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

BEFORE SHRI MAHAVIR SINGH (VICE PRESIDENT) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 109/MUM/2019
Assessment Year: 2012-13

Illies Engineering India Pvt. Ltd. Rex Chamber, 218/219, Walchand Hirachand Marg, Ballard Estate, Mumbai-400 001. **PAN No. AABCI 5410 L** **Appellant**	**Vs.**	DCIT 2(2)(1), 545, Aayakar Bhavan, M.K. Road, Mumbai-400020. **Appellant**

Assessee by	:	Mr. Madhur Agarwal, AR
Revenue by	:	Mr. Michael Jerald, DR
Last Date of Hearing	:	06/11/2020
Date of Pronouncement	:	01/02/2021

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2012-13. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-5, Mumbai [in short 'CIT(A)'] and arises out of the penalty levied u/s 271(1)(c) the Income Tax Act 1961, (the 'Act').

2. The ground of appeal filed by the assessee reads as under :

> The Ld. CIT(A) erred in confirming levy of penalty u/s 271(1)(c) of the Act of Rs.65,64,793/- for furnishing of inaccurate particulars without appreciating that it was inadvertent human error.

3. Briefly stated, the facts of the case are that the assessee, a trader in capital goods filed its return of income for the assessment year (AY) 2012-13 on 27.11.2012 declaring total loss of Rs.7,70,94,246/-. During the course of assessment proceedings, it is noticed by the Assessing Officer (AO) that the assessee has debited an amount of Rs.2,02,33,602/- as deferred tax asset written off in the profit and loss account as exceptional item. However, the same has not been disallowed in the computation of taxable income. In response to a query raised by the AO, the Authorized Representative (AR) of the assessee explained *vide* ordersheet noting dated 12.03.2015 that the same remained to be added inadvertently and accepted the addition. Accordingly, the AO made an addition of Rs.2,02,33,602/- to the total income of the assessee. Thus the total loss reflected by the assessee in the return of income was reduced to loss of Rs.5,68,60,644/-.

4. The AO then initiated penalty proceeding u/s 271(1)(c) of the Act. In response to the penalty notice u/s 274 r.w.s 271(1)(c) of the Act. The assessee filed a reply stating *inter alia* that :

> "3.2 In the instant case, the return of income was assessed declaring a total loss of Rs.5,68,60,644/-. Further, during the course of assessment proceedings, assessee had accepted the addition made on account of deferred tax asset written off in the profit and loss account as exceptional item and also offered its explanation that the said expenditure was mistakenly allowed in the computation of total income, there was no intention of evasion of tax or understating its total income in any manner. In view of the above, Explanation 1 to section 271(1)(c) of the Act is not attracted by the Assessing Officer and is deemed *bona fide*."

However, the AO was not convinced with the above explanation of the assessee and levied a minimum penalty of Rs.65,64,793/- with the following reasons :

> "12. Under the new scheme of scrutiny norms, all the cases are not selected for scrutiny assessment. Had the assessee's case not been selected for scrutiny, the assessee could have been benefited by filing inaccurate particulars of income. The assessee took a chance with the Department. Had the revenue not detected the concealment of income of the assessee, the assessee could have enjoyed the fruits of filing inaccurate particulars of income and would have caused loss to the revenue.
>
> 13. The facts leading to the above mentioned additions have been discussed in detail in the assessment order u/s 143(3) dated 12.03.2015. It was only after a thorough examination of the books pertaining to the relevant assessment year that the Assessing Officer concluded that an item like deferred tax asset written off in the profit and loss was an extra item which incorporated in the profit & loss account to suppress the profit. The additions made in the quantum assessment having attained finality, penalty is a natural corollary. The evidence against the assessee would not have come to light but for the enquiries conducted in the course of the scrutiny assessment by the Assessing Officer. Hence, it is appropriate to infer that the assessee had consciously kept the facts relating to deferred tax asset written off before the revenue authorities. It follows that the element of 'mens rea' is implicit in the assessee's action. For the sake of argument, even if it is assumed that there was no deliberate act on the part of the assessee with intention to defraud the Revenue, the decision of the Hon'ble Supreme Court in the case of Dharmendra Textiles Processors &Ors (2008) 306 ITR 277 (SC) goes against the assessee. It has been held by the Apex Court in the aforesaid case that-
>
> > ".....the explanation appended to section 271(1)(c) of the Income Tax Act, 1961 indicates the element of strict liability on the assessee for concealment

> or for giving inaccurate particulars while filing the return. 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 the provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under section 276C.....[emphasis provided]

Hence, the imposition of penalty in this case is a natural culmination of the assessment proceedings."

5. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that the Ld. CIT(A) confirmed the minimum penalty of Rs.65,64,793/- levied by the AO with the following reasons :

"4.3 I have considered the facts of the case and submissions made by the assessee. (A) It appears from the paragraph 4 of the assessment order *u/s.* 143(3) dated 12/3/2015 as follows;

"Accordingly, the amount of Rs.2,02,33,602/- is hereby added to the total income of the assessee. Penalty proceedings u/s. 271(1)(c) of the IT Act 1961 are being separately initiated 'for furnishing inaccurate particulars of income to this extent'. The total income was computed as follows:

> 'It is clear from the above that no independent evidence was available on the record. It is only when the return was selected for scrutiny and the proper verification was made during the scrutiny assessment and discrepancy was found. Had the return was not selected for scrutiny, the fact would never been revealed before the department and assessee would have been allowed irregular carry forward of loss. It is obvious from the fact the assessee company has wilful and mala fide intention to suppress the profit by showing the aforesaid item to the profit and loss account.'

(B) It also appears from item 6 of the P&L Account that 'debit of Rs.2,02,33,602/- representing deferred tax assets write off was an 'exceptional item' and was mentioned after 'profit/loss before exceptional and extraordinary items and tax figure of Rs.6,29,91,911/- and hence was clearly visible and since such an item was being debited for the first time as compared to earlier financial year 2010-11 relevant to AY 2011-12, it was clearly visible and noticeable, it is also observed from the part(A) P&L columns 36 that assessee had clubbed the figure of deferred tax write off of Rs,2,02,33,602/- in the column marked 'other expenses' and claimed a deduction of Rs.3,57,32,193/- to arrive at a figure of business loss of Rs.8,32,25,514/- in column 40 of the part (A) P & L marked 'profit before interest depreciation and taxes' and then total business loss was worked out at Rs.7,70,94,246/- in Part(A) total income of the ROI as per the attached sheet of computation of total income. Even in the computation sheet, the base for starting the computing the income from business and profession was selected at Rs.8,32,25,514/- and adjustments for disallowance/addback and deduction/ allowance for various items like depreciation, disallowance u/s. 49A/40/ unrealized loss on Foreign currency transactions by way of addback and depreciation and income to be considered separately as deductions/allowance in the computation and then showing income of Rs.15,08,750/- as income from other sources to arrive at a business loss of Rs.7,70,94,246/-. This figure of loss of Rs7,70,94,246/- further bifurcated into unabsorbed depreciation of Rs.20,22,163/- and unabsorbed business loss of Rs.7,50,72,083/- and total income shown at Rs. zero. Calculation of taxes payable was shown at Rs. NIL and TDS credit of Rs.1,50,000/- was claimed and refund due was worked out at Rs.1,50,000/- and schedule 1,2,3,5 and 7 giving breakup of disallowances, u/s 49A/40c, income from other sources were meticulously worked out in two-page computation sheet dated 3/12/2012 claimed to have been signed by authorized signatory. Return of Income for AY 2012-13 showing 'current year loss' of Rs.7,70,94,246/- and refund of Rs.1,50,000/- were duly shown against columns 3a and 9 of the return of income form and was duly signed by Mr. Frank Koenig and uploaded on 27/11/2012. AO selected the case for

scrutiny as per systems and procedures and noticed this mistake and issued a show cause notice and the aasessee's AR submitted that the 'amount of Rs.2,02,33,602/- representing deferred tax assets was inadvertently not added back. AO added back the same to the business loss of Rs.7,70,94,246/- and worked out the revised business loss at Rs.5,68,60,644/- and initiated penalty proceedings under section 271(1)(c) of the IT Act 1961 for 'furnishing inaccurate particulars of income'.

