आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 287/JP/2017
निर्धारण वर्ष/Assessment Years : 2005-06

| | | |
|---|---|---|
| M/s Rasal Builders & Developers Pvt. Ltd.,<br>114, Joshi Marg, Santi Nagar,<br>Kalwar Road, Jhotwara, Jaipur. | बनाम<br>Vs. | The ITO,<br>Ward-3(1),<br>Jaipur. |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AACCR 6981 Q | | |
| अपीलार्थी/Appellant | | प्रत्यर्थी/Respondent |

निर्धारिती की ओर से/ Assessee by : Shri Dilip Shivpuri (Adv.)
राजस्व की ओर से/ Revenue by : Smt. Monisha Choudhari (Addl.CIT)

सुनवाई की तारीख/ Date of Hearing : 15/12/2020
उदघोषणा की तारीख/Date of Pronouncement : 02/03/2021

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

The assessee has filed the present appeal against the order of ld. CIT(A), Aligarh ( Camp at Jaipur) dated 28.12.2015 for the assessment year 2005-06 confirming the levy of penalty u/s 271(1)(c) of the Act.

2. This matter was earlier dismissed *ex-parte* by the Coordinate Bench vide its order dated 09.04.2018 for non-prosecution and thereafter, the Coordinate Bench vide its order dated 04.06.2018 has recalled the earlier *ex-parte* order and accordingly the matter has now come up for hearing before us.

3. In its appeal, the assessee has taken the following grounds of appeal:-

> *"1. In the facts and circumstances of the case and in law the ld. CIT(A) has erred in confirming the action of the ld. AO in imposing penalty of Rs. 7,73,859 under section 271(1)(c) of Income Tax Act, 1961. The action of ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said penalty of Rs. 7,73,859/-.*
>
> *2. In the facts and circumstances of the case and in law the ld. AO has erred in imposing penalty under section 271(1)(c) without specifically pointing out in the show cause notice, whether the penalty was proposed on concealment of particulars of income or for furnishing inaccurate particulars of income."*

4. During the course of hearing, the ld AR submitted that as far as addition of Rs. 2,79,000/- and of Rs. 10,05,301/- confirmed by the CIT(A) is concerned, the impugned penalty order should have been passed by 31.03.2011 and given that the penalty order has been passed on 22.03.2013, hence, as far as the above two additions are concerned, they have become barred by limitation on 31.03.2011 and cannot be made a part of the order of penalty passed on 22.03.2013. These two items may, therefore, be deleted from the impugned penalty order. Regarding the third addition of Rs 8,30,000 is concerned, it was submitted that the only basis on which the penalty was levied was that the addition of Rs. 8,30,000/- had been confirmed by the CIT(A) as well as the ITAT and the ITO did not consider the explanation submitted by the assessee in right perspective. It was further submitted that the show-cause notice issued by the AO was vague and didn't specify

whether the penalty was proposed on concealment of particulars of income or for furnishing inaccurate particulars of income and in light of various authorities, the same shows non-application of mind by the AO and on this ground as well, the penalty so levied deserve to be set-aside. Further, the ld AR submitted that the contentions so advanced are reiterated in the written submissions which may be considered and the contents thereof read as under:

*"The Appellant humbly submits as under:*

*1. That the present appeal is against the penalty u/s 271(1) (c) of Rs. 7,73,859/- levied by ITO, Ward 3 (1), Jaipur for A.Y. 2005-06 vide his order dated 22.03.2013 on the following undisclosed income:*

| | |
|---|---|
| *a) cash credits from agriculturists* | *Rs. 2,79,500/-* |
| *b) Unsecured loans taken through cheque* | *Rs. 8,30,000/-* |
| *c) Advances received against flat bookings* | *Rs. 10,05,301/-* |
| *Total* | *21,14,801/-* |

*2. The brief facts relevant to the appeal are that an assessment for A.Y. 2005-06 was completed u/s 143(3) on 28.12.2007 by making the following additions:*

| *S.No.* | *Nature of additions* | *Amounts* |
|---|---|---|
| *1.* | *Unsecured loan received form M/s Orbit Polytech P. Ltd.* | *Rs. 18,50,000/-* |
| *2.* | *Unsecured loans below Rs. 20,000/- taken in cash* | *Rs. 2,79,000/-* |
| *3.* | *Unsecured loans taken through cheque but genuineness not proved* | *Rs. 8,30,000/-* |

| | | |
|---|---|---|
| *4.* | *Unexplained advances received against flat bookings* | *Rs. 10,05,301/-* |
| *5.* | *Disallowance u/s 40A(3) of I.T. Act* | *Rs. 1,33,200/-* |
| | *Total* | *Rs. 38,28,001/-* |

*The matter was agitated in appeal before the CIT(A) who confirmed all the additions vide his order dated 12.09.2008.*
*Then, the assessee appealed against the said order to the Hon'ble ITAT who, vide their order dated 24.04. 2009 decided the appeal in the following manner:*

| *S.No.* | *Nature of additions* | *Amounts* | *Deleted/confirmed/set-aside by ITAT* |
|---|---|---|---|
| *1.* | *Unsecured loans received from M/s Orbit Polytech P. Ltd.* | *15,80,000/-* | *Set-aside back to AO for re-examination* |
| *2.* | *Unsecured loans below Rs. 20,000/- taken in cash* | *2,79,000/-* | *Assessee did not file appeal against the said appeal before either the CIT(A) or ITAT* |
| *3.* | *Unsecured loans through cheque but genuineness not proved* | *8,30,000/-* | *Set-aside back to AO for re-examination* |
| *4.* | *Unexplained advances against flat bookings* | *10,05,301/-* | *Addition confirmed by ITAT* |
| *5.* | *Disallowance u/s 40A(3)* | *1,33,200/-* | *Addition confirmed by ITAT* |
| | *Total* | *38,28,001/-* | |

*In view of the items at S.No. 1 & 3 above being set-aside back to the file of the AO, the ITO, Ward 3(1) passed an order u/s 143(3)/250/set-aside on 06.12.2010 at a total income of Rs. 37,26,110/- in which the amounts of Rs. 15,80,000/- and of Rs. 8,30,000/- were added back as unexplained credits. Being aggrieved of the said order, the Appellant appealed to the CIT(A) who deleted the addition of Rs. 15,80,000/- (which was later on added in the hands of the sister concern M/s Orbit Polytech Pvt. Ltd.) and confirmed the addition of Rs. 8,30,000/-, vide her order dated 19.09.2011. No appeal was apparently filed against the said order.*

*Thereafter, the impugned penalty order u/s 271(1) (c) was passed on 22.03.2013.*

*3. That ,as the facts narrated above, which are mentioned in the penalty order, out of the 3 additions on which penalty has been levied, 2 , namely those of Rs. 2,79,000/-(unsecured loans below Rs. 20,000/- taken in cash ) and of Rs. 10,05,301/- (advances against booking of flats ) were confirmed by the Hon'ble ITAT in the first round of appeal, in their order dated 24.04.2009.*

