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

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

ITA Nos. 7034, 7035 & 7036/MUM/2017
(A.Ys: 2010-11, 2008-09 & 2009-10)

M/s Orbit Corporation Ltd., The View, 165 Dr. Annie Besant Road Worli, Mumbai – 400 012	*v.*	Dy. Commissioner of Income-tax Central Circle – 47 Aayakar Bhavan, Mumbai **PAN: AAACO3920A**
(Appellant)		**(Respondent)**

Assessee by	**:**	**None**
Department by	**:**	**Shri Awangshi Gimson**
Date of Hearing	**:**	**28.11.2019**
Date of Pronouncement	**:**	**19.02.2020**

O R D E R

PER C.N. PRASAD (JM)

1. These appeals are filed by the assessee against different orders of the Learned Commissioner of Income Tax (Appeals)–50, Mumbai [henceforth in short "Ld.CIT(A)"] dated 27.09.2017, 18.09.2017 & 27.09.2017 for the A.Ys. 2010-11,.2008-09 & 2009-10 respectively.

2. Assessee in all its appeals challenged the order of the Ld.CIT(A) in sustaining the penalty levied u/s. 271(1)(c) of the Act and raised almost

identical and similar grounds in all these appeals and particularly for the A.Y. 2010-11 the following grounds were raised: -

"1. On the fact and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in levying a penalty of Rs.32,64,84,460/- u/s.271(1)(c) of the Income Tax Act 1961 being 300% of the tax sought to be evaded by claiming that the assessee has concealed or furnished inaccurate particulars of its income.

2. On the fact and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in levying a penalty of Rs.32,64,84,460/- u/s.271(1)(c) of the Income Tax Act 1961, without appreciating the fact that the proceedings against the quantum order is pending before the Hon'ble ITAT.

3. On the fact and circumstances of the case as well as in Law, the Learned Assessing Officer has erred in levying a penalty without creating charge whether it is for concealment of income or furnishing inaccurate particulars of income.

4. On the fact and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in levying a penalty u/s.271(1)(c) of the Income Tax Act 1961 instead of u/s.271AAA of the Income Tax Act, 1961, without considering the facts and circumstances of the case.

5. On the fact and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in levying a penalty u/s. 271(1)(c) of the Income Tax Act 1961 on the issue of disallowance of alleged bogus purchases of Rs.86,522/-, without considering the facts and circumstances of the case.

6. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in levying a penalty on the issue of disallowance of claiming deduction u/s.80IB(10) of the Income Tax Act, 1961 of Rs.31,73,34,449/-without considering the facts and circumstances of the case.At the outset, Learned Counsel for the assessee submitted that all the grounds of appeal of the revenue are decided by the Tribunal in assessee's own case for the A.Ys. 2008-09 to 2013-14 by various orders and also identical issues were decided by the Tribunal in the case of ICICI Prudential's case. Copies of the orders were placed on record by the Ld. Counsel.

7. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned

Assessing Officer in levying a penalty on the issue of addition of Rs. 1,44,000/-towards alleged salary paid in cash to an employee, without considering the facts and circumstances of the case.

8. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in levying a penalty on the issue of addition Rs. 26,12,000/-towards alleged additional undisclosed income, without considering the facts and circumstances of the case.

9. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in directing Assessing Officer to considered loan of Rs. 5,69,00,000/-, without any information and report from Assessing Officer and also stating that such action of Assessing Officer will not be hit by limitation period which is beyond his jurisdiction & subject matter of appeal."

3. Inspite of issue of notice none appeared on behalf of the assessee nor any adjournment was sought by the assessee/official liquidator. Therefore, we proceed to dispose off all these appeals on hearing the Ld. DR on merits.

4. Ld. DR referring to the assessment order passed u/s. 143(3) of the Act submits that the Assessing Officer while completing the assessment made various additions/disallowances i.e. addition towards bogus purchases, disallowance u/s. 80IB of the Act, addition towards undisclosed income and expenditure as the assessee could not substantiate the allowability of its claims. Ld. DR submits that Assessing Officer initiated penalty proceedings u/s. 271(1)(c) of the Act and levied penalty for the concealment of income or furnishing inaccurate particulars of income. Ld. DR submits that on appeal the Ld.CIT(A) sustained the

penalty considering the submissions of the assessee and the averments of the Assessing Officer in the penalty order. Ld. DR vehemently supported the orders of the authorities below in levying and sustaining the penalty u/s.271(1)(c) of the Act.