(C) The assessee did not file any appeal against the assessment order dated 12/3/2015 assessing business loss of Rs.5,68,60,644/- and the AO issued show cause notice for levying penalty under section 271(1)(c) of the IT Act 1961 and the assessee submitted as mentioned earlier in paragraphs. AO's observations are mentioned in earlier paragraph 4.2 and hence are not repeated here-. In nutshell, AO considered and examined assessee's reply in facts of the case and in law and in light of judicial decisions and levied minimum penalty of Rs.65,64,793/- @100% of tax sought to be evaded of Rs.65,64,793/- on the same ground and issue of furnishing of inaccurate particulars of income and also by following SC decision in the case of Dharmendra Textile Processors 2008/306/ITR/277/SC and assessee is in appeal and has submitted as per paragraph 4.3 of this appellate order. Notices were issued and Ms. Indra Anand from T P Ostwal & CO., CAs attended the office from time to time and made submissions and crux of the submissions and citations quoted are as follows:

> "There was no deliberate/intentional act on part of the assessee either to conceal income or furnish inaccurate particulars of income to the extent of Rs.2,02,33,602/- and it was an inadvertent mistake on the part of the assessee and the additions of Rs.2,02,33,602/- have not resulted in payment of any taxes due to incurrence of heavy losses and the carried forward losses have not been utilized for setting off income of future years."

Basic question is whether assessee has furnished inaccurate particulars of income to the extent of Rs2,02,33,602/- or not whether provisions of section 271(1)(c) of the

IT Act 1961 are attracted or not. Prima facie, it would appear that the item of deferred tax items was clearly and noticeably visible from the P & L Account and assessee appears to have prepared return of income and the 'computation of total income' in two pages meticulously and filled up each and every column, by and large, correctly while working out the figures debited to the P & L Account and filling up the relevant and respective columns in the return of income running into more than 20 pages. However, the assessee had chosen an erroneous figure of Rs.8,32,25,513/- instead of the correct figure of Rs.6,29,91,911/- and even if this figure of Rs.8,32,25,513/- was adopted as a base, it forgot to add the deferred tax asset written off figures of Rs.2,02,33,602/- appearing as an exceptional item in column 6 while computing the total income. Not only this, assessee clubbed and classified this exceptional item of deferred tax asset written off of Rs.2,02,33,602/- as 'other expenses' while filling up column 36 of part(A) P&L of the return of income for AY 2012-13. The same mistake stands committed in the two-page computation, of total income which was worked out meticulously while working out the addbacks and deductions/allowances and claiming TDS credit for Rs.1,50,000/-. It may be mentioned here that even the figure of income taxable as income from other sources consisting of interest has been meticulously worked out to even include interest on refund of Rs.8,750/- with other income of corporate rents receipts of Rs.15,00,000/- . Thus this was not a case of an inadvertent error but a case of deliberate and intentional error committed by the assesses and its directors to furnish inaccurate particulars of income for AY 2012-13 and evade income to the extent of Rs.2,02,33,602/- which would qualify for set off in future assessment years. Assessee's CAs contention that the additions of Rs.2,02,33,602/- have not resulted in payment of any taxes and the current years losses have not been claimed as set off against future income is besides the point and when explanation of section 271(1)(c) of the IT Act 1961 clearly applies to the facts of the case, it becomes a clear case of 'furnishing inaccurate particulars of income' and hence provisions of section 271(1)(c) are squarely attracted in the case and hence levy of penalty of Rs.65,64,793/- is clearly is fully justified in facts of the case and in law.

(D) Assessee has cited following decisions in its favour:

1) CIT V/S, J K Industries Ltd-297/ITR/ 176
2) CIT V/S Reliance Petroproducts Ltd. 2010/230/ ITR/320/SC
3) Dilip N Shroff V/S JCIT—2007/291/ITR/519/SC

The facts of the above decisions are not similar to the facts of the assessee's case. Therefore, the assessee's reliance on the above case laws are not correct. In nutshell, levy of penalty of Rs.65,64,625/- under section 271(1)(c) of the IT Act 1961 is fully justified and assessee's appeal is rejected on all grounds of appeal."

6. Before us, the Ld. counsel for the assessee submits that the deferred tax asset written off was reported in the financials, however, the same was inadvertently left to be added back to the net loss before tax while making the tax computation; this was purely due to oversight ; this error was only a computation error made in the return of income; such mistake occurred due to overlooking the contents of the profit & loss account. It is further explained that the contents of the financial statements do not conceal any particulars, the error incurred was a bonafide and an inadvertent human error, purely due to oversight and completely unintentional.

The Ld. counsel also draws our attention to the fact that the assessee has been incurring losses since many years and hence, the intention to evade tax purposefully does not arise. The assessed loss, as pointed out by him year-wise is given below :

A.Y.	**Assessed Losses (Rs.)**
2007-08	1,67,15,613/-
2008-09	4,33,18,703/-
2009-10	5,34,01,264/-

2010-11	4,75,92,684/- (Returned)
2011-12	4,30,36,731/- (Returned)
2013-14	5,97,28,637/- (Returned)
2014-15	7,24,90,842/- (Returned)
2015-16	5,73,01,148/- (Returned)
2016-17	6,72,11,920/- (Returned)

Thus it is stated that during the year under consideration also, the assessee incurred Rs.568,60,644/- as assessed loss after the addition; the exceptional item being deferred tax asset written off was inadvertently left to be added back while computing the income at the time of filing the return. It is explained that merely because the addition was accepted as an inadvertent error, the AO held that the explanation offered was not satisfactory.