*As per section 275 of the Income-Tax Act, which prescribes the time-limit for levy of penalty,*

*"275. [(1)] No order imposing penalty under this Chapter ,shall be passed -*

*[(a)] in a case where the relevant assessment order or other order is the subject-matter of an appeal to the Commissioner(Appeals) under section 246 [or section 246A] or an appeal to the Appellate Tribunal under section 253, after the expiry of the financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, are completed, or six months from the end of the month in which the order of the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal is received by the Principal Chief Commissioner*

*or Chief Commissioner or Principal Commissioner or Commissioner, whichever period expires later:*

*[Provided that in a case where the relevant assessment or other order is the subject-matter of an appeal to the Commissioner (Appeals) under section 246 or section 246A, and the Commissioner (Appeals) passes the order on or after the 1st day of 2003 disposing of such appeal, an order imposing penalty shall be passed before the expiry of the financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated , are completed, or within one year from the end of the financial year in which the order of the Commissioner (Appeals) is received by the ]Principal Chief Commissioner] or Chief Commissioner, or [Principal Commissioner] or Commissioner, whichever is later;]*

*Now since in the first round, the order of the AO was passed on 28.12.2007 and of the Commissioner(Appeals) was passed on 12.09.2008, the penalty order should have been passed, as per the Proviso to section 275(1) on:*

*a)`either on or by 31.03.2008, or*

*b) on or by 31.03.2010,*

*whichever is later.*

*If we consider the main section 275(1), then the relevant dates would be:*

*a) either on or by 31.03.2008, or*

*b) on or by 31.03.2011,*

*whichever is later.*

*Hence, the order of penalty ,as far as addition of Rs. 2,79,000/- and of Rs. 10,05,301/- confirmed by the CIT(A) was concerned, should have been passed, in any case, by 31.03.2011. It was passed on 22.03.2013, hence, as far as the above two additions*

*are concerned, they have become barred by limitation on 31.03.2011 and cannot be made a part of the order of penalty passed on 22.03.2013. These two items may, therefore, be deleted from the impugned penalty order.*

*4. Now what is left is only the addition of Rs. 8, 30,000/- which is the total of the credits received by the following creditors:*

| *S.No.* | *Name of Creditor* | *Amount* |
|---|---|---|
| *1.* | *Shri Roop Singh Rathore* | *1,65,000/-* |
| *2.* | *Shri Dashrath Singh* | *75,000/-* |
| *3.* | *Shri Dinesh Sharma* | *2,00,000/-* |
| *4.* | *Shri Shrawan Lal* | *3,00,000/-* |
| *5.* | *Shri Surendra Singh* | *90,000/-* |
| | *Total* | *8,30,000/-* |

*GROUND NO. 1 OF APPEAL:*

*Before, these credits are discussed, it may be submitted that penalty proceedings have been held to be proceedings separate from assessment proceedings inasmuch as assessment proceedings are taxing proceedings while penalty proceedings are criminal proceedings in their very nature and a decision given in an assessment proceedings cannot possibly bind the authority who tries the assessee for an offence. For this proposition, strength is drawn from the following case laws:*

*1) Krishan Lal Shiv Chand Rai v. CIT [1973] 88 ITR 293 (P&H);*

*2) CIT v. J.K. Synthetics Ltd. [1996] 219 ITR 267 (Del.);*

*3)Muniappa Gounder (B) v. CIT [1976] 102 ITR 787 (Mad.*

*4) CIT v. Abdul Bakshi & Bros. (H) [1986] 160 ITR 94 (AP) (FB);*

*5) CIT v. Doris S. Luiz [1974] 96 ITR 646 (Ker.).*

*It has also been held that an assessee is entitled to submit fresh evidence in the course of penalty proceedings. It is because penalty proceedings are independent proceedings. The Tribunal ,in the case of Prasanna Enterprises v. CIT [2000] 244 ITR 188(Ker.) held that since the Tribunal confirmed the penalty u/s 271(1) (c) without considering the fresh evidence, its order was invalid and the matter was remanded.*

*In the light of this proposition of law it is seen that the penalty order deals with the evidence and submissions of the appellant most superficially and without application of mind, in these words:*

*"10. I have considered the reply of the assessee carefully and found not convincing for the reason that during the course of assessment proceedings & re-assessment proceedings, after giving adequate opportunities, the assessee company could not explain the identity and creditworthiness of the transactions as discussed in length in foregoing paras.....The addition made on account of unsecured loan taken through cheque amounting to Rs. 8,30,000/- and on account of.....had been confirmed by the ld. CIT(A) as well as the Hon'ble ITAT which also established that the assessee had introduced its unaccounted money in its books of accounts in the shape of cash credits. Further, the facts of the case law quoted by the AR of the assessee are completely different from the instant case. Thus it is clear that the assessee company had introduced its undisclosed income to the extent of Rs. 21,14,801/- (Rs. 2,79,000/-+ Rs. 8,30,000+Rs. 10,05,301).*

*Thus it is clear that the only basis on which the penalty was levied was that the addition of Rs. 8,30,000/- had been confirmed by the CIT(A) as well as the ITAT. The ITO did not consider the explanation submitted by the assessee which is reproduced at para 9(2) of the order in these words:*

*9.2) Unsecured loan taken through cheques amounting to Rs. 8,30,000/-:*

*During the course of assessment proceedings, the AO himself has admitted that the assessee company has taken unsecured loans of Rs. 8,30,000/- from five persons through cheques. Since the amounts were received through banking channel, it automatically proves the identity of the lenders and the genuineness of the transactions. Since the payment was received from banking channels, the AO, using his statutory powers, could have gathered further evidence from these persons as well as the bank directly. On account of such inaction on the part of the AO the assessee company has already suffered tax and interest thereon. In view of the fact that the AO himself stated that the amounts have been received through cheques, no penalty is imposable."*

*From the explanation offered above, it is clear that:*

*a)admittedly the amounts in question had been received through cheques. Hence, the identity of the creditors, and the genuineness of transaction stood proved.*

*b) the source of the credit was the bank account of the creditor, hence his creditworthiness stood proved. If the AO had any doubt about the source, he could have and should have made inquiries from the concerned bank, using his statutory powers. this was not done.*

*c) since the creditors claimed to be agriculturists, they were not obliged to file a return of income.*

*d) all the creditors had admitted that they had given the credit. In view of this fact, if the creditworthiness was in doubt, then addition should have been made in the hands of the creditors, and not the company.*

*e) no evidence had been led by the AO to the effect that the credit was the unexplained money of the company, especially when the books of account of the company was not doubted.*

*The initial onus of proving the identity and creditworthiness of the creditor, and the genuineness of the transaction lies with the assessee. But once evidence had been produced on this account by the assessee, the onus or burden of proof shifted to the AO. The AO has been given very wide powers by the Income-Tax Act to make necessary inquiries , but it seems that these powers were not exercised by the AO before levying the penalty. For the proposition that the burden of proof shifts towards the AO once initial burden has been discharged, the following case laws are relied on:*

*1) CIT v. Binod Company [1980] 122 ITR 832(Pat.);*

*2) CIT v. Tata Services Ltd.[1980] 122 ITR 594(Bom.);*

*3) CIT v. Motilal & Co. [1990] 184 ITR 288 (Cal.).*

*It may also be submitted that the presumption under the Explanation can be displaced by the assessee proving that the failure to return correct income did not arise from any fraud or gross or wilful neglect and the quantum of proof necessary would be that required in a civil case, namely, preponderance of probabilities. This proposition has been laid down in a catena of decisions , some of which are as under:*

*a) CIT v. Nathulal Agarwala & Sons [1985] 153 ITR 292 (Pat.) (FB);*

*b) CIT v. Pawan Kumar Dalmia [1987] 168 ITR 1 (Ker.);*

*c) CIT v. Gurudayalram Mukhlal [1991] 190 ITR 39 (Gau.);*

*d) CIT v. Bimal Kumar Damani [2003] 261 ITR 87 (Cal.).*

*As far as the present case is concerned, it is abundantly clear that after the identity of the creditor and the genuineness of the transaction were established, the only issue was the creditworthiness of the creditor. Since the money had come through the banking channel, so the AO could have made necessary inquiries from the bank to establish the creditworthiness. The burden of proof had now shifted to the AO. Unfortunately, the AO did not make any inquiry of his own to try and establish true facts. Penalty proceedings being independent proceedings he should have made fresh inquiries at his level.. For example, if the creditors were agriculturists, he could have got inquiries made as to their land holding, the quantum of agriculture produce, the likely amount for which it could have been sold, to try and find out their worth in money terms, and whether they had the financial wherewithal to advance that much amount of money. He could have obtained a copy of the relevant bank account to find out how much money was there in the bank, and whether the credit could be explained from the bank balance. This he did not do, and relied solely and totally on the findings at the quantum level balance. This procedure is against established law as expounded in the case laws mentioned above, hence needs to be rejected.*

*Further, once creditors had owned up the credit, and their identity was established, the addition, if it had to be made, should have been considered in the hands of the creditors. This is the import of the decision of the Hon'ble Supreme Court in the case of CIT v. Lovely Exports (P.) Ltd. [2008] 216 CTR 195 (SC) wherein the Hon'ble Apex Court held that if share application money is received by the assessee company from alleged bogus shareholders , whose names are given to the assessing officer, then the department is free to proceed to reopen their individual assessments in accordance with law but this amount of share money cannot be regarded as undisclosed income under section 68 of the assessee company.*

*The ratio of this decision of the Hon'ble Supreme Court has now been followed in a number of cases by various High Courts. One such example is the case of CIT v. Awadh Fertilisers (P.) Ltd. [2013] 217 Taxman 27 (Allahabad). Another example is the case of CIT v. Pranav Foundations Ltd. [2014] 229 Taxman 58 (Madras). In view of these authoritative pronouncements of law by the Apex Court and by the other High Courts, the addition, if any, had to be made in the hands of the creditors and not the assessee company. Copies of the decisions cited supra are annexed herewith as Annexures A/1. A/2 and A/3.*

*Still further, no evidence has been produced on record to prove that the money received through creditors was actually the undisclosed income of the company. The books of account of the company have not been held to be unreliable, or incomplete or incorrect. Hence, whatever income is being shown in the hands of the company has been taken to be correct. In this situation, it cannot be held, without any evidence whatsoever, that the credits belonged to the company, and not to the creditors.*

*GROUND NO. 2 OF APPEAL:*

*The second ground of appeal is that the AO has not specifically mentioned in the notice u/s 271(1) (c) whether the penalty is for inaccurate particulars of income or for concealment of particulars of income. A copy of the notice of penalty as received from the AO is enclosed as Annexure A/4. A bare perusal of the said notice makes it clear that the AO has not struck out the inapplicable part of the said notice, and so it is not clear whether the penalty notice has been issued for filing inaccurate particulars of income or for concealment of income.*

*There are now a plethora of decisions on the issue that if the correct limb of the penalty notice is not ticked , or the inapplicable part of the notice is not struck off, the notice becomes invalid, and consequentially, the penalty proceedings become invalid. Attention is drawn towards the following decisions on this issue:*

*a) CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565(Kar.);*

*b) CIT v. SSA's Emerald Meadows [2016] 242 Taxman 180 (SC);*

*c) Yum Restaurants (India) (P.) Ltd. v. ITO[2017] 58 ITR(T) 107(Delhi-Trib.);*

*d) Mohd. Sharif Khan v. Dy. CIT [2017] 58 ITR(T) 260(Jaipur-Trib.).*

*Copies of the decisions at S.No. b), c) & d) above are annexed herewith and marked as Annexures A/5, A/6 & A/7.*

*It is pertinent to point out that in the case of Mohd. Sharif Khan supra the Hon'ble ITAT, Jaipur has, after considering the relevant case laws, has held that if the relevant portion of the penalty notice is not ticked, then the notice is invalid , and the penalty proceedings are to be quashed. In the said decision, reference is also made of the decision of the Hon'ble Rajasthan High Court in the case of Sheveta Construction Co. (P.) Ltd. v. ITO [DB IT Appeal No. 534 of 2008] whose ratio decidendi is the same.*

*Hence, in view of the binding decision of the jurisdictional High Court in the case of Sheveta Construction Co. (P.) Ltd. supra and of the ITAT, Jaipur Bench in the case of Mohd. Sharif Khan supra, it is submitted that the present penalty order also deserves to be quashed."*

5. Per contra, the ld. DR submitted that the penalty order has been duly passed within the limitation period as provided u/s 275 of the Act and our reference was drawn to the report submitted by the AO and the contents thereof reads as under:

*"No. ITO/W-1(1)/JPR/2020-21/391 Dated 10.02.2020*
*To,*
*The Jt. Commissioner of Income Tax (Sr. DR-III),*

*Income Tax Appellate Tribunal,*
*Jaipur.*

*Madam,*

*Sub:-*

*In the matter pending before the Hon'ble ITAT, Jaipur in the case of Rasal Builders, ITAT No. 287/JP/2017 for the A.Y. 2005-06 regarding-*

*Kindly refer to the letter No. Addl. CIT/DR-III/ITAT/JPR/2020-21/263 dated 15.12.2020 on the subject cited above thereby calling the comments on the following additional ground raised by the assessee.*

*1. Why penalty was levied on 22.03.2013 on 2,79,000/- can 10,05,301/- when it should have been levied within 6 months of the passing the order of the Hon'ble ITAT on 24.04.2009?*

*2. The chronology of the event in the case of the assessee for the A.Y. 2005-06 are submitted as under:-*

| *Sr. No.* | *Date* | *Event* | *Remarks* |
|---|---|---|---|
| *1.* | *28.12.2005* | *ITR filed declaring income of Rs. Nil.* | *Book profit u/s 115JB show at Rs. 20,443/-* |
| *2.* | *28.12.2007* | *Assessment completed U/s 143(3) at a total income of Rs. 37,26,110/-. Additions made on account of:-*<br>*i. Unexplained cash credits of Rs. 15,80,000/-*<br>*ii. unsecured loans in cash of Rs. 2,79,500/-*<br>*iii. Unsecured cash credits of Rs. 8,30,000/-.*<br>*iv. Unexplained credits of Rs. 10,05,301/-.*<br>*v. Disallowance u/s 40A(3) Rs. 1,33,200/-* | |
| *3.* | *12.09.2008* | *Ld. CIT(A) dismissed the appeal in ITA No. 795/2007-08* | |
| *4.* | *24.04.2009* | *ITA No. 1500/JP/2008 Hon'ble ITAT partly set aside and remand the matter to the file of AO with certain directions* | |
| *5.* | *06.12.2010* | *Assessment order for set aside case completed at a total income of Rs. 37,26,110/- i.e. on the same income which was determined vide order u/s 143(3) dated 28.12.2007* | |
| *6.* | *19.09.2011* | *ITA No. 329/10-11 Ld. CIT(A) deleted the addition of Rs. 15,80,000/- and confirmed the addition of Rs. 8,30,000/- and confirmed other additions.* | |

| | | | |
|---|---|---|---|
| *7.* | *22.03.2013* | *Imposed penalty u/s 271(1)© of Rs. 7,73,859/-* | |

*3. From the above chronology of the event of the case it is evident that vide order dated 24.09.2009, the Hon'ble ITAT remand back the matter to the file of AO with certain directions. Therefore, no penalty was imposed consequent upon the order dated 24.09.2009 of the Hon'ble ITAT as the matter was pending with theAO and it was premature for imposing penalty under sec. 271(1)(c) of the I.T. Act, 196. The penalty under sec. 271(1)(c) of the I.T. Act, 1961 was imposed only after the order dated 19.09.2011 of the ld. CIT(A). The said penalty has been imposed with the stipulated time frame after the receipt of the order of Ld. CIT(A)."*

6. Further, the ld. DR relied on the finding of the lower authorities and our reference was drawn to the findings of the ld. CIT(A) which are contained at para 5 which read as under:-

*"5 शास्ति आदेश में वर्णित तथ्यों और अपीलार्थी के लिखित निवेदन में दिये गये तर्कों पर विचार करने के उपरांत अपील के विविध आधारों का निस्तारण निम्नवत किया जा रहा है–*

*5.1 अपील का प्रथम आधार*

*1 The learned AO has erred in the facts and circumstances of the case by imposing penalty u/s 271(1)(c) read with section 68 of Income Tax Act, 1961 on their grounds, firstly on Unsecured loans taken by the assessee below Rs.20,000/- which were not proved to be false by the learned AO. As such first of all the assessee because of his engagement in various business activities did not have time to produce all these persons to substantiate their identity as well as for the reason that assessee wanted to buy peace with department. It is not the case where the Assessing Officer has proved the unsecured loan to be false. There is a difference between the facts not proved and facts proved false and according to law penalty can be imposed only when the facts are proved false.*

*5.2 निर्णय*

*निर्धारण अधिकारी का कहना है कि अपीलार्थी ने कथित रूप से कृषकों से रू.2,79,500/– के असुरक्षित ऋण प्राप्त किये थे, जो कि नगद में थे और प्रत्येक ऋण रू.20,000/– से कम था। निर्धारण अधिकारी के अनुसार अपीलार्थी इन असुरक्षित ऋणों के संबंध में ऋणदाताओं की पहचान और ण देने की क्षमता को सिद्व करने में असफल रहा है। अपीलार्थी का कहना है कि वह व्यस्त होने के कारण सम्बन्धित व्यक्तियों को प्रस्तुत न कर सका और निर्धारण अधिकारी ने यह सिद्व नहीं किया है कि यह असुरक्षित ऋण फर्जी है।*

*मैंने समस्त तथ्यों और साक्ष्यों पर विचार कर लिया है। मेरा मानना है कि अपनी आय को सिद्व करने हेतु आवश्यक साक्ष्य प्रस्तुत करने का उतरदायित्व निर्धारिती का होता है। रूपये 2,79,950/– के असुरक्षित ऋण के संबंध में अपीलार्थी अपना उतरदायित्व निभाने में असफल रहा है। इस संबंध में धारा 271(1)(c) के स्पष्टीकरण–1 के प्रावधान विचारणीय है। उक्त स्पष्टीकरण के अनुसार जहॉ किसी व्यक्ति की कुल आय की संगणना करने के लिए किन्हीं महत्वपूर्ण तथ्यों की बाबत ऐसा व्यक्ति स्पष्टीकरण देने में असफल रहता है, वहॉ उसके परिणामस्वरूप ऐसे व्यक्ति की कुल आय की संगणना करने में जोड़ी गई रकम धारा 271(1)(c) के प्रयोजनों के लिए उस आय को उपदर्शित करने वाली समझधी जायेगी जिसके संबंध में विशिष्टयॉ को छिपाया गया है। इस प्रकार आय की विशिष्टियों को छिपाने का मामला सिद्व हो यजाता है। एक बार यह सिद्व हो जाये कि आय की विशिष्टियों को छिपाया गया है तो आयकर अधिकारी के समक्ष धारा 271(1)(ब) के अंतर्गत शास्ति अधिरोपित करने के अतिरिक्त और कोई विकल्प नहीं होता है। साथ ही साथ माननीय उच्चतम नयायालय द्वारा UOI & Ors v. Dharmendra Textile Processors & Ors.[2008] 306 ITR 277 (SC) के केस में दिये गये निर्णय के आधार पर यह कहा जा सकता है कि शास्ति अधिरोपित करने हेतु आपराधिक मनः स्थिति को सिद्व करना आवश्यक नहीं है।*

*उपरोक्त विवेचना के आधार पर मेरा मानना है कि रूपये 2,79,500/– के कथित असुरक्षित ऋण के संबंध में धारा 271(1)(ब) के अंतर्गत शास्ति अधिरोपित करना न्यायोचित है और मैं उस शास्ति को पुष्ट करता हूॅ। इस प्रकार अपील के इस आधार को निरस्त किया जाता है।*

*5.3 अपील का द्वितीय आधार*

*2. Secondly on the unsecured loans taken through cheques amounting to Rs.8,30,000/- hence proves the identity of the lenders and genuineness of the transactions since the amounts were received through banking channel, it*

*automatically proves the identity of the lenders and genuineness of the transactions.*

*5.4 निर्णय*

*अपीलार्थी ने कथित रूप से विविध व्यक्तियों से रूपये 8,30,000/– के असुरक्षित ऋण प्राप्त किये हैं और निण्धारण अधिकारी ने पाया कि यद्वपि ये ऋण चैक से प्राप्त हुये हैं तथापि सम्बन्धित व्यक्ति न तो आय करदाता हे और न ही उनकी ऋण देने की क्षमता के संबंध में पर्याप्त साक्ष्य है। इस आधार पर निर्धारण अधिकारी ने रूपये 8,30,000/– को अपीलार्थी की छिपाई आय मानकर उस पर धारा 271(1)(c) के अंतर्गत शास्ति अधिरोपित की है। इस संबंध में अपीलार्थी का कहना है कि चूॅकि ये रूपये बैंक चैक से आये हैं इसलिए ऋण दाताओं की पहचान और प्रमाणिकता स्वतः ही सिद्व हो जाती है। साथ ही साथ यह भी कहा गया है कि निर्धारण अधिकारी अपनी शक्तियों का प्रयोग कर सम्बन्धित साक्ष्य स्वयं ही प्राप्त कर सकते थे।*

*मेरे विचार में अपीलार्थी के तर्कों में पर्याप्त बल नहीं है । धारा 68 के अंतर्गत रोकड़ जमा के संबंध में स्पष्टीकरण देने का उतरादायित्व अपीलार्थी का होता है। मात्र यह कह देने से कि लेनदेन बैंकिंग माध्यम से हुआ है, अपीलार्थी अपने उतरदायित्व से मुक्त नहीं हो सकता है। इस असुरक्षित ऋण के संबंध में पर्याप्त साक्ष्य प्रस्तुत करने में हुई असफलता से सिद्व होता है कि अपीलार्थी के पास इस असुरक्षित ऋण की बाबत कोई स्पष्टीकरण नहीं है। इस संबंध में धारा 271(1)(c) के स्पष्टीकरण–1 के प्रावधान विचारणीय हैं। उक्त स्पष्टीकरण के अनुसार जहॉ किसी व्यक्ति की कुल आय की संगणना करने के लिए किन्हीं महत्वपूर्ण तथ्यों की बाबत ऐसा व्यक्ति स्पष्टीकरण देने में असफल रहता है, वहॉ उसके परिणामस्वरूप ऐसे व्यक्ति की कुल आय की संगणना करने में जोड़ी गई रकम धारा 271(1(c) के प्रयोजनों के लिए उस आय को उपदर्शित करने वाली समझी जायेगी, जिसके संबंध में विशिष्टियों को छिपाया गया है। चूॅकि अपीलार्थी रूपये 8,30,000/– के असुरक्षित ऋण की प्रमाणिकता सिद्व करने में असफल रहा है इसलिये उक्त स्पष्टीकरण के अनुसार यह वहा आय है, जिसके संबंध में विशिष्टियों को छिपाया गया है। इस प्रकार आय की विशिष्टियों को छिपाया गया है तो आयकर अधिकारी के समक्ष धारा 271(1)(c) के अंतर्गत शास्ति अधिरोपित करने के अतिरिक्त और कोई विकल्प नही होता है। साथ ही साथ माननीय उच्चतम न्यायालय द्वारा UOI & Ors V. Dharmendra Textile Processors & Ors. [2008] 306 ITR 277 (SC) के केस में दिये गये निर्णय के आधार पर यह कहा जा सकता है कि शास्ति अधिरोपित करने हेतु आपराधिक मनः स्थिति को सिद्व करना आवश्यक नहीं है। उपरोक्त विवेचना के आधार पर मेरा मानना है कि रूपये 8,30,000/– के कथित असुरक्षित ऋण के संबंध में धारा 271(1)(c) के अंतर्गत शास्ति अधिरोपित*

*करना न्यायोचित है और मैं उस शास्ति को पुष्ट करता हूँ। इस प्रकार अपील के इस आधार को निरस्त किया जाता है।*

*5.5 अपील का तीसरा आधार*

*3. The last was on unexplained credit in the name of advance against flat booking as the name amount were shown as receipts in the books of the assessee. However, Proper receipts were issued against these payments. Accordingly, the action of the learned AO is illegal, unjustified arbitrary and against the facts of the case. Relief may please be granted by quashing the order being illegal and without authority of law.*

*5.6 निर्णय*

*निर्धारण की कार्यवाही के दौरान ज्ञात हुआ कि अपीलार्थी ने फलैट बुंकिग के तौर पर 11 व्यक्तियों से अग्रिम के रूप में रूपये 10,05,301/– की राशि प्रापत की है। यह समस्त राशि रोकड़ में कृषकों से प्राप्त हुई है। अपीलार्थी इस संबंध में ऋणदाताओं की पहचान और ऋण देने की क्षमता को सिद्व करने में असफल रहा। इस आधार पर निर्धारण अधिकारी ने माना कि रूपये 10,05,301/– की आय अपीलार्थी की छिपी हुई आय है और इसलिए उन्होनें धारा 271(1)(c) के अंतर्गत शास्ति अधिरोपित की।*

*इस संबंध में अपीलार्थी का कहना है कि उसने रूपये 10,05,301/– में से रूपये 7,41,000/– को निकाल कर वित्तीय वर्ष 2006–07 में अपने निर्माण की लागत से घटा दिया था। इस प्रकार उसने पहले ही इस राशि को अपनी आय में सम्मिलित कर लिया है।*

*मेरे विचार में एक बार जब किसी जोड़ को अपीलीय प्राधिकारी द्वारा पुष्ट कर दिया गया हो तो शास्ति की कार्यवाही के दौरान उसके संबंध में कोई स्पष्टीकरण निरर्थक है। द्वितीय दौर में माननीय आयकर अपीलीय प्राधिकरण द्वारा दिये गये निर्णय से स्पष्ट है कि इस रोकड़ जमा के संबंध में अपीलार्थी ऋणदाताओं की पहचान और ऋण देने की क्षमता को सिद्व करने में असफल रहा है। अपीलार्थी की इस असफलता से सिद्व होता है कि उसके पास इस रोकड़ जमा के संबंध में कोई स्पष्टीकरण नहीं है। धारा 271(1)(c) के स्पष्टीकरण–1 के अनुसार जहॉ किसी व्यक्ति की कुल आय की संगणना करने के लिए किन्हीं महत्वपूण्र तथ्यों की बाबत ऐसा व्यक्ति स्पष्टीकरण देने में असफल रहता है, वहॉ उसके परिणामस्वरूप एसे व्यक्ति की कुल आय की संगणना करने में जोडी गई रकम धारा 271(1)(c) के प्रयोजनों के लिए उस आय को उपदर्शित करने वाली समझी जायेगी जिसके संबंध में विशिष्टियों को छिपाया गया है। चूॅकि अपीलार्थी रूपये 10,05,301/– के कथित*

*अग्रिम की प्रामाणिकता सिद्व करने में असफल रहा है इसलिये उक्त स्पष्टीकरण के अनुसार यह वह आय है, जिसके संबंध में विशिष्टियों को छिपाया गया है। इस प्रकार आय की विशिष्टियों को छिपाने का मामला सिद्व हो जाता है। एक बार यह सिद्व हो जाये कि आय की विशिष्टियों को छिपाया गया है तो आयकर अधिकारी के समक्ष धारा 271(1)(c) के अंतर्गत शास्ति अधिरोपित करने के अतिरिक्त और कोई विकल्प नहीं होता है। साथ ही साथ माननीय उच्चतम न्यायालय द्वारा UOI & Ors V. Dharmendra Textile Processors & Ors. [2008] 306 ITR 277 (SC) के केस में दिये गये निर्णय के आधार पर यह कहा जा सकता है कि शास्ति अधिरोपित करने हेतु आपराधिक मनः स्थिति को सिद्व करना आवश्यक नहीं है।*

*उपरोक्त विवेचना के आधार पर मेरा मानना है कि रूपये 10,05,301/– के कथित अग्रिम के संबंध में धारा 271(1)(c) के अंतर्गत शास्ति अधिरोपित करना न्यायोचित है और मैं उस शास्ति को पुष्ट करता हूँ। इस प्रकार अपील के इस आधार को निरस्त किया जाता है।*

*5.7 अपील का चौथा आधार*

*4. The appellant may kindly be allowed to add, amend or alter any or any or all of the grounds on or before the hearing.*

*5.8 निर्णय*

*अपील का यह आधार सामान्य प्रकृति का है और इस पर निर्णय देने की आवश्यकता नहीं है।*

*नोट :–*

*अपीलार्थी ने अपने लिखित निवेदन में शास्ति प्रक्रिया प्रारंभ करने हेतु निर्धारण अधिकारी अपनी संतुष्टि को दर्ज न करने का तर्क भी दिया है। इस बिन्दु पर अपील के आधारों में कोई आधार नहीं है, फिर भी न्यायहित में इस आपति का निस्तारण करना भी आवश्यक है। अपीलार्थी का कहना है कि निर्धारण आदेश में मात्र यह उल्लेख कर देना कि शास्ति की प्रक्रिया अलग से प्रारंभ की जा रही है, निर्धारण अधिकारी की संतुष्टि को सिद्व नहीं करता है।*

*मैनें अपीलार्थी के तर्कों पर विचार कर लिया है। धारा 271(1B) के प्रावधानों के अनुसार जहॉ निर्धारण या पुनः निर्धारण के आदेश में किसी निर्धारिती की कुल आय की संगणना करने में कोई रकम जोड़ी जाती है और उक्त आदेश में धारा 271(1)(c) के तहत कार्यवाही आरंभ करने का निदेश है, वहॉ निर्धारण या पुनः*

*निर्धारण के ऐसे आदेश के बारे में समझा जायेगा कि उससे धारा 271(1)(c) के अधीन शास्ति की कार्यवाही आरंभ किये जाने के लिये निर्धारण अधिकारी का समाधान गठित होता है।*

*इस प्रकार धारा 271(1B) के प्रावधानों के अनुरूप, चूँकि इस केस में निर्धारण अधिकारी ने धारा 271(1)(c) के तहत कार्यवाही कारंभ करने का निदेश दिया था इसलिए यह माना जा सकता है कि उन्होनें शास्ति की कार्यवाही आरंभ करने के लिए अपना समाधान गठित कर लिया था। इस आधार पर यह माना जा सकता है कि संतुष्टि दर्ज न करने के संबंध में अपीलार्थी की आपति में कोई बल नहीं है और इस कारण इस आपति को निरस्त किया जाता है।*

7. We have heard the rival contentions and perused the material available on record. In this case, the original assessment order u/s 143(3) was passed on 28.12.2005 during the course of which the penalty proceedings were initiated and thereafter, the matter was carried in appeal before the ld CIT(A) and thereafter, before the Tribunal wherein on certain issues, the matter was set-aside to the file of the AO to decide the same afresh. In the set-aside proceedings, the matters which were remanded by the Tribunal were again brought to tax by the AO against which the assessee carried the matter in appeal before the ld CIT(A) where part relief was granted and part addition were confirmed. And with the order of the ld CIT(A) dated 19.09.2011, the matter in the quantum proceedings attained finality and no further appeal was filed by either of the parties. The AO thereafter passed the penalty order on 22.03.2013 u/s 271(1)(c) of the Act which has been confirmed by the ld CIT(A) and against which the assessee is in appeal before us.

8. Coming specifically to the three issues which have been considered for levy of penalty u/s 271(1)(c) as apparent from Para 6 of

the penalty order, it is noted that in respect of addition of Rs 2,29,500/- on account of unsecured loans below Rs 20,000/-, the assessee has not preferred any appeal and the matter has attained finality with the passing of the original assessment order u/s 143(3) dated 28.12.2007.

9. In respect of addition of Rs 10,05,301/- on account of unexplained advances against flat bookings, the assessee preferred an appeal before the ld CIT(A) and thereafter, before the Tribunal wherein the Tribunal confirmed the said addition and no further appeal has been preferred by the assessee before the Hon'ble High Court and the matter has thus attained finality with the passing of the Tribunal order dated 24.04.2009.

10. In respect of addition of Rs 8,30,000/- on account of unsecured loan, the assessee preferred an appeal before the ld CIT(A) and thereafter, before the Tribunal wherein the Tribunal set-aside the matter to the AO and in the set-aside proceedings, the AO again made the addition vide order dated 6.12.2010. The addition so made by the AO in the set-aside proceedings were again challenged before the ld CIT(A) who has confirmed the said addition and no further appeal has been preferred by the assessee before the Tribunal. The matter has thus attained finality with the passing of the ld CIT(A) order dated 19.09.2011.

11. In respect of all the aforesaid three matters, the AO has levied the penalty u/s 271(1)(c) vide his order dated 22.03.2013. The contention which has been advanced by the ld AR is that as far as levy

of penalty on first two matters is concerned, the same is barred by limitation u/s 275 of the Act as the first matter has attained finality with the passing of the assessment order u/s 143(3) dated 28.12.2007 and second matter has attained finality with the passing of the Tribunal order dated 24.04.2009 and since the penalty order has been passed on 22.03.2013, the same is way beyond the limitation period as provided in section 275 of the Act. Per contra, the contention of the Revenue is that since the assessment order, in the course of which the penalty was initiated in respect of all these three matters, was subject matter of appeal before the Tribunal and the Tribunal has set-aside the matter on certain other issues with certain directions, it was premature to impose penalty on receipt of the order of the Tribunal as the matter was pending with the AO and once, the set-aside order was passed by the AO, the same was again subject matter of appeal before the ld CIT(A), and on receipt of order of the ld CIT(A) dated 19.09.2011, the impugned penalty order has been passed on 22.03.2013 which is well within the limitation period as prescribed u/s 275 of the Act.

12. On perusal of the provisions u/s 275 of the Act, we find that the provisions of section 275(1)(b) and (c) are not applicable in the instant case. What is relevant is the provisions contained in section 275(1)(a) of the Act. In terms of section 275(1)(a), it has been provided that no order imposing a penalty under this chapter shall be passed in a case where the relevant assessment order is the subject-matter of an appeal to the Commissioner(Appeals) under section 246A or an appeal to the Appellate Tribunal under section 253, after the expiry of the financial year in which the proceedings, in the course of which action for

imposition of penalty has been initiated, are completed, or six months from the end of the month in which the order of the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, whichever period expires later.

13. By way of proviso to section 275(1)(a), it has been further provided that where the relevant assessment or other order is subject matter of appeal to the ld CIT(A), order imposing penalty shall be passed before the expiry of the financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, are completed, or within one year from the end of the financial year in which the order of the Commissioner (Appeals) is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, whichever period expires later

14. What is therefore relevant to determine is whether the relevant assessment order in course of which action for imposition of penalty has been initiated is subject matter of appeal before the ld CIT(A) and/or before the Tribunal and whether the proceedings have been completed and attained finality or not. In the instant case, it is not disputed that the penalty has been initiated in respect of all the three issues during the course of assessment proceedings with passing of the assessment order u/s 143(3) dated 28.12.2005 and the order so passed by the AO has thereafter been subject matter of appeal before the ld CIT(A) and thereafter, before the Tribunal and in the set-aside proceedings, again the subject matter of appeal before the ld CIT(A). The emphasis of the

legislature is on the assessment order which is subject matter of appeal and not on the individual matters which may or may not be subject matter of appeal as there cannot be individual penalty orders for individual additions rather the penalty order has to be passed taking into consideration all the matters which are subject matter of assessment proceedings and in respect of which the penalty has been initiated.

15. Moving further, it is relevant to note that with the passing of the order of the Tribunal, the assessment proceedings have not attained finality as the Tribunal has remanded two of the matters back to the file of AO for fresh examination and the order so passed by the AO in the set-aside proceedings has again been the subject matter of appeal before the ld CIT(A) and with the passing of the order of the ld CIT(A) and in absence of further appeal by either of the parties, the assessment proceedings are completed and the matter has attained finality and the period of limitation should therefore be counted from the date of receipt of such order of the ld CIT(A) by the Commissioner in terms of proviso to section 275(1)(a) of the Act rather than from the date of receipt of such order of the Tribunal by the Commissioner in terms of section 275(1)(a) of the Act. In this regard, useful reference can be drawn to the decision of the **Hon'ble Delhi High Court** in case of **Salora International Limited vs CIT** [2018] 91 taxmann.com 287 (Delhi) wherein the Hon'ble Delhi High Court was pleased to held as under:

*"11. A plain and textual reading of Section 275(1A) (section 275(1)(a)) clarifies that the expiry of six months prescribed is to be reckoned "from the date of completion of proceedings or from the end of the month in which the order of the CIT(A) or as the case may be the appellate tribunal is received."* ***If the logic of the provision is kept in mind, it is obviously an adjudicatory "order" which culminates in "the proceedings" (i.e. an order that determines inter alia the rights of the parties finally) that is to be deemed a terminus quo for the completion of penalty proceedings.*** *Any other interpretation would inject a great deal of uncertainty because in either case of maintainability of an appeal preferred by either the revenue or the assessee, in the eventuality of withdrawal of that appeal, without an adjudicatory order, the period of limitation would be deemed to subsist. The law abhors uncertainty. Therefore, the dependence of the period of the limitation upon whether an order becomes final at the instance of one party, i.e. that filing and prosecution or withdrawal of an appeal (by one party or the other) would be, in the opinion of the Court one such event which leaves the legal position inchoate and unsatisfactory. Instead, an interpretation that permits certainty should be adopted. Viewed as such, the CIT's order provided a fixed date from which to reckon the end of the period of limitation-some time in early July 1994. The absence of an appeal by the assessee (against the CIT(A)'s appellate adjudicatory order) meant that at least with respect to the amount that it had accepted in the adjudicatory order as an addition, the penalty*

*proceedings survived. As far as the other issue was concerned, perhaps there was no occasion for a further penalty proceeding given that the issue might have been rendered debatable, even in the eventuality of an order favouring the revenue. In other words, as far as deletion was concerned, the assessee definitely was not aggrieved.*

16. In the instant case, the ld CIT(A) has passed the order on 19.09.2011 and the penalty order has thereafter been passed by the AO on 22.03.2013 which is well within the limitation period of one year from the end of financial year in which the order of the ld CIT(A) has been received by the Commissioner. In the result, the contention so advanced by the ld AR in so far as the impugned order is barred by limitation cannot be accepted.

17. Now, coming to contention advanced by the ld AR regarding defect in the show-cause notice issued u/s 271(1)(C) of the Act and in view of correct limb of penalty provisions not been specified showing non –application of mind by the AO, the penalty proceedings should be held as invalid.

18. In this regard, we refer to the notice issued u/s 271 r/w 275 dated 28.12.2007 wherein it has been stated as under:

*"whereas in the course of assessment proceedings for AY 2005-06, it appears to me that you have concealed particulars of your income or furnished inaccurate particulars of such income, you are hereby requested to appear and show cause why an order*

*should not be made imposing penalty u/s 271(1)(c) r/w 274 of the Act."*

19. We therefore find that while issuing the notice u/s 271(1)(c), the specific charge in terms of concealment of particulars of income or furnishing of inaccurate particulars of income is not ascertainable. We now refer to the penalty order dated 22.03.2013, wherein the AO has stated that "in view of aforesaid discussion, it is clearly established and satisfied that the assessee has concealed the income to the tune of Rs 21,14,801/- and is liable for penalty u/s 271(1)(C) of the Act." We therefore find that even though at the time of initiation of penalty proceedings, the AO was not decisive about the specific charge, however while passing the penalty order, the AO has given a clear and specific finding as to how it is a case of concealment of income and which shows apparent consideration and application of mind on part of the AO. In this regard, useful reference can be drawn to the decision of the Third Member in case of HPCL Mittal Energy ltd [2018] 97 taxmann.com 3 (Amritsar-Trib) wherein various decisions relied upon by the ld AR have also been considered and it was held as under:

*" **21.** Apart from the above three situations in which the AO has clear-cut satisfaction, there can be another fourth situation as well. It may be when it is definitely a case of under-reporting of income by the assessee for which an addition/disallowance has been made, but the AO is not sure at the stage of initiation of penalty proceedings of the precise charge as to 'concealment of particulars of income' or "furnishing of inaccurate particulars of income'. In such circumstances, he may use slash between the two expressions*

*at the time of initiation of penalty proceedings. However, during the penalty proceedings, he must get decisive, which should be reflected in the penalty order, as to whether the assessee is guilty of 'concealment of particulars of income' or 'furnishing of inaccurate particulars of such income'. Uncertain charge at the time of initiation of penalty, must necessarily be substituted with a conclusive default at the time of passing the penalty order. If the penalty is initiated with doubt and also concluded with a doubt as to the concealment of particulars of income or furnishing of inaccurate particulars of such income etc., the penalty order is vitiated. If on the other hand, if the penalty is initiated with an uncertain charge of 'concealment of particulars of income/furnishing of inaccurate particulars of income' etc., but the assessee is ultimately found to be guilty of a specific charge of either 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income', then no fault can be found in the penalty order."*

20. In the instant case, the relevant findings of the AO reads as under:

*"10. I have considered the reply of the assessee carefully and found not convincing for the reason that during the course of assessment proceedings & re-assessment proceedings, after giving adequate opportunities, the assessee company could not explain the identity and creditworthiness of the transactions as discussed in length in foreging paras. The assessee did not produce agriculturist from whom loans below 20,000/- was received amounting to Rs. 2,79,500/-, hence it is to say by the AR of the assessee that due to*

*engagement of the assessee in various business activities does not have any weight. Similarly, the assessee has not preferred further appeal before appellate authority against this issue which also established that the assessee had introduced its unaccounted money in its books of accounts in the shape of cash credits shown in the name of various agriculturist below Rs.20,0000/-. The additions made on account of unsecured loan taken through cheque amounting to Rs. 8,30,000/- and on account of unexplained credit in the name of advance against flat booking of Rs.10,05,301/- had been confirmed by the ld. CIT(A) as well as Hon'ble ITAT which also established that the assessee had introduced its unaccounted money in its books of accounts in the shape of cash credits. Further, the facts of the case laws quoted by the AR of the assessee are completely different from the instant case. Thus, it is clear that the assessee company had introduced its undisclosed income to the extent of Rs. 21,14,801/- (Rs. 2,79,500 + 8,30,000 + Rs.10,05,301). Further, it is mentioned here than if the case of the assessee had not been selected under scrutiny then the amount to the extent of Rs. 21,14,801/-, as discussed above, would have not been taxed. Therefore, it is clearly established that the assessee has introduced his undisclosed income by way of introducing unexplained/bogus credits in various forms.*

*11. In view of aforesaid discussion, it is clearly established and satisfied that the assessee has concealed the income of Rs. 21,14,801/- and it is liable for penalty u/s 271(1)(c) of Act 1961. Thus, it is a fit case for levy of penalty u/s 271(1)(c). I therefore, proceed to levy penalty of Rs. 7,73,859/-. "*

21. We therefore find that uncertain charge at the time of initiation of penalty proceedings is followed by a certain charge and definite finding at the time of passing the penalty proceedings as to the concealment of particulars of income and the penalty order so passed cannot be vitiated on the ground of uncertain charge and non-application of mind as so contended by the ld AR.

22. Now, coming to other contention advanced by the ld AR relating to levy of penalty relating to unsecured loan amounting to Rs 8,30,000/-. In this regard, we find that the AO has levied the penalty stating that addition has been confirmed by the ld CIT(A) and the Tribunal which establishes that the assessee had introduced its accounted money in its books of accounts in shape of cash credit. We however find that the assessee carried the matter in appeal before the Tribunal and the Tribunal has set-aside the matter to the file of the AO and the relevant findings are contained at para 6 to 9 of the Tribunal order dated 24.04.2009 which read as under:-

> *"6. The AO noted that during the year the assessee company had taken unsecured loan of Rs. 75,000/- from Shri Dashrat Singh, Rs. 2,00,000/- from Shri Dinesh Sharma, Rs. 1,65,000/- from Shri Roop Singh Rathore, Rs. 3,00,000/- from Shrawan lal and Rs. 90,000/- from Shri Surendera Singh totaling to Rs. 8,30,000/-. The AO has added this amount under section 68 of the Act on the basis that creditors are not assessed to tax and their creditworthiness has not been proved. The contention of the assessee before the ld. CIT(A) were that the loans were taken by cheque and confirmation of Shri roop Singh Rathore and Shri Shrawan Lal were submitted to the AO hence the Ao was not justified in making addition under section 68 only on the basis of*

*the creditors not being assessed to tax and non submission of their bank statements. The ld. CIT(A) has, however, sustained the addition.*

*7. Before the Tribunal, the assessee has reiterated the same arguments that the whole payment of Rs. 8,30,000/- were received by cheque, all creditors confirmed the amount (pages 33 to 37 of the PB), all the transactions are well entered and considered in the books of account and bank balance as on 31.03.2005 shows sufficient fund. It has been further submitted that in case of any doubt, the AO should have issued summon under section 131 to the creditors. Reliance has been placed on the following decisions:-*

*CIT vs. P Mahan Kal (2007) 291 ITR 278 (SC)*
*CIT vs. Hanuman Agarwal (1985) 151 ITR 150 (Pat.)*

*8. The ld. D/R on the other hand has tried to justify the orders of the lower authorities that none of the three requirements of section 68 i.e. identity, creditworthiness of the creditor and genuineness of transaction has been established by the assessee.*

*9. Considering the above submissions, we, in the interest of justice remand the matter to the file of the AO with this direction that if the assessee had filed confirmations of the creditors before the AO, then AO in case of doubt will issue summons to the creditors on the given address to verify the correctness thereof and decided the issue afresh accordingly after affording opportunity of being heard to the assessee. The ground no.2 is thus allowed for statistical purpose."*

23. We therefore find that the assessee has submitted before the Tribunal that the payment have been received through cheque, all creditors have confirmed the amount and filed their confirmations, all the transactions have been entered in the books of accounts and bank

balance show sufficient funds and basis such contentions, the Tribunal had remanded the matter to the file of the AO with the direction that where the assessee has filed the confirmations before the AO, then the AO in case of any doubt will issue summons to these creditors to verify the correctness thereof. And, in the set-aside proceedings, we find that there is no further enquiry or summons issued by the AO to the specified creditors and the findings as given in the original order were reiterated by the AO in the order passed pursuant to directions of the Tribunal. In the above background, we therefore agree with the contention of the ld AR that once the explanation has been submitted by the assessee along with necessary confirmation and other evidences, the onus shifts on the AO to disprove the same by bringing contrary evidence on record and which in the instant case, has not been disproved by the AO and therefore, mere non-acceptance of the explanation so submitted by the assessee can be made a basis for addition in the quantum proceedings, however, the same cannot result in levy of penalty u/s 271(1)(c) of the Act. Therefore, we agree with the contention so advanced by the ld AR regarding levy of penalty on addition of Rs 8,30,000/- and the same is hereby directed to be deleted.

24. No other contention has been advanced on merits of levy of penalty an addition of Rs. 2,79,000/- and Rs. 10,05,301/-. Hence, the levy of penalty on such addition are hereby confirmed.

In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 02/03/2021.

| Sd/- | Sd/- |
|---|---|
| ( संदीप गोसाई ) | (विक्रम सिंह यादव) |
| (Sandeep Gosain) | (Vikram Singh Yadav) |
| न्यायिक सदस्य/Judicial Member | लेखा सदस्य/Accountant Member |

जयपुर/Jaipur
दिनांक/Dated:- 02/03/2021.
*Ganesh Kumar
आदेश की प्रतिलिपि अग्रेशित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- M/s Rasal Builders & Developers Pvt. Ltd., Jaipur.
2. प्रत्यर्थी/ The Respondent- ITO, Ward-3(1), Jaipur.
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur.
6. गार्ड फाईल/ Guard File {ITA No. 287/JP/2017}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar