IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A" DELHI

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
&
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

I.T.As No.2631/DEL/2018
Assessment Years 2008-09

M/s. A2Z Maintenance & Engineering Services Limited, B-404, Central Park, Sector-42, Gurgaon	v.	DCIT, Central Circle-II, Faridabad.
TAN/PAN: AAECA1203A		
(Appellant)		(Respondent)

I.T.A No.939, 940, 941, 942, 943/DEL/2019
Assessment Years 2009-10, 2010-11, 2011-12, 2012-13 & 2013-14

A2Z Infra Engineering Limited, O-116 First Floor, Shopping Mall, Arjun Marg DLF, Phase-I, Gurgaon.	v.	DCIT, Central Circle-II, Faridabad, Haryana.
TAN/PAN: AAECA1203A		
(Appellant)		(Respondent)

I.T.As No.811 & 812/DEL/2019
Assessment Years 2011-12 & 2012-13

DCIT, Central Circle-II, Faridabad, Haryana.	v.	A2Z Infra Engineering Limited, O-116 First Floor, Shopping Mall, Arjun Marg DLF, Phase-I, Gurgaon.
TAN/PAN: AAECA1203A		
(Appellant)		(Respondent)

Assessee by:	Ms. Ritu Kamal Kishore		
Department by:	Shri P. Praveen Sidharth, CIT-DR		
Date of hearing:	07	02	2023
Date of pronouncement:	28	03	2023

O R D E R

PER PRADIP KUMAR KEDIA, A.M.:

The captioned Cross Appeals have been filed at the instance of the Assessee and the Revenue against the separate orders of the Commissioner of Income Tax (Appeals)-III, Gurgaon ['CIT(A)' in short], dated 26.02.2018 and 30.11.2018 arising from the various penalty orders passed by the Assessing Officer (AO) under Section 271(1)(c) of the Income Tax Act, 1961 (the Act) concerning AYs 2008-09, 2009-10, 2010-11 2011-12, 2012-13 and 2013-14 respectively.

2. All the captioned appeals have been heard together and are being disposed of by way of this consolidated order. The respective appeals are dealt with hereunder:

ITA No.2631/Del/2018 AY 2008-09

3. As per the grounds of appeal, the challenge of the assessee against the imposition of penalty of Rs.29,09,607/- are two fold namely (a) lack of justification for imposition of penalty on merits (ii) the imposition of penalty on the strength of vague satisfaction recorded in the assessment order and also on the basis of vague notice issued under Section 274 r.w. Section 271(1)(c) of the Act without clearly specifying the nature of charge levelled against the assessee.

4. We shall first address ourselves on the merits of imposition of penalty.

5. Briefly stated, the assessee is engaged in providing engineering services etc. The search and seizure operation under Section 132 of the Act was conducted on the premises of the group cases including the assessee on 24.04.2012. The assessment was consequently carried out under Section 153A

of the Act. During the course of search operation, a disclosure of Rs.65 lakh was made under S. 132(4) of the Act. The aforesaid disclosure was included the Return of Income (ROI) filed in S. 153A proceedings and the income was assessed. Simultaneously, the Assessing Officer invoked Explanation-5A to Section 271(1)(c) of the Act and imposed penalty on the disclosure of Rs. 65 lakh made under Section 132(4) of the Act and incorporated in the ROI.

6. On perusal of the assessment order framed under S. 153A, it is noticed that the Assessing Officer in paragraph 3 of the assessment order has admitted that the disclosure made under Section 132(4) of Rs.65 lakh was duly included in the return of income and assessed without any demur. The Assessing Officer however observed that without search, such disclosure would not have come and therefore, he is satisfied that assessee is liable to pay penalty under Section 271(1)(c) of the Act. The penalty notice under S. 274 r.w.s 271(1)(c) were issued and impugned penalty order dated 24.08.2015 was framed for the Assessment Year 2008-09 in question wherein Explanation-5A to Section 271(1)(c) was invoked to levy penalty under Section 271(1)(c) of the Act in question.

7. In the first appeal by the assessee, the CIT(A) denied any relief and confirmed the action of the Assessing Officer towards imposition of penalty under Section 271(1)(c) r.w. Explanation-5A thereto of the Act.

8. Further, aggrieved, the assessee preferred appeal before the Tribunal.

9. We have dispassionately considered the rival submissions and material placed before us and adverted to. The solitary issue that arises for consideration is whether the Assessing Officer was justified in imposing penalty under Section 271(1)(c) of the Act towards additional income included in the return filed under Section153A pursuant to search under Section 132 of the Act having regard to the facts and circumstances existing in the case.

9.1 Multiple objections have been raised on behalf of the assessee to assail

the imposition of penalty. The first and foremost objection borne out on behalf of the assessee is that the allegation on the exact nature of default in the order of the Assessing Officer(AO) in the quantum proceedings as well as in the penalty proceedings is completely absent. As contended, neither the 'satisfaction' contemplated under S. 271(1)(c) rws 271(1B) towards any specific default is discernible from the assessment order, nor the consequent penalty notice issued under Section 274 r.w. Section 271(1)(c) spells out any particular limb of default specified in S. 271(1)(c) of the Act. Both assessment order as well as the penalty notice omits to firmly allege any particular default committed by the Assessee. No strike off of irrelevant portion in the penalty notice has also been carried out by the AO. The Assessee thus contends that in the absence of any satisfaction formed in the course of assessment proceedings, the directions for initiation of penalty proceedings in the assessment order itself is bad in law.

9.2 To deal with legal objection, it may be relevant to capsule the law in this regard.

9.2.1 A bare look at the provisions of Section 271(1)(c) of the Act shows that satisfaction of the concerned tax authority to the effect that the assessee has either 'concealed the particulars of income' or 'furnished inaccurate particulars of income' is the condition precedent for levy of penalty and such satisfaction must be arrived it in the course of any proceedings under the Act. These are the two eventualities or to say two limbs which empowers the AO to impose the penalty u/s 271(1)(c) of the Act. These two terms holds two distinctive meanings and carry different connotations. The two expressions cannot be interchanged or interpreted for one another, as has been held in several judgments including *Shri T. Ashok Pai vs. CIT (2007) 292 ITR 11 (SC); Dilip N Shroff v. JCIT 291 ITR 519 (SC)*. As both the limbs i.e. 'concealment of particulars of income' and 'furnishing inaccurate particulars

of income' carry different connotations, it is incumbent upon the AO to satisfy himself before initiation of penalty proceedings that the case of the assessee falls either under the first limb or under the second limb. A mandatory presence of the requisite 'satisfaction' of the AO before initiating the penalty proceedings has been affirmed by the courts. A reference is made to *CIT v. S.V. Angidi Chettiar (1962) 44 ITR 739 (SC); D.M. Manasvi v. CIT [1973 AIR 22] (SC); CIT v. Manjunatha Cotton and Ginning Factory [359 ITR 565] [Kar.]* in this regard.

9.2.2 Hence, in the backdrop of judicial pronouncements, 'satisfaction' of the AO *vis a vis* the nature of default is a *sine qua non* and required to be indicated by express assertion to this effect in the course of assessment proceedings. Conventionally, to comply with the requirement of law, the 'satisfaction' towards exact nature of default committed by Assessee is recorded in the assessment order and in the penalty notice issued in this regard by striking off the inapplicable portion in the notice u/s 274 r.w.s. 271(1)(c) of the Act.

9.2.3 Significantly Section 271(1B) was inserted by Finance Act, 2008 with retrospective effect from 1-4-1989 which also addresses the legislative intent on the subject matter. S. 271(1B) merely intends to provide latitude to the revenue towards manner of recording satisfaction in the course of assessment proceedings. By virtue of insertion of S. 271(1B), a mere direction of AO without spelling out the process of deriving satisfaction qua a default would sufficiently meet the requirement of S. 271(1)(c) for initiation of penalty proceedings. However, the direction qua a specific default continues to be mandatory despite insertion of S. 271(1B) of the Act. To understand the legislative intent, it may be pertinent to refer to the 'Notes on Clauses' of Finance Bill, 2008 on the enactment of S. 271(1B) which reads as under:

"Clause 48 seeks to amend section 271 of the Income-tax Act, which relates to failure to furnish returns, comply with notices, concealment of income, etc.

Under the existing provisions contained in Chapter XXI the Assessing Officer is required to be satisfied during the course of penalty proceedings. Legislative intent was that such a satisfaction was required to be recorded only at the time of levy of penalty and not at the time of initiation of penalty. However, some of the judicial interpretations on this issue are favouring the view that satisfaction has to be recorded at the time of initiation of penalty proceedings also.

It is therefore proposed to insert a new sub-section (1B) in section 271 of the Income-tax Act so as to provide that where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and if such order contains a direction for initiation of penalty proceedings under sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under sub-section (1).

This amendment will take effect retrospectively from 1st April, 1989."

9.2.4 As self evident from the Memorandum to the Finance Bill 2008, the new section 271(1B) was inserted with the intention to give validity to the 'satisfaction' made by the Assessing Officer on the basis of a simple direction to this effect without any thing more. However, the directions which tantamount to satisfaction must be with reference to a specific charge against the assessee by choosing the appropriate limb as contextually applicable.

9.2.5 The constitutionality of the above amendment was challenged in the Hon'ble Delhi High Court in the case of *Madhushree Gupta v. UOI [WP (C) No. 5059 of 2008]*. While contemplating on the constitutionality of the said amendment, the Hon'ble High Court interpreted the provisions of section 271(1B) in conjunction with section 271(1)(c) and made very important observations as noted hereunder:

"The contra-submission of the learned ASG that prima facie satisfaction of the Assessing Officer need not be reflected at the stage of initiation but only at the stage of imposition of penalty is in the teeth of Section 271(1)(c) of the Act. Section 271(1)(c) has to be read in consonance of Section 271(1B). The presence of prima facie satisfaction for initiation of penalty proceedings was and remains a jurisdictional fact which cannot be wished away as the provision stands even today, i.e., post amendment. If an interpretation such as the one proposed by the Revenue is accepted then, in our view, the impugned provision will fall foul

of Article 14 of the Constitution as it will then be impregnated with the vice of arbitrariness. The Assessing Officer would in such a situation be in a position to pick a case for initiation of penalty merely because there is an addition or disallowance without arriving at a prima facie satisfaction with respect to infraction by the assessee of clause (c) of sub-section (1) of Section 271 of the Act. A requirement which is mandated by the provision itself.

15.7 Learned ASG also sought to place reliance on the Memorandum as well as Clause 48 of the Notes on Clauses appended to the Finance Act, 2008. Even though both the Memorandum as well as Notes On Clauses refers to the conflict in judicial opinion and gives that, as the reason for insertion of the impugned provision, in our opinion, in sub-section (1B) of Section 271 does not do away with the principle that the prima facie satisfaction of the Assessing officer must be discernible from the order passed by the Assessing Officer during the course of assessment proceedings pending before him."

14. Accordingly, in view of the above judgment of the Hon'ble Delhi High Court, it has been clearly set out that mere direction of the Assessing Officer in his Assessment Order stating that 'penalty provisions are initiated separately', would not be sufficient to attract the provisions of subsection (1B) of section 271 of the Act. In order to qualify for deem satisfaction, the Assessing officer has to also mention as to which limb of subsection (c) of section 271 of the Act has been charged on the Assessee in order to satisfy the provisions of section 271(1B). By the same token, vague satisfaction by mentioning 'concealment of particulars or 'furnishing particulars' that is both limbs which are distinct would tantamount to lack of application of mind and no satisfaction qua the exact nature of default.

9.2.6 The ratio in *Madhushree Gupta v. UOI* was later adopted by the Hon'ble Karnataka High Court in the case of *CIT v. Manjunatha Cotton and Ginning Factory (359 ITR 565)* which reiterated that the AO must record a categorical finding regarding the charge alleged against the assessee i.e. 'concealment of particulars of income' or in the alternative, 'furnishing of inaccurate particulars of income' in the assessment order passed by him.

9.2.7 Noticiably, the Hon'ble Karnataka High Court in its later decision in the case of *CIT v. MWP Ltd. [ITA No. 332 of 2007]* held that phrases like 'penalty proceedings are being initiated separately' or 'penalty proceedings u/s 271(1)(c) are initiated separately' do not comply with the meaning of the word 'direction' as contemplated in amended section 271(1B) of the Act.

9.2.8 In view of the above judicial pronouncements, both pre and post insertion of S. 271(1B), the position of law emerges is that for initiation of

penalty proceedings, the assessment order must categorically record the specific charge or default alleged. Failing to do so or where the allegation of default committed is vague or non specific, the so called deemed satisfaction contemplated under S. 271(1B) can not be validated in law.

9.3 On facts, as quoted in the assessment order in the present case, the averments concerning directions and consequent deemed satisfaction of the AO under S. 271(1B) reads as *" Hence, I am satisfied that penalty u/s 271(1)(c) of the Income Tax Act has to be initiated for which notice u/s 274 r.w.s. 271(1)(c) is being issued separately"*. Manifest as it is, the AO has most casually initiated the penalty proceedings without choosing to specify any limb. Clearly, the act of the AO is vitiated by the non application of mind about the nature of default and, in consequence, vitiates the 'satisfaction' contemplated under section 271(1)(c) of the Act. As observed in preceding para, the formation of satisfaction is not a mere formality or an empty ritual. In the present case, the so called 'satisfaction' of the AO in the assessment proceedings has not been tied up with any positive finding towards the exact nature of default and hence, the so called satisfaction is mechanical & illusory and thus cannot be countenanced in law.

9.4 This apart, the notice issued to the Assessee under s. 274 r.w.s. 271(1)(c) also does not strike off the inappropriate part and a vague notice showing tentative nature of default in the form of either/or has been issued to the Assessee. The penalty proceedings sans strike off in the penalty notice and also in the assessment order thus is wholly unsustainable in law.

9.5 We thus find apparent merit in the plea of the assessee. The Section 271(1)(c) r.w. Section 271(1B) clearly imposes duty on the Assessing Officer to record a 'satisfaction' toward the nature of default in the course of the

assessment proceedings before initiation of penalty proceedings. The nature of default is neither traceable from the penalty notice nor from the directions in the assessment order. Thus, in the absence of satisfaction *qua* the nature of default committed, the initiation of penalty proceedings itself is a complete non-starter and consequent imposition of penalty is clearly vitiated in law. The imposition of penalty in question is thus liable to be quashed and set aside on this ground alone.

10. We shall however also advert to another facet of the plea raised on behalf of the assessee while assailing imposition of penalty. A plea has been *inter alia* raised on behalf of the assessee towards non fulfillment of pre-requisites before invoking Explanation-5A to Section 271(1)(c) of the Act. As pointed out on behalf of the assessee, in order to invoke Explanation-5A, the assessee, in the course of search, must be found to be either (a) owner of assets in the nature of any money, bullion, jewellery or other valuable articles or things etc or in the alternative (b) the income is deduced on the basis of any entry in the books of account or other documents or transactions which represents income of the assessee. In the present case, the penalty flows from a mere disclosure in the course of statement recorded under Section 132(4) of the Act at the time of search operation. No averments are found in the assessment order or in the penalty order to the effect that any asset as specified in Explanation 5A(i) has been found or income is based on entry in any books of account or other documents or transaction referred under clause (ii) to Explanation 5A which can be said to correspond with such declaration.

10.1 On appraisal, we find force in the plea of the assessee for non applicability of Explanation-5A in the peculiar facts of the case. It is trite that the Explanation 5A being penal in nature requires strict construction. The pre-requisites towards applicability of Explanation-5A has not been demonstrated

by the Revenue either in the penalty order or the first appellate order thereon.

10.2 Thus, the imposition of penalty under the shelter of Explanation 5A is clearly without sanction of law.

11. In conclusion, we find merit in the plea of the assessee on both counts. Consequently, the order of the CIT(A) is set aside and the penalty order seeking to impose penalty in question stands quashed.

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

ITA No.939/Del/2019 (Assessment Year 2009-10) :

13. Pursuant to search, the assessment was framed under Section 153A of the Act vide assessment order dated 04.02.2015 in the Assessment Year 2009-10 also,. As per the assessment order, the assessee offered a disclosure of Rs.1,56,00,000/- toward undisclosed income in the statement recorded under Section 132(4) of the Act. Similar to AY 2008-09 supra, the aforesaid amount was included by the assessee in the return of income filed under Section 153A of the Act. The penalty proceedings were initiated on such disclosure made in the ROI, without making any reference to the nature of default committed by the assessee, i.e., whether the alleged default is 'concealment of particulars of income' or furnishing of inaccurate of particulars of income'. Pertinently, the directions of AO in the assessment order towards initiation of penalty proceedings reads as " *I am satisfied that penalty u/s 271(1)(c) of the Income Tax has to be initiated for which notice u/s 274 r.w.s. 271(1)(c) is being issued separately"* After framing the assessment, a notice under Section 274 r.w. Section 271(1)(c) was also issued without showing the specific charge/nature of default alleged against the assessee. Consequently, penalty order dated 12.03.2018 was framed whereby penalty of Rs.53,02,440/- was imposed in

respect of the aforesaid undisclosed income offered on the basis of statement under Section 132(4) of the Act.

13.1. The facts and issue in the present case is identical to ITA No.2631/Del/2018 relevant to Assessment Year 2008-09(supra). The nature of default being absent in the course of assessment proceedings, the initiation of penalty proceedings is bad in law. The penalty order passed by the Assessing Officer is liable to be cancelled on this score alone.

13.2 On merits, it is yet again seen that the sole reason for imposition of penalty is that the disclosure would not have come in the absence of search proceedings. We are unable to find any substance in the approach adopted by the Assessing Officer. The imposition of penalty under Section 271(1)(c) r.w. Explanation 5A thereon is dependent upon the conditions enjoined in Explanation-5A therein. The penalty order is unreasoned and does not make any discussion on how the condition of Explanation-5A is satisfied. In essence, the penalty order is vague and cryptic on essential aspects. The First Appellate Authority is also silent on the fulfillment of conditions enumerated in Explanation-5A. No specific reference to any asset or documents, which may label the alleged concealment of income, is found. The addition and consequent penalty appears to be on the basis of surrender made alone. It is true that Explanation-5A provides an exception and departure to the general rule that a concealment is committed vis-à-vis the return filed and the Explanation 5A can be invoked towards undisclosed income found in the course of search despite its subsequent inclusion in ROI subject however to the fulfillment of specific conditions.

13.3 The conditions provided in Explanation-5A are not shown to have been satisfied in any manner. Hence, in parity with ITA No.2631/Del/2018, Assessment Year 2008-09 in identical fact situation, the plea of the assessee

succeeds. The first appellate order is set aside and the Assessing Officer is directed to delete the penalty in question.

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

ITA No.940/Del/2019 Assessment Year 2010-11

15. The factual matrix in AY 2010-11 is also identical to penalty appeals in AY 2008-09 and 2009-10 (supra).

15.1 As per the assessment order dated 18.12.2015 relevant to Assessment Year 2010-11 in question also, pursuant to search under Section 132 dated 24.04.2012, the Assessing Officer made additions on various grounds and initiated penalty proceedings under Section 271(1)(c) of the Act without any specific nature of charge and without showing satisfaction in the assessment order about the nature of default committed by the assessee. The notice issued under Section 274 r.w. Section 271(1)(c) was also found to be vague and without showing any specific charge against the assessee. The directions of AO in the assessment order towards initiation of penalty proceedings extracted as " *penalty proceedings u/s 271(1)(c) is initiated separately on account of additions made under para…….. A notice u/s 274 read with section 271(1)(c) of the Act is also enclosed"*

15.2 In the absence of nature of default discernible from the directions of AO at the time of framing the assessment order, consequent penalty proceedings itself is unsustainable in law. In parity with ITA no. 2631/D/2019 and 939/D/2019 supra, the entire penalty proceedings is void *ab initio* and consequent penalty order is bad in law.

15.3 Likewise, for the similarity of reasons the conditions of Explanation-5A has not been shown to be satisfied. Hence, the penalty is not sustainable on merits either.

16. Consequently, we set aside the first appellate order and direct the Assessing Officer to delete the penalty imposed under Section 271(1)(c) of the Act.

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

ITA No.941/Del/2019 Assessment Year 2011-12

18. As per the captioned appeal, the assessee has challenged imposition of penalty against the additions of Rs.5,77,02,769/- on account of disallowance of deduction claimed under Section 35D of the Act and additions of Rs.84,94,115/- towards disallowance of speculative business loss claimed by the assessee. The Assessing Officer imposed penalty of Rs.2,19,89,082/- under Section 271(1)(c) of the Act. In the first appeal, the CIT(A) deleted the penalty imposed on account of speculative loss but however sustained the penalty on disallowance of deduction claimed under Section 35D of the Act.

18.1 The appeal of the Revenue against the partial relief granted by the CIT(A) was stated to have been dismissed by the ITAT. We are thus left with the sustainability of penalty on disallowance under Section 35D of the Act. While framing the assessment order, the Assessing Officer *inter alia* observed that '*further also satisfied that the assessee has concealed his income or filed inaccurate particulars to the extent' as discussed in paragraphs 4, 5, 6 and 7 and thereby liable for initiation of penalty under Section 271(1)(c) of the Act*.' Thus, in the light of understanding on law developed in ITA No. 2631/D/2019 (supra), it is apparent from the directions of the Assessing Officer towards deemed satisfaction of default against the assessee is totally vague and unintelligible *qua* the nature of default and thus totally unsustainable in law. To reiterate, it is not known whether the satisfaction is qua 'concealment of particulars' or towards 'furnishing inaccurate particulars of income'. While drawing the satisfaction, the charge against the assessee is not known.

18.2 Coupled with this, similar to other appeals supra, the notice issued under Section 274 r.w. Section 271(1B) is vague and non-descript and does not meet the requirement of law.

19. Hence, the penalty order framed without requisite satisfaction towards nature of default at the time of initiation of penalty proceedings is outside the sanction of law and thus deserves to be quashed.

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

ITA No.943/Del/2019 Assessment Year 2013-14

21. The facts in issue are identical to ITA no. 941/D/2019 concerning AY 2011-12 supra. The penalty in the instant case has also been imposed on account of disallowance of deduction claimed under Section 35D of the Act amounting to Rs.5,77,02,769/- and disallowance of speculative business loss amounting to Rs.39,96,102/-.

22. Similar to ITA 941/D/2019 supra, the CIT(A), in first appeal, granted partial relief and deleted penalty imposed on account of speculative loss.

23. The assessee is in appeal before Tribunal against the penalty of Rs.1,87,47,620/- on account of disallowance of deduction of Rs.5,77,02,769/- under Section 35D of the Act.

24. The facts and the issue are identical to ITA No.941/Del/2019 concerning Assessment Year 2011-12. No specific nature of default has been alleged in assessment order and also in penalty notice. Hence, in parity with the process of reasoning adopted in Assessment Year 2011-12, the penalty imposed by the Assessing Officer stands deleted.

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

ITA No.811/Del/2019 Assessment Year 2011-12

26. As per the captioned appeal, the Revenue has challenged the reversal of penalty imposed under Section 271(1)(c) of the Act by the Assessing Officer towards wrong claim of speculative loss of Rs.84,94,515/- as business loss.

27. Briefly stated, the Assessing Officer while framing the assessment *inter alia* observed that the assessee has claimed a loss on forward commodity trading amounting to Rs.2,33,69,140/- for Assessment Year 2012-13 and also Rs.84,94,515/- for Assessment Year 2011-12 in question. In response to inquiry on the loss claimed, the assessee-company replied before the Assessing Officer that it has done arbitrage in forward marketing trading in steels and aluminum which are used in the business of the assessee-company to hedge and safeguard against the losses which may arise in the ordinary course of business. It was thus claimed that loss on forward commodity in the nature of hedging transaction is excluded from the purview of definition of speculative transaction provided under Section 43(5) of the Act and thus the loss has been rightly claimed as business loss. The Assessing Officer however treated the loss on forward trading to be speculative losses while framing the assessment under Section 153A of the Act. In effect, loss was treated as 'speculative loss' by virtue of legal fiction of S. 43(5) of the Act instead of 'business loss' and consequently the set off of such loss was not allowed against the normal business income as per the scheme of the Act. Having made the addition/disallowances, the Assessing Officer observed that *'I am satisfied that the assessee has concealed income or filed inaccurate particulars as discussed in paragraphs 4, 5, 6 and 7 and thereby liable for initiation of penalty under Section 271(1)(c) of the Act.* A penalty notice under Section 274 r.w. Section 271(1)(c) was issued and penalty @ 100% on such additions were made.

28. Aggrieved, the assessee preferred appeal before the CIT(A). The CIT(A) referred to the judicial pronouncements and observed that mere treatment and re-classification of claim towards business loss as speculative loss by the Assessing Officer did not automatically warrant inference on concealment of income as alleged. The operative paragraph of the order of the CIT(A) granting relief from penalty on the issue reads as under:

> *"5.3.1 (b) Addition of Rs. 84,94,115/- on account of disallowance of loss on forward commodity*
>
> *5.3.2 During the year under consideration, the appellant had incurred a loss of Rs. 2,33,69,140/- on forward trading in commodities. The AD treated the transaction as speculative loss and therefore did not allow the loss. This disallowance was upheld by CIT(A).*
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> *Thereafter, A0 imposed penalty u/s 271(1)(c) of the Act on this disallowance.*
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> *5.3.3 In the case of DCIT v/s Shree Ram Electrocast (P) Ltd [2017] 84 taxmann.com 63 (Kolkata-Trib), Hon'ble ITAT has held that merely because losses were not allowed to be set off against normal business income and was treated as speculative loss, it was only a change of sub-head loss and not furnishing of inaccurate particulars of income invoking penal provision.*
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> *The Hon'ble ITAT discussed the issue as follows:-*
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> *"This issue is squarely covered in favour of the assessee by the various judicial pronouncements cited by the assessee. In one of such cases, namely CIT -vs.- SPK Steels Put.*
>
> *Limited [270 IT 156 (M.P.)], it was held by the Hon'ble Madhya Pradesh High Court that penalty under section 271(1)(c) was not eligible in respect of disallowance of assessee's claim for set off of share trading loss by treating the same as speculative in nature as per Explanation to Section 73 on the basis of preliminary details furnished by the assessee along with the return of income as the assessee could not be said to have filed inaccurate particulars or concealed particulars of his income, which was chargeable to tax.*
>
> *In the case of CIT -vs.- Auric Investment & Securities Limited /310 ITR 121 (Delhi)] before the Hon'ble Delhi High Court, the claim of the assessee for set off of share trading loss against other income of non speculative nature was disallowed by the Assessing Officer by treating the same as the loss of speculative nature by invoking the Explanation*

to section 73. The Assessing Officer also imposed penalty under section 271(1)(c) on the ground that the assessee had furnished inaccurate particulars of income to the extent of making a wrong claim for set off of share trading loss against normal income. Hon'ble Delhi High Court, however, held that the penalty imposed by the Assessing Officer under section 271(1)(c) was not sustainable as mere treatment of business loss as speculation loss by the Assessing Officer did not automatically warrant inference of concealment of income and there was nothing on record to show that in furnishing its return of income, the assessee had either concealed its income or had furnished any inaccurate particulars of income. Similarly in the case of CIT -vs.- Bhartesh Jain [323 ITR 358 (Delhi)], the Hon'ble Delhi High Court held that mere treatment of business loss as speculation loss would not justify levy of penalty under section 271(1) (c).

Keeping in view the ratio of the judicial pronouncements relied upon by the learned counsel for the Assessee, which decisions are squarely applicable in the present case, we find no infirmity in the impugned order of the Id. CIT(Appeals) cancelling the penalty imposed by the Assessing Officer under section 271(1)(c) and upholding the same, we dismiss this appeal filed by the Revenue.

In view of the facts of the case in this regard and the judicial pronouncements relied upon on this issue, the penalty on addition related to disallowance of deduction claimed under Section 35D of the Act is confirmed."

29. Aggrieved by the reversal of penalty imposed, the Revenue has preferred appeal before the Tribunal.

30. We have heard the rival submissions on the issue and perused the material available on record.

31. At the outset, we have already opined in cross appeal of the Assessee in ITA No. 941/Del/2019 for Assessment Year 2011-12 in question that the necessary 'satisfaction' desired under Section 271(1)(c) r.w. Section 271(1B) is clearly absent in the present case. Thus, where the penalty order itself stands quashed for the reasons mentioned in cross appeal of the assessee, the appeal of the revenue is rendered infructous and thus liable to be dismissed *in limine*.

32. Adverting to merits of the penalty imposed, we find that the Assessing

Officer has changed the character of the loss from 'business loss' to 'speculative loss' both of which are assessable under the same head of income, i.e., income from business / profession notwithstanding restrictive rules applicable for set off of speculative losses. While it is the case of the assessee that the loss has arisen from the activity of hedging and thus do not fall within the sweep of deeming fiction of S. 43(5) of the Act, the Assessing Officer disputed the claim of the Assessee on the ground that assessee is only a broker and does not require any hedging. On this point of difference, the loss has been reclassified from business to speculative loss. Thus, the loss arising on transaction of trading has not been disputed per se but the character of loss is subject matter of dispute. On such backdrop, the CIT(A) has applied the principles culled out from judicial pronouncements at the first appellate stage and found that the assessee is not exigible for penalty.

33. We observe, that the judgment rendered in the case of *CIT Vs. Auric Investment & Securities Ltd., 310 ITR 201 (Del)* is directly on the issue. Similar view has also been taken by the Hon'ble Delhi High Court in *CIT vs. Bhartesh Jain, 235 CTR 220*. The Hon'ble High Court in both the cases have unequivocally held that penalty levied on account of additions made due to change of treatment of business loss as claimed by the assessee to speculative loss as determined by the Assessing Officer would not justify imposition of penalty under Section 271(1)(c) of the Act. Hence, in the light of judgment rendered in these cases, the penalty is not justified even on merits.

34. The penalty action of AO is unsustainable in law on both counts, i.e., lack of satisfaction at the time of initiation of penalty proceedings as well as absence of any concealment on merits. We thus see no error in the order of the CIT(A). Consequently, we decline to interfere with the order of the CIT(A).

35. In the result, the appeal of the Revenue is dismissed.

ITA No.812/Del/2019 Assessment Year 2012-13

36. As per its grounds of appeal, the Revenue has challenged the order of the CIT(A) towards deletion of penalty under Section 271(1)(c) of the Act imposed on the assessee for wrongly claiming speculative loss of Rs.2,33,69,140/- as business loss. The CIT(A) has adjudicated the issue in favour of the assessee and reversed the penalty imposed as under:

> *"5.3.1 (b) Addition of Rs. 2,33,69,140/- on account of disallowance of loss on forward commodity*
>
> *5.3.2 During the year under consideration, the appellant had incurred a loss of Rs. 2,33,69,140/- on forward trading in commodities. The A treated the transaction as speculative loss and therefore did not allow the loss. This disallowance was upheld by CIT(A).*
>
> *Thereafter, AO imposed penalty u/s 271(1)(c) of the Act on this disallowance.*
>
> *5.3.4 In the case of DCIT v/s Shree Ram Electrocast (P) Ltd (20171 84 taxmann.com 63 (Kolkata-Trib), Hon'ble ITAT has held that merely because losses were not allowed to be set off against normal business income and was treated as speculative loss, it was only a change of sub-head loss and not furnishing of inaccurate particulars of income invoking penal provision.*
>
> *The Hon'ble ITAT discussed the issue as follows:-*
>
> *"This issue is squarely covered in favour of the assessee by the various judicial pronouncements cited by the assessee. In one of such cases, namely CIT -vs.- SPK Steels Pvt. Limited (270 ITR 156 (M.P.)], it was held by the Hon'ble Madhya Pradesh High Court that penalty under section 271(1)(c) was not eligible in respect of disallowance of assessee's claim for set off of share trading loss by treating the same as speculative in nature as per Explanation to Section 73 on the basis of preliminary details furnished by the assessee along with the return of income as the assessee could not be said to have filed inaccurate particulars or concealed particulars of his income, which was chargeable to tax.*
>
> *In the case of CIT -vs.- Auric Investment & Securities Limited 310 IT 121 (Delhi)] before the Hon'ble Delhi High Court, the claim of the assessee for set off of share trading loss against other income of non speculative nature was disallowed by the Assessing Officer by treating the same as the loss of speculative nature by invoking the Explanation to section 73. The Assessing Officer also imposed penalty under section 271 (1)(c) on the ground that the assessee had furnished inaccurate particulars of income to the extent of making a wrong claim for set off of share trading loss against normal income. Hon'ble Delhi High Court, however, held that the penalty imposed by the Assessing Officer under section 271(1)(c) was not sustainable as mere treatment of business loss as speculation loss by the Assessing Officer did not automatically warrant inference of concealment of income and there was nothing on record to show that in furnishing its return of income, the assessee had either concealed its*

income or had furnished any inaccurate particulars of income. Similarly in the case of CIT -vs.- Bhartesh Jain [323 IT 358 (Delhi)], the Hon'ble Delhi High Court held that mere treatment of business loss as speculation loss would not justify levy of penalty under section 271(1)(c).

Keeping in view the ratio of the judicial pronouncements relied upon by the learned counsel for the Assessee, which decisions are squarely applicable in the present case, we find no infirmity in the impugned order of the Id. CIT(Appeals) cancelling the penalty imposed by the Assessing Officer under section 271(1)(c) and upholding the same, we dismiss this appeal filed by the Revenue."

In view of the facts of the case and the judicial pronouncements relied upon on this issue, the penalty on this addition cannot be sustained and hence deleted.

5.3.5 (c) Addition of Rs. 6,60,000/- made on account of ingenuine claim of guest house rent

The appellant had claimed Rs. 6,60,000/- on account of rent paid for guest house which was disallowed by the A0 on the ground that same has never been used as guest house. The appellant neither during assessment proceedings not appellate proceedings filed any proof to prove the contention that the property for which rent of Rs. 6,60,000/- was in fact used as a guest house for the company during the year under consideration and the addition was confirmed by the CIT(A).

As the appellant had furnished inaccurate particulars regarding the same, penalty w/s 271(1)(c) of the Act on this addition has been imposed by the AO. It is apparent that the guest house rent claimed by the appellant was not genuine as the same could not be backed by any evidence and appellant had filed inaccurate particulars with regard to the same. Hence penalty on this addition is confirmed.

5.4 Ground No.6 and 7 are general in nature and hence not adjudicated."

37. The facts in issue are identical to ITA No.811/Del/2019 concerning Assessment Year 2011-12 (supra). Hence, the reasoning adopted in ITA No.811/Del/2019 Assessment Year 2011-12 shall apply *mutatis mutandis* in the present case also. Hence, no interference with the order of the CIT(A) is called for.

38. In the result, the appeal of the Revenue is dismissed.

ITA No.942/Del/2019 Assessment Year 2012-13

39. The captioned Cross Appeal has been filed by the assessee towards levy of penalty on additions of Rs.5,77,02,769/- on account of disallowance of

deduction under Section 35D of the Act. The assessee has also challenged imposition of penalty on account of addition of Rs.6,60,000/- towards rent of guest house.

40. Briefly stated, in the assessment proceedings under Section 153A, the Assessing Officer *inter alia* observed that a sum of Rs.5,77,02,769/- has been claimed as deduction towards share issue expenses for Assessment Year 2012-13. The Assessing Officer alleged that the expenses incurred are in the nature of capital expenditure as per Hon'ble Supreme Court decision in the case of *M/s. Brooke Bond India Ltd. vs. CIT, 225 ITR 798 (SC).* On being inquired, the assessee pointed out that it has incurred public issue expenses at the time of IPO during the Financial Year 2010-11 relevant to Assessment Year 2011-12. The $1/5^{th}$ of the public issue expenses amounting to Rs.5,77,02,769/- are written off during the Assessment Year 2012-13 in question under Section 35D of the Act. The Assessing Officer observed that the money received in the IPO has gone into capital investment in subsidiaries and therefore, no new unit can be said to be set up nor any expansion can be said to be undertaken. The Assessing Officer thus disallowed the share issue expense claimed under Section 35D(1) of the Act. The AO however also noted that (3.5%) part of money has been utilized for setting up of new plants also and therefore, allowed the expenses proportionately. The Assessing Officer thus eventually disallowed Rs.5,77,02,769/- claimed as deduction under Section 35D of the Act. The Assessing Officer thereafter observed in the assessment order that '*I am satisfied that assessee has concealed his income or has filed inaccurate particulars*' to the extent of this amount and therefore liable for initiation of penalty under Section 271(1)(c) of the Act.

41. Aggrieved, the assessee preferred appeal before the CIT(A) for cancellation of penalty. The assessee however did not get any relief from the CIT(A).

42. Further aggrieved, the assessee preferred appeal before the Tribunal.

43. We have carefully considered the rival submissions and perused the first appellate order, penalty order and assessment order.

44. The challenge of the assessee to the imposition of penalty under Section 271(1)(c) are two fold (i) no requisite satisfaction was recorded by the Assessing Officer before initiation of penalty (ii) mere disallowance of expenses claimed is not justified where all the particulars in relation to claim of expenses were made available to the Assessing Officer in the course of the assessment and in fact a part of the expenses claimed was also allowed.

45. On merits, it is the case of the assessee that undisputedly, the assessee incurred share issue expenses. The profits resulting from such expenses were invested substantially in the expansion of its subsidiaries undertaking as per the MOU of the company. It was widely a *bona fide* believe of the assessee on the basis of expert opinion that assessee is entitled for deduction under Section 35D of the Act. In such eventualities, the assessee continues to hold believe that extension and expansion of his undertaking includes extension of subsidiaries undertaking. The extension or setting up a new unit by subsidiary, in effect, expands the business of holding company. It is universal model of big undertaking that holding company sets up new unit through their subsidiary company and therefore, deduction under Section 35D could not be restricted to the investment made by the holding company itself but the deduction shall also be allowed if the holding company makes expansion of business through its subsidiary company. Without going into the correctness of claim per se, we find that the issue cannot be said to be free of any debate to the least. Under the circumstances, it is a clear case of *bona fide* belief on the correctness of claim made. It is not the case of the Revenue that any particulars filed in this regard in the assessment proceedings were either false or inherently wrong. The disallowance has been carried out as result of

difference of opinion on the allowability of a claim. Under the circumstances, the case of the assessee is covered by the judgment rendered by the Hon'ble Supreme Court in *CIT vs. Reliance Petro Products, (2010) 322 ITR 158 (SC).* In our view, the imposition of penalty on account of mere disallowance of expense is *prima facie* unjustified. Noticeably, the Hon'ble Punjab and Haryana High Court in *CIT vs. B.B. Singhal (2011) 198 Taxman 158 (P&H)* has held that *bona fide* mistakes could not be subject to penalty. In the instant case, it is undisputed fact that the assessee has disclosed all material facts and was under *bona fide* belief that it is entitled to deduction of share issue expenses under the provisions of Section 35D of the Act. The disallowance is only on the ground that the claim allegedly does not pass the test of S. 35D. In such circumstances, we see substantial merit on facts in the plea of the assessee towards inapplicability of Section 271(1)(c) of the Act on a highly debatable issue.

46. It is next observed that penalty has also been imposed towards rent expenses of guest houses on the ground that two houses are locked at the time of post search inquiry and have not been used as guest house. In defense, the assessee submitted that the guest house has been actually found to be taken on rent by the AO and claim of the expenses is not dependent on actual usage of the guest house. The guest house is used occasionally as per need based requirements. All the relevant facts were placed on record in this regard. Thus, the penalty cannot be visited on the *bona fide* claim of the assessee.

47. Notwithstanding the disallowance in the assessment proceedings, we find merit in the plea. The penalty has been levied on the ground of disallowance of rent expenses due to non usage of such guest house. In the light of the decision rendered in *Reliance Petro Products (supra)*, penalty under Section 271(1)(c) on such alleged wrong claim is totally unjustified. The penalty is thus reversed and cancelled on merits.

48. Notwithstanding, the legal ground of the Assessee towards absence of satisfaction qua any specific default is squarely covered in favour of the Assessee by observations made in other appeals captioned above. As noted, the Assessing Officer has noted the nature of the default in the very uncertain terms stating 'concealment of income or furnishing of inaccurate particulars of income'. The so called satisfaction under S. 271(1)(c) r.w.s 271(1B) does not meet the requirement of law as delineated in other appeals supra. The exercise of power for initiating penalty under Section 271(1)(c) is dependent upon a categorical satisfaction of the Assessing Officer in the course of the assessment proceedings towards the nature of alleged default which is clearly absent in the present case and consequently the penalty proceedings initiated without requisite satisfaction is a nullity. The consequent penalty order thus requires to be quashed at the threshold.

49. The action of the CIT(A) thus requires to be reversed and the penalty imposed in question is required to be quashed both on merits as well as on the legal ground.

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

51. In the combined result, all the captioned appeals of the assessee are allowed whereas both the appeals of the Revenue are dismissed.

Order pronounced in the open Court on 28/03/2023.

Sd/-	Sd/-
[ANUBHAV SHARMA]	**[PRADIP KUMAR KEDIA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

DATED: **/03/2023**

Prabhat