be false, or

such person offers an explanation which is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

It is submitted that above explanation apply where in relation to the facts either no explanation is given or the explanation given is found to be false or there is lack of bonafides in the explanation given. Whereas in the case of the Assessee, the expenditure has crystallized in the relevant assessment year and accordingly, the same has been claimed in the original return of income. Further, even at the time of filing of the revised return of income, the arbitration proceeding were not initiated by the EPC Contractor. Accordingly, there was a bonafide reason for the claim of the expenditure in the revised return as well. Also, during the course of assessment proceedings, the Assessee had explained truly and correctly the entire facts. Your goodself may appreciate that the observations in the assessment order do not refute the explanations given by the Assessee in respect of the expenditure rather, the assessing officer has proceeded to consider the income attributable to such expenses. Therefore your goodself may appreciate that the Assessee does not fall in any of the above-said criteria since:

The Assessee has neither failed to offer an explanation nor such explanation is found to be false; or

Further, the Assessee has been able to substantiate the explanations and demonstrated that such explanations were bonafide

Therefore, it cannot be said that Assessee had failed to offer an explanation or any explanation have been found to be false or the explanation relating to the facts lacks bonafide. Hence, the provisions of section 271 (1)(c) of the Act are not attracted and therefore penalty should not be imposed on the facts and circumstances of the case.

In the following judicial precedents, the Hon'ble Courts/Tribunals have held that merely because there was an addition made by the assessing officer in the course of assessment where the Assessee had taken a different position at law based on judicial precedents, section 271(1)(c) of the Act is not attracted:

- *Shervani Hospitalities Ltd. vs. CIT [2013] 35 taxmann.com 271 (Delhi)*
- *Devsons (P.) Ltd. vs. CIT [2010] 329 ITR 483 (Delhi)*
- *Karan Raghav Exports (P) Ltd. vs. CIT [2012] 21 taxmann.com 8 (Delhi)*
- *ACIT vs. DSL Software Ltd. [2012] 20 taxmann.com 408 (Delhi)*
- *Nuchem Ltd vs. DCIT [49 ITD 441 (DEL)]*
- *Cement Marketing Company of India Ltd vs. Assistant Commissioner of Sales Tax [124 ITR 15 (SC)]*
- *CIT vs. Santosh Financiers [247 ITR 742 (Ker)]*
- *CIT vs. Inden Bislers [240 ITR 943] (Mad.)*

Assessee also submitted that the company is of the opinion that the liability to pay the EPC Contractor has crystallized during the year and is eligible for deduction as revenue expenditure. However, such opinion of the Assessee has not been accepted in the assessment proceedings. In this regard, it is submitted that the courts have held that where additions have been made by the AO to the returned income on account of debatable questions of law or differences in opinion, the same would not tantamount to concealment of income or furnishing inaccurate particulars of income so as to warrant levy of penalty. Assessee has relied on the following case laws:

- *ITO vs. Roborant Investments (P) Ltd. 7 SOT 181 (Mum)*
- *Whirlpool of India Limited vs. JCIT [2008] 114 TTJ 211 (Del)*
- *ACIT vs. Jindal Equipment Leasing [2011] 131 ITD 263 (Del)*
- *ADIT vs. Citicorp Investment Bank (Singapore) Ltd. (ITA No. 7592/Mum/2010)*

5. The reply of the assessee has been considered. The addition in respect of expenditure pending settlement of EPC contract was made by the Assessing Officer by observing as under:-

"8.1 During the year, the company completed the execution of a multi-product pipeline from Khartoum refinery to Port Sudan for the Ministry of Energy and Mining of the government f Sudan (MEM). The project has been implemented in consortium with Oil India Ltd., company's share being 90%. The aforesaid project was completed during the relevant assessment year. The EPC contractor executing the project on behalf of the consortium has claimed additional costs aggregating to Rs.1,026.08 million, being the company's share out of Rs.1,140.08 million has been provided as expenditure during the year.

8.2 The company has forwarded to MEM claims of Rs.1524.20 milliion (company's share being 1,493.10 million) which have not been accepted by

MEM. Accordingly, the company has not considered any revenue in its Profit and Loss account for the F.Y.2005-06."

6. After considering the reply filed by the assessee, the Assessing Officer held that:

"on completion of the project during the year, the company had a definite right to claim its share of revenues to the extent of 1493.10 million. The assessee company also forwarded its claim of Rs.1493.10 million to MEM during the year. As such, for the year under consideration the income was ascertained and definite and hence should have been returned as taxable income. The principal of matching in accounts which is upheld in server judgments of the Supreme Court and High Court including the jurisdictional High Court is based on four concepts:
(a) The period to which income / expenditure relates to
(b) The year in which the income / expenditure accrue – or right to receive or liability to pay arises.
(c) Ascertainment of quantification of the income or expenditure &
(d) Final payments.
8.7 It may be mentioned that whereas in the cash system of accounting the fourth point i.e. payments is most important. In the case of accrual system of accounting the first three points are important. In the case of the assessee who maintained its account on accrual system of accounting the first three points are important. As the project is completed during the year and there is ascertainment of company's share of income to the extent of Rs.1493.10 million the claim for which has also been forwarded by the assessee company to MEM the same should have been recognized as revenue. This is more so, because the corresponding costs totaling Rs.1140.08 million have been provided for in reducing the profits of the year".

7. The Assessing Officer then relied upon the case of Metal Box Company India Ltd. vs. Their Workman 73 ITR 63 (SC) and Calcutta Company Ltd. vs. CIT, 37 ITR 1 (SC) and held that:

"the principal that both incomes and the expenses in relation thereto are to be taken into account for determining taxable profits of the year on accrual basis. Subsequent, cessation of right to receive income or liability to pay may be dealt as per the provisions of income tax as per section showing write – off of debts (section 36) in case income offered is not fructified or section 41 when due to cessation of liability the same is offered as income.

8.10. As the assessee has failed to offer the accrued revenues to the extent of Rs.1493.10 million the claim for which has also been forwarded by the assessee company to MEM the same should have been recognized as revenues. This is

more so, because the corresponding costs totaling Rs.1140.08 million have been provided for in reducing the profits of the year. The sum of Rs.1493.10 million is added to the taxable income of the assessee company."

8. The CIT(A) has deleted addition made by the Assessing officer in respect of Sudan project for income not offered to tax in the return of income. However, CIT(A) has also mentioned in the order that assessee is not eligible to claim deduction of expenditure incurred in respect of liability claimed by EPC contractor as arbitration proceedings are pending. Therefore to this extent, the assessee has furnished inaccurate particulars of its income and is therefore liable to penalty u/s 271(1)(c) of the Income-tax Act, 1961. Reliance in this regard is placed on the following decisions:-

(i) The Hon'ble ITAT in the case of Sanjay Enterprises Pvt ltd Vs ITO in ITA No 3036 & 4083/Del/2007 dated 16.12.2011 has elaborately considered the provisions of Section 271 (1)(c) of the Act and has come to the conclusion that a heavy onus was placed on the assessee to explain the difference between the assessed income and returned income. It has been held that the onus is not on the Revenue to prove mala fide, even when the primacy onus was on the assessee to prove that there was no concealment in view of Expln. 1 to Section 271(1)(c) of the Act and no separate enquiry is necessary before imposing the penalty. It is well established that whenever there is difference between the returned and assessed income, there is inference of concealment The operative portion of the jurisdictional Tribunal's order is reproduced hereunder :

`The legislature has not used the words 'concealed his incomes., From this it would be apparent that penal provision would operate when there is a failure to disclose fully or truly all the particulars. The words 'particulars of income' refer to the facts which lead to the correct computation of income in accordance with the provisions of the Act. So when any fact material to the determination of an item as income or material to the correct computation is not filed or that which is filed is not accurate, then the assessee would be liable to penalty under Section 271(1)(c) of the Act. The expression 'has concealed the particulars of income' and 'has furnished inaccurate particulars of income' have not been defined either in section 271 or elsewhere in the Act. However, notwithstanding the difference in the two circumstances, it is now well established that they lead to the same effect namely, keeping off a certain portion of the income from the return. According to Law Lexicon, the word "conceal" means: "to hide or keep secret. The word 'conceal' is con-celare which implies to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of to withhold knowledge of. The offence of concealment is, thus, a direct attempt to hide an item of income or a portion thereof from the knowledge of the income-tax authorities."

In Webster's Dictionary, "inaccurate" has been defined as :"not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript." If the disclosure of facts is incorrect or false to the knowledge of the assessee

and it is established, then such disclosure cannot take it out from the purview of the act of concealment of particulars or furnishing inaccurate particulars thereof for the purpose of levy of penalty. The penalty u/s 271(1)(c) of the Act is leviable if the AO is satisfied in the course of any proceedings under this Act that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. In this context, Hon'ble Gujrat High Court in the case of A.M. Shah & Co. v.CIT [1999] 238 ITR 41542000] 108 Taxman 137 (GO observed that "there cannot be a straight jacket formula for detection of these defaults of concealment or of furnishing inaccurate particulars of income and indeed concealment of particulars of income and inaccurate particulars of income may at times overlap, as for example when half of the income under a particular head is not at all disclosed, that would be concealed to that extent while the remaining half which is in fact disclosed would, not being his complete disclosure amount to inaccurate particulars of income as regards that constituent item of _the return._ By the _very nature of the assessment proceedings the ITO While ascertaining the total income chargeable to tax would be in a position to detect the specific or definite particulars of income concealed or of which false particulars are furnished. Where in the constituents of income returned, such specific or definite particulars of income are detected as concealed, then even in the total income figure to that extent they reflect, it would amount to concealment to that extent. In the same way where specific and definite particulars of income are detected as inaccurate, then such figure will also make the total income inaccurate in particulars to the extent it does not include such income. Whether it be a case of only concealment or of only inaccuracy or both, the particulars of income so vitiated would be specific and definite and be known in the assessment proceedings by the ITO, who on being satisfied about each concealment or inaccuracy of particulars of income would be in a position to initiate the penalty proceedings on one or both of the grounds of default as may have been specifically and directly detected. The opportunity of hearing given by the notice under section 271(1)(c), obviously is against such concealment and inaccuracy as is detected in the assessment proceedings".

(ii) Hon'ble jurisdictional High Court in Jaswant Rai v. CBDT [1982] 133 ITR 19/[1981] 7 Taxman 210 (Delhi) held that the subsequent act of disclosure of an income would not make any difference and it cannot be said that the assessee had not concealed particulars of their income or had not furnished inaccurate particulars of such income.

A very heavy onus was placed on the assessee to explain the difference between the assessed income and returned income and the assessee did not discharge the said onus. In the light of the discussion made above and conduct of the assessee, it is, thus clear that all the material facts and particulars relating to the assessee's-computation of income were never disclosed by the assessee, and it is further clear that the assessee did not offer any explanation at all before the AO during the penalty proceedings. In these circumstances and in the light of decisions of the Hon'ble Supreme Court and jurisdictional High Court referred to above, we are of the opinion that the assessee has not been able to discharge the burden that lay upon them by Explanation 1 to s. 271(1)(c) of the Act. Therefore, we have no hesitation in upholding the order of the ld. CIT(A) in confirming the penalty

imposed by the AO under s. 271(1)(c) of the Act. Consequently, ground no.1 in the appeal is dismissed."

(iii) The Hon'ble Supreme Court in the case of CIT, Delhi Vs Atul Mohan Bindal reported in Civil Appeal No 5769 of 2009 dated 24.8.2009, the Hon'ble Apex Court held that a close look at Section 271(1)(c) and Explanation (1) appended thereto would show that in the course of any proceedings under the Act, inter alia, if the Assessing Officer is satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income, such person may be directed to pay penalty. The operative part of the decision of Apex Court is reproduced hereunder :-

" close look at Section 271(1) (c) *and Explanation (1) appended thereto would show that in the course of any proceedings under the Act, inter alia, if the Assessing Officer is satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income, such person may be directed to pay penalty. The quantum of penalty is prescribed in Clause (iii). Explanation 1, appended to section 271(1) provides that if that person fails to offer an explanation or the explanation offered by such person is found to be false or the explanation offered by him is not substantiated and he fails to prove that such explanation is bona fide and that all the facts relating the same and material to the computation of his total income has been disclosed by him, for the purposes of Section 271(1)(c), the amount added or disallowed in computing the total income is deemed to represent the concealed income. The penalty spoken of in Section 271(1)(c) is neither criminal nor quasi criminal but a civil liability; albeit a strict liability Such liability being civil in nature, mens rea is not essential.*

(iv) In the case of Union of India and Ors. vs. Dharamendra Textile Processors and Ors, a three judge Bench of this Court held that Dilip N. Shroff did not lay down correct law as the difference between Section 271(1)(c) and Section 276(c) of the Act was lost sight of The Court held that the explanation appended to Section 271(1)(c) indicates element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the return. The Court held thus:

The Explanations appended to Section 271(1)(c) of the Income Tax Act, 1961, indicate the elements of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the return. The judgment in Dilip N. Shroff case (supra) has not considered the effect and relevance of Section 276 (c) of the I. T Act. The object behind the enactment of Section 271(1)(c) read with Explanations indicates 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 276 (c)."

(v) The Hon'ble M. P. High Court in the case of Vimal Ginning and Pressing Factory Vs CIT 279 ITR 100 held as under: "When no explanation offered when

penalty proceedings were initiated, imposition of penalty uls 271 (1) (c) is valid."

(vi) The Hon'ble M. P. High Court in the case of Rukmini Bai 276 ITR 650 held as under:

"Held, rejecting the application, that the assessee did not file any explanation when the penalty proceedings were initiated The *expiration could be the same as that given before the Assessing Officer and if that had been so, it would have had to be looked into in the penalty proceedings, but when no explanation was filed, it could not be taken into consideration. The assessee could not contend for the first time before the court that interference was warranted in the facts and circumstances of the case. Calling for the statement of case was not warranted in this case because the Tribunal had rightly recorded that the imposition of penalty under section 271(1) (c) in the case was just and proper"*

(vii) Hon'ble Allahabad High Court in the case of CIT Vs Rakesh Suri, 331 ITR 458 held as under:

Held, allowing the appeal, that the assessee had concealed the material facts and given incorrect statement of facts in the application and also not provided information required by the Assessing Officer, after receipt of notice. Accordingly the action of the assessee was neither bona fide nor voluntary. The manner in which the assessee had tried to prolong the case before the Assessing Officer by not providing information immediately and by narrating incorrect facts in the letter dated December 6, 2006 showed that the assessee had concealed the income and disclosure was not voluntary but under compulsion being cornered by the Assessing Officer. Penalty had to be imposed."

(viii) Furthermore the Hon'ble Delhi High Court, in the case of M/s Zoom Communication Pvt. Ltd., in ITA No.7/2010 dated 24.05.2010 has held that-

"The Court cannot overlook the fact that only a small percentage of the Income Tax Returns are picked up for scrutiny. if the assessee makes a claim which is not only incorrect in laws 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 u/s 271(1)(c) of the Act.

The Hon'ble High Court observed that the a claim which is wholly untenable in law and has absolutely no foundation on which it could be mean, the assessee would not be liable to imposition of penalty, even if he was not acting bonafide while making a claim of this nature, that would give a licence to unscrupulous assessees to make wholly untenable and unsustainable claims without there being any basis for making them, in the hope that their return would not be picked up for scrutiny

and they would be assessed on the basis of self assessment Under Section 143(1) of the Act and even if their case is selected for scrutiny, they can get away merely by paying the tax, which in any case, was payable by the. The consequence would be that the persons who make claims of this nature, actuated by a mala fide intention to evade tax otherwise payable by scrutiny. This would take away the deterrent effect, which these penalty provision in the Act have".

9. Considering the facts of the case and in the light of Explanation (1) of Section 271 (1) (c) of the IT Act and in view of plethora of decisions of Hon'ble Supreme Court, High Court and jurisdictional Tribunal, I am of the view that Explanation (1) to section 271 (1) (c) of the IT Act is clearly attracted in the case of the assessee.

10. In the light of above stated facts and circumstances, it is established beyond doubt that the assessee has furnished inaccurate particulars of income to the extent of Rs.102,60,80,000/- on account of disallowance of expenditure claimed by the assessee in respect of claim raised by the EPC contractor for Sudan pipeline project. "

(B.1.1) Aggrieved, the assessee filed appeal before the Ld. CIT(A). Vide impugned appellate order dated 01.12.2016, the Ld. CIT(A) deleted he aforesaid penalty amounting to Rs. 34,53,78,528/-, holding as under:

2. All the grounds of appeal are directed against the penalty of Rs.34,53,78,528/- levied u/s 271(1)(c) of the Act.

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

"ONGC Videsh Limited('the Appellant' or 'Company'), a company incorporated under the provisions of the Companies Act, 1956 is a wholly owned subsidiary of Oil and Natural Gas Corporation Limited ('ONGC').The Appellant filed its original return of income on 29November 2006 which was subsequently revised on 31 March 2008. The assessment was completed vide order under section 143(3) of the Act dated 04 December 2009 after making additions/disallowances aggregating to Rs. 4,683,458,236. The appeal filed by the Appellant has been disposed by the Hon'ble CIT(A) vide order dated 24 February 2014. Vide such order, the Hon'ble CIT(A) has deleted all the aforesaid additions made in the assessment order. However, Hon'ble CIT(A) has disallowed the amount of claim raised by EPC Contractor to the extent accepted by the Company and provided as liability in the audited balance sheet.

While passing the order, the Hon'ble CIT(A) has observed that

> *There is no legal entitlement to the claim to the contractor as well as to the appellant. Neither the claim of the EPC Contractor has been accepted by the appellant company nor has the claim of the appellant company been accepted by MEM. In view of the above neither revenue is recognizable in the hands of EPC Contractor nor it can be recognized in the hands of the appellant company. The principle which the appellant applied to claim that revenue is not recognizable, by the same principle the liability has not crystallized and has not arisen in its hand. In other words neither the liability has arisen in the hands appellant company nor revenue has accrued.*

In this regard, we wish to submit that the transaction of expenditure in relation to EPC Contractor and accrual of income from Ministry of Energy and Mining of the Government of Sudan ('MEM') are independent of each other and the liability of the Appellant to make payments to the EPC contractor are not linked with the receipt of the funds from MEM. In view of the above, the

Appellant has filed an appeal before the Hon'ble Income Tax Appellate Tribunal against the order of the Hon'ble CIT(A) which is pending for adjudication.

Pursuant to the order passed by the Hon'ble CIT(A), the Deputy Commissioner of Income Tax, Circle 19(1) ('Ld. AO') has passed a penalty order dated 30 March 2015 under section 271(1)(c) of the Act holding that the Appellant has furnished inaccurate particulars of its income to the extent of Rs. 1,026,080,000 in respect of claim raised by the EPC Contractor for Sudan pipeline project. Aggrieved by the aforesaid penalty order passed by the Ld. AO, the Appellant is in appeal before your honor.

Facts of the Case

The Appellant was awarded contract for executing a multi-product pipeline project on Build, Own, Lease and Transfer (BOLT) from Khartoum Refinery to Port Sudan by the Ministry of Energy and Mining of the Government of Sudan. For commissioning the above-said pipeline, the contract was awarded to M/s Dodsal Engineering and Construction Pte. Ltd. (formerly known Dodsal Pte. Ltd.) ('EPC Contractor').

The Appellant had also appointed ONGC as its consultant for managing the entire project of pipeline execution and had directed Dodsal to directly deal/correspond with the Engineering Services, Division of ONGC on all matters relating to the project.

The Company has entered into a participating agreement with Oil India Limited ('Oil India'), wherein Oil India holds 10% share in the project and balance 90% is held by the Appellant.

During the relevant assessment year, the Appellant completed the execution of multi-product pipeline from Khartoum Refinery to Port Sudan for the Ministry of Energy and Mining of the Government of Sudan ('MEM').

Facts in respect of claim raised by EPC Contractor for additional work carried out and accepted/verified by the Appellant's consultant

The EPC Contractor encountered certain constraints such as the scarcity of water for hydro testing, port congestion etc. In order to complete the work within the schedule timelines, the EPC Contractor adopted various acceleration measures and significant expenditure.

In a letter dated 30 June 2005, the Appellant informed the EPC Contractor that variations in quantities of items indicated and / or identified in the Contract shall be settled on the As Built Data and / or Documents in accordance with the provisions and unit rates set forth in Annexure C of the Contract. The EPC Contractor was also requested to submit their detailed variation proposals based on the As Built Data and Documents.

Subsequently, on 14 August 2005, a meeting was held among the representatives of the Appellant's consultant and EPC Contractor to discuss the adjustment to the contract price consequent upon the alterations/variations to the scope of work undertaken by the EPC Contractor. Further, the EPC Contractor was advised by the Appellant to submit its variation proposals, alongwith relevant supporting documentation.

The amount of claim of EPC contractor for additional work done, provided in the books of accounts

In compliance with the above advice, the EPC claimed additional costs amounting to USD26,982,643, USD 8,894,325and USD 1,270,435 (aggregating to Rs. 1,659 million) vide its letters and invoice dated 1 December 2005 and 09 January 2006. Such letters/invoice were submitted with ONGC (consultant) for review and approval. The Consultant reviewed such claims and approved the claims of USD 26,982,643 and USD 1,270,435 with minor modifications and rejected the claim of USD 8,894,325. The same were communicated to the EPC Contractor vide its letters dated 25 May 2006 and 05 October 2007.

On the basis of the letters issued by the ONGC in respect of approval of claim of EPC Contractor and opinion of its consultant (Price Water House Coopers), the Company made provision of its share amounting to Rs.1,026.08 Million in its books of accounts and accordingly, claimed deduction in the return of income. The relevant extract of such opinion issued by its consultant is as under:

> Having read the above facts, the query, the PCA contract, the contract with M/S Dodsal and having regard to the accounting standards in India, unless OVL obtains an expert opinion

which opines that the above claims made by M/S Dodsal are not acceptable/enforceable under the provisions of the contract between OVL and M/s Dodsal, we are of the opinion that the above costs should be recognized.

Disclosure of above facts in the Audited accounts for the AY 2006-07

The above facts have been fairly disclosed in the note 5 of schedule 27 of the annual report of the financial year 2005-06.

Specific disclosure in the return of income

Since the expenditure incurred by EPC Contractor was revenue in nature and represent liability already incurred, the Appellant has claimed deduction of expenses in the return of income. Also, the Appellant has specifically mentioned the facts of such claim in clause 6 of the notes to the computation of income attached to its return of income.

Subsequent arbitration proceedings initiated by EPC contractor

Subsequently, the Appellant had issued a letter dated 31 July 2008, wherein, the EPC Contractor has been communicated that its claims have been assessed quantitatively by ONGC (Consultant) and such claims are now being legally scrutinized in totality for their admissibility.

Upon receipt of the above letter wherein the claims of the EPC Contractor were legally scrutinized, the EPC Contractor initiated arbitration proceedings against the Appellant, vide its letter dated 26 December 2008, since these amounts of claims had been assessed and admitted by the Company/consultant earlier. In such arbitration petition, it has been categorically mentioned that:

> *The contents of this letter were absolutely contrary to the admission of amounts due and payable to Dodsal set forth in letters dated May 25, 2006 and October 5, 2007, read with the letter dated November 2, 2007. Further, the additional works undertaken by Dodsal were duly certified by OVL. The amounts payable to Dodsal have already been assessed and confirmed through the above referenced letters dated May 25, 2006; October 5, 2007 and November 2, 2007. Any further assessment suggested in OVL's letter dated July 31, 2008 is not warranted in light of OVL's prior admissions and is obviously intended only to delay the payment of the Aggregate Amount.*

Keeping in view that the arbitration has been initiated on 26 December 2008, your honor may appreciate that there was no dispute in relation to claim raised by EPC Contractor and approved by the consultant of the Company till the date of filing of the tax return for the AY 2006-07 (both original and revised). Further, the Company has also issued the certificate of completion of work to the EPC Contractor. Accordingly, the liability amounting to Rs. 1,026.08 million had crystallized in the financial year 2005-06 and the same has been claimed as revenue expenditure.

From the above, your honor may appreciate that the Appellant did not had any information w.r.t. any litigation/arbitration at the time of filing of original as well as revised return of income. Therefore, the Appellant acted in a bonafide manner and did not conceal any particulars of income or furnish any inaccurate particulars of income before the tax authorities, accordingly, the penalty under section 271(1)(c) of the Act should not be levied on the Appellant.

Counter claim made on MEM, Sudan, which was rejected

On the basis of the claim of the EPC Contractor, the Appellant forwarded its counter claim to its customer, MEM, Sudan, though it was not covered by terms of contract and hence was subject to the acceptance by Sudan Government. Till the finalization of the books of accounts of financial year 2005-06, the Appellant had forwarded a claim of USD 34,128,976 to MEM [equivalent to Rs. 1,524.20 million (Appellant's share being Rs. 1,371.78 million)] vide its letter dated 17 April 2006. Subsequently, claims of USD 11,878,586 and USD 169,147 were also made by letter dated 06 July 2006. In response to the same, the Appellant received a response vide letter dated 09 December 2006, wherein the legal department of MEM had communicated that Appellant is not legally entitled to claim the amount from MEM.

Relying on the above rejection of claim by the MEM, the Hon'ble CIT(A) has deleted the addition made by the Ld. AO. Keeping in view that the addition made by the Ld. AO did not sustain, the penalty should not be imposed on this account. Further, the Appellant disclosed all the facts during the course of the proceedings before the Ld. AO, accordingly, penalty under section 271(1)(c) should not be imposed on the Appellant.

Our Submission

On perusal of the provisions of section 271(1)(c) of the Act, your honor may appreciate that that the AO may direct a person to pay penalty, if he is satisfied that in the course of any proceedings under the Act either.

a) such person has concealed the particulars of income or

b) has furnished inaccurate particulars of such income.

On perusal of the above, your honor may appreciate that it is a pre-requisite that for the case to fall under the section 271(1)(c) of the Act, there should be either concealment of income or there should be furnishing of inaccurate particulars of income.

Concealment of income

In the present case, your honor may appreciate that the facts in respect of the claim raised by the EPC Contractor on the Appellant have been fully disclosed in the note 5 of schedule 27 of the annual report. Also, the Appellant has specifically mentioned the details of such claim in the notes to the computation of income. Further, the Appellant has also filed the relevant documents with the tax authorities during the course of assessment, penalty and appeal proceedings. In view of the above, it is submitted that Appellant had fully disclosed all the relevant particulars and facts and there was no concealment of income.

Furnishing of inaccurate particulars of income

It is submitted that the expenditure has crystallized in the relevant assessment year and accordingly, the same has been claimed in the original return of income. Further, even at the time of filing of the revised return of income, the arbitration proceedings were not initiated by the EPC Contractor. Accordingly, there was a bonafide reason for the claim of the expenditure in the revised return as well. Also, during the course of assessment proceedings, the Appellant had explained truly and correctly the entire facts. Your honor may appreciate that the observations in the assessment order do not refute the explanations given by the Appellant in respect of the expenditure rather, the Ld. AO has proceeded to consider the income attributable to such expenses. Accordingly, the Appellant has not furnished inaccurate particulars of income/claim made in the return of income.

Explanation 1 to Section 271(1)(c)

Further, explanation 1 to section 271(1)(c) of the Act deals with deeming provisions with regard to levy of penalty. Explanation 1 to sec 271(1)(c) of the Act is reproduced as under:

> *"Where in respect of any facts material to the computation of the total income of any person under this Act,--*
>
> *(A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Commissioner to be false, or*
>
> *(B) such person offers an explanation which is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,*
>
> *then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."*

On perusal of the above explanation your honor may appreciate that the same applies where either no explanation is given or the explanation given is found to be false or there is lack of bonafides in the explanation given. In this regard, we wish to draw your attention towards the following judicial precedents wherein it has been held that penalty is not imposable if the assessee had a bonafide claim:

- ***Shervani Hospitalities Ltd. vs. CIT [2013] 35 taxmann.com 271 (Delhi)***

  In this case, the Hon'ble Delhi High court while deleting the penalty has observed that the assessee had an arguable case or had taken a bona fide plea. The assessee had given his explanation and categorically and clearly stated the true and full facts in the return itself. He did not try to camouflage or cover up the expenses claimed. It is not uncommon and unusual for an assessee to make a bona fide claim of a particular expenditure as a

revenue deduction and expense but not succeed. Every addition or disallowance made does not justify and mandate levy of penalty for concealment under section 271(1)(c). Levy of penalty is not an automatic consequence when an addition is made by disallowing an expense and by not accepting the interpretation given by the assessee. The plea and contention raised by the assessee has to be examined before it is decided whether or not the assessee has been able to bring his case within the four corners of the Explanation.

Explanation 1 clearly stipulates that the penalty can be imposed when the details furnished by the assessee are found to be incorrect, erroneous and false. Merely making a claim which is held as not sustainable under law should not lead to penalization, when the assessee had furnished full details in the return itself and the claim is a debatable, reasonably plausible or may well have been accepted.

- ***Hon'ble Delhi High Court in the case of CIT vs. DCM Limited [2013] 37 taxmann.com 447 (Delhi)*** *held that levy of penalty is not warranted where all the information and facts are present before the Assessing officer. Relevant extract reproduced below:*

  It is obvious and crystal clear that the assessee was aware that this claim would be examined by the Assessing Officer and the claim was put forward on the basis that loan was given to a subsidiary company and the loan granted to them was for specific purpose and for the benefit of the holding company. It is not disputed or denied that the loan in fact was granted and has been also written off. There was no concealment or furnishing of inaccurate facts. The legal position put forward by the respondent assessee that the loan unpaid and written off should be either treated as business loss or alternatively as capital loss was rejected. No penalty for concealment can be imposed in the present case. Case is completely covered by Explanation I. It is not disputed that full factual matrix or the facts were before the Assessing Officer at the time of assessment when this claim was made. The fact that scrutiny assessment was pending is a relevant and important circumstances to show the bona fides of the assessee as he was aware that the claim would be examined and would not go unnoticed Secondly, the claim was rejected in view of the legal position, which was against the assessee and not because of statement of incorrect or wrong facts.

- ***Pilani Investment & Industries Corporation Ltd. [2016] 67 taxmann.com 60 (Cal.)***

  .....there is concurrent finding of the CIT(A) and the Tribunal that the explanation was bona fide. This finding is not under challenge before us. It is not even alleged that the assessee failed to prove that all the facts relating to and material to the computation of his total income were not disclosed by him. Thus, the requirements appearing from the explanation remain unfulfilled. As a result Section 271(1)(c) cannot operate against the assessee.

- ***MAK Data (P) Ltd. vs. CIT [2013] 38 taxmann.com 448 (SC)***

  Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.

On perusal of the above judicial precedents, your honor may appreciate that the Hon'ble Courts have observed that the Explanation 1 to section 271(1)(c) of the Act is not applicable if the assessee has provided a bonafide explanation and the same has not been refuted by the tax authorities. The concept of bonafide has been explained in the case of ***New Holland Tractors (India) P. Ltd. vs. CIT [2014] 49 taxmann.com 573 (Delhi)*** *wherein the Hon'ble Delhi High Court has observed as under:*

Test of bona fide has to be applied keeping in mind the position as it existed, when the return of income was filed. The Act, i.e. the Income Tax Act, is a complex legislation involving intricate and often debatable legal positions. The legal issue involved may relate to principles of accountancy. Invariably, on questions of interpretation, the assessees do adopt a legal position which they perceived as most beneficial or suitable. This would not be construed as lack of bona fides as long as the legal position so adopted is not per se contrary to the language of the statute or an undebatable legal position not capable of a different connotation

*and understanding. **When two legal interpretations were plausible and there was a genuine or credible plea, penalty for concealment/furnishing of inaccurate particulars, should not and cannot be imposed.** If the view taken by the assessee required consideration and was reasonably arguable, he should not be penalized for taking the position.*

On the basis of the above, your honor may appreciate that the Appellant has disclosed all the facts and provided the explanations to the Ld. AO, however, the Ld. AO has summarily held that he is of the view that the explanation is clearly attracted. Therefore your honor may appreciate that the Appellant case does not fall under above Explanation since:

(i) The Appellant has neither failed to offer an explanation nor such explanation is found to be false;

(ii) Further, the Appellant has been able to substantiate the explanations and demonstrated that such explanations were bonafide

(iii) Appellant has disclosed all the facts and material in relation to provision made for claim raised by the EPC contractor in the Audited accounts (note 5 of schedule 27 of the Audit accounts) and in the notes to computation of income (clause 6 of the notes to the computation of income attached to its return of income)

In view of the above, your honor may appreciate that the Explanation 1 to section 271(1)(c) of the Act is not attracted and therefore penalty should not be imposed on the facts and circumstances of the case.

No Penalty in case of legal claim and/or difference of view

On perusal of the assessment order passed by the Ld. AO, your honor may appreciate that the Ld. AO has made the addition in the hands of the Appellant in respect of corresponding counter claim made on MEM but has allowed the deduction for the claim raised by the EPC contractor. The Ld. AO never doubted the incurrence of the expenditure of the Appellant. The only contention raised by the Ld. AO in making addition in respect of accrual of income is matching principle.

Further, during the appeal proceedings, the Hon'ble CIT(A) has concurred with the view of the Appellant that the no income has arisen. However, Hon'ble CIT(A) has disallowed the expenditure claimed by the Appellant stating that liability has not crystallized.

Therefore, your honor may appreciate that the Department itself has different views at different levels on the same set of facts. Therefore, your honor may appreciate that whether the liability in respect of claim of EPC contractor has crystallized during the year or not is a legal issue on which difference of view exist.

We wish to submit before your honor that various judicial bodies have unanimously held that the penalty is not imposable in the case of a debatable issue or in the case of bonafide difference of opinion:

- ***CIT vs Reliance Petroproducts Pvt. Ltd. [2010] 322 ITR 158 (SC)***

  In this ruling, the Hon'ble Supreme Court has held that making a claim which is disallowed by the Assessing Officer would not tantamount to furnishing of inaccurate particulars or concealment of income.

  "no finding by the AO that any details supplied by the assessee in its Return were found to be incorrect or false. Such not being the case, there would be no question of inviting the penalty under Section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee....

  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 order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars."

- *The Hon'ble Jurisdictional Delhi High in the case of* ***Ravindra Bahl vs. ADIT [2013] ITA No 46 of 2013 (Delhi HC)*** *has been held as follows:*

  "Taxation provisions can be complex, debatable and capable of different interpretation. When an assessee discloses true and correct facts; takes a position in law and the position was plausible and arguable, penalty should not be imposed. *It is not unusual for an assessee to file or make a claim but not succeeded for legal or technical reasons. But every addition or disallowance made does not justify or mandate levy of penalty. Penalty is not an automatic or mandatory consequence, when addition is made, an expense is disallowed or a receipt is taxed as a revenue receipt."*

- ***New Holland Tractors (India) P. Ltd. vs. CIT [2014] 49 taxmann.com 573 (Delhi)***

  The Hon'ble Delhi High court has held that when two legal interpretations were plausible and there was a genuine or credible plea, penalty for concealment/furnishing of inaccurate particulars, should not and cannot be imposed. If the view taken by the assessee required consideration and was reasonably arguable, he should not be penalized for taking the position. The tax statutes are convoluted and complex and there can be manifold opinions on interpretation and understanding of a provision or the tax treatment. In such cases, even when the interpretation placed by the Revenue is accepted, penalty should not be imposed if the contention of the assessee was plausible and bona fide.

- ***Karan Raghav Exports (P) Ltd. vs. CIT [2012] 21 taxmann.com 8 (Delhi)***

  As far as disclosure of facts is concerned, this is clear from the note, which was attached with the return itself. We have quoted the relevant portion of the note above. Full and correct facts have been stated in the said note. The other question is whether the claim made was palpably wrong and legally untenable or a debatable and plausible claim on which the assessee did not succeed on legal interpretation. We have examined the nature of the claim made and the findings recorded by the High Court in their order dated 1st November, 2010. The claim made by the appellant may have been rejected, but it cannot be said that the same was not plausible or legally tenable. This aspect has been discussed above and it has been held that the claim made was bona fide. Regarding the legal opinion in writing, it is not mandatory for a person to obtain legal opinion in writing. Assessees do take legal opinion and in the present case the return of income was duly audited. Claim for depreciation is a technical claim based on interpretation of legal provision. Legal opinion, in such cases, is frequently given by Chartered Accountants to help the company to prepare its return of taxable income. In the present case, there is no allegation that the quantum of depreciation claim was incorrectly computed. The note itself indicates that it is written by a professional.

  It has been observed by the Hon'ble Delhi High Court that the question whether penalty should be imposed under section 271(1)(c) when a debatable and arguable legal issue is decided against the assessee and the assessee had disclosed full and correct facts is no longer res integra. *The Courts in several judgments have drawn a distinction between a false claim, which cannot be countenanced, and claims, which are made on the basis of legal provisions which are debatable and quite plausible.*

- ***CIT vs. Steel Authority of India Ltd.[2014] 52 taxmann.com 328 (Delhi)***

  The Hon'ble Delhi High court held that where assessee has given truthful and cogent explanation without concealing facts why interest relating to earlier years, which was capitalized, had been accounted for as a liability in current year, penalty under section 271(1)(c) was not to be levied for furnishing inaccurate particulars of income by claiming prior period expenses.

- ***DCIT vs. Integrated Master Securities (P.) Ltd. [2012] 26 taxmann.com 189 (ITAT Delhi)***

What is to be seen in the instant case, is whether the claim for deduction of depreciation under section 32, made by the assessee was bona fide and whether all the material facts relevant thereto have been furnished and once it is so established, the assessee cannot be held liable for concealment penalty under section 271(1)(c). The assessee, in the light of certain decisions, claimed that it is entitled to depreciation on the membership fee of stock exchange under section 32. The Assessing Officer has not been able to establish that the claim of the assessee for deduction of depreciation under section 32 was not bona fide or that any specific particulars were concealed or furnished inaccurate. A mere disallowance of a claim of deduction does not necessarily imply concealment or furnishing of inaccurate particulars because the issue regarding allowability of deduction of depreciation on membership fee of stock exchange under section 32 of the Act was debatable issue. ***A mere rejection of the claim of the assessee by relying on different interpretations does not amount to concealment of the particulars of income or furnishing inaccurate particulars thereof by the assessee.*** *In the case under consideration, there is nothing to suggest that the assessee furnished any inaccurate particulars or concealed the particulars.*

Similar view has been taken in following case laws:

- *Whirlpool of India Limited vs. JCIT [2008] 114 TTJ 211 (Del)*
- *ACIT vs. Jindal Equipment Leasing [2011] 131 ITD 263 (Del)*
- *ADIT vs. Citicorp Investment Bank (Singapore) Ltd. (ITA No. 7592/Mum/2010)*
- *Additional CIT vs. Delhi Cloth and General Mills Co. [157 ITR 822 (Del)];*
- *Durga Kamal Rice Mills vs. Commissioner of Income-tax [265 ITR 25 (Cal)]*
- *Principal Commissioner of Income-tax vs. Control & Switchgear Contractors Ltd. [2016] 377 ITR 215 (Delhi)(MAG.)*
- *Devsons (P.) Ltd. vs. CIT [2010] 329 ITR 483 (Delhi)*
- *Business Standard Digital Ltd [2010-TIOL-378-ITAT-DEL]*
- *Southern Gas Fittings (P) Ltd vs. DCIT 80 ITD 202 (Chennai)*

On the basis of the above judicial precedents, your honor may appreciate that it is a well settled law that penalty cannot be levied in cases involving debatable issues wherein more than one view is possible or where addition / disallowance to the income arises due to difference of opinion.

In the present case, the Appellant has not furnished inaccurate particulars of income at the time of furnishing its return of income. The Appellant was under a ***bona fide belief*** *that the liability to make payment to EPC Contractor has crystallized and accordingly, the same was claimed as deduction on the advice of the consultant.*

On the basis of the above, your honor would appreciate that the entire issue of crystallization of liability is a debatable issue. Therefore, it shall be arbitrary to conclude that Appellant had furnished inaccurate particulars of income. Accordingly, we humbly plead that penalty should not be imposed on the Appellant as there is neither any concealment of income nor furnishing of any inaccurate particulars of income. In view of the factual and legal submissions made above, it is respectfully prayed that no penalty should be levied in the present case of the Appellant.

Penalty proceedings distinct from assessment proceedings

In the following judicial precedents it has been held that the assessment proceedings and penalty proceedings are separate proceedings and penalty is not imposable merely because addition was made in the assessment proceedings.

- *In* ***CIT vs JK Synthetics Ltd (1996) 219 ITR 267****, Delhi High Court has held that:*

  The proceedings for imposition of penalty and assessment proceedings are two separate and independent proceedings and, therefore, separate and distinct provisions have been enacted in the statute for initiation of the same. Therefore, the findings recorded by the Tribunal in the quantum appeal cannot be said to be decisive.

- In **National Pictures Corporation Society Cinema vs. ITO (2002) 120 Taxman 91 (Chd.)** it has been held that:

  "It is trite law that penalty proceedings are entirely distinct from assessment proceedings and however relevant and cogent the findings in the assessment proceedings may be, they are not conclusive evidence as far as penalty proceedings are concerned. Merely because the evidence was disbelieved in assessment proceedings, it could not be said that the assessee failed to discharge the initial burden of explaining the payment claimed to be made by it."

Further, we wish to draw your kind attention towards the following judicial precedents, wherein the judicial bodies, including the jurisdictional High Court and ITAT, have disposed off the quantum appeal and penalty appeal through a common order and held that even though the additions are confirmed in the quantum appeals, the penalty is not imposable due to absence of the conditions specified section 271(1)(c) of the Act:

- **New Holland Tractors (India) P. Ltd. vs. CIT [2014] 49 taxmann.com 573(Delhi)**

  We have had the advantage of penning the judgment in the appeal preferred in relation to the quantum proceedings and have held that the assessee was wrong in not offering the whole or entire amount of the technical fee for tax in the year of receipt. But, it does not follow that penalty for concealment must be imposed as the quantum appeal is decided against the assessee. The findings in the assessment proceedings cannot be considered as conclusive and final for the purpose of imposition of penalty under section 271(1)(c) of the Act. .....In assessment proceedings, we are primarily concerned with the assessment of income i.e. quantification and computation of total income as per the provisions of the Act, whereas in penalty proceedings we are primarily concerned with the conduct of the assessee. Penalty is imposed not because addition is made but because there is concealment or furnishing of inaccurate particulars by the assessee.

- **Vinod Bhargava vs. CIT [2014] 51 taxmann.com 498 (Andhra Pradesh)**

  If any information was suppressed by the assessee and but for the attentiveness of the Income Tax Officer, it would have escaped taxation, the assessee must certainly be dealt with sternly. Where, however, the assessee honestly files returns by presenting the facts known to him and claims some benefit in his understanding of the law, the mere fact that a different view is possible on some of the claims, must not lead, straight away, to imposition of penalty. Denial of benefit itself would be a phenomenal disadvantage to the assessee.

- **Suzuki Motorcycle India Ltd. (ITA No. 6487/Del/2013 and 4248/Del/2010)**

  In regard to the other addition on the basis of which penal action has been upheld by the CIT(A) namely long term capital loss it is seen that the addition in the quantum proceedings has been upheld by us. It is settled legal position for which no authority need be cited that penalty proceedings and quantum proceedings are separate and distinct. It is equally a settled legal position which also needs no authority that the explanation offered in the penalty proceedings has to be considered separately and independently in the matrix of the requirements of the penal provision.

Contentions of the Ld. Assessing Officer:

On perusal of the impugned order passed by the Ld. AO, your honor may appreciate that the Ld. AO has not applied its own mind to give any reason/basis for furnishing of inaccurate particulars for imposition of penalty. While passing the order, the Ld. AO has only mentioned that since the CIT(A) has mentioned that the Appellant is not eligible to claim deduction of expenditure incurred in respect of liability claimed by EPC Contractor. Therefore to this extent, the Appellant has furnished inaccurate particulars of income and is therefore liable to penalty under section 271(1)(c) of the Act.

On the basis of the judicial precedents mentioned above, it is abundantly clear that penalty shall not be imposed merely on account of addition made/sustained in the quantum proceedings, rather, the requirements of section 271(1)(c) of the Act should also be satisfied. The above conclusion of the Ld. AO does not provide any basis of concluding that inaccurate particulars were furnished, other than additions made in the order of the Hon'ble CIT(A). Therefore, the penalty levied by the Ld. AO deserves to be deleted.

Further, while imposing penalty on the Appellant, the Ld. AO has relied on certain judicial precedents. In this regard, we wish to submit that the case laws relied upon by the Ld. AO are factually different from the present case. Also, the Appellant has specifically differentiated each of the case law relied upon by the Ld. AO in its detailed submission dated 05 August 2016."

2.2. Penalty u/s 271(1)(c) is levied by the AO pursuant to the decision of the Ld. CIT(Appeals)-XVI in A. No. 140/09-10 for A. Y. 2006-07 against the order of the AO relating to addition of Rs.149,31,00,000/- (as against the correct amount of Rs.1371.78 million) being the appellant's share of income for claim made from the customer, Ministry of Energy and Mining of the Government of Sudan (MEM). The EPC Contractor engaged by the appellant for executing the project of a multiproduct pipeline from Khartoum Refinery to Port Sudan for MEM had claimed additional cost post completion of the aforesaid project. The appellant company had forwarded to MEM the claim made by the EPC Contractor. The appellant company made provision for the claim made by the EPC Contractor for additional work amounting to Rs.102,60,80,000/- and claimed deduction in the return of income. However, matching revenue to the extent of Rs.149,31,00,000/- (as against the correct amount of Rs.137,17,80,000/-) was not considered in the P & L A/c on the ground that no income can be said to accrue to an assessee, unless the assessee acquired the right to receive that income. The Ld. CIT(Appeals) deleted the aforesaid addition to income by the AO but disallowed the provision made/deduction of expenditure against the claim raised by EPC Contractor for additional work stating that the liability has not crystallized in the previous year. Relevant extract of the order of the Ld. CIT(Appeals) is reproduced below:

"There is no legal entitlement to the claim to the contractor as well as to the appellant. Neither the claim of the EPC Contractor has been accepted by the appellant company nor has the claim of the appellant company been accepted by MEM. In view of the above neither revenue is recognizable in the hands of EPC Contractor nor it can be recognized in the hands of the appellant company. The principle which the appellant applied to claim that revenue is not recognizable, by the same principle the liability has not crystallized and has not arisen in its hand. In other words neither the liability has arisen in the hands appellant company nor revenue has accrued.

In view of the above, the additional expense of Rs. 1,026.08 million provided as expenditure by the appellant on this account calls for disallowance as no liability as arisen in the hands of the appellant. Further, since revenue did not accrue or arise in the hands of the appellant, therefore, the addition of Rs. 1,493.10 million made by the AO cannot be justified. The cause laws relied on by the AR not applicable in the instant case because the contractor is not legally entitled to the additional claims and liability claimed by EPC Contractors which is pending in arbitration tribunal is not accepted by the appellant. In view of the above, the addition made by the AO is reduced from Rs. 1,493.10 million to Rs. 1,026.08 million. The appeal is partly allowed in this ground."

2.3. The AO levied penalty u/s 27.1(1)(c) at Rs.34,53,78,528/- holding that the appellant has furnished inaccurate particulars of its income to the extent of Rs.102,60,80,000/- in respect of claim raised by the EPC Contractor for Sudan Pipeline Project. Aggrieved by the aforesaid penalty order, the appellant has filed this appeal.

2.4. I have carefully considered the penalty order and submissions filed by the Ld. AR. Snapshot of the Ld. AR's submission is that there is no case of concealment of income or furnishing inaccurate particulars of income, as the appellant company has disclosed all the facts in the audited account for the F. Y. 2006-07 in Note 5 of Schedule 27 of the Annual Report. The same is reproduced as under:

> *"During the year, the Company completed the execution of the 12"X 741 Kms multi-product pipeline from Khartoum Refinery to Port Sudan for the Ministry of Energy and Mining of the Government of Sudan (MEM) on Build, Own, Lease and Transfer (BOLT) basis and handed over the same to MEM. The project has been implemented in consortium with Oil India Limited, Company's share being 90%.*
>
> *The EPC Contractor executing the project has claimed additional costs aggregating to Rs. 1659.00 Million (Company's share being Rs. 1,493.10 Million), which have not been accepted by the Company as yet. However, part of the claims has been forwarded to MEM for their approval for an aggregate amount of receivables from MEM Rs. 1,524.20 Million (Company's share being Rs. 1371.78 Million), while the balance claims may be forwarded to MEM after further verification. Pending settlement with the EPC Contractor, an amount of Rs. 1,026.08 Million, being the Company's share out of Rs. 1,140.08 Million has been provided as expenditure during the year based upon the advices received by the Company from its consultant. The Company's share of the balance amount has been shown as claims not acknowledged as debt. However, no revenue in this respect has been recognized pending final approvals by MEM."*

2.5. It was further submitted that since the claim made/expenditure incurred, by the EPC Contractor was revenue in nature which represents liability already incurred, the appellant has claimed deduction of expenses in the return of income. The Ld. AR also stated that the appellant had specifically mentioned the facts of such claim in clause 6 of the notes to the computation of income attached to its return of income. The said clause 6 is reproduced as under:

> *During the year, the company completed the execution of multi-product pipeline from Khartoum Refinery to Port Sudan for the Ministry of Energy and Mining of the Government of Sudan (MEM). The project has been implemented in consortium with Oil India Limited, Company's share being 90%. The EPC Contractor executing the project on behalf of the consortium has claimed additional costs aggregating to Rs. 1659 Million. Pending settlement with the EPC Contractor, an amount of Rs. 1,026.08 Million, being the company's share*

out of Rs. 1,140.08 Million has been provided as expenditure during the year based upon the advices received by the Company from its consultant.

The company has forwarded to MEM claims of Rs. 1524.20 Million (Company's share being Rs. 1493.10 Million) which have not been accepted by MEM. Accordingly, the company has not considered any revenue in its Profit & Loss Account for the FY 05-06."

2.6. In terms of the above note, the Ld. AR has claimed that the said expenditure was claimed based upon advices received from its consultants. The advice of the consultants with reference to the said claim filed by the appellant is reproduced as under:

"Having read the above facts, the query, the PCA (Pipeline Contract Agreement), the contract with M/s Dodsal (EPC Contractor) and having regard to the accounting standard applicable in India unless OVL (appellant) obtains an expert opinion which opines that the above claim made by M/s Dodsal are not acceptable/enforceable under the provisions of the contract between OVL and Dodsal, we are of the opinion with the above costs should be recognized."

In the above opinion M/s Dodsal is the EPC Contractor and OVL is the appellant.

2.7. The Ld. AR has vehemently argued that there was no dispute in relation to claim raised by EPC Contractor and approved by the consultant company till the date of filing of tax return for the A. Y. 2006-07 (both original and revised). Accordingly, the liability amounting to Rs.102,60,80,000/- had crystallized in the F. Y. 2005-06 and the same was claimed as revenue expenditure in the return. In view of these facts, the appellant acted in a bonafide manner and did not conceal any particulars of income or furnished any inaccurate particulars of income and therefore, penalty should not be levied on the appellant. The Ld. AR has relied on a number of case laws in support of his contention.

2.8. The central issue for consideration is whether the appellant is liable for penalty u/s 271(1)(c) in respect of provision of its share in the claim of EPC Contractor in its books of accounts and the deduction claimed in the return of income in respect of Rs.102,60,80,000/- which was fairly disclosed in note 5 of schedule 27 of the annual report of the appellant. Further, the appellant specifically mentioned the facts of such claim in clause 6 of the notes to the computation of income attached to its return. The AO had accepted this claim and made addition as the appellant had failed to offer the accrued revenues. The Ld. CIT(Appeals) while deleting the addition on account of matching revenue, held that the deduction claimed was not inadmissible as liability claimed by the EPC Contractor was not accepted by the appellant. It is therefore, evident that there was difference of view on the same set of facts duly disclosed by the appellant in the return of

income. It is not the case of the AO that any dubious or fraudulent claim was made by the appellant company.

2.9. Given these facts that there was due disclosure in the notes to accounts and the note to computation of income, it is to be seen whether the appellant can be charged for concealment of income or for furnishing inaccurate particulars thereof. Further, 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 in penalty proceedings had stated that it had made full disclosure and elaborate legal submissions and it cannot be said to have either concealed any income or furnished inaccurate particulars of income and therefore, was not liable for penalty u/s 271(1)(c). The AO however, held, that in view of the CIT(Appeals) decision that the appellant is not eligible to claim deduction of expenditure in respect of additional claims made by EPC Contractor, the appellant company had furnished inaccurate particulars of its income to this extent. He accordingly, invoked the provisions of Explanation 1 to Section 271(1)(c) of the Act and charged the appellant for furnishing inaccurate particulars of its income and levied the impugned penalty.

2.10. It will be relevant here to examine the provisions of Section 271(1)(c) which is reproduced below:

> *"271. Failure to furnish returns, comply with notices, concealment of income, etc.--(1) If the Assessing Officer or the Deputy Commissioner (Appeals) or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person—*
>
> .....
>
> *(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,*
>
> .....
>
> *Explanation 1.--Where in respect of any facts material to the computation of the total income of any person under this Act,-- (A) such person fails to offer an explanation or offers an*

explanation which is found by the Assessing Officer or the Deputy Commissioner (Appeals) or the Commissioner (Appeals) to be false, or (B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

2.11. As per Clause (A) to Explanation 1 to Section 271(1)(c), penalty is to be imposed, if an assessee fails to offer an explanation which is found by the AO to be false. Clause (B) to Explanation 1 provides that where the assessee offered an explanation but the same remained unsubstantiated, penalty should not be imposed if the explanation is bonafide and all facts relating to the same and material to the computation of the total income have been disclosed. In the present case, the appellant had offered an explanation and all facts relating to the same and material to the computation of the total income have been disclosed in the return of income. The issue therefore, which arises for the consideration is whether the appellant conduct was bonafide. The Hon'ble Delhi High Court in the case of New Holland Tractor vs. CIT 49 taxmann.com 573 had held as under:

"

31. Primary issue which arises for consideration is whether the conduct of the assessee was bonafide. We have used very strong words like erroneous, fallacious, untenable etc. with reference to various contentions and submissions made by the assessee in the quantum appeal, but we do not think we will be contradicting ourselves when we hold that the conduct of the assessee was bonafide and the onus to show and establish bonafides has been discharged. The observations and adjectives used by us in the quantum appeal rejecting the submission of the assessee have been made after having advantage and benefit of the assessment order, appellate orders and hearing arguments of the counsel for the appellant assessee and the Revenue. Hindsight results in greater clarity and wisdom. Test of bona fide has to be applied keeping in mind the position as it existed, when the return of income was filed. The Act, i.e. the Income Tax Act, is a complex legislation involving intricate and often debatable legal positions. The legal issue involved may relate to principles of accountancy. Invariably, on questions of interpretation, the assessees do adopt a legal position which they perceived as most beneficial or suitable. This would not be construed as lack of bona fides as long as the legal position so adopted is not per se contrary to the language of the statute or an undebatable legal position not capable of a different connotation and understanding. When two legal interpretations were plausible and there was a genuine or credible plea, penalty for concealment/furnishing of inaccurate particulars, should not and cannot be imposed. If the view taken by the assessee required consideration and was reasonably arguable, he should not be penalized for taking the position. The tax statutes are convoluted and complex and there can be manifold opinions on interpretation and understanding of a provision or the tax treatment. In such cases, even when the interpretation placed by the Revenue is accepted, penalty should not be imposed if the contention of the assessee was plausible and bona fide. Of course full facts should be disclosed. While applying the test of bonafide, we have to also keep in mind that even best of

legal minds can have difference of opinion. It is not uncommon to have dissenting opinion on the question of law, in the courts.

.....

2.12. The Hon'ble Delhi High Court in the case of Devsons (P) Ltd. vs. CIT 329 ITR 483 (Del) have observed as under:

"It is a trite law that where divergent views exist either within the department itself or such divergent views are expressed by the different High Courts and there is no uniformity or consensus on opinion on any aspect of law, the assessee cannot be faulted for taking a particular stand. The caveat, of course, is that the assessee must have placed all his cards on the table by disclosing each and every fact to the departmental authorities or the court concerned. If the assessee does so, then merely because the departmental authorities concerned or the High Court concerned does not concur with the legal stand adopted by the assessee, it will not be enough reason to hold that the assessee is guilty of concealment of income or of furnishing inaccurate details. Thus, the question whether the assessee has invited upon himself the penalty sought to be imposed on him by the authority concerned is really a question of fact and has to be decided keeping in mind the entire gamut of events and circumstances.

2.13. Penalty u/s 271(1)(c) was not leviable where the appellant had disclosed all material information as held by the Hon'ble ITAT, Delhi Bench in the case of Nuchem Ltd vs. DCIT [49 ITD 441 (DEL)]. The Hon'ble tribunal held as under:

"..... none of the appellate authority has held that the material facts relating to the computation of income have been suppressed by the assessee. Neither they have held that explanation given by the assessee has been false, nor is there a finding that the explanation remains unsubstantiated. There is no finding that the assessee has suppressed material relating to disallowance. Therefore, it cannot be said that the assessee is guilty of suppressing material facts relating to its income. There is also no finding that full material facts have not been disclosed by the assessee. It only mentions that the authorities have not accepted the explanations of the assessee for certain reasons. It is a different matter that on account of difference of opinion, which is also possible amongst various authorities, the plea of the assessee has not been accepted. Under the deeming provisions, if the explanation is bonafide and material to the computation of total income, are disclosed by the assessee, Explanation 1 will not apply."

2.14. In my view, the appellant has furnished an explanation which it has substantiated as bonafide in so much as all the material facts relating to the claim in the return regarding deduction of expenditure were duly disclosed and the appellant cannot be held guilty of furnishing any inaccurate particulars of income. In the landmark case of Reliance Petroproducts (P) Ltd., (2010) 322 ITR 158 the Hon'ble Supreme Court had made the following observations:

"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(1)(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."

2.15. In view of the legal position and the facts of the case, the appellant had given an explanation, which is bonafide. Further, 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, the penalty levied u/s 271(1)(c) of the Act of Rs.34,53,78,528/- is deleted. These grounds of appeal are ruled in favour of the appellant. "

(B.2) This present appeal has been filed by Revenue against the aforesaid impugned appellate order dated 01.12.2016 of Ld. CIT(A). During appellate proceedings in Income Tax Appellate Tribunal ("ITAT", for short) synopsis was filed from the assessee's side. The relevant portion of the synopsis is reproduced as under:

3. The facts in brief are:

(a) The respondent is engaged in exploration, development and production of hydrocarbons in overseas jurisdictions to augment the oil security of India mainly by way of acquiring participating interest in production sharing agreements. Typically, the hydrocarbons in the natural habitat embedded in a particular territory are the property of the State/Government in whose territory/jurisdiction such hydrocarbons lie. Any person other than that State cannot carry hydrocarbon operations unless such person has entered into PSC with the Government or its nominated agencies for grant of rights to carry on the hydrocarbons operations in a specific area/block. Such agreement is generally called Production Sharing

Agreement ('PSA'). By virtue of PSA, the Government owning hydrocarbons, grants rights to the parties alongwith incidental licenses for carrying on hydrocarbon operations. Once the right to extract hydrocarbons is received by a party from the Government or its agencies, such rights are transferrable to other parties, subject to certain conditions, as may be imposed by the respective government or its agencies.

4. The respondent had filed a return of total income on 29.11.2006, declaring an income of Rs. 635,90,39,360/-, which return of income had been **revised** to Rs. 638,06,45,610/-. As against the income returned, the learned AO framed an assessment and computed the total income at Rs. 1106,41,03,850/-. (Pg. 1 – 29 of PB) The aforesaid order of assessment had however been rectified u/s 154 of the Act by an order dated 09.03.2010. The income computed however did not undergo any change.

5. That while computing the aforesaid income, the AO made the following additions:

Sl. No.	Particulars		Amount (in Rs.)
1.	Income from business & Profession (as declared in revised return)		**638,06,45,610/-**
Add.	1. Disallowance of depreciation in respect of participation right of Sakhalin, Myanmar, Sudan, Ivory Coast, Egypt, Qatar etc. (para 4 of order)	204,57,99,264/-	
	2. Disallowance of claim of Depreciation on support equipments and assets of ventures where commercial production have not started (para no. 5 of order)	1,94,58,972/-	
	3. Disallowance of claim exp. pending settlement of EPC contract but not recognised as revenues (para no. 8 of order)	1,49,31,00,000/- (Absolute value 149,31,02,715/-)	
	4. Disallowance of pre-acquisition exp. claimed	1,12,51,00,000/-	**468,34,58,236/-**
	Total Taxable Income		**1106,41,03,846/-**
	Rounded off		**1106,41,03,850/-**

5.1 The learned AO had also initiated the penalty proceedings u/s 271(1)(c) of the Act when he in para 13 of the assessment order dated 04.12.2009 observed that, penalty proceedings u/s 271(1)(c) of the I.T. Act have been initiated separately. It may however be added that, while making each of the aforesaid four additions, the learned AO in paras 4.25, 5.10, 8.11 and 9.9 of the assessment order respectively stated that he is "satisfied that the assessee company has furnished inaccurate particulars of its income and concealed its income on this issue".

6. It is further submitted that while making addition of Rs. 149,31,02,715/-, at Sl. No. (3) in the table above, the learned AO in para 8.10 had observed as under:

> "As the assessee has failed to offer the accrued revenues to the extent of Rs. 1493.10 Million the claim for which has also been forwarded by the assessee company to MEM the same should have been recognised as revenues. This is more so, because the corresponding costs totalling Rs. 1140.08 Million have been provided for in reducing the profits of the year. The sum of Rs. 1493.10 Million is added to the taxable income of the assessee company."

6.1 The aforesaid extracted portion of the learned AO's order shows that the learned AO had made addition of Rs. 149,31,02,715/-, though in the table computing income (as extracted above in para 5) he had narrated the said addition by observing that 'disallowance of claim of expenses pending settlement of EPC contract but not recognised as revenues' (para 8 of the order). In fact said sum of Rs. 149,31,02,715/- represented an alleged accrued income to the assessee.

6.2 It is significant to be noted that the learned AO had not disallowed the claim of the assessee as additional cost which aggregated to Rs. 1140.08 Million. The said sum of Rs. 1140.08 million included a sum of Rs. 1026.08 Million, which represented an additional claim made by EPC contractor was considered as admissible by the assessee as can be noted from the narration of facts and stated in subsequent paragraphs. It is submitted that the aforesaid sum of Rs. 1026.08 million, represented a claim made against the assessee by consortium of M/s Dodsal Pte Ltd. and M/s Dodsal Private Limited (hereinafter referred to as 'Dodsal' or 'EPC contractor'), who had been engaged by the assessee to carryout engineering, procurement and

construction of Sudan Pipeline. EPC contractor had claimed from the assessee, additional cost amounting to USD 26,982,643, USD 1,270,435 and USD 8,894,325 (aggregating to Rs. 1659 million) vide its letters and invoices dated 1 December 2005 and 09 January 2006.

6.3 It is further submitted that assessee submitted the letters/invoices issued by the EPC contractor with its consultant for review and approval. Vide letter dated 25.05.2006, the consultant intimated the EPC contractor that its first claim has been scrutinized and processed for payment of an amount of USD 2,42,57,643/-. Subsequently, vide letter dated 05.10.2007, the consultant approved the second claim for an amount of USD 12,29,652 and rejected the claim of USD 88,94,325. Thus, the amount approved by the consultant in respect of the claim of the additional cost aggregated to USD 2,54,87,295 (assessee's share USD 2,29,38,566 being 90% of USD 2,54,87,295). Since the assessee's consultant had quantitatively assessed the liability, the assessee provided the aforesaid sum as a liability in its books of accounts i.e. of a sum equivalent to Rs. 1026.08 million, which represented 90% of Rs. 1140.08 being assessee's share. Remaining amount since had not been admitted by it were not provided in the books of accounts nor had been claimed by it since it had not been approved. It is also admitted fact & is also borne out from the documents placed on record (see compilation of documents in relation to arbitration proceedings) that Dodsal who had initiated Arbitration proceedings had also received an acknowledgement from the assessee's consultant that its claim has been accepted and the payment in respect thereof is being processed. It was this claim which had been debited in its annual accounts and which sum had been claimed as deductible.

6.4 On the basis of the aforesaid claims made by EPC contractor, the assessee raised an additional claim of USD 34,128,976 on MEM Sudan [equivalent to Rs. 1524.20 million (Appellant's share being Rs. 1371.78 million)].. The said claim of the assessee remained un-admitted by MEM Sudan. As no income as claimed by it from MEM had accrued to it, no such sum as claimed was reflected in its accounts as its income.

7. It is submitted that while framing the assessment, the learned AO, as is apparent from para 8.10 of the assessment order had made addition of Rs. 149,31,02,715/-. The aforesaid addition was made by the AO when he held that the assessee has failed to

offer the accrued revenues to the extent of Rs. 1493.10 million, the claim for which had been forwarded by the assessee to MEM. It is significant to be noted that the learned AO in his order in para 8.5 of the assessment order had not disputed the claim made by the assessee when it had provided for additional expenses of Rs.1026.08 million being company's share in the consortium and payable to EPC contractor. The learned AO in para 8.5 of his order had held as under:

> "As can be seen from the facts of the case, the **project has been completed**. As such both the total costs as well as the total revenues should be taken into accounts for determining the taxable profits on accrual basis. As such the company made a provision for additional expense of Rs. 1026.08 Million being company's share in the consortium. As the claim of revenues of the company to the extent of Rs. 1493.10 Million also accrued and crystallized on completion of the project, the company should have recognised the same as revenues during the year on matching principal and paid taxes on it.

8. At this stage alone the assessee submits that, a sum of Rs. 1026.08 million represented a claim of expenditure; whereas an amount of Rs. 149,31,02,715/- represented an income which had allegedly accrued. It is submitted that these are two different items and sum, one is of incurring of an expenditure and another is of accrual of income. **The learned AO did not disallow the claim as made of Rs. 1026.08 Million and as such it is evidently clear that he could not be stated to have been satisfied that the assessee had furnished any inaccurate particulars of its income or had concealed any such sum of income so far as this sum of Rs. 1026.08 million is concerned.**

9. It is next submitted that, being aggrieved from the aforesaid order of the AO, who had made the aforesaid four additions as has been set out in para 5 above, the assessee had filed an appeal before the learned CIT(A) who by his order dated 24.02.2014, had deleted each of the four additions. However, while deleting the addition of Rs. 149,31,02,715/- in para 7.4.10 (page 75 of paper book) he held as under:

> "In view of the above, the additional expense of Rs. 1026.08 million provided as expenditure by the appellant on this account calls for disallowance as no liability as arisen in the hands of the appellant.

Further, since revenue did not accrue or arise in the hands of the appellant, therefore, the addition of Rs. 1493.10 million made by the AO cannot be justified. The cause laws relied on by the AR are not applicable in the instant case because the contractor is not legally entitled to the additional claims and liability claimed by the EPC contractors which is pending in arbitration tribunal is not accepted by the appellant. in view of the above, the addition made by the AO is reduced from Rs. 1493.10 million to Rs. 1026.08 million. The appeal is partly allowed in this ground." (Emphasis supplied)

10. Aggrieved from the aforesaid order, revenue had filed an appeal before the Hon'ble Tribunal which inter-alia raised following three grounds of appeal which reads as under:

"6. The Ld. CIT(A) has erred in law and on facts by ignoring the fact that the project had completed during the year. And according to the mercantile law of accountancy, which the assessee has been following, the total cost of the project and the total revenues shall have been taken into account for calculation of profits on accrual basis.

7. The Ld. CIT(A) has erred in law and on facts by ignoring the fact that the claim of the revenues amounting to 1493.10 million has been forwarded by the company to MEM during the year which shows that the revenue has not only accrued but crystallized during the year, the same should have been taken in account for calculation of profits.

8. The Ld. CIT(A) has erred in law and on facts by ignoring the fact that the assessee is maintaining its books of accounts on mercantile basis therefore the expenditure which have neither accrued nor incurred in the relevant previous year, is not allowable in this year."

10.1 The assessee had also filed an appeal inter-alia challenging the addition sustained by the learned CIT(A) which had been reduced from Rs. 1493.10 million to Rs. 1026.08 million. From the aforesaid sequence of events, it would be seen that the learned AO had made addition of Rs. 1493.10 million which was reduced to Rs. 1026.08 million by the learned CIT(A).

11. Since the learned CIT(A) had held, an addition made by the learned AO stands reduced to Rs. 1026.08 million, the assessee filed an appeal and had raised the following grounds of appeal:

(i) That the Ld. CIT(A) erred in law and on facts of the case in not allowing deduction amounting to INR 1,026.08 million being the claim received from EPC Contractor for additional expenditure incurred in respect of laying of Sudan pipeline.

(ii) Ld. CIT(A) has failed to appreciate that the liability in respect of additional expenditure in laying of Sudan pipeline has crystallized as the additional claim for expenses was received and provided in the books during the year.

12. It was contended by the assessee before the Hon'ble Tribunal that ground Nos. 6, 7 and 8 raised above by the revenue in fact do not arise from the order of assessment in as much as the AO had himself held and admitted the same in para 8.5 at page 22 of its order, as extracted in para 7 above.

13. The Hon'ble Tribunal, however, while disposing of the appeal has held that, the addition made by the learned AO of Rs. 1493.10 million is unsustainable but has upheld the addition sustained by the learned CIT(A) of Rs. 1026.08 million.

14. Since the AO had initiated penalty proceedings u/s 271(1)(c) of the Act, he levied a penalty of Rs. 34,53,78,528/- by his order dated 30.03.2015. The learned CIT(A), however, by his order dated 01.12.2016 has deleted the penalty. He has held in the aforesaid order in para 2.15 as under:

> "In view of the legal position and the facts of the case, the appellant had given an explanation, which is bonafide. Further, 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, the penalty levied u/s 271(1)(c) of the Act of Rs. 34,53,78,528/- is deleted. These grounds of appeal are ruled in favour of the appellant."

15. The assessee-respondent while supporting the order of the learned CIT(A) seeks to further add that even the levy of penalty by the AO was without jurisdiction in as much as there had been no initiation of penalty proceedings in respect of an addition sustained by the learned CIT(A) of Rs. 1026.08 million. It is submitted that the AO had not disallowed the claim of expenditure incurred of Rs. 1026.08 million which was the sum claimed by it as deductible. The said sum was not a sum which had been either added by the AO or had been disallowed by him while computing the income of the assessee. On the contrary, it was not denied by the AO that the assessee had incurred a liability of Rs. 1026.08 million. Further it is submitted that the learned CIT(A) while sustaining an addition of Rs. 1026.08 million, out of an addition made of Rs. 1493.10 million had also not recorded any note of satisfaction nor initiated any penalty proceedings u/s 271(1)(c) of the Act.

16. In view of above circumstances, it is submitted that apart from the findings recorded by the learned CIT(A), even the levy of penalty by the AO in respect of a sum of expenditure incurred and claimed by the assessee which had not been disputed by the AO and in respect of which no satisfaction had been recorded by the learned AO in the order of assessment, is not sustainable, as the AO had never been satisfied that in the course of assessment proceedings the assessee had either furnished inaccurate particulars of income or had concealed its income. **(see Pr. CIT vs. M/s Sahara India Life Insurance Company Ltd. ITA No. 475/2019, judgment dated 02.08.2019)**

17. Before closing with the aforesaid submissions, the assessee-respondent submits that the Hon'ble Tribunal while disposing of the assessee's appeal by its order dated 01.07.2019, held as under:

> "The various decisions relied on by the Ld. Counsel for the assessee are distinguishable and not applicable to the facts of the present case. In our opinion, the approach of the assessee should be consistent both for the revenue as well as expenditure. The assessee cannot take one stand for claiming the expenditure as an allowable deduction and, at the same time, do not recognize the revenue. In the instant case, since the claim has not been accepted by the EPC contractor, therefore, the addition made by the Assessing Officer is not

> justified. At the same time, although the assessee has provided in its Profits & Loss Account regarding the additional claim made by the EPC contractor, however, the assessee has challenged the same before the arbitrator and no payment having been made and the same is also under litigation and, therefore, following matching principle the claim of additional expenditure made by the assessee in its books of account has to be disallowed. We accordingly uphold the order of the CIT(A) on this issue and the grounds raised by the assessee as well as the revenue are accordingly dismissed."

17.1 It is respectfully submitted that the matching principle as has been adopted has no application in the facts of this case. In the instant case the question involved was about the allowability of expenditure incurred. It is well settled rule of law that expenditure incurred is allowable in the year in which they are incurred. It is equally well settled that an income accrues when an assessee had right to receive such income. The claim of the assessee is that it has incurred expenditure and as such, the same is allowable.

17.2 In so far as the accrual of income is concerned, its claim is that no such income had accrued as it has no right to receive the said sum. This has been admitted by the Hon'ble Tribunal too.

18. It is submitted that, if para 19 of the order of Hon'ble Tribunal is read, it would be found that it has correctly noted the sequence of events where it was stated that the assessee had admitted the claim of Dodsal which was duly intimated to EPC contractor on 25.04.2006. It had also been admitted by the AO himself that the assessee had provided for the aforesaid sum in the books of accounts. It is further added that the issue pertaining to an addition of Rs. 1026.08 million was not even the subject matter of appeal by the assessee before the learned CIT(A), since the AO had made addition of Rs. 149,31,02,715/- and had not disallowed claim of expenditure of Rs. 1026.08 million.

18.1 The assessee had considered as admissible the claim of USD 25,487,295 (assessee's share USD 22,938,566 being 90% of USD 25,487,295) out of aforesaid three claims and provided for in the books amounting to Rs. 1026.08 million. This provision was made bonafide based on the claim of the contractor which was assessed by the assessee's consultant (Engineering Services of Oil and Natural Gas Corporation Ltd.)

and communicated to the contractor by the consultant. The provision Rs. 1026.08 million was disclosed by way of Note no. 5 of the Notes to Accounts contained in Schedule 27 of the asssessee's annual accounts and was reviewed by the assessee's statutory auditors appointed by the Comptroller and Auditor General of India (CAG) and by the CAG itself since the assessee is a central Public Sector Undertaking (PSU) under the Ministry of Petroleum & Natural Gas, Government of India. Remaining amount was not provided as it had not yet been approved. No amount was claimed in subsequent years. No claim of any income was even made on MEM Sudan in the previous year relevant to AY 2006-07, claim was made on 17.4.2006.

19. From the observations made in the order of assessment, it would be seen that the AO had held, that as the company has made provision for additional expenses of Rs. 1026.08 Million being company's share in the consortium and it claimed revenues of the company to the extent of Rs. 1493.10 Million also accrued and crystallized on completion of the project, the company should have recognised the same as revenues during the year on matching principle. The learned AO has not contended that such a claim of expenditure incurred had either not crystallized or was contingent. The only objection of the AO was since the assessee has made a claim to the extent of Rs. 1493.10 Million, the said sum ought to have been shown as income.

20. It is more than evident that there are two different aspects of the matter; one is about the incurring of expenditure and another is about the accrual of income. The AO has not disputed about the fact that the assessee had incurred expenditure which had been provided by it in the books of accounts and had not been disputed. Further the fact that the AO had made an addition pertains to a separate amount which in the opinion of the AO had accrued to the assessee which was disputed by the assessee company.

21. In the final analysis it is submitted that in the absence of a satisfaction recorded by the learned AO in the course of proceedings that the assessee has concealed the particulars of income or had furnished the inaccurate particulars in respect of claim of expenditure aggregating o Rs. 1026.08 million, no penalty could have been levied. Even otherwise, it is submitted that the assessee had furnished full and true particulars in respect of the claim of expenditure and thus it is prayed the revenue's appeal be dismissed. It is thus prayed that, it be held that, since there had been no initiation of proceedings in respect of expenditure claimed by it nor was the sum disallowed by the

AO and as such levy of penalty is totally arbitrary and unjustified which had rightly been deleted by the learned CIT(A).

"

(B.2.1) A copy of order dated 02.08.2019 of Hon'ble Delhi High Court in the case of Pr. Commissioner of Income Tax v s. M/s Sahara India Life Insurance Company Ltd and others in ITA No. 475/2019 and others was also filed from the assessee's side, during appellate proceedings in ITAT, mention of which was made in the aforesaid synopsis.

(C) At the time of hearing before us, the Ld. Commissioner of Income Tax (Departmental Representative) ["Ld. CIT(DR)", for short] placed reliance on the aforesaid penalty order dated 30.03.2015 of the Assessing Officer. However, in response to specific query from the Bench, she conceded that there was full disclosure of material facts by the assessee in the Return of Income, and during the assessment proceedings; and further, that no relevant information of fact was withheld by the assessee from the Revenue's authorities during assessment proceedings. She also conceded that the question whether the aforesaid amount of Rs. 102,60,80,000/-, would be allowable in the hands of the assessee, or not; was highly disputable and, that different points of view could legitimately exist on the question of its allowability. She also did not dispute the fact that the AO had failed to specifically record his satisfaction for initiation of penalty proceedings in respect of the aforesaid amount of Rs. 102,60,80,000/- in the Assessment Order dated 04.12.2009, although the AO had specifically recorded such satisfaction in respect of the other additions (such as, addition of aforesaid amount of Rs. 149,31,02,715/-; disallowance of claims of depreciation amounting to Rs. 204,57,99,264/- and Rs. 1,94,58,972/-; and disallowance of pre-acquisition expenses amounting to Rs. 112,51,25,851/-.)

(C.1) On the other hand, the Ld. Senior Advocate appearing for assessee strongly supported the aforesaid impugned appellate order dated 01.12.2016 of Ld. CIT(A) and placed reliance on the aforesaid synopsis [relevant portion of which have been reproduced earlier in foregoing paragraph **(B.2)**] and the order dated 02.08.2019 of the Hon'ble Delhi High Court in the case of Pr. Commissioner of Income Tax vs. M/s Sahara India Life Insurance Company Ltd. (supra).

(D) We have heard both sides patiently. We have perused the materials available on record carefully. We have considered the precedents mentioned in the records or referred to in the course of appellate proceedings in ITAT. It is not in dispute that the AO had failed to initiate penalty proceedings under Section 271(1)(c) of I.T. Act in respect of the aforesaid disallowance of expenses amounting to Rs. 102,60,80,000/- although the AO had specifically initiated penalty proceedings in respect of other additions (such as, the addition of aforesaid amount of Rs. 149,31,02,715/-; disallowance of claims of depreciation amounting to Rs. 204,57,99,264/- and Rs. 1,94,58,972/-; and disallowance of pre-acquisition expenses amounting to Rs. 112,51,25,851/-.) On perusal of the aforesaid order dated 01.12.2016 of the Ld. CIT(A); we also find that the Ld. CIT(A) has also failed to initiate penalty proceedings under Section 271(1)(c) of I.T. Act, in respect of the aforesaid disallowance of Rs. 102,60,80,000/-. Thus, penalty proceedings under Section 271(1)(c) of I.T. Act were neither initiated by the AO during assessment proceedings nor by the Ld. CIT(A) during the appellate proceedings in respect of the aforesaid disallowance of Rs. 102,60,80,000/-. The Ld. CIT(A) has also not levied any penalty under Section

271(1)(c) of I.T. Act. **When the AO specifically initiates penalty proceedings in respect of certain additions in the assessment order, but does not record initiation of penalty proceeding in respect of the other additions; it has to be inferred that the additions in respect of which penalty proceedings were not initiated, were not intended to be considered for subsequent order imposing penalty U/s 271(1)(c) of IT Act. When certain things are specifically included and remaining things are not included therein, it has to be inferred that what was not specifically included was not intended to be included at all. Scope of penalty proceedings U/s 271(1)(c) of IT Act cannot be widened later to include within its scope such additions which were not sought to be covered within the scope of penalty U/s 271(1)(c) of IT Act, at the time when penalty proceedings were initiated and assessment order was passed. The retrospective widening of the scope of penalty, to include those items for levy of penalty U/s 271(1)(c) of IT Act which were not included for this purpose at the time when penalty proceedings U/s 271(1)(c) of IT Act were initiated and assessment order was passed; amounts to review and change of opinion by the AO, to the detriment of the Assessee; which has no authority of law. Initiation of penalty proceedings by the AO is valid only if the AO is satisfied in the course of any proceedings, that the Assessee has concealed the particulars of income or furnished inaccurate particulars of income. When this satisfaction for initiation of penalty proceedings U/s 271(1)(c) of IT Act is recorded by the AO in assessment order in respect of**

certain additions during the assessment proceedings; and not recorded in respect of certain other additions; it acts as a bar against levy of penalty U/s 271(1)(c) of IT Act in respect of those additions in respect of which such satisfaction was not recorded in the assessment order or during the assessment proceedings.

(D.1) It is also not in dispute that the issue regarding disallowance and consequent addition amounting to aforesaid Rs. 102,60,80,000/- was highly disputable issue, on which two different views were legitimately possible. It is further not in dispute that there was full disclosure of materials facts and circumstances by the assessee in the Returns of Income and during assessment proceedings; and that no relevant information of fact was withheld by the assessee from the revenue's authorities during assessment proceedings. **When there was full disclosure of materials facts and circumstances by the assessee in the Return of Income and during assessment proceedings; then, on a the disputable issue of quantum addition, on which two different views are legitimately possible, of which the one favourable to the assessee has been adopted by the assessee; eventually, the Assessee may or may not succeed in the quantum proceedings and the disputable issue, on which two different views were possible, may eventually be decided against the Assessee in quantum proceedings. However, the assessee cannot be burdened with penalty U/s 271(1)(c) of I.T. Act, if on a disputable issue of quantum addition, on which two different views were legitimately possible, the Assessee decided to**

adopt the view which was favourable to the assessee; in a case in which all necessary details were filed by the Assessee in support of the claim and when no material inaccuracies were found in these details, and when the assessee is not guilty of suppression of any material facts. In quantum proceedings, when two different views are legitimately possible on a disputable claim made by the assessee; one of which is favourable to the assessee, the multiplicity of legitimate views and disputability of the claim has the effect of excluding the scope of penalty U/s 271(1)(c) of I.T. Act in respect of such disputable claim even if the disputable claim is decided against the assessee in quantum proceedings; because in such a case the disputable claim made by the assessee neither amounts to 'concealment of particulars of income' nor to 'furnishing of inaccurate particulars of income'

(D.2) The Ld. CIT(DR) has failed to bring any facts and circumstances legal provision or judicial precedents to our attention to persuade us to take a view different from the view taken by the Ld. CIT(A) deleting the aforesaid penalty amounting to Rs. 34,53,78,528/-, vide his impugned appellate order dated 01.12.2016.

(D.3) In view of the foregoing, we are of the view that this is not a fit case for penalty under Section 271(1)(c) of I.T. Act and we decline to interfere with the impugned appellate order dated 01.12.2016 of the Ld. CIT(A). For this view taken by us, we take support from Reliance Petroproducts (P) Ltd. 322 ITR 158 (SC); Devsons (P) Ltd. vs. CIT 329 ITR 483 (Del.); Hindustan Coca Cola Marketing Company Pvt. Ltd. Vs. DCIT

(2019) 198 TTJ 0513 (Del.) and M/s Padmini Infrastructure Developers India Ltd. Vs. DCIT (2019) 55 CCH 0420 DelTrib.

(E) In the result, appeal filed by Revenue is dismissed.

Order pronounced in the open court on 18/02/2020.

Sd/-	Sd/-
(AMIT SHUKLA)	**(ANADEE NATH MISSHRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 18/02/2020
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	