5. Heard Ld. DR on merits and perused the orders of the authorities below. On a perusal of the order of the Ld.CIT(A), we find that the Ld.CIT(A) considered this aspect of the matter elaborately with reference to the submissions of the assessee and the averments in the Assessment Order, penalty order and following various judicial pronouncements upheld the action of the Assessing Officer in levying penalty u/s. 271(1)(c) of the Act. While holding so, the Ld.CIT(A) observed as under: -

> *"4.3.2 From the above facts culled out from the above referred orders of the A.O as well as the submissions of the appellant, the issue under consideration is whether the A.O. was justified in initiating and impositng penalty u/s. 271(1)(c) of the I.T. Act, 1961 on account of the above referred three types of additions/ disallowances i.e.*
>
> *(i) Bogus expenses amounting to Rs.9,71,37,382/.*
> *(ii) incorrect/wrong claim u/s 80IB of the I.T. Act amounting to Rs.36,69,95.593/- and*
> *(iii) Payment of Rs. 1,44.000/- in cash by the appellant to one of its employee. However, the appellant has not been able to explain the source of such payment and therefore, the penalty on this amount is on account of undisclosed and unexplained income.*
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> *4.3.3 (a) To understand the issue, at the very outset it will be worthwhile to mention that Penalty proceeding u/s 271(1)(c) of the I.T, Act. 1961 can be initiated on two charges, ie. (1) concealment of particulars of income and (2) furnishing of inaccurate particulars of income. If proceedings are initiated on charge of concealment, then penalty cannot be levied on the charge of furnishing of Inaccurate particulars of income and vice versa Thus, there must be a clear finding*

about the charge of penalty. It is incumbent upon the AO to state whether penalty was being levied for concealment of income or for furnishing of inaccurate particulars of income. In the absence of such finding, the order would be bad in law. Manu Engg Works 122 TR 300 (Gu), New Sorathia Engg, Co. 282 ITR, 642 (Gui), Padma Ram Bharali 110 ITR 54 (Gau), Thus, basis of satisfaction cannot be altered subsequently by IAC. CIT Vs. Kejriwal Iron Stones, 168 ITR 715 (Raj),

4.3.3 (b) At this stage, it is necessary to understand the distinction between the two charges on the basis of which penalty can be levied, i.e. (1) concealment of particulars of income and (2) furnishing of inaccurate particulars of income. It is the particulars of income which is the common subject matter of both the charges which will be discussed later. The word 'conceal' as per Webster's dictionary means to hide', withdraw, or remove from observation; cover or keep from sight, to keep secret, to avoid disclosing or divulging. That means non disclosure of particulars of income. On the other hand, where particulars are disclosed but such disclosure is not correct, true or accurate, it would amount to furnishing of inaccurate particulars of income. For example, in case of businessmen, if a. particular transaction of sale is not shown in the books, it would amount to concealment of particulars of income while sale is shown but at a lesser value, it would amount to furnishing of inaccurate particulars of income.

4.3.3(c) It is pertinent to note that thrust of the legislature is upon the particulars of income which are cither concealed or furnished inaccurately by the appellant. Therefore, one must understand the meaning of the words 'particulars of income'. The Hon'ble ITAT had to consider the meaning of the expression 'furnishing of inaccurate particulars of income appearing in Sec. 271(1)(c) in the case of Kanbay Software India (P) Ltd, 122 TTJ 721 (Pune). It was held that the expression particular refers to facts, details, specifics or the information about some or something. Thus, the details or information about the income would deal with factual details of income and cannot be extended to areas which are subjective such as status of the taxability of an income, admissibility of a deduction and interpretation of law. Accordingly, it was held that mere rejection of appellant's legal claim would not amount to furnishing of inaccurate particulars of income. This view is now fortified by the recent Supreme Court Judgment in the case of Reliance Petroprodcts, 322 ITR 158 SC In this case, the claim of appellant u/s. 36(1)(iii) was rejected by the AO and the order of the AO was upheld by the Tribunal. As a result thereof, the penalty u/s. 271(1)(c) was imposed on account of furnishing of inaccurate particulars of income. The penalty was held to be illegally imposed by the Tribunal since factual details of income furnished by the appellant were found to be correct. The matter ultimately reached the Supreme Court and the Hon'ble Couurt upheld the view of the Tribunal holding that 'mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate claim of furnishing inaccurate particulars regarding the income of the appellant.

4.3.3 (d) On the other hand, where charge against the appellant is concealment of particulars of income, the AO has to establish either that the appellant has not disclosed the particulars of income under the main provisions or the case of appellant falls within the scope of the deeming fictions created under the Explanations. Explanation 1 creates a legal fiction and raises a presumption against the appellant. It provides that if in respect of any fact which is material to the computation of total income, appellant (i) does not offer an explanation or offers an explanation which is found to be false by AO, OR (ii) offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all material facts have been disclosed then, the amount added or disallowed shall be deemed to be income in respect of which particulars are concealed. It is pertinent to note that this Expln. is restricted to a case where appellant is unable to offer an explanation or is unable to substantiate the explanation offered by him in respect of factual detail of the income. Therefore, even this Explanation cannot apply to a case where addition / disallowance have been made by mere rejection of legal claim made by the AO. This view has also been taken by Pune Bench of the Tribunal in the case of Kanbay Software (Supra). Therefore, bonafide of legal claim is not the subject matter of the Expln. 1. In my view, the ratio of the Apex Court in the case of Reliance Petroproducts (supra), to the effect that mere rejection of legal claim would not invite, the penalty would also apply where the charge against the appellant is concealment of particulars of income. Concealment lakes place on the date when return is filed without disclosing the particulars of income of that year as held by the Apex court in the case of Brijmohan Vs. CIT - 120 ITR 1 SC It is further held that the law which prevails on the date of filing such return would be applicable for levy of such penalty. Impliedly, it would mean that offence of concealment cannot be said to have committed before filing of the return.

4.3.3 (e). Explanation 1 to Sec. 271(11(c) cannot be applied where charge against the appellant is furnishing of inaccurate particulars of income, since it provides a deeming fiction qua concealment of particular of income only and consequently cannot be extended to a case where charge against the appellant is On the other hand, where charge furnishing of inaccurate particular of income. against the appellant is concealment of particulars of income, the AO has to establish either that appellant has not disclosed the particulars of income under the main provisions or the case of appellant falls within the scope of the deeming fictions created under the Explanations. For example, the appellant might not disclose particular sales or dividend income or income from any source. Such instances would fall under the main provisions itself. In such cases, the burden is on the AO to establish the existence of the charge on the basis of material on record.

4.3.3 (f) The judicial decisions are to the effect that such proceedings are penal in nature and burden to prove the mens rea and that the receipt in the hands of appellant constitutes income is on the revenue.

The appellant is not required to prove his innocence. This was held, considering the old provisions of Section 28(1){c) of Indian I.T.Act, 1922, by the Hon'ble Bombay High Court in the case of Gokuldas Harivailabhdas 34 ITR 98, which was approved by the Apex Court in the case of Anwar Ali, 76 ITR 696 (SC). It was also held by the Apex Court that penalty proceedings are independent proceedings and therefore findings recorded in assessment proceedings, though may be relevant, but would not be conclusive. Mere rejection of explanation of appellant in assessment proceedings would be sufficient for levy of penalty. Subsequently, the Court had to consider the levy of penalty under the provisions of Orissa Sales Tax Act for failure to register as a dealer. It was held that an order imposing penalty for failure to register as a dealer. It was held that an order imposing penalty for failure to carry out a statutory obligation is the result of quasi criminal proceedings and penalty would not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. The view taken in the case of Anwar AI has been followed in Khoday Eswarsa and Sons, 83 ITR 369 (SC) in Anantharam Veerasighaiah & Co., 123 ITR 457 (SC) in T. Ashok Pai, 292 ITR 11 (SC) and in Dilip N. Shroff. 291 ITR 519. It is to be noted that the provisions of Section 271(1)(c) as considered by the Apex Court in the case Anwar Ali (supra) were identical to the provisions under the old Act of 1922. in the case of Sir Shadilal Sugar & General Mills, 168 ITR 705 (SC), it was held that penalty could not be imposed merely because the appellant agreed to be assessed on a particular income. The decision of the Apex Court was based on the provisions as they were originally enacted. The view taken by the division bench in the case of Dilip N. Shroff was doubted and overruled in UOI-Vs. Dharmendra Textile Processors, 306 ITR 277 (SC) by holding that penalty under the above provision is a civil liability and therefore willful concealment is not an essential ingredient for attracting the civil liability. It was pointed out that the division bench in the case of Dilip N. Shroff failed to notice conceptual and contextual difference between Sec. 271(1)(c) and Section 271C. Further, it approved the other decision of the division bench in the case of Chairman SEBI (2006) 5SCC 361.

4.3.3(g). The Honble Delhi High Court in the case of CIT Vs. Zoom Communication Pvt. Lid. (2010) 40 DTR (Del) 249 observed that the Courts cannot overlook the fact that only a small percentage of the IT returns are picked up for scrutiny. If the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim is not found to be bonafide, it would be difficult to say that he would still not be liable to penalty u/s. 271(1)(c). If one takes the view that a claim which is wholly untenable in law and has absolutely no foundation on which it could be made, the appellant 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 appellants to make wholly untenable and unsustainable claims without there being any basis for

making them, in the hope that their claim would not be picked for scrutiny and they would be assessed on the basis of self assessment u/s. 143(1) 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 them. consequence would be that the persona who make claims of this nature, actuated by a mala fide intention to evade tax otherwise payable by them would get away without paying the tax legally payable by them, if their cases are not picked up for scrutiny This would take away the deterrent effect, which these penalty provisions in the Act have.

4.3.3(h) In the case of CIT Vs. Nathulal Agarwala & Sons (1985), 153 ITR 292 (Pat)(FB], FulI Bench of Hon'ble Patna high Court has observed as follows –

"As to the nature of explanation offered by the appellant, it seems plain on principle that it is not the law that the moment any fantastic or unacceptable explanation is given, the burden placed on him will be discharged and perhaps hardly can be, that any presumption rebutted It is not the law and every explanation of the appellant must be accepted. In my view, the explanation of the appellant for avoidance of penalty must be an acceptable explanation. He may not prove what he assets to the hilt positively, but at least material brought on record must show that what he says is reasonably valid.

The above views were approved by the Hon'ble Supreme Court in the case of cit Vs. Mussadilal Ram Bharose (1987) 165 ITR 14 (SC). Referring to the judgment of Honble Patna high Court, their Lordships have observed as follows-

"The Patna High Court emphasized that as to the nature of explanation to be rendered by the assessee, it was plain on principle that it is not the law that the moment any fantastic or unacceptable explanation is given, the burden placed on him will be discharged and presumption rebutted. We agree We further agree that it is not the law that each and every explanation by the assessee must be accepted. It must be acceptable explanation, acceptable to a fact-finding body,"

Viewed in this perspective, just because appellant has an explanation- whatever be its worth and credibility, it does not cease to be a case in which concealment penalty is to be levied. In our considered view, and bearing into mind entirety of the case, the explanation of the appellant does not merit acceptance.

4.3.3(i). The Hon'ble Supreme Court in the case of CIT Vs. Durga prasad More, 1973 CTR (SC) 500 (1971) 82 ITR 540 (SC), the taxing authorities are not required to put blinkers while looking at the documents produced before them and. that they are entitled to look into the surrounding circumstances to find out the reality of recitals made in those documents". Their Lordships further observed that science has not vet invented any instrument to test the reliability of evidence placed before a Court or Tribunal and therefore, the Courts and Tribunals have

to judge the evidence before them by applying the test of human probabilities. In our considered view, it is contrary to human probabilities that merely in view of invoice and delivery challan issued by the vendor and CA's certificate furnished by the lessee, and disregarding the true nature of transaction, the appellant genuinely believed that the leased assets did exist. We reject this explanation.

4.3.3(j). There can be distinct mutually exclusive situation in the case of an addition to income. In the first scenario, the addition made could be on account of contumacious conduct of the appellant in which mensrea is established or can be reasonably inferred, that the addition made to the income is on account of Contumacious conduct of the appellant nor is it established, or can be reasonably inferred, that the appellant's conduct and explanation is bonafide, In such a situation, in the light of Honble Supreme Court's judgment in the case of Dilip Shroff (supra), penalty u/s. 271(1)(c) could not have been levied since the onus of establishing mens rea of the appellant could not have been discharged in such a situation. However, as the law stands now and in the light of Honble Supreme Court's judgment in the case of in the case of Dharmendra Textile Processors (supra), penalty u/s. 271(1)(c) will be leviable, since it is not necessary for the tax authorities to establish mensrea of the appellant. That is the area in which legal position has changed. However, there is still a third scenario in which an addition is made to the income but it is established or can be reasonably inferred that assessee's conduct and explanation is bona fide. These are the situations in which the appellant is able to establish his innocence. In such a situation, in accordance with the undisputed scheme of Sec 271(1)(c), neither the penalty was leviable prior to Hon'ble Supreme Court's judgment in the case of Dilip Shroff, nor is it leviable after the Dharmendra Textile Processors's case (supra).

4.3.3(k). There is no change in law so far as first and third scenario visualized above are concerned. The scheme of section 271(1)(c) remains as it is and this scheme clearly requires much more than a mere addition to assessee's income before penalty under the said section can be imposed. The views expressed by their Lordships in Dharmendra Textile Processors's case (supra) do not bring about any radical change in the scheme of Section 271(1)(c) though these views do seek to nullify the Dilip Shroff judgment (supra) which, in the esteemed views of the Large bench did not take into account the correct scheme of things as these were - more particularly post-insertion of Expln I to Section 271(1)(c). Indeed, even on the first principles and as seen in the above light, while this view is in accordance with the scheme of the section and the amendment brought about in the scheme of the section by insertion of Expln. 1 to Section 271(1)(c), it does not bring about any radical change to the main scheme of section 271(1)(c) itself.

4.3.3(l) In the case of CIT vs Morgan Finvest Pvt. Ltd reported at 2012-TIOL- 1008-DEL-IT, the assessee is a private limited company engaged in the business of investment. It had filed its ROI declaring 'nil'

income. During assessment, AO noticed that assessee had claimed depreciation in respect of a property in New Delhi. It was purchased on 29.4.2004 for Rs. 3.5 crores, on which stamp duty and taxes of Rs. 25 lakhs were also paid. It appeared that the assessee had raised a loan in order to acquire the property The property was sold by the assessee on 18.9.2004 to a company for a consideration of Rs. 4,5 crores. An agreement of sale was executed, however the possession of the property was not given, nor was any sale deed executed and registered. The AO found that the property was residential in nature and had not been put to use for the purpose of the assessee's business. It was also enquired that the property remained vacant since it was sold by the original owner and the property at that time was in the name of a director of the assessee company. AO thus, concluded that the assessee had kept the property with it only for four months or so and had entered into an agreement to dispose of the same, which indicated a motive to earn STCG and not any intention to use the property for the purpose of the business. It was also noticed that the building cost on which depreciation was claimed included the cost of land on which no depreciation was allowable under the Act. On this basis, the AO held that the property had not been used by the assessee for the purpose of its business and, therefore, no depreciation was allowable u/s 32. The assessee had not filed any appeal against the non allowance of the depreciation. The AO thus, initiated proceedings for the levy of penalty for concealment of income u/s 271(1)(c) and levied the penalty. The Tribunal cancelled the penalty and held that the observation of the AO that through Agreement to Sale, the property has been sold during the year was without any basis. It was also pointed out that, in the balance-sheet the property was reflecting under the head "Fixed assets" and not as investment. The assessee company does not own any other property and the property had been purchased for the purpose of business activities but the same was not found suitable for commercial activities and therefore, the same was sold in the following years. It was also observed that penalty proceedings and the assessment proceedings were separate proceedings Though the disallowance of depreciation has been made in the assessment proceedings but the explanation submitted in the penalty proceedings appears to be satisfactory and bona fide that the assessee had acquired the premises for the business purposes for claim of depreciation. Mere disallowance in the assessment proceedings will not lead to the penalty u/s 271(1)(c). 4.3.3(m). The Hon'ble Delhi High Court held that the AO has rightly brought out in the assessment order that having regard to the short period during which the assessee held the property, which it had acquired with the use of borrowed funds, an intention to make a quick profit on the property deal cannot be ruled out. In this background, and considering the fact that there is no evidence to show use of the property during the relevant previous year for the purpose of the assessee's business, it is clear that the claim of depreciation was not bona fide. Moreover, it is not denied that while claiming depreciation, the cost of the land was also included, contrary to the provisions of the Act under which no depreciation is allowable on land. This position is well settled after the judgment of the Supreme

Court in CIT vs. Alps Theatre. This also shows that the claim was far from bona fide. The complete lack of any evidences to show that the property was used for the purpose of the assessee's business and the attempts made by the assessee to show to the contrary are indicative of the frivolous nature of the claim, It was further held by the High Court that this is not a case where all the correct particulars relating to the claim were furnished and a claim for relief or allowance was made on that basis, which was not accepted by the AO who did not question the particulars relating to the claim, but merely took a different view on the very same particulars. This is a case where questionable details and particulars relating to the claim were furnished by the assesse and such details were so fundamental to the genuineness and bona fide of the claim that the mere furnishing of those particulars made the claim vulnerable. In this background, we are wholly unable to countenance the observations of the Tribunal that the assessee had purchased the property for the purpose of its business and sold it in the following year when it found the property not suitable for its commercial activities. We are also unable to subscribe to the view of the Tribunal that the explanation submitted by the assessee "appears to be bona fide and all the facts were on record and nothing has been concealed therein". Tribunal had completely missed the fact that there was no evidence to show that the property was used for the purpose of the assessee's business during the relevant previous year, In the result we answer the substantial question of law in the affirmative, in favour of the revenue and against the assessee. The appeal of the revenue is accordingly allowed. Further, the SLP filed by the assessee was dismissed by the Honble Supreme Court.

4.3.3(n). Here, it will be pertinent to mention that the Explanation I to section 271(1)(c) automatically comes into operation in respect of any facts material to the computation of the total income of any person, when there is failure to offer any explanation, or an explanation offered is found to be false, or not substantiated as held in the case of CIT Vs A Sreenivas Pai 242 ITR 29 (Kerala), The Honble Kerala High Court further held that the amount added or disallowed in computing the total income is deemed to represent the income in respect of which the particulars have been concealed. As per the provisions of the Explanation 1, the onus to establish that the explanation coffered was bona fide and all facts relating to the same, and material to the computation of income, have been disclosed by him, will be on the person charged with concealment. In this connection, farther reference is made to the case of Western Automobiles (India) Vs CIT (112 ITR 1048) wherein the Honble Jurisdictional High Court of Bombay has held that where the assessee agree to inclusion of amount, onus shifts on assessee in penalty proceedings to show that the amount was not the concealed income.

4.3.4. As regards issue whether penalty can be imposed on the amount of tax sought to have been evaded on account of bogus purchases of Rs 86,522/- it may be mentioned here that similar facts and

similar issue was there in A.Y. 2008-09 and A.Y 2009-10 where the penalty imposed by the A.0. u/s 271(1)(c) has been upheld by me in CIT(A) order dated 18.09.2017 and 27.09.2017 respectively and decided against appellant, therefore, since the facts and ratio of the case remain the same in the present assessment year, for the reasons and facts as well as judicial pronouncements mentioned in my order dated 18.09.2017, the issue in present appeal is decided against the appellant and this part of penalty imposed u/s 271(1)(c) by the A.O. is upheld and the appellant's ground no.2 related to imposition of penalty is Dismissed.

4.3.5. Coming to the another component of penalty imposed by the A.O. with regard to the disallowance u/s 80IB being incorrect/wrong claim u/s 80IB of the I.T. Act amounting to Rs.31,73,34,449/-, it may be referred that similar issue was examined by me in A.Y. 2008-09 and A.Y. 2009-10 of this appellant only wherein after examining the facts of the case as well as judicial pronouncements, the issue of imposition of penalty u/s 271(1(c) on wrong claim of deduction u/s 80IB amounting to Rs.135,27,89,940/- and Rs. 9,71,37,382/- was decided against the appellant and where the imposition of penalty on this account was upheld be me. Since the facts and ratio of the present case are similar to A.Y. 2008-09 and A.Y 2009-10, therefore, for the reasons and judicial pronouncements referred and relied upon by me in the said appellate order dated 18.09.2017, the imposition of penalty u/s 271(1)(c) on this part amount of Rs.31,73,34,449/- is upheld and appellant's ground no 3 related to this issue is to be dismissed.

4.3.6. Coming to the third part of penalty relating to Rs.1,44,000/- for the present assessment year, it is clear from the fact itself that Shri Poddar, one of the employee's of this group had, in his statement recorded on 11.02.2010, had stated that the appellant was paying Rs 12,000/- per month to one employee in cash. This has not been disputed by the appellant on facts. Further, the source of such payment of Rs.1,44,000/- has not been explained properly and therefore, this amount remains undoubtedly payment in cash from undisclosed source of income and therefore, penalty on such account is justified. Further, it may be referred that similar issue was examined and decided by me in appeal order dated 27.09.2017 for A.Y. 2009-10 of this appellant only wherein after examining the facts of the case, the issue of imposition of penalty u/s 271(1)(c) was held to be justified and therefore, following the same, the imposition of penalty u/s 271(1)(c) on this part of amount: of Rs.1,44,000/- is upheld and appellant's ground no.4 related to this issue is to be dismissed.

4.3.7.1 Ground no.5 relates to imposition of penalty @ 300% relates to statement of disclosure u/s 132(4) made during the course of search, but not offered in Returns filed u/s 153AC.

4.3.7.2. I have gone through the penalty order dated 30.03.2014 as well as assessment order dated 27.12.2011 so as to know the correct facts and figures of the issue involved here. As per the assessment order

para 3.1, 3.2, 3.3, 3.4 and 3.5, Shri Pujit Agarwal, the Managing Director of M/s Orbit Corporation Ltd., had offered undisclosed income of Rs.17 crore in the hands of the company. The detail break up of Rs.17 crore is found in para 3.3 as well as para 3.4 of the assessment order, Further, it is seen from para 3.5 of the assessment order that after reconciling the various figures there was a balance of Rs.26,12,000/-. The A.O. has also mentioned that out of Rs.17 crore disclosure, the appellant company had gone to Income Tax Settlement Commission in case O.C.R.P.L and offered Rs.7,19,00,000/-, Another amount of Rs.9,52,00,000/- was explained to be pertaining to Mr Ravi Kiran Agrawal (A.Y. 2010-11). As per the assessment order para 3.4, the A.O. has categorically mentioned that out of Rs.7,19,00,000/- in the hands of 0.C.R.P.L (A.Y. 2005-06), the appellant offered only Rs.1,50,00,000/- in the Return and "balance sum of Rs.5.69,00,000/- has not been offered in the Returns filed u/s 153AC. From the assessment order dated 27.12.2011, para 3.4 read with total chart of addition in para 9 of the assessment order, it is not clear whether the amount of Rs.5,69,00,000/- which "has not been offered in the Returns filed u/s 153AC", what action was taken by the A.O. either in the hand of present appellant company or 0.C.R.P.L i.e. (" Orbit Constructions and Realtors Pvt. Ltd.") i.e. whether this amount of Rs.5,69,00,000/- was added in the hands of either Orbit Constructions and Realtors Pvt, Ltd. or Pujit Agrawal, Managing Director of Orbit Corporation Ltd., who made the disclosure u/s 132(4) during the course of search (refer para 3.1 of the assessment order dated 27.12.2011 of the present appellant) or not. It is also not clear at this stage whether the A.O. took any remedial measure to make addition of "this amount of Rs.5,69,00,000/- which has not been offered in the Returns filed u/s 153AC" in the hands of this very appellant company, since Pujit Agraval offered income of Rs.17 crore in the capacity of Managing Director of the present appellant company. This disclosure of Rs.17 crore by Mr. Pujit Agrawal was not a mere statement, it was found to be on the basis of incriminating documents which has been referred and discussed in para 3.3 of the assessment order in the table/chart given by the A.O. Accordingly, the A.O. is directed to verify above observations and submit a compliance report through proper channel within 30 days of receipt of this appeal order, if the amount of Rs.5,69,00,000/- has already been taken care of. Alternatively, if this amount has not been taxed so far, the A.O., after verification of facts and following the procedure of natural justice to the appellant, will take remedial measures to protect the interest of revenue and A.O. shall not be precluded with regard to time period which otherwise is available to the A.O. u/s 153 of the I.T. Act, 1961 r.w.s.250 of the I.T. Act, 1961 while giving effect of the appeal order.

4.3.7.3. Coming back to the facts and figures relating to imposition of penalty with regard to Rs. 26,12,000/-, it is found from para 3.5 of the assessment order that this particular amount was "balance remaining amount", which was "brought to tax and being added as the additional income of the assessee for A.Y. 2010-11 based on the statement given

by him (Mr Pujit Agrawal Managing Director) under oath u/s 132(4) of the I.T Act." Since the income was concealed by the appellant in the Returns filed and was only detected during the course of search, the same was liable for penalty As per the penalty order dated 30.03.2014, this amount pertains to the difference between the additional amount offered to tax and the actual income brought to tax against the same. This amount of Rs.26,12,000/- is part of disclosure of Rs,17 crore by Mr. Pujit Agrawal in the capacity of Managing Director of the appellant company and which was found to be on the basis of incriminating documents which has been referred and discussed in para 3.3 of the Assessment order in the table/chart given by the A.O. Therefore, I am of the considered opinion that this part of Rs.26,12,000/- is also concealed income and penalty on this amount is justified and upheld. Accordingly, the appellant's ground of appeal is dismissed.

4.3.8. The appellant in its ground of appeal no.1 in general and partly in ground nos.2, 3, 4 and 5 has objected to the imposition of penalty by the A.O. @ 300% of the tax sought to be evaded by the appellant company. in this regard it may be mentioned that in earlier para, I have already upheld the issue of imposition of penalty by the A.O. on various account. In so far as percentage of penalty is concerned, Section 271(1)(c) the Act provides as under:

> *271. If the Assessing Officer or the Commissioner Appeals or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person:*
>
> *(a) has failed to comply with a notice under sub-section (2) of section 115WD or under sub-section (2) of section 115WE or under sub-section (1) of section 142 or sub-section (2) of section 14345, or*
>
> *(b) fails to comply with a direction issued under sub-section (2A) of section 142], or*
>
> *(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or*
>
> *(d) has concealed the particulars of the fringe benefits or furnished inaccurate particulars of such fringe benefits,*
>
> *he may direct that such person shall pay by way of penalty,—*
>
> - *(ii) in the cases referred to in clause (b), in addition to tax, if any, payable by him, a sum of ten thousand rupees for each such failure;*

- *(iii) in the cases referred to in clause (c) 55 or clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits."*

Thus, it is clear that it is the desertion of the A.O. to impose penalty either at 1006 or 300%% or in between the two. Present case is not a normal case rather it is a search case and where the appellant is found to be guilty of concealing income/furnishing incorrect particulars so as to evade tax even after disclosure, therefore, the A.O. was justified in imposing penalty 300% Accordingly, the appellant's ground of appeal no 1 and this part of ground included in ground nos. 2, 3, 4 and 5 are dismissed.

In view of the above, facts and circumstances of the case it is held that the A O. was justified in imposing penalty u/s 271(1)(c) of the I.T. Act, 1961 in A.Y.2010-11. Accordingly, the appellant's ground of appeal for A.Y. 2010-11 is dismissed.

4.3.9. The 6 and last ground of appeal by the appellant is with regard to levying of penalty u/s 271(1)(c) for issues covered in ground nos. 4 and 5 i.e. for the amount of Rs. 1,44,000/- and Rs.26,12,000/-). According to the appellant, the issue of penalty was to be considered u/s 271AAA and not under section 271(1](c) of the 1.T. Act, 1961.

I have considered this issue and given a thought to it. Here, it will be pertinent to reproduce Section 271AAA.

"Penalty where search has been initiated.

271AAA. (1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of June, 2007, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten percent of the undisclosed income of the specified previous year.

(2) Nothing contained in sub section (1) shall apply if the assessee

(i) in the course of the search, in a statement under sub-section (4) of section 132. admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) substantiates the manner in which the undisclosed income was derived, and

(iii) pays the tax, together with interest, if any, in respect of the undisclosed income.

(3) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

(4) The provisions of sections 274 and 275 shall, so far as may be, apply in relation to the penalty referred to in this section. Explanation- For the purposes of this section,-

(a) "undisclosed income" means-

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or

(b) otherwise not been disclosed to the Chief Commissioner or Commissioner before the date of search; or

(ii) any income of the specified previous year represented, either wholly or Partly, by any entry in respect of an expense recorded in the books of accounts or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted;

(b) specified previous year" means the previous year-

(i) which has ended before the date of search, but the date of filing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or

(ii) in which search was conducted.]"

From the above, it is clear that benefit of Section 271AAA will be available to only those assessee/appellant who have met all the three conditions mentioned in sub section 2 of Section 271AAA. In the present case, the appellant has not been able to (i) specify the manner in which such income has been derived; (t) substantiates the manner in which the undisclosed income was derived; and (ii) given proof of payment of the tax, together with interest, if any, in respect of the undisclosed income before filing the Return with respect to the disclosed amount. In

fact, it is found, as discussed in earlier para, that the appellant company has not honored its statement which was made during the course of search, despite the fact that the statement was based on incriminating materials as referred above."

6. None of the above findings have been rebutted by the assessee with evidences before the Assessing Officer/Ld.CIT(A). On a careful perusal of the order of the Ld.CIT(A) and the reasons given therein, we do not find any good reason to interfere and disturb the findings in the order passed by the Ld.CIT(A) in sustaining penalty u/s. 271(1)(c) of the Act. The Ld.CIT(A) has elaborately discussed the issues of additions/disallowances and rightly sustained the penalty u/s. 271(1)(c) of the Act on the said additions and disallowances made by the Assessing Officer. Thus, as the findings and observations of the Ld.CIT(A) have not been rebutted with evidences by the assessee, we do not see any infirmity in the order passed by the Ld.CIT(A) in sustaining the action of the Assessing Officer. Grounds raised by the assessee are dismissed.

7. As the additions/disallowances made in the Assessment Orders passed for A.Ys. 2008-09 & 2009-10 are similar to that of the A.Y. 2010-11, the penalty levied by the Assessing Officer on these additions and disallowances were rightly sustained by the Ld.CIT(A) as was done for the A.Y. 2010-11. Therefore, since the facts are identical for the A.Ys. 2008-09 & 2009-10 to the facts for the A.Y. 2010-11, we sustain the action of

the Ld.CIT(A) in confirming the penalty for the A.Y. 2008-09 & 2009-10 also.

8. In the result, appeals of the assessee for all three assessment years i.e. A.Ys. 2008-09 to A.Y. 2010-11 are dismissed.

Order pronounced in the open court on the 19th February, 2020

Sd/-	Sd/-
(G. MANJUNATHA)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai / Dated 19/02/2020
Giridhar, Sr.PS

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum