IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 670/MUM/2017
Assessment Year: 2011-12

Rheal Software Pvt. Ltd., 901, Premium Tower, Lokhandwala Complex, Andheri (W), Mumbai-400053.	Dy. CIT-8(3), Mumbai. Vs.
PAN No. AABCR8008B	
Appellant	**Respondent**

Assessee by	:	Shri Ronak Doshi, AR
Revenue by	:	Shri D.G. Pansari, DR
Last Date of Hearing	:	15/11/2019
Date of Pronouncement	:	10/02/2020

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2011-12. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-18, Mumbai [in short 'CIT(A)'] and arises out of the levied penalty u/s 271(1)(c) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

1.1 On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the action of the AO in issuing the notice u/s. 274r.w.s. 27(1)(c) in a standard proforma without indicating any specific reason/charge against the Appellant for levy of penalty u/s. 271(1)(c).

1.2 The Ld. CIT(A) failed to appreciate and ought to have held that:

- It is incumbent upon the AO to indicate the precise charge for levy of penalty before initiating the penalty proceedings;
- Issue of show-cause notice in standard formal does not absolve the AO from the mandatory requirement of a reasoned notice to be issued prior to initiating the penalty proceedings;
- In view of various judicial pronouncements, issue of such a plain show cause notice u/s. 274 is invalid and ab-initio void.

1.3 The Appellant therefore, prays that the show-cause notice issued u/s 274 r.w.s. penalty order by the Ld. AO be held as null and void in the absence of principle of natural justice and on account of passing of a non-speaking order.

2.1 On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the AO in levying penalty of Rs.1,58,30,000/- under section 271(1)(c) of the Act on the alleged ground that the Appellant has furnished inaccurate particulars and has concealed its income.

2.2 The Ld. CIT(A) failed to appreciate and ought to have held that:

a. the Appellant had *suo-motu* filed a revised return withdrawing deduction claimed u/s. 10B of the Act;
b. for the purpose of penalty proceedings, the relevant return is revised return, if the Appellant has satisfied all the condition as laid down u/s 139(5) of the Act;
c. since the Appellant, based on expert certification, was under the *bonafide* belief that the claim of deduction u/s. 10B of the Act was available and had accordingly claimed the same in its original Return of Income , it will not bring in its wake the levy of penalty;
d. since the claim was made relying on Form 56G which was duly certified by the expert i.e. Chartered Accountant, no penalty can be levied on the disallowance of the same;

e. when the process of detection of allegedly concealed income was not complete, in fact nothing related to the issue under consideration was pointed out by the AO, till date of filing of revised returns, imposition of penalty on Appellant u/s 271(1)(c)of the Act was not justified.

2.3 The Appellant prays that the AO be directed to delete the aforesaid penalty of Rs.1,58,30,000/- levied under section 271(1)(c) of the Act.

3.1 On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the AO in levying penalty of Rs.1,58,30,000/- under section271(1)(c) of the Act in respect of the entire addition made in the assessment order without restricting the same to the extent of alleged tax sought to be evaded by the Appellant.

3.2 The Ld. CIT(A) failed to appreciate and ought to have held:

a. that as per the provisions of Explanation 4 to sub-clause (iii) to section 271(1)(c), the amount of sought to be evaded is defined to mean difference between the tax due on total income assessed and the tax which would have been chargeable had the total income been reduced by the amount of concealed income or income in respect of which inaccurate particulars have been filed;
b. that the penalty, if at all leviable, then the same ought to have been levied on the differential amount between the tax payable as per assessment order i.e. Rs.1,63,04,652/- and tax as per MAT of Rs.91,82,026/-.

3.3 The Appellant prays that in case penalty u/s. 271(l)(c) is confirmed, then the AO be directed to compute the penalty only to the extent of differential tax between the tax on total income assessed and the tax that ought to have been payable as reduced by the amount of concealed income.

3. Briefly stated, the facts of the case are that the assessee-company filed its return of income for the assessment year (AY) 2011-12 on 29.09.2011

declaring total income of Rs.16,15,484/- after claiming deduction of Rs.46,54,118/- u/s 10B of the Act. Thereafter, the assessee filed revised return on 05.12.2012 withdrawing its claim of deduction u/s 10B and declaring total income of Rs.4,92,69,602/-. The difference between the returned income and assessed income was on account of disallowance of deduction of Rs.4,76,54,118/- u/s 10B of the Act. Subsequent to assessment, the AO initiated penalty proceedings u/s 271(1)(c) of the Act. In response to the show cause notice dated 02.07.2014 issued by the AO the assessee filed a written submission dated 10.07.2014.

The AO noted that in the original return of income, the assessee had claimed deduction of Rs.4,76,54,118/- u/s 10B. The AO issued the notice u/s 143(2) on 31.07.2012. Subsequently, during the course of assessment proceedings, the assessee filed revised return of income withdrawing its claim of deduction u/s 10B of Rs.4,76,54,118/-, on the reason that the requisite period of 10 years for allowance of deduction u/s 10B had already expired. As per the assessee, it relied on the Auditor's report in Form 56G, while claiming deduction.

The AO observed that (i) the assessments for AYs 2006-07, 2007-08 and 2008-09 were made u/s 143(3) and in all these years, the assessee was advised by a team of professionals who would have definitely worked upon the period for claim of deduction u/s 10B, after receipt of notice u/s 142(1), (ii) in the impugned assessment year the assessee filed revised return of income on 05.12.2012 i.e. after notices were issued u/s 143(2) dated 31.07.2012 and u/s

142(1) dated 24.11.2012 and served upon the assessee, (iii) the assessee has not filed appeal before the Ld. CIT(A).

On the basis of the above facts and reasons, the AO held that by making such an improper claim of depreciation, the assessee has willfully reduced its incidence of taxation and thereby concealed its income as well as furnished inaccurate particulars of its income. Therefore, he levied a minimum penalty of Rs.1,58,30,000/- u/s 271(1)(c) of the Act.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that *vide* order dated 29.11.2016, the Ld. CIT(A) agreed with the reasons given by the AO and dismissed the appeal filed by the assessee.

5. Before us, the Ld. counsel for the assessee submits that the appellant was registered with EOU on 25.08.2001, though it commenced operations on 01.12.2000; it had been claiming deduction u/s 10B from AY 2002-03 based on mandatory filing of audit report in Form 56G ; thus following the same, originally, even for the impugned assessment year, based on said audit report in Form 56G where 'in year of deduction-Ten Year' was stated, deduction u/s 10B was claimed. It is clarified that post issuance of notice u/s 143(2) dated 31.07.2012 and general questionnaire issued u/s 142(1) dated 20.11.2012, the appellant had revised return on 05.12.2012 by withdrawing claim of section 10B which was claimed inadvertently. It is further stated that the AO accepting the said revised return passed assessment order u/s 143(3) without making any further adjustments, except observing at para 4 that by putting inadmissible claim of deduction u/s 10B, the assessee has not only furnished inaccurate particulars of income but also concealed income within the meaning

of section 271(1)(c). The Ld. counsel explains that the AO accepted the revised return and made assessment ; if he accepted revised return there was no question of making inadmissible claim of deduction u/s 10B in such revised return; in fact, admittedly there is no concealment or inaccurate furnishing of income in such revised return.

On merits, it is explained by him that penalty cannot be levied based on following propositions.

(a) If claim of deduction was based on an expert opinion/legal advice/CA advice/audit report and then such claim is disallowed, no penalty can be levied.

It is stated (i) that in the case of the appellant, its claim in original return was based on Form 56G and hence no penalty can be levied, since it was based on expert certification, (ii) in assessment for the past years from AY 2006-07 to AY 2010-11 (except AY 2009-10) u/s 143(3), similar Form 56G and claim u/s 10B were accepted, (iii) the inadvertent mistake which crept in the column "number of consecutive assessment year in which deduction is claimed" thus continued, ultimately, since revised return has been accepted effectively appellant has claimed deduction only for 9 years i.e. upto AY 2010-11.

(b.) If deduction is claimed based on bona fide belief, penalty u/s 271(1)(c) cannot be levied.

The Ld. counsel submits that in the present case deduction u/s 10B in original return was based on Form 56G and hence appellant had a bona fide belief and thus, subsequent withdrawal cannot lead to penalty u/s 271(1)(c).

(c) Merely because return was revised after issuance of notice u/s 143(2), it cannot be presumed that act of revision was not voluntary without AO's specific detection to that effect and hence no penalty can be levied u/s 271(1)(c).

It is submitted by the Ld. counsel that though notice u/s 143(2) was issued in July 2012, the questionnaire issued in November 2012 was very general and asked various details which were not present in appellant's case ; there was no specific query of AO that in view of expiry of ten years, why deduction u/s 10B is claimed. It is thus explained that since the appellant revised its return prior to specific detection by AO and the fact that AO has accepted revised return and assessed appellant on such basis, penalty cannot be levied. In this regard reliance is placed by him on the decision in *PCIT v. Niraj Jindal* (ITA No. 463/2016) dated 09.02.2017 by Delhi High Court; *CIT v. Manjunatha Cotton & Ginning Factory* 359 ITR 565 (Karn.) Reliance is also placed on the order of the ITAT, Mumbai in *Archana Talati* (ITA No. 696/Mum/2016), wherein the Tribunal following the decision of Punjab & Haryana High Court in *Rajiv Garg* deleted penalty where post notice u/s 148, the assessee included in its return certain income and paid taxes voluntarily and such return was regularized by the AO.

It is stated by the Ld. counsel that in the present case, the Department has not invoked *Explanation* 1 to section 271(1)(c) and rightly so since *Explanation* was offered to revised return ; claim of deduction u/s 10B in original return was based on bona fide belief, relying on Form 56G.

It is further explained by him that the AO has accepted revised return but in the assessment order observed at para 4 that by putting inadmissible claim of deduction u/s 10B, the assessee has not only furnished inaccurate particulars of income but also concealed income within the meaning of section 271(1)(c) ; in show cause notice dated 15.01.2014, admittedly the AO has not struck off between concealment of income or inaccurate particulars of income; in penalty order at para 5, AO holds "by making such improper claim of depreciation, the assessee has willfully reduced its incidence of taxation and has thereby concealed its income as well as furnished inaccurate particulars of its income".

In this regard, reliance is placed by him on the decision by the Hon'ble Supreme Court in *Dilip Shroff* (161 Taxman 218). Thus it is stated that in the present case observations in assessment proceedings cannot be said to have "initiated the penalty" proceedings and accordingly, in absence of striking off any one limb in show cause notice, the entire penalty proceedings are bad in law. Reliance is placed on the order of the ITAT, Mumbai in *Jehangir Hc Jehingir*, wherein the Tribunal has deleted penalty where AO had levied penalty on both limbs.

Reliance is also placed by him on the decision in *Reliance Petroproducts* 322 ITR 158 (SC).

5.1 The Ld. counsel submits that in absence of indication of specific charge/reasons for levy of penalty u/s 271(1)(c) and where the inappropriate portion in the notice is not struck off, notice dated 15.01.2014 issued u/s 274 r.w.s 271 of the Act is defective. In this regard reliance is made by him on the

decision in *CIT v. Manjunatha Cotton & Ginning Factory* (359 ITR 565) (Kar.); *CIT v. SSA's Emerald Meadows* (73 taxmann.com 241) (Kar)(HC); *CIT v. SSA's Emerald Meadows* (73 taxmann.com 248) (HC); *CIT v. Samson Perinchery* (ITA No. 1154, 953, 1097, 1226/2014, order dated January 5, 2017) (Bom HC); *M/s Wadhwa Estate & Developers India Pvt. Ltd. v. ACIT* (ITA No. 2158/Mum/2016, order dated February 02, 2017) (Trib- Mum); *Dr. Sarita Milind Davare v. ACIT* (ITA No. 2187/M/2014, order dated December 21, 2016) (Trib- Mum); *Sejal P. Savla v. ACIT* (ITA No. 3382/Mum/2015, order dated August 10, 2016) (Trib-Mum); *ACIT v. Dipesh M. Panjwani* (ITA No. 6330, 5878, 6328, 6188/M/12, order dated March 18, 2016) (Trib- Mum); *Sanghavi Savla Commodity Brokers P. Ltd. v. ACIT* (ITA No. 1746/M/011, order dated December 22, 2015) (Trib-Mum); *Parinee Developers Pvt. Ltd. v. ACIT* (ITA No. 6772/M/2013, order dated September 11, 2015) (Trib- Mum); *Shri Hafeez S Contractor v. ACIT* (ITA No. 6222-6223/M/2013, order dated September 2, 2015) (Trib-Mum); *H. Lakshminarayana v. ITO* (2015) (61 taxmann.com 373) (Trib- Bang); *Tulip Mines Pvt. Ltd. v. DCIT* (ITA No. 2407/Kol/2013, order dated October 7, 2016); *Suvaprasanna Bhatacharya v. ACIT* (ITA No. 1303/Kol/2010, order dated November 6, 2015) (Trib-Kol); *DCIT v. Ittina Properties Pvt. Ltd*. (ITA No. 36/Bang/2014, order dated November 21, 2014) (Trib- Bang); *A.R. Chadha v. ACIT* (80 ITD 56) (Trib-Del) (TM).

Without prejudice to the above, it is stated that non-filing of appeal against additions in assessment itself does not amount to acceptance of disallowance and cannot automatically form basis for levy of penalty u/s 271(1)(c). In this regard reliance is placed by him on the decision in *Sir Shadilal Sugar Mills* (168 ITR 705)(SC); *Manjunatha Cotton & Ginning Factory* (supra).

Relying on the decision in *T. Ashok Pai v. CIT* (292 ITR 11) (SC), *ACIT v. DSL Software Ltd.* (20 taxmann.com 408) (T Del), *Pfizer Ltd. v. Dy. CIT* (2012) 146 TTJ 385 (Mum) (Trib), the Ld. counsel explains that when a legal claim is based on an expert's opinion/report/certificate, no penalty can be levied.

Further it is stated that if the claim is made under a bona fide belief or due to inadvertent error then, penalty u/s 271(1)(c) of the Act cannot be levied. In this context, reliance is placed by him on the decision in *Price Waterhouse Coopers (P.) Ltd. v. CIT* (25 taxmann.com 400) (SC), *CIT v. Somany Evergreen Knits Ltd.* (35 taxmann.com 529) (Bom.).

Further it is stated by him that merely because return was revised after issue of notice u/s 143(2), it cannot be presumed that the act of revision was not voluntary without AO's specific detection to that effect. In this regard, the Ld. counsel relies on the decision in *CIT v. Shri Rajram Cloth Stores* (214 ITR 262) (Mad (HC), *Prema Gopal Rao v. DCIT* (ITA No. 8653/M/2011, order dated January 1, 2015) (Trib-Mum), *ACIT v. Ashok Raj Nath* (ITA No. 2970/Del/2012, order dated August 31, 2012 (Trib- Del.), *ACIT v. Prem Chand Garg* (31 SOT 9/2009) (Trib- Del), *Shri Manhar Lal Modi v. ITO* (ITA No. 2063, 6064, 2065, 2066/Ahd/2009, order dated August 27, 2009) (Trib-Ahd).

Further, it is stated by him the return validly revised u/s 139(5) for correcting a bona fide mistake in the original return for withdrawing claim of deduction etc. the same cannot attract penalty u/s 271(1)(c). In this context, the Ld. counsel refers to the decision in *Cheap Cycle Stores v. CIT* (154 Taxman 284) (All.), *CIT v. Backbone Enterprises* (195 Taxman 200) (Guj), *CIT v. Shankerlal Nebhumal Uttamchandani* (311 ITR 327).

Finally, relying on the decision in *Sesa Resources Ltd. v. ACIT* (38 taxmann.com 224); *ITO v. Sanjeev Mishra* (41 SOT 17), the Ld. counsel submits that mere denial of claim would not *per se* result in levy of penalty u/s 271(1)(c).

5.2 The Ld. counsel submits that in the case of the decision of the Hon'ble Bombay High Court in the case of *Smt. Kaushalya & Ors* 216 ITR 660 (Bom) relied on by the CIT(A), the High Court held that in AY 1967-68, the penalty was rightly deleted by the Tribunal since the notice was issued without specifying the exact charge by the Department against the assessee ; however, in so far as AY 1968-69 and 1969-70 were concerned, the High Court held that on facts for those year, the assessee fully knew the details of the exact charge of the Department against the assessee and hence merely mistake in language used or non-striking off any inaccurate particulars did not invalidate the notice ; at the same time the High Court also held that in such a case the entire factual background should be considered. It is argued by the Ld. counsel that in the present case the Department has not specified the exact charge on which penalty is levied ; in fact in the assessment order itself, the AO without being specific, decided that the appellant had not only furnished inaccurate particulars but also concealed income. Relying on the decision in *Manjunatha Cotton & Ginning Factory* (supra), wherein the Hon'ble Karnataka High Court has dealt with the issue of defective notice u/s 274, it is stated by him that subsequently, the Supreme Court in *SSA's Emerald Meadows* (supra) has upheld similar view taken by the Karnataka High Court. Also it is explained by him that the Bombay High Court in *CIT v. Samson Perincherry* (supra) has also followed

the decision of Karnataka High Court and held that in absence of specifying exact charge in the notice, penalty is bad in law.

It is further stated by him that the ITAT, Mumbai has also considered the decision in *Kaushalya* (supra) while deciding the issue in case of *Dr. Sarita Davare* (supra) and *Wadhwa Estate* (supra) and still decided in favour of the assessee by deleting the penalty.

On merits, the Ld. counsel submits that the appellant relied on Form 56G wherein it has been stated that the 10th year of the claim would be AY 2011-12, considering the fact the 1st year of claim u/s 10B is AY 2002-03 ; in fact in the assessment years 2006-07, 2007-08, 2008-09 and 2010-11, wherein scrutiny assessment u/s 143(3) was made, the AO has not pointed out any of the facts which have been inaccurately furnished. Thus stating that since the concerned issue is debatable, it is argued that the penalty cannot be levied. Elaborating further, it is explained by him that the appellant had commenced manufacture/production on December 1, 2000; however, it was registered as a 100% EOU only on 25.08.2001 and these facts have never been disputed and thus there is no furnishing of inaccurate particulars of income. Further, it is stated by him that the appellant was in the bona fide belief that since it was registered as an EOU only on 25.08.2001, it was entitled to the deduction u/s 10B for 10 consecutive assessment years beginning with the AY 2002-03 relevant to the Previous Year 2001-02 (in which it obtained registration of EOU); on the past precedents and possible interpretation of language u/s 10B as well as the report of the Auditor in Form 56G, the appellant was under a bona

fide belief that deduction u/s 10B for AY 2011-12, being the 10th consecutive year was claimable.

Elaborating further, the Ld. counsel states that when the scrutiny assessment was going on in respect of the captioned year, the appellant was contemplating to start another undertaking for its software business and in fact a new LLP name, Rheal Software Technology Solution was incorporated in March 2011 and was registered as a SEZ in June 2011 and deduction u/s 10A was claimed on the profits in AY 2012-13, it was during this time while filing the return for AY 2012-13 of the said LLP, that the management re-examined all the claims available including the claim u/s 10B wherein the anomaly of the interpretation of section 10B was discussed and decided to revise the return for AY 2011-12 and withdraw the claim of deduction u/s 10B of the Act.

It is stated that as per section 271(1)(iii), penalty for concealment of income or furnishing of inaccurate particulars of income is determined based on 'amount of tax sought to be evaded' which has been defined *inter alia*, as the difference between the tax due on the income assessed and the tax which would have been chargeable had such total income been reduced by the amount of concealed income or income for which inaccurate particulars have been furnished.

It is stated that the assessee filed its original return with total income of Rs.16,15,480/- and paid tax u/s 115JB; it paid tax under MAT amounting to Rs.91,82,026/-. Subsequently, after revising the return of income, the appellant withdrew its claim u/s 143(3) with assessed income at Rs.4,92,69,600/-. The AO completed the assessment u/s 143(3) with assessed income at

Rs.4,92,69,600/- and tax payable at Rs.1,63,04,652/-. The AO levied penalty at Rs.1,58,30,000/- being 100% of tax liability on Rs.4,76,54,118/- (claim u/s 10B withdrawn).

The Ld. counsel therefore submits that in case penalty u/s 271(1)(c) is confirmed, then the AO be directed to restrict the penalty only to the extent of difference between tax assessed and tax as returned/paid by the appellant i.e. Rs.1,63,04,652/- less Rs.91,82,026/-.

5.3 During the course of clarification, the decision of the Hon'ble Supreme Court in the case of *MAK Data (P.) Ltd. v. CIT* (358 ITR 593) was referred by the Bench. In response to it, the Ld. counsel submits that the assessee in that case had filed return and in the course of scrutiny, the AO noticed that certain documents were impounded in the case of the sister concern of the assessee and the AO, by specific show cause notice, sought for specific information regarding documents impounded in the case of sister concern. The assessee thereafter, in the said case, voluntarily surrendered some income to buy peace and avoid litigation. The Hon'ble Supreme Court observed the fact of detection made by the AO much prior to voluntary surrender of income and confirmed penalty ignoring plea of assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement", etc. to explain away its conduct. It is thus submitted by the Ld. counsel that in the present case, as demonstrated from notices issued u/s 142(1), it is clear that the notices are quite general in nature ; number of details called for in such notices were not applicable at all to facts of the present case ; though notice u/s 143(2) was issued on 31.07.2012 and notice u/s 142(1) was issued on 24.11.2012, there was no 'detection' of any

wrong claim u/s 10B; further there was no material or search or investigation wing data etc. in the present case. Thus it is stated by him that clearly on facts itself, decision of *MAK Data* (supra) does not apply to the present case.

5.4 Also the decision in *Sunderam Finance Ltd. v. ACIT* 403 ITR 407 by the Hon'ble Madras High Court and the decision in SLP against it, were brought to the notice of both sides during the course of clarification. In response to it, the Ld. counsel files a written reply stating that the facts in that case are on different footing as compared to the appellant ; the High Court in para 12 and 13 clearly record that in that case the assessee claimed depreciation on asset not in existence and it was only post search and statement recorded that assessee accepted that claim was wrong and accepted denial of depreciation; the High Court noted no action was taken by that assessee against another company for fraud and but for search such fact would not have come to light.

The Ld. counsel submits that on the issue of notice u/s 274 non-striking of, the High Court observed that firstly, the plea was taken first time before the High Court. Referring to the present case it is stated by him that it is undisputed that year on year and in fact last four assessment years, the case was taken for scrutiny and claim of deduction u/s 10B was allowed ; there was no 'detection' by the AO as the notice was issued was purely generic ; the appellant had suo motu filed revised return which was accepted by the AO. Thus it is explained by him that on facts the case of *Sundaram Finance* (supra) is distinguishable where claim was wrong, due to search it was found out and later admitted by the assessee. Referring to the decision of the Hon'ble Bombay High Court in *Sesa Resources* (38 taxmann.com 224), wherein it is held that no penalty would be

levied as there was no 'concealment' on denial of deduction u/s 10B. It is further stated on the notice issue that in *Sundaram Finance* (supra), claim was made after 10 years and first time before the High Court, whereas in the present case claim was made before the CIT(A) itself and secondly, the High Court clearly at para 16 held that "we have perused the notices and we find relevant columns have been marked" ; thus on facts it appears that on that case if AO wanted to levy penalty for both concealment and inaccurate furnishing of income, he had marked both, whereas in the present case, there is no marking and no strike off and no tick mark on both and therefore, the decision of *Sundaram Finance* should not apply. Finally, it is stated by him that mere dismissal of special leave by the Hon'ble Supreme Court without reason is not a merger of the High Court order; it is an expression of opinion by the Court that a case for invoking appellate jurisdiction of the Court was not made out.

6. On the other hand, the Ld. Departmental Representative (DR) relies on the decision in the case of *CIT v. Smt. Kaushalya & Ors* (1995) 216 ITR 660 (Bom) and *Mak Data P. Ltd. v. CIT* (CA No. 9772 of 2013) by the Supreme Court of India. Referring to the decision in *Smt. Kaushalya & Ors* (supra), it is explained by him that "the issuance of notice is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done. Mere mistake in the language used or mere non-striking of the inaccurate portion cannot by itself invalidate the notice."

Further referring to the observations in the case of *CIT v. Mithila Motors (P.) Ltd.* [1984] 149 ITR 751 (Patna), the Ld. DR submits that "U/s 274 of the Income Tax Act, 1961, all that is required is that the assessee should be given

an opportunity to show cause. No statutory notice has been prescribed in this behalf. Hence, it is sufficient if the assessee was aware of the charges he had to meet and was given an opportunity of being heard. A mistake in the notice would not invalidate penalty proceedings."

Further referring to the decision of the Hon'ble Supreme Court in *Mak Data P. Ltd.* (supra), the Ld. DR submits that "the AO has to satisfy whether the penalty proceedings be initiated or not during the course of assessment proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing."

Also the Ld. DR refers to the following finding in *CIT v. Zoom Communication Pvt. Ltd.* (ITA 07/2010) delivered by the Hon'ble Delhi High Court on 24.05.2010 :

> "21. We find that the assessee before us did not explain either to the Income Tax Authorities or the Income Tax Appellate Tribunal as to in what circumstances and on account of whose mistake, the amounts claimed as deductions in this case were not added, while computing the income of the assessee company. We cannot lose sight of the fact that the assessee is a company which must having professional assistance in computation of its income, and its accounts are compulsorily subjected to audit. In the absence of any details from the assessee, we fail to appreciate how such deductions could have been left out while computing the income of the assessee company and how it could also have escaped the attention of the auditors of the company."

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

Broadly stated, there are two grounds involved in this appeal. The first ground raised in this appeal is against the notice u/s 274 r.w.s. 271(1)(c) issued by the AO without indicating any specific reason/charge. The second issue is the contentions of the appellant that on merits, it is not a fit case for imposition of penalty u/s 271(1)(c).

In the instant case, *vide* order dated 15.01.2014 passed u/s 143(3), the AO initiated the penalty proceedings u/s 271(1)(c) on the ground that "by putting forth such inadmissible claim of deduction u/s 10B, the assessee has sought to lower its incidence of taxation and has thereby, not only furnished inaccurate particulars of its income but has also concealed its income within the meaning of section 271(1)(c) of the Act."

In the penalty order dated 18.07.2014 passed u/s 271(1)(c) of the Act, the AO has levied a minimum penalty of Rs.1,58,29,507/- on the ground that "by making such an improper claim of depreciation, the assessee has wilfully reduced its incidence of taxation and has thereby concealed its income as well as furnished inaccurate particulars of its income".

In *CIT vs. Samson Perincherry* (ITA No. 953, 1097, 1154 & 1226 of 2014), the Hon'ble Bombay High Court held:

> "Therefore, the satisfaction of the Assessing Officer with regard to only one of the two breaches mentioned under Section 271(1)(c) of the Act, for initiation of penalty proceedings will not warrant/permit penalty being imposed for the other breach. This is more so, as an Assessee would respond to the ground on which the penalty has been initiated/notice issued. It must, therefore, follow that the order imposing

penalty has to be made only on the ground of which the penalty proceedings has been initiated, and it cannot be on a fresh ground of which the assessee has no notice."

As mentioned earlier, in *Mak Data P. Ltd*. (supra), the Hon'ble Supreme Court has that "the AO has to satisfy whether the penalty proceedings be initiated or not during the course of assessment proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing."

It is relevant to mention here that in the instant case, the AO had issued a show-cause notice u/s 274 r.w.s 271 dated 28.01.2014 and served it on the assessee. There was no response by the assessee to that show-cause notice. Thereafter the AO issued another show-cause notice dated 02.07.2014 to the assessee. In response to it the assessee filed a reply date 10.07.2014 before the AO.

As mentioned earlier, the AO has initiated the penalty proceedings not only for furnishing inaccurate particulars of income but also for having concealed the income and subsequently levied penalty having considered the above two ingredients. Therefore following the order of the Hon'ble Bombay High Court in *Samson Perincherry* (supra) and the Hon'ble Supreme Court in *Mak Data P. Ltd*. (supra), we hold that there is no technical defect in initiating the penalty proceedings u/s 271(1)(c) of the Act. Thus the first ground of appeal is decided against the assessee.

7.1 However, we find that the appellant filed its return of income for the AY 2011-12 on 29.09.2011, after claiming deduction of Rs.4,76,54,118/- u/s 10B of the Act. The said return was accompanied by the tax audit report and also

the audit report in Form No. 56G, which is required for claiming deduction u/s 10B of the Act. Pursuant to the filing of return of income, the AO issued a notice u/s 143(2) dated 31.07.2012. Thereafter, a notice u/s 142(1) dated 30.11.2012 was issued by the AO calling for various details as mentioned therein. The appellant thereafter filed a letter dated 14.12.2012 intimating the revision of its return filed on 05.12.2012 u/s 139(5) of the Act and the reasons for revision of the said original return.

A perusal of the documents clearly indicates the appellant had offered explanation of its bona fide claim on the basis of Form 56F filed right from AY 2002-03 till AY 2011-12. When it realized its mistake, it revised its return by not claiming deduction u/s 10B of the Act.

We further notice that the notices issued u/s 142(1) are quite general in nature. Though notice u/s 143(2) was issued on 31.07.2012 and 142(1) was issued on 24.11.2012, there was no 'detection' of any wrong claim u/s 10B of the Act.

Thus the appellant had been claiming deduction u/s 10B for the AY 2002-03 based on mandatory filing of audit report in Form 56G. Following the same, originally, even for the impugned assessment year i.e. AY 2011-12, based on the said audit report in Form 56G, where 'in year of deduction-Ten Year' was stated, deduction u/s 10B was claimed by the appellant. Post issuance of notice u/s 143(2) dated 31.07.2012 and general questionnaire issued u/s 142(1) dated 24.11.2012, the appellant had revised return of income on 05.12.2012 by withdrawing claim of section 10B which was claimed inadvertently.

We find merit in the contention of the Ld. counsel that in assessments for the past years from AY 2006-07 to AY 2010-11 (except AY 2009-10) u/s 143(3), similar Form 56G and claim u/s 10B were accepted and therefore, the inadvertent mistake which crept in the column "Number of consecutive assessment year in which deduction is claimed", thus continued.

In the case of *Bombay Cloth Syndicate v. CIT* (1995) 79 TAXMAN 352 (Bom), for the AY 1970-71, the assessee, a partnership firm, had filed its original return showing an income of Rs.1,10,339/-. On 05.01.1971, CBDT published in a National Daily, a public notice stating that if the original return filed by the assessee was false, he may file a revised return to avoid consequences of discovery. During the course of scrutiny of accounts, the AO suspected that the figures of sales and purchases were not entered properly in the books of accounts and had impounded the books u/s 131(3) by an order dated 23.03.1971. On 24.05.1971, the assessee-firm filed a revised return showing an income of Rs.1,40,664/-. On the basis of the revised return, assessment was completed and penalty imposed by invoking *Explanation* to section 271(1)(c) on the basis that the returned income was less than 80% of the assessed income. The Tribunal held that the latter return could not be treated as revised return u/s 139(5) because it was not a case of inadvertent omission but of conscious concealment of particulars of income in the original return. It further held that the imposition of penalty was a matter of judicial discretion, not governed by CBDT's Instructions and hence, the said public notice was not binding of on the Departmental Officers. The Tribunal therefore, confirmed the penalty order and also the application of *Explanation* to section 271(1)(c). On appeal by the assessee, the Hon'ble Bombay High Court held that

> "There was no justification for the conclusion that the latter return was not a 'revised return' as contemplated under section 139(5). The incorrectness in the original return had not been discovered by the ITO. Account books were impounded by him merely to remove the suspicion which arose in his mind due to some discrepancies and to find out the truth. Much before the enquiry was completed and any discoveries of evasion were made the return was filed. That apart, the department, having assessed the income of the assessee on the basis of that return and taken the advantage of extended period of one year for completion of assessments under section 153(1)(c) from the date of its filing, could not be allowed to take a stand that it was not a revised return u/s 139(5). The Department's stand amounted to 'approbate and reprobate' which is not permissible in law."

In the instant case, as mentioned earlier the appellant filed a letter dated 14.12.2012 intimating the revision of its return filed on 05.12.2012 u/s 139(5) and the reasons for revision of the said original return. The AO accepting the said revised return passed an assessment order u/s 143(3) without making any further adjustments, except by observing at para 4 that by putting inadmissible claim of deduction u/s 10B, the assessee has not only furnished inaccurate particulars of income but also concealed income within the meaning of section 271(1)(c) of the Act. It is relevant to mention here that the AO accepted the revised return and made assessment. If he accepted the revised return, there was no question of making inadmissible claim of deduction u/s 10B in such revised return. In fact, there is no concealment or inaccurate furnishing of income in such revised return.

In the case of *CIT v. Backbone Enterprises* (2010) 195 TAXMAN 200 (Guj), assessee filed its return of income claiming deduction u/s 80-IA. The AO noticed that it was a firm and that under the provision of the Act, only companies

registered in India were entitled to deduction u/s 80-IA. The AO therefore, issued notice u/s 154 calling upon the assessee to show cause as to why deduction claimed u/s 80-IA should not be disallowed. Prior to the issue of said notice, the assessee had already filed a revised return of income u/s 139(5), wherein no claim u/s 80-IA was made. The AO, however, did not consider revised return and took a view that assessee had made a wrong claim u/s 80-IA. Accordingly, the AO imposed penalty on assessee u/s 271(1)(c) of the Act. On appeal, the CIT(A) as well as Tribunal set aside the penalty order. On appeal by the Revenue, the Hon'ble Gujarat High Court held that "since the assessee had made a bona fide claim for deduction u/s 80-IA, which came to be rectified by filing a revised return withdrawing claim, there was no concealment or furnishing of inaccurate particulars of income on the part of the assessee and therefore, the authorities below were justified in setting aside the penalty levied u/s 271(1)(c) of the Act."

In *Sesa Resources Ltd. v. ACIT* (2013) 38 taxmann.com 224 (Bom), the assessee had claimed in deduction u/s 10B of the Act. The appellant, however, was denied the same. The orders in this regard had attained finality. The question before the High Court was, whether merely on account thereof, the assessee is liable for penalty. The Hon'ble Bombay High Court held, following the judgment of the Hon'ble Supreme Court in *CIT v. Reliance Petroproducts (P.) Ltd.* (2010) 322 ITR 158 (SC) and its own judgment in *CIT v. Aditya Birla Nova Ltd*. [ITA No. 3899 of 2010] held that the Tribunal was in error in holding that merely because the claim for deduction was denied, the appellant is liable to pay penalty.

In *CIT v. Shankerlal Nebhumal Uttamchandani* (2009) 311 ITR 327 (Guj), during the course of search of the assessee's premises various documents, loose papers, passbooks, bank statements, etc. were found and seized. On the basis of various passbooks of Vysya Bank and Canara Bank in relation to bank accounts in the names of various family members of the assessee, certain queries were raised by the Revenue. On 27-2-1989, the assessee surrendered the amounts reflected by the various bank accounts in the names of the family members as his own income from undisclosed sources followed by revised returns filed on 31-3-1989. The Assessing Officer came to the conclusion that the assessee was guilty of concealment of income by furnishing inaccurate particulars in the original returns of income and for this purpose, apart from the factum of the assessee having declared the amounts standing to the credit of the family members in the bank accounts, the Assessing Officer noted that such an amount reflected in the bank accounts in the names of the family members was not commensurate with the known sources of income of those family members and that the passbooks of the bank accounts were found from the custody of the assessee, the bank accounts were operated by the assessee, and the funds utilized by the assessee for investment in the firm. Therefore, he held that the amount actually belonged to the assessee. He, therefore, imposed penalty on the assessee under section 271(1)(c).The Hon'ble Gujarat High Court held that-

> "The Tribunal had in terms found that though certain queries were raised and put to the assessee there was no specific pinpointing of particular items of income which had been concealed by the assessee. The Tribunal had found, as a matter of fact, that till 31-3-1989, the process of detection of allegedly concealed income was not complete, being the date of filing of the revised returns. The Tribunal had also noted as a matter of fact that the very same amounts standing to the credit of the bank

accounts of various family members had already been assessed by the Departmental authorities along with interest in the hands of the family members and it was also an admitted position that those family members had nowhere admitted that the family members were benamidars of the assessee. In the circumstances, the Tribunal rightly came to the conclusion that no penalty was exigible under the provisions of section 271(1)(c) of the Act."

7.2 In view of the factual scenario and position of law mentioned at para 7.1 hereinabove, we delete the penalty of Rs.1,58,30,000/- levied by the AO u/s 271(1)(c) of the Act. Thus the second ground of appeal is decided in favour of the assessee.

As the penalty is deleted by us, the 3rd ground of appeal becomes redundant.

8. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 10/02/2020.

Sd/-	Sd/-
(SAKTIJIT DEY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 10/02/2020
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai