**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER**
**AND ARUN KHODPIA, ACCOUNTANT MEMBER**

**IT(ss)A No.53/CTK/2013: Assessment Years :2004-05**
**IT(ss)A No.54/CTK/2013: Assessment Years :2005-06**
**IT(ss)A No.55/CTK/2013: Assessment Years :2007-08**
**IT(ss)A No.67/CTK/2013: Assessment Years :2006-07**
**IT(ss)A No.68/CTK/2013: Assessment Years :2008-09**

**ITA Nos.12 & 13/CTK/2014**
**Assessment Years: 2008-09 & 2009-10**

**ITA Nos.210 to 214/CTK/2020**
**Assessment Years: 2004-05-2008-09**

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| Sarosh Yazdani, N-4/135, IRC Village, Nayapalli, Bhubaneswar | Vs. | ACIT, Circle-1(2), Aayakar Bhavan, Rajaswa Vihar, Bhubaneswar. |
| PAN/GIR No.AAUPY 4364 M | | |
| **(Appellant)** | .. | ( **Respondent**) |

**IT(ss)A No.86/CTK/2013: Assessment Years :2004-05**
**IT(ss)A No.87/CTK/2013: Assessment Years :2005-06**
**IT(ss)A No.88/CTK/2013: Assessment Years :2006-07**
**IT(ss)A No.89/CTK/2013: Assessment Years :2007-08**
**IT(ss)A No.90/CTK/2013: Assessment Years :2008-09**

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| ACIT, Circle-1(2), Aayakar Bhavan, Rajaswa Vihar, Bhubaneswar | Vs. | Sarosh Yazdani, N-4/135, IRC Village, Nayapalli, Bhubaneswar |
| PAN/GIR No.AAUPY 4364 M | | |
| **(Appellant)** | .. | ( **Respondent**) |

Assessee by : Shri Sunil Mishra, AR
Revenue by : Shri M.K.Gautam, CIT DR

**Date of Hearing : 03 /11/2022**
**Date of Pronouncement : 03/11/2022**

**O R D E R**

**Per Bench**

**IT(SS) A Nos.53,54,55, 67 & 68/CTK/2013** are the appeals filed by the assessee and **IT(ss) A Nos.86 to 90/CTK/2013** are the appeals filed by the revenue against the separate orders of the ld CIT(A) - 1, Bhubaneswar dated 18.3.2013, in Appeal No. 0358/10-11 for the assessment year 2004-05, dated 19.3.2013 in Appeal Nos.0359/10/-11 and 0361/10-11 for the assessment years 2005-06 & 2007-08, dated 28.3.2013 in Appeal No.0360/10-11 and No.0362/10-11 for the assessment year 2006-07 & 2008-09, respectively.

2. Shri Sunil Mishra, ld AR appeared for the assessee and Shri M.K.Gautam, ld CIT DR appeared for the revenue. Ld CIT DR has filed a written submission, as follows:

> "The assessee is engaged in the business of iron ore raising contracts for M/s. Serajuddin & Co through his proprietary concern namely M/s. Sarosh Aliza Mining. Besides he was also working as a partner in M/s. Serajuddin & Co. A search & seizure operation u/s.132 of the Income Tax Act was carried out on 28.05.2008 at the premises of the assessee.
>
> i.) Notice u/s.l5,3A (a) dated 11.03.2010 was sent through RPAD and same was duly served on the assessee. However the assessee did not file any return of income in response to said notice. The A.O. vide letters dated 16.07.2010 & 03.09.2010 also informed the assessee that since he had already been provided with the extracts of seized documents therefore he should immediately file return of income. But there was no compliance from the assessee. ii.) Notice u/s.l42(l) along with the questionnaire was issued on 26.07.2010 fixing the compliance on 05.08.2010 but there was non-compliance. The assessee neither sought any adjournment nor filed the requisite details. The A.O. thereafter issued a final show-cause notice dated 13.10.2010 informing the assessee that in case of non-compliance, the assessment shall be completed on the basis of material available on record.

In these facts & circumstances, the assessment was completed ex-parte u/s.144 of the Act.

iii.) The search operations also revealed that Shri Sarosh Yazdani was inflating the labour expenses, Power & Fuel charges and other expenses. Even the alleged vouchers for various expenses were also not found. For example, the assessee had claimed labour expenses of Rs.7.57 crores in FY 2006-07 in his profit & loss account (as per original return filed U/S.139(1) of the Act). However from the seized wages register and attendance register (SAM-1, SAM-8, SAM-13 & SAM- 20), that maximum number of labourers employed by the assessee stood at 160 but out of above, as many as 50 to 60 labourers had either left the job or were absent. As per SAM-1, the number of labourers for July,2007 stood at 49 and weekly payment was only Rs.22,625/- in respect of these labourers. Similarly the number of labourers for first week of September (4th September to 9th September), 2007 stood at 72 and weekly payment was only Rs.36,166/- in respect of these labourers. For the last week of September (25th September to 30th September), 2007, the number of labourers stood at 62 and weekly payment was only Rs.37,905/- in respect of these labourers. For the month of August, 2008, (22nd August to 27th August), the number of labourers stood at 55 and weekly payment was only Rs.31,093/- in respect of these labourers. This issue has been discussed by the A.O. on pages-3 to 4 of the assessment order. The A.O. 'also examined the seized wages register SAM-32, wherein bonus of Rs.2,83,240/ only had been paid which corresponds to 20% of total salary payments amounting to Rs.17 lakhs. Thus claim of labour/salary payment made by the assessee was highly inflated.

Even the power & fuel expenses claimed at Rs.5.51 crores were highly inflated. Considering the number of dippers (machineries) employed by the assessee, the average consumption of fuel would not have exceeded 1000 litres per day and even these were utilized for 300 days in that year, the fuel expenses could not have exceeded Rs.90 lakhs. On the other hand, the assessee had claimed power & fuel expenses to the extent of Rs.5.51 crores in FY 2006-07.

iv.) On page-7 of the assessment order, the A.O. has discussed the seized documents belonging to Shri Sarosh Yazdani namely SY-06. It refers to cash withdrawals from bank account of M/s. Sarosh Aliza Mining (proprietary concern of Shri Sarosh Yazdani for the months i.e. April, 2007 to August, 2007. **These handwritten pages contain narration like "Self for adjustment A/c" for different months.** The page-31 of seized document namely SY-06 which is handwritten shows cash withdrawals for total amount of Rs.41,05,752/- for the month of April, 2007. It refers to adjustment account for February and March 2007, the required amount of cheques (two cheques) receipt and cash return and distribution among three partners. As per the same, immediately after the cheques were credited, the entire amount was withdrawn in cash and

adjustment refers to the cash receipt by M/s. Serajuddin & Co. from Sarosh Aliza Mining which has been allocated to the partners of the assessee firm. The cash withdrawn is exactly equal to the aggregate amount paid by cheques for February and March, 2007 to M/s. Sarosh Aliza Mining as per statement prepared under the head "On account payment to contractors" as per RKS/Contractor Payment details/Sheet-1(6) and 1(7). These have been reproduced by the A.O. on page-5 of the assessment order. As against the cheque payments of Rs.19,55,120/- and Rs.21,50,632/- for February and March, 2007 made to M/s. Sarosh Aliza Mining, there is narration "adjustment a/c for Feb. and March, 2007" which tallies with the cash withdrawals made by said Mining Contractor from SBI, Barbil. **This cash** was **not withdrawn for meeting expenses but for adjustment.** The total cash withdrawals were to the extent of Rs.18.26 crores for FY 2007-08 which could not have utilized for meeting expenses. The A.O. asked the assessee to explain the nature of such adjustment entries and purpose of cash withdrawals but there was no compliance by the assessee. This amount was not disbursed to labour or used for meeting day to day expenses as no books of account were found at the time of search at the premises of the assessee on 28.05.2008.

v.) A bunch of loose sheets (SCPL/l containing 10 pages) was found from the computer of M/s. Serajuddin & Co. at Balda Mines. Kindly refer to page-6 of the assessment order. These documents were prepared by Shri N. R. Nayak, GM of Balda mines and it was also duly signed by him on 10.02.2008. These documents were prepared to compare the raising cost before and after installation of screening unit for six mining contractors including M/s. Sarosh Aliza Mining, proprietary concern of the assessee. The average cost of production had been worked out at Rs.146/- per MT and that of the assessee stood at Rs.140/- per MT. As against these rates, the raising cost paid by M/s. Serajuddin & Co. to the assessee @ Rs.650/- per MT and Rs.720/- per MT which showed inflation of the expenses to the extent of 200%.

vi.) The A.O. has discussed on pages-7 & 8 of the assessment order that many incriminating documents were found from the premises of M/s. Serajuddin & Co. during search operations on 28.05.08 which showed that the various mining contractors including the assessee used to pay back the amount in cash to the mine owner as high as 50% to 100% of total receipts for the contract work. For example, seized/impounded documents identified as RKS/Contractors payment details/sheet 1(9), sheet 1(4), sheet 3 etc.

vii.) The A.O. has exhaustively analyzed the impounded/seized material and there is no doubt that the assessee indulged in inflating expenses. The assessee including other contractors had paid back cash ranging from 50% to 100% to M/s. Serajuddin & Co. through a carefully laid down modus-operandi of inflating expenses. **The contractors had no other option but to co-operate and conspire with the mine owner.** The excel

> sheets clearly and unambiguously point towards inflation of expenses and receipt of excess monies in cash from the contractors. Such cash received from the contractors was also allocated among partners and they had also shared the gains.
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> Thus the order of the A.O. estimating NP @20% should be restored and that of the CIT(A) be reversed."

3. At the time of hearing, it was fairly agreed by both the sides that the issues involved in these appeals are squarely covered by the decision of the Co-ordinate Bench of this Tribunal in the case of Dillip Kumar Naik in I**T(ss)A Nos.4 to 8/CTK/2015 for** Assessment Years : 2005-06 to 2009-10 and **C.O. Nos.25 to 29/CTK/2015,** order dated 21.10.2022, wherein, it para 8, it has been held as follows:

> "8. Coming to the issue of percentage of the net profit as determined by the ld CIT(A) at 10%. A perusal of the order of the ld CIT(A) clearly shows that the highest percentage disclosed by the assessee is 6%. This being so, we are of the view that the interest of justice would be served if the estimation of the percentage of net profit is taken at 8% as against 10% directed by the ld CIT(A) and we do so. The findings of ld CIT(A) in regard to adoption of estimation of income of the assessee stands upheld and the estimation of income by the ld CIT(A) at 10% stands reduced to 8%."

4. Here, it must be mentioned that the assessee has filed a chart, which shows the profit percentage is varied in between 5.8% to 7.26% for the assessment years 2004-05 to 2008-09. This being so, we are of the view that respectfully following the decision of the Co-ordinate Bench, on

identical facts in the case of Dillip Kumar Naik (supra), the estimation of 10% as done by the ld CIT(A) stands reduced to 8%.

5. In the result, appeals of the assessee stand partly allowed whereas the appeals of the revenue stand dismissed.

**ITA Nos.12 & 13/CTK/2014_ A.Y. 2008-09 & 2009-10**

6. These are appeals filed by the assessee against the separate orders both dated 6.11.2013 in Appeal Nos.0273/11-12 & 0274/11-12 confirming the levy of penalty u/s.271F of the Act.

7. At the time of hearing, both the sides fairly agreed that the issue is squarely covered by the decision of the Co-ordinate Bench of this Tribunal in the case of S.M.Enterprises in **ITA Nos.10 & 12/CTK/2014** Assessment Years : 2008-09 & 2009-10, order dated 20.10.2022, wherein, the Co-ordinate Bench in paras 10 to 12 have held as follows:

> "10. It was submitted by ld AR that the issue in these appeals is squarely covered by the decision of the Co-ordinate Bench of this ITAT in the case of Gobardhan Matia vs ACIT in ITA Nos.573 & 574/CTK/2013 order dated 22.9.2022, wherein, the Co-ordinate Bench has held in para 4 as follows:
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> > "4. We have considered the rival submissions. The levy/confirmation of penalty is based on the facts of each case. There is no presumption that the assessee is willfully violating the law. It is an admitted fact that notice u/s.153A has been served on the assessee and the assessee is required to file the return within 30 days. It is also an admitted fact that for obtaining of the Xerox copies of the seized document,

> it took more than 2-3 months. Just by obtaining of xerox copies of seized documents, the return cannot be filed. It has to be co-related, verified, examined and reconciled before the return is filed. The filing of return beyond the due date is admittedly invalid return as there is no provision for filing the return belatedly once notice u/s. 153A has been issued. This being so, we are of the view that the assessee had a valid ground for non-filing of return. Accordingly, penalty levied by the AO and confirmed by the ld CIT(A) is deleted."
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> 11. In reply, ld CIT DR vehemently supported the order of the AO and ld CIT(A).
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> 12. We have considered the rival submissions. As it is noticed that the facts in assessee's case are similar to the facts in the case of Gobardhan Matia (supra) in respect of levy of penalty under section 271F of the Act. Respectfully following the decision of the Co-ordinate Bench in the case of Gobardhan Matia (supra), the penalty as levied u/s.271F of the Act by the AO and confirmed by the ld CIT(A) stands deleted."

8. As the facts of the present case are identical to the facts of the case of S.M.Enterprises referred to supra, and also in the case of Gobardhan Matia (supra), respectfully following the decision of the Co-ordinate Bench, in the above two cases, the penalty as levied u/s.271F of the Act by the AO and confirmed by the ld CIT(A) stands deleted.

9. In the result, appeals of the assessee stand allowed.

**ITA Nos.210 to 214/CTK/2020: Assessment Years: 2004-05-2008-09**

10. These are appeals filed by the assessee against the separate orders all dated 17.8.2020 of the ld CIT(A)-1, Bhubaneswar in Appeal Nos.0003 to

0007/15-16 confirming the levy of penalty u/s.271(1)(c) of the Act for the assessment year 2004-05 to 2008-09, respectively.

11. It was the specific submission of ld AR that in respect of ITA No.214/CTK/2020 for the assessment year 2008-09. The impugned assessment year is the specified period and consequently the penalty u/s.271(1)(c) was not leviable. It was fairly agreed by both the sides that this issue is squarely covered by the decision of the Co-ordinate Bench of this Tribunal in the case of S.M.Enterprises in ITA Nos.199, 200 & 202, 233 & 234/CTK/2020 for the assessment years 2004-05 to 2009-2010 order dated 20.10.2022. Ld CIT DR has filed written submission, as follows:

> "i.) The question for adjudication in the present case is that where the Assessing Officer directs initiation of penalty proceedings in the assessment order but in the show cause notice, it is not indicated whether penalty is sought to be imposed for furnishing inaccurate particulars of income or for concealment of income by not striking off the inapplicable portion in the printed notice, whether it would vitiate the penalty proceeding and the consequential order of penalty or not. **This issue has been decided in the favour of Revenue by the Hon'ble Mumbai High Court in the case of CIT vs. Smt. Kaushalya (216 ITR 660) (paras** 7 **to 12). It** was held by the Hon'ble Mumbai High Court that section 274 or any other provision in the Act or the Rules, does not either mandate the giving of the notice or its issuance in a particular form. Penalty proceedings are quasi-criminal in nature. Section 274 contains a principle of natural justice of the assessee being heard before levying penalty. Rules of natural justice cannot be imprisoned in any straight-jacket formula. For sustaining a complaint for failure of principles of natural justice on the ground of absence of opportunity, it has to be established that prejudice is caused to the concerned person by the procedure followed. The issuance of notice is an administrative device for informing the assessee about proposal to levy penalty in order to enable him to explain as to why it should not be done. Mere mistake in the language used or mere non-striking off of inaccurate portion cannot by itself invalidate the notice.
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> ii.) **This issue has also been decided in the favour of Revenue by the Hon'ble Madras High Court in the case of Sundaram Finance**

**Ltd. vs. ACIT** (93 taxmann.com 250) **(para 16).** It was held that even assuming that there was defect in the notice, it had caused no prejudice to the assessee and the assessee clearly understood what was the purport and import of notice issued under Section 274 r/w Section 271 of the Act. Therefore, principles of natural justice cannot be read in abstract and the assessee, being a limited company, having wide network in various financial services, should definitely be precluded from raising such a plea at a belated stage. The Hon'ble Madras High Court also noted **the** decision of Hon'ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton & Ginning Factory (supra) while rendering its decision on the issue. **The SLP against the decision of High Court in this case has also been dismissed by Hon'ble Supreme Court (99 taxmann.com 1**52).

iii.) The satisfaction for initiating the penalty proceedings is recorded by the A.O. in the assessment order. The notice which is being issued u/s.274 is merely to allow the assessee an opportunity of being heard. It is not mandatory to specify the nature of charges in such a notice. It must be borne in mind that no statutory form has been prescribed for such notice. **This issue also stands settled by the decision of Hon'ble Mumbai High Court in the case of Maharaj Garage & Company vs. CIT (400 ITR 292) (para 15)** wherein it was held that the requirement of Section 274 of the Income Tax Act for granting reasonable opportunity of being heard in the matter cannot be stretched to the extent of framing a specific charge or asking the assessee an explanation in respect of the quantum of penalty proposed to be imposed, as has been urged. The assessee was supplied with the findings recorded in the order of re-assessment, which was passed on the same date on which the notice under Section 271(l)(c) was issued, initiating the proceedings of imposing the penalty. The assessee had sufficient notice **of** the action of imposing penalty. Therefore the High Court did not find either any jurisdictional error or unjust exercise of power by the authority, iv.) **Reliance is also placed on the decision of Hon'ble Bangalore ITAT in the case of M/s. Jaysons Infrastructure India Pvt. Ltd. Vs. ITO in ITA No.997/Bang/2015 order dated 09.06.2017 and Shri P.M. Abdulla Vs. ITO in ITA No.1223 & 1224/Bang/2012 dated 17.10.2016** wherein it was held that absence of specific mention in the show cause notice u/s.274 of the Act about the charge u/s.271(l)(c ) of the Act is not fatal to levy of penalty u/s.271(l)( c) of the Act.

**v.) In the case of Earth moving Equipment Service Corporation (84 taxmann.com 51),** the penalty u/s. 271(l)(c) was sustained by the Hon'ble Mumbai IT AT on the ground that the AO therein had levied penalty after due application of mind, in as much as in the assessment order, it was mentioned that penalty proceedings were being initiated for furnishing of inaccurate particulars of income and the penalty was finally levied on the same ground. Further the ITAT held that mere non marking of the relevant clause in the notice is a curable defect, and the action of the revenue **is** rescued by the provisions of section 292BB of the Act, which

cures minor defects in the various notices issued, provided that such notice, in substance and effect, was in conformity with the intent and purpose of the Act. Thus the Hon'ble Bench concluded that penalty could not be deleted on this ground.

vi.) **It must be appreciated that concealment of income is the result of furnishing inaccurate particulars of income.** It is evident that for assessment year 2004-05, the assessee had filed the original return **of** income showing total income of Rs.45,99,790/- on 04.01.2005. The A.O. has computed the total income at Rs.79,24,640/-. **Thus at the time of filing original return, the assessee was guilty of furnishing inaccurate particulars of income. The act of inflating the wages and power/fuel expenses and paying back cash to the extent of 50% against raising bills to M/s. Serajuddin & Co. clearly demonstrated that the assessee had concealed income to that extent. It** has been held by the Hon'ble Jaipur ITAT in the case of Grass Field Farms & Resorts (P) Ltd. vs. DCIT (70 taxmann.com 176) on identical facts that **where notice seeking to levy penalty mentioned both offences, i.e. one was concealing particulars of income and second for furnishing inaccurate particulars of income and since assessee was given adequate opportunity to explain both offences, there was no illegality in levying penalty with reference to only one offence.** It was held that under the facts of the assessee's case, it may attract both the offences i.e. the concealment of income as well as furnishing of inaccurate particulars of income and, therefore, the Assessing Officer rightly initiated the penalty proceedings for both the offences. In the penalty notice also both the offences were mentioned and therefore, the assessee got the adequate opportunity to explain its stand with regard to both the offences. Thereafter the Assessing Officer levied the penalty only for furnishing of inaccurate particulars of income. In these facts & Circumstances, **the** issue was decided in the favour of the Revenue.

The decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra) which was delivered without considering the earlier decision of Hon'ble Mumbai High Court in the case of CIT vs. Smt. Kaushalya (supra) is Per Incuriam and can't be considered as a binding precedent.

vii.) Reliance is also placed on the decision in the case of **Smt Ram Piari Vs CIT** (327 **ITR 318),** wherein the Assessing Officer found undisclosed income from capital gains on account of sale of property and he imposed penalty which was upheld by the Commissioner (Appeals) as well as by the Tribunal. It was held by Honourable Punjab & Haryana High Court that **the contention that the penalty was liable to be set aside on account of the Commissioner (Appeals) describing the action of the assessee as "showing inaccurate particulars, while the Assessing Officer described it as "concealing the particulars" could not be upheld.** The observations of the Commissioner (Appeals) were also in the

context of concealing and mere fact that mention of inaccurate particulars was also made, did not make any difference. **It was clear that the assessee had concealed the particulars of income as well as given inaccurate particulars. The penalty provision was to provide remedy for loss of revenue for which the element of "wilful" concealment was not essential.**

viii.) **It must be appreciated that even where the income is estimated, the A.O. can levy penalty as held by Hon'ble Madhya Pradesh High Court in the case of CIT vs. Smt. Chandrakanta** (205 **ITR 607)** by holding as under:

" The facts stated above clearly disclose that the assessee first showed a loss of Rs. 50,000. Then he revised the return, showing profit of Rs.7,500. Apparently, it has been found that the estimate of the income was incorrect and he had concealed the income and inaccurate particulars were furnished. In our opinion, the case clearly falls under clause (c) of subsection (1) of section 271 of the Act and, therefore, the penalty was levied. We fail to see the logic behind the reasons assigned by the Tribunal to exonerate the assessee from payment of penalty. When the assessee submitted his return and showed a loss of Rs.50,000 and then revised it and showed a profit of Rs.7,500, he had necessarily suppressed the particulars of income and given an incorrect account of his income. It may also be mentioned that the assessee did not maintain books of account. Income had, therefore, to be assessed on estimate basis. That being so, it is difficult to swallow that since the assessee's income was assessed on estimate basis, the assessee was not liable to any penalty. Instead, we find that the reasons assigned by the Tribunal have no basis under the law. We, therefore, have no hesitation in holding that the Appellate Tribunal took an absolutely incorrect view of law by exonerating the assessee from penalty. As we have stated earlier, the assessee did conceal his income and furnished inaccurate particulars and, therefore, was rightly subjected to penalty. In these circumstances, we hold that, on the facts and in the circumstances of the case, the Tribunal was not at all justified in cancelling the penalty levied under the Explanation to section 271(l)(c) of the Income-tax Act. In view of the above finding, question No. 2 need not be answered".

The **Hon'ble Madras High Court in the case of CIT vs. S. Krishnaswamy (219 ITR 607 holding the** same view **observed as under:**

" We have considered the rival submissions on the above aspect. Taking into account the facts found as well as the legal position, we have necessarily to accept the argument of learned counsel for the Revenue and reject that of learned counsel for the assessee. First of all, it is clear to us that this is not a case of the assessing authority estimating the income. As already mentioned, after the search and seizure of the abovereferred to

documents and after the officer found the abovesaid omissions of substantial collections from buses to the extent of Rs.42,334 in one assessment year and Rs.1,01,787 in **the** other assessment year, the assessee came forward to file revised returns, including therein, the abovesaid omissions also. He only claimed certain allowances in relation to the abovereferred to omitted collections. As already seen, to a great extent, the said allowances were given, subject to only one qualification, viz., as against the claim for certain revenue expenditures to the extent of Rs.400 per day, what was allowed was Rs. 300 per day. In such a situation, it cannot be said that the revised assessment made based on the abovesaid revised return, was on an estimated income.

At any rate, even assuming that the revised assessment was based on an estimate made by the assessing authority, it cannot be said that in such a case, there could be no scope for saying that the assessee has concealed his income, warranting penalty under section 271(l)(c). In our opinion, in this regard, the Tribunal has erred in law in assuming that there are two views in the matter. One, as held in the abovereferred to CIT vs. E.V. Rajan [1985] 151 ITR 189 (Mad) ; Cement Distributors Pvt. Ltd. vs. CIT [1966] 60 ITR 586 (Mad) ; A.K. Bashu Sahib vs. CIT [1977] 108 ITR 736 (Mad) ; CIT (Addl.) vs. Bhoopathy (E.) [1978] 113 ITR 188 (Mad) ; Rathnam and Co. vs. IAC [1980] 124 ITR 376 (Mad) and CIT vs. Mir Mohamed Ali [1981] 128 ITR 215 (Mad) **and** another, as held in Bombay Hardware. Syndicate vs. CIT [1978] 114 ITR 586 (Mad) ; (14 ITR 133 (Mad) (sic.)) and Addl. CIT vs. T.K. Perumalswamy [1984] 150 ITR 600 (Mad). **As pointed out in CIT vs. E.V. Rajan [1985] 151 ITR 189 (Mad) at page 195 itself, the "uniform view" taken by this court is that the "penalty provision has been applied even in cases where assessment is made on the basis of an estimate".** In that decision, all the abovereferred to decisions of this court, which took a similar view earlier have also been referred to. Even in a later decision in CIT vs. Balakrishna Textiles [1992] 193 ITR 561 (Mad) relied on by learned counsel for the Revenue, the same view has been reiterated. The relevant observation therein is as follows:

(page 367): "Even if the Revenue had assessed the income at a higher estimate than that furnished by the assessees, it cannot be stated as an inflexible rule that, in all cases, estimated income is not liable to penalty, as it is always open to draw an inference of deliberate underestimate on the facts and circumstances and if there was such an underestimate, an inference of concealment can also be drawn. We, therefore, are unable to appreciate the reasoning of the Tribunal that the estimate of the Revenue being higher than that of the assessees, there can be no concealment."

**The Hon'ble Ahmedabad ITAT in the case of Shyourajsingh B. Chouhan (40 SOT 453) held as under in para-8 of its decision:**

" As is evident from the aforesaid clause (c) of section 271(1) of the Act, the words used are 'has concealed the particulars of his income' **or**

furnished 'inaccurate particulars of such income'. Thus, both in case of concealment and inaccuracy, the phrase 'particulars of income' has been used. The Legislature has not used the words 'concealed his income'. From this it would be apparent that penal provision would operate when there is a failure to disclose fully or truly all the particulars. The words 'particulars of income' refer to the facts which lead to the correct computation of income in accordance with the provisions of the Act. So when any fact material to the determination of an item as income or material to the correct computation is not filed or that which is filed is not accurate, then the assessee would be liable to penalty under section 271(l)(c) of the Act. If the income had to be assessed under section 145 of the Act, then the presumption would be that the income was not properly returned, as held by Hon'ble jurisdictional High Court in CIT vs. Chandra Vilas Hotel [2007] 291 ITR 202 (Guj.). In this decision the Hon'ble High Court found that the assessee was not maintaining its account for six years and every year assessments were framed with the help and assistance of section 145(1) of the Act. Accordingly, the Hon'ble jurisdictional High Court observed that at least some order should have worked as an eye-opener for the assessee and that every year the assessee was repeating the same trend and still it wanted to say that it had not concealed the income or there was no fraud or gross or wilful neglect on its part. In the instant case also, the assessee was not maintaining the accounts during the course of the business year after year and in fact, the assessee was writing the accounts after the close of the year and inflating the expenses so as to show the income at his will. In these circumstances, it does not lie in the mouth of the assessee that it **was** not concealing his income by furnishing inaccurate particulars thereof, as concluded by the Assessing Officer and the Id. CIT(A)".

The Hon'ble Ahmedabad Tribunal further held that there is no substance in the contention that penalty under section 271(l)(c) of the Act cannot be imposed in all circumstances whenever the income was assessed on estimate rejecting the explanation of the assessee. **Even on estimated additions, levy of penalty has been upheld in the case of CIT Vs. Md. Warasat Hussain (171 ITR 405) (Patna High Court), CIT Vs. E.V. Rajan (151 ITR 189)(Madras High Court), CIT Vs. Hoshiarpur Express Transport Co. Ltd. (162 ITR 393) (Punjab & Haryana High Court), CIT Vs. Fazilka Dabwali Transport Co. (P.) Ltd. (178 ITR 656) (Punjab & Haryana High Court), and A.M. Shah & Co. Vs. CIT (238 ITR 415) (Gujarat High Court).** It was further held that even the feeble plea on behalf of the assessee that penalty had been initiated for concealment of income while had been levied for furnishing inaccurate particulars of thereof was not correct since both the Assessing Officer and the CIT(A) had levied penalty because the assessee concealed his income by claiming inflated expenditure i.e., furnishing inaccurate particulars of such claim of expenditure. **The CIT(A) held that the assessee had deliberately manipulated its books of account in such a fashion that there was no other way but to estimate the income of the assessee and that the assessee concealed his income by claiming**

> **the inflated expenditure in his books of account.** The Ahmedabad Tribunal further held that it agreed with the CIT(A) that this was not a case of pure and simple estimation but a case of estimation for the reason that the expenditure claimed was deliberately inflated and there were various wrong claims. In the light of the above discussions, it was held that all the material facts and particulars relating to the assessee's computation of income were never disclosed by the assessee and it was further clear that the explanation offered by the assessee had not been substantiated and as well as it was not found to be plausible and bona fide one and it was against all human probabilities, especially when the conduct of the assessee showed that he had been inflating expenses and writing books well after the close of the year not only in the year under consideration but even in the preceding three assessment years also. In this view of the matter, the levy of penalty was held to be justified. **The Hon'ble Supreme Court in the case of B.A. Balasubramaniam Bros. & Co. vs. CIT [1999]** 236 **ITR 977,** held that penalty can be imposed even on estimated addition also. It was held that where the assessee was not able to discharge the onus which was on it under the Explanation to section 271(l)(c) of the Act. The ITO was justified in imposing penalty, notwithstanding the fact that income was assessed on estimate basis. In view of above facts, the appeal of the assessee is required to be dismissed."

12. As it is noticed that the issue is squarely covered by the decision of the Co-ordinate Bench of this Tribunal in a group concern M/s. S.M.Enterprises referred to supra, wherein, it has been held as follows:

> "5. In respect of penalty levied for the assessment years 2008-2009 & 2009-2010, it was the submission of the ld. CIT-DR that in the assessment order the AO has mentioned that the penalty has been initiated both u/s.271(1)(c) of the Act and u/s.271AAA of the Act. It was the submission that mentioning of the wrong section in the penalty order is a curable defect. It was further submitted that the mistake in the penalty order should not be lead to the cancellation of the penalty order. For this proposition, he placed reliance on the decision of the Hon'ble Supreme Court in the case of T. Ashok Pai, reported in [2007] 161 TAXMAN 340 (SC). It was the submission that inadvertent and bonafide mistake has been held to be ground enough for cancellation of penalty u/s.271(1)(c) of the Act by the Hon'ble Supreme Court, the corollary being a bonafide mistake in mentioning of the section in respect of levy of penalty by the AO should also be treated as bonafide mistake.

6. We have considered the rival submissions. For the assessment years 2008-2009 & 2009-2010, which are the years in respect of which the AO issued notice u/s.271(1)(c) as also penalty notice u/s.271AAA of the Act, but has levied the penalty u/s.271(1)(c) of the Act by its order dated 16.03.2015 and has not levied any penalty u/s.271AAA of the Act is considered, the penalty as levied by the AO is 100% of the tax sought to be evaded. The penalty leviable u/s.271AAA of the Act is only 10% of the undisclosed income. Thus, clearly the intention of the AO was to levy penalty u/s.271(1)(c) of the Act and it cannot be considered as a mistake on the part of the AO. A perusal of the provisions of Section 271AAA of the Act shows that when a search has been conducted on or after 1st June, 2007 but before 1 st day of July, 2012 then for the specified previous year being the previous year which has ended before the date of search but the date of filing of the return u/s.139(1) of the Act has not expired and the assessee has not filed his return as also the year in which the search was conducted are to be considered only u/s.271AAA of the Act. The provisions of Section 271AAA(3) of the Act specifically excludes the provisions of Section 271(1)(c) of the Act for the said two specified previous years. The search in assessee's case having been conducted on 27.09.2008. Two specified previous years are AYs.2008-2009 & 2009- 2010. For these two assessment years, the penalty, if at all leviable, was u/s.271AAA of the Act and not u/s.271(1)(c) of the Act. Consequently, on this ground, the penalty as levied by the AO and as confirmed by the CIT(A) for the said two assessment years, stands deleted. Thus, ITA Nos.233 & 234/CTK/2020 stand allowed.

7. Coming to the appeals filed by the assessee in ITA Nos.199-202/CTK/2020 for AYs. 2004-2005 to 2007-2008, a perusal of the notice issued u/s.274/271(1)(c) of the Act, dated 19.12.2014 for all the above assessment years, it is found that the AO has not struck off the inappropriate words in the penalty notices. A perusal of the decision of the Hon'ble Supreme Court in the case of Dilip N. Shroff, referred to supra, clearly shows that the non-striking off of the inappropriate words in the paragraph deprives the assessee a fair opportunity to explain its stand thereby violating the principle of natural justice. The decision of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) when read with the decision of the Hon'ble Apex Court in the case of Reliance Petro Products Ltd. (supra), would show that the decision in the case of Dilip N. Shroff (supra) continues to hold good in spite of the decision of the Hon'ble Supreme Court in the case of Dharmendra Textiles (supra).

8. Further it is an admitted fact that there are catena of decisions both in favour of the assessee and against the assessee in respect of issue as to whether the penalty u/s.271(1)(c) of the Act is leviable on an estimated income. The penalty admittedly is leviable on the facts of each case. A perusal of present case clearly shows that the estimation of income has been done by the assessee when it filed its return insofar as books are not available. Estimation has been done by the AO when making the

assessment by following a particular method of estimation. This method of estimation by the AO has been disturbed by the ld. CIT(A) who has applied an alternative method of estimation of the assesee's income. The coordinate bench of the Tribunal went further to revise the estimation as done by the ld. CIT(A). A perusal of the assessment order clearly shows that the estimation as done by the AO in the assessment order is not on the basis of any seized documents but by interpretation and presumption drawn out of the various seized documents. Thus, at no stage, it can be said that there has been a contumacious conduct on the part of the assessee, which can lead to the conclusion of concealment of income. In the circumstances, as the income of the assessee has been estimated at all stages and there is no evidence of concealment of income at any of its stages, right from the filing of return to the appeal before the Tribunal, we are of the view that no penalty is leviable.

9. It is further recognised that when there are catena of decision both in favour the assessee and against the assessee, the view in favour of the assessee is to be adopted as has been held by the Hon'ble Supreme Court in the case of Vegetable Products, reported in 88 ITR 192 (SC). In the circumstances, as no concealment has been proved in the case of the assessee, the penalty as levied by the AO and confirmed by the ld. CIT(A) stands deleted. Our decision to delete the penalty also gets support from the fact that the AO has not struck out inappropriate words in the paragraphs of notice issued u/s.274/271(1)(c) of the Act and on account of the fact that income of the assessee has been assessed only on estimation basis and no evidence of concealment of income has been found in the case of the assessee. In the circumstances, all the four appeals of the assessee for AYs.2004-2005 to 2007-2008 stand allowed."

13. Respectfully following the decision of the Co-ordinate bench referred to supra, the penalty levied u/s.271(1)(c) by the AO and confirmed by the ld CIT(A) stands deleted.

14. In the result, all the appeals of the assessee stand allowed.

Order dictated and pronounced in the open court on 3/11/2022.

| | |
|---|---|
| Sd/- | sd/- |
| **(Arun Khodpia)** | **(George Mathan)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Cuttack; Dated 3/11/2022

B.K.Parida, SPS (OS)

**Copy of the Order forwarded to :**

1. The Assessee: Sarosh Yazdani, N-4/135, IRC Village, Nayapalli, Bhubaneswar
2. The Respondent: ACIT, Circle-1(2), Aayakar Bhavan, Rajaswa Vihar, Bhubaneswar
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT-1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

**By order**

Sr.Pvt.secretary
**ITAT, Cuttack**