The Ld. counsel submits that the financial statements of AY 2012-13 were on record which reflected the deferred tax asset written off in the profit & loss account and also a note to that effect in this Schedule of significant accounting policies. Thus it is stated that the observation that there was no independent evidence and the finding that the same had been revealed in the assessment proceeding only is erroneous. It is stated that the carry forward loss has not been set off subsequently and the assessee has huge carry forward assessed losses of earlier years which were otherwise available for set off.

On the above, the Ld. counsel relies on the decision in *Price Waterhouse Coopers Pvt. Ltd. v. CIT* – 348 ITR 306 – SC, *Hotel Sahil Pvt. Ltd. v. ACIT* (ITA No. 5857/Mum/2017), *Omega Corrugators Pvt. Ltd. v. ITO* (ITA No. 5216/Mum/2018) and *DCIT v. Israni Investments Pvt. Ltd*. (ITA No. 386/Mum/2017).

7. On the other hand, the Ld. Departmental Representative (DR) submits that the Ld. CIT(A) has rightly confirmed the order of the AO in levying a minimum penalty of Rs.65,64,793/- u/s 271(1)(c) as the assessee had debited an amount of Rs.2,02,33,602/- as deferred tax asset written off in the P&L account as exceptional item, whereas, the same had not been disallowed in the computation of taxable income. In this regard, reliance is placed by him on the decision in *Dharmendra Textiles* (supra).

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

We begin with the decision mainly relied on by the Ld. counsel. In *Price Waterhouse Coopers Pvt. Ltd.* (supra), the assessee filed its return of income on 30.11.2000 u/s 139(6) r.w.s. 139(6A) of the Act. As statutorily required by section 139(6A) of the Act, the assessee also filed its tax audit report u/s 44AB of the Act. The Statement of Particulars filed by the assessee was in Form 3CD as required by Rule 6G(2) of the Income Tax Rules, 1962. In Column 17(i) of the Statement it was stated as follows

(i)	Provision for payment of gratuity not allowable under section 40A(7);	Rs.23,70,306/- (Liability provided for payment of gratuity)

Even though, the statement indicated that the provision towards payment of gratuity was not allowable, the assessee claimed a deduction thereon in its return of income. On the basis of the return and the statement, an assessment order was passed u/s 143(3) of the Act on 26.03.2003. According to the assessee, the claim for deduction was inadvertent and it also seems to

have been overlooked by the Assessing Officer. Subsequently, the Assessing Officer issued a notice to the assessee u/s 148 of the Act on 22.01.2004 for reopening the assessment. The notice did not indicate any reason why it was issued except to state that income for the assessment year 2000-01 had escaped assessment. In response to the notice, the assessee filed its return under protest on 16.02.2004 and also requested for the grounds for reopening the assessment. By a letter dated 16.12.2004, the assessee was furnished the reason for reopening the assessment, which read as under :

> "A. Reasons for-opening u/s 147 relevant to A.Y. 2000-01
> In this case, regular assessment was completed under Section 143(3) on 26.03.03 at a total income of Rs.24,42,91,550/-.
> On perusal of the assessment records, it is seen from Clause 17(i) of the Tax Audit Report that Rs.23,70,306/- being liabilities provided for payment of gratuity, was provided for during the year. This provision is not allowable u/s 40A(7) and was required to be added back. However, the same has not been added by the assessee in its computation, thereby leading to underassessment of income by Rs.23,70,306/."

Soon after, the assessee was communicated the reasons for reopening the assessment, it realized that a mistake had been committed and accordingly by a letter dated 20.01.2005, the Assessing Officer was informed that there was no wilful suppression of facts by the assessee but that a genuine mistake or omission had been committed which also appears to have been overlooked by the Assessing Officer before whom the tax audit report was placed. Accordingly, the assessee filed a revised return on the same day. A re-assessment was passed on the same day and the assessee then paid the tax due as well as the interest thereon. Thereafter, the AO levied a penalty @

300% on the tax sought to be evaded by the assessee by furnishing inaccurate particulars and determined the quantum of penalty at Rs.27,37,689/-. In appeal filed by the assessee, the CIT(A) upheld the penalty levied by the AO. In appeal by the assessee, the Tribunal reduced the penalty to 100%. In appeal by the assessee, the Hon'ble Calcutta High Court upheld the order of the Tribunal. In appeal filed by the assessee, the Hon'ble Supreme Court held that:

> "18. The fact that the Tax Audit Report was filed along with the return and that it unequivocally stated that the provision for payment was not allowable under Section 40A(7) of the Act indicates that the assessee made a computation error in its return of income. Apart from the fact that the assessee did not notice the error, it was not even noticed even by the Assessing Officer who framed the assessment order. In that sense, even the Assessing Officer seems to have made a mistake in overlooking the contents of the Tax Audit Report.
>
> 19. The contents of the Tax Audit Report suggest that there is no question of the assessee concealing its income. There is also no question of the assessee furnishing any inaccurate particulars. It appears to us that all that has happened in the present case is that through a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income. This can only be described as a human error which we are all prone to make. The calibre and expertise of the assessee has little or nothing to do with the inadvertent error. That the assessee should have been careful cannot be doubted, but the absence of due care, in a case such as the present, does not mean that the assessee is guilty of either furnishing inaccurate particulars or attempting to conceal its income.
>
> 20. We are of the opinion, given the peculiar facts of this case, that the imposition of penalty on the assessee is not justified. We are satisfied that the assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars.

21. Under these circumstances, the appeal is allowed and the order passed by the Calcutta High Court is set aside."

[Emphasis underlined by us]

8.1 On the other hand, the major reliance placed by the Ld. DR is on the decision in *Dharmendra Textiles Processors* (supra). The questions which arise for determination in that case are : whether section 11AC inserted by the Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evade payment of tax should be read to contain *mens rea* as an essential ingredient; and whether there is a scope for levying penalty below the prescribed minimum limits. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority is duty bound to impose penalty equal to the duties so determined in such cases. The assessee, on the other hand, referred to section 271(1)(c) of the Income-tax Act, 1961 taking the stand that section 11AC is identically worded and in a given case it is open to the Assessing Officer not to impose any penalty. The Division Bench made reference to rule 96ZQ and rule 96ZO of the Central Excise Rules, 1944 and to a decision in Chairman, *SEBI v. Shriram Mutual Fund* [2006] 5 SCC 361 and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) and section 11AC and rule 96ZQ(5) is common. According to the Division Bench, the correct position, in law, has been laid down in *Chairman, SEBI's case* (supra). Therefore the Division Bench referred the controversy involved to a Larger Bench, doubting the correctness of the view expressed in

Dilip N. Shroff v. Joint CIT [2007] 161 Taxman 218 (SC). The Hon'ble Supreme Court held that :

> "The stand of the assessee was that the absence of specific reference to mens rea is a case of casus omisus. If the contention of the assessee was to be accepted that the use of the expression 'assessee shall be liable' in section 11A proves the existence of discretion, it would lead to a very absurd result. In fact, in the same provision there is an expression used, i.e., 'liability to pay duty'. It can, by no stretch of imagination, be said that the adjudicating authority has even a discretion to levy duty less than what is legally and statutorily leviable. [Para 12]
>
> It is a well-settled principle, in law, that the Court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of the legislative intent. [Para 13]
>
> It is of significance to note that the conceptual and contextual difference between section 271(1)(c) and section 276C was lost sight of in Dilip N. Shroff's case (supra) [Para 24]
>
> The Explanations appended to section 271(1)(c) entirely indicate the element of strict liability on the assessee for concealment or for giving inaccurate particulars of income while filing return. The judgment in Dilip N. Shroff's case (supra) had not considered the effect and relevance of section 276C. Object behind enactment of section 271(1)(c), read with the Explanations thereto, indicates that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability, as is the case in the matter of prosecution under section 276C. [Para 25]

In the Union Budget of 1996-97, section 11AC was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget, reference has been made to the provision stating that the levy of penalty is mandatory. In the notes on clauses also, the similar indication has been given. [Para 26]

Above being the position, the plea that the rules 96ZQ and 96ZO have a concept of discretion inbuilt could not be sustained. Dilip N. Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The matter shall now be placed before the Division Bench to deal with the matter in the light of what has been stated above, only so far as the cases where challenge to vires of rule 96ZQ(5) are concerned. In all other cases, the orders of the High Court or the Tribunal, as the case may be, are to be quashed and the matter was to be remitted back to it for disposal in the light of the instant judgments. [Para 27]"

8.2 It is well settled that in the scheme of the Act, the proceedings for imposition of penalty, though emanating from proceedings of assessment, are essentially independent and a separate aspect of the proceedings which closely follow the assessment proceedings. It is also well settled that findings given in assessment proceedings are certainly relevant and have probative value, but such findings are material alone and may not justify the imposition of penalty in a given case, because the considerations that arise in penalty proceedings are different from those that arising assessment proceedings as held in *Banaras Textorium v. CIT* (1988) 169 ITR 782, 790, 791 (All) ; *CIT v. Govindankutty Menon* (1989) 178 ITR 509, 515 (Ker) ; *Hotel & Allied Trades (P.) Ltd. v. CIT* (1996) 221 ITR 619, 646 (Ker). We may refer here to the judgment of the Hon'ble Supreme Court in the case of *Anantharam*

Veerasinghaiah & Co. v. CIT (1980) 123 ITR 457, 462 (SC), wherein it is held that the findings recorded in assessment order constitute good evidence in the penalty proceedings but those findings cannot be regarded as conclusive for the purpose of the penalty proceedings. A reading of Hon'ble Supreme Court decision in *CIT v. Anwar Ali* (1970) 76 ITR 696, 701 (SC) shows that while assessment proceedings may constitute good evidence in penalty proceedings, they are not conclusive. Whether a penalty can be imposed in a given case, the entirety of the circumstances must be taken into account. All will depend on the circumstances of a case. There cannot be any such inflexible rule.

Mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon as held in *D.M. Dahanukar v. CIT* (1967) 65 ITR 280, 286 (Bom) ; *M. Hussain Ali & Sons v. CIT* (1965) 58 ITR 787 (Mad).

8.3 An examination of the details filed before the Ld. CIT(A) clearly indicates that since the AY 2007-08, the appellant is incurring losses. The assessed losses spread from AY 2007-08 till AY 2016-17. In the year under consideration the appellant has incurred Rs.5,68,60,644/- as assessed loss after the addition.

In the instant case, the assessee had made an inadvertent computation error while filing its return of income and accordingly the same was accepted by them in the course of assessment. The assessee has not in any way taken any benefit by carrying forward a higher loss. It is relevant to mention here that the financial statements of the AY 2012-13 were on record which reflect the deferred tax asset written off in the profit & loss account and also a Note to that effect in the Schedule of significant accounting policies. Thus the observation made by the AO that there was no independent evidence and the finding that the same haS been revealed in the assessment proceedings only is not correct. We find that the carried forward loss has not been set off subsequently and the assessee has huge carry forward assessed losses of earlier years which were otherwise available for set off.

As mentioned earlier, the financial statements of the assessee were placed before the AO during the course of assessment proceedings which clearly stated the deferred tax asset written off as a separate line item on the face of the profit and loss account. Also in Note 19 (Significant Accounting Policies) forming part of financial statements, it is stated at 19.6b that :

> "Deferred Tax for timing differences between book profit and tax profit is accounted for using the tax rates and laws that have enacted as of the Balance Sheet date. Deferred tax assets are recognized to the extent there is reasonable certainty that these assets can be realized in future. However, the company does not anticipate to make profits in the near future in view of the same, deferred tax asset to the tune of Rs.2,02,33,602/- has been written off in December, 2012."

An examination of the above clearly indicates that deferred tax asset written off was reported in the financials, however, the same was

inadvertently left to be added back to the net loss before tax while making the tax computation. This error is only a computation error made in the return of income which occurred due to overlooking the contents of the profit and loss account. The contents of the financial statements do not conceal any particulars. The error committed by the appellant is a bona fide and inadvertent one. The obtaining factual matrix in the instant case is broadly similar to the decision in *Price Waterhouse Coopers Pvt. Ltd.* (supra), instead of *Dharmendra Textiles Processors* (supra).

8.4 In view of the above factual scenario and position of law enunciated in *Price Waterhouse Coopers Pvt. Ltd.* (supra) , we set aside the order of the Ld. CIT(A) and delete the penalty of Rs.65,64,793/- levied by the AO.

9. In the result, the appeal is allowed.

Order pronounced in the open Court on 01/02/2021.

Sd/-	**Sd/-**
(MAHAVIR SINGH)	**(N.K. PRADHAN)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 01/02/2021
Rahul Sharma Sr. PS

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