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

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI RAJ KUMAR CHAUHAN (JUDICIAL MEMBER)

ITA No. 1049, 1050, 1051, 1052, 1053, 1054 & 1055/MUM/2025
Assessment Year: 2014-15, 2015-16, 2016-17, 2017-18, 2018-19, 2019-2020 & 2020-21

Swaran Nadhan Salaria, Mahek, Salaria Bunglow, A B Nair Road, Juhu, Mumbai-400049. **PAN NO. AMOPS 4918 D** **Appellant**	***Vs.***	DCIT-Central Circle1(2), 906, 9th floor, Pratishtha Bhavan, Old CGO Annexe, M.K. Road, Mumbai-400020. **Respondent**

Assessee by	:	Mr. Rakesh Joshi
Revenue by	:	Mr. Virabhadra S. Mahajan, Sr. DR

Date of Hearing	:	12/06/2025
Date of pronouncement	:	30/07/2025

ORDER

PER BENCH

The captioned appeals by the assessee are directed against separate orders passed by the Ld. Commissioner of Income-tax (Appeals)-47, Mumbai [in short 'the Ld. CIT(A)'] for assessment years 2014-15 to assessment year 2020-21 respectively in relation to penalty levied by the Assessing Officer. Being identical issue-in-

dispute involved in these appeals, same were heard together and disposed off by way this consolidated order for the sake of convenience.

2. Firstly, we take up the appeal of the assessee for assessment year 2014-15. The grounds raised by the assessee are reproduced as under:

> 1. *On the facts and circumstances of the case and in law, the learned CIT (A) has erred in confirming the penalty levied on adhoc disallowance of salaries and wages amounting to Rs.14,22,444/- & adhoc disallowance of administrative expenses amounting to Rs.2,17,162/- made u/s 37(1) of the act on estimated basis.*
> 2. *On the facts and circumstances of the case and in law, the learned CIT (A) has erred in confirming the penalty leviedon suo-moto disallowance of interest of Rs.33,94,396/- & Excess depreciation of Rs.38,02,913/- in the return of income filed u/s 153A.*

3. Before us, the Ld. Counsel for the assessee filed an additional ground on 04.06.2025, which is reproduced as under:

> *1) The Learned CIT(A) has erred in confirming the action of the Learned Assessing officer in levying penalty on the addition made in the assessment order, without appreciating the fact that these addition itself are not sustainable in the order passed u/s. 143(3) r.w.s 153A of the Income Tax Act, 1961.*

3.1 We have heard both the parties on the issue of admissibility of the additional ground. We find that the issue-in-dispute raised being of purely legal in nature and goes to the root of the matter and not requiring investigation of the fresh facts, therefore, same was admitted for adjudication.

4. Briefly stated, facts of the case are that the assessee, an individual, is head of a group namely "Trig", based at Chandigarh. The Trig group is engaged in providing manpower, securities and facility services to various business entities. The assessee filed his original return of income u/s 139(1) of the Act on 28.11.2014 declaring total income at Rs.1,80,57,280/-. The return of income was selected for scrutiny and the assessment u/s 143(3) of the Income-tax Act, 1961 (in short 'the Act') was completed on 28.12.2016 determining total income at Rs.2,12,77,280/-. Subsequently, in view of search and seizure action u/s 132 of the Act carried out in the case of the assessee, notice u/s 153A of the Act dated 18.12.2020 was issued to the assessee. In response to notice u/s 153A of the Act, the assessee filed return of income on 24.02.2021 declaring total income at Rs.1,78,56,660/-(i.e. total income varied as compared to income declared in original return of income filed on 28/11/2014) .

4.1 During the course of assessment proceedings u/s 153A of the Act, the Assessing Officer observed discrepancies/variation in the profit and loss account and balance sheet filed with the return under section 153A vis-à-vis the original return. Notably, variations were found in cash and bank balances also. Owing to the complexity of transactions and nature of seized documents, a reference under section 142(2A) was made for special audit.

4.2 After considering the report of the special auditor and the seized document found during the course of the search, the Assessing Officer completed assessment u/s 153A of the Act and made disallowance at the rate of 4 percentile of 'salary and wages' expenses and 10 percentile of administrative expenses on estimate basis and initiated penalty u/s 271(1)(c) of the Act for furnishing inaccurate particulars of the income.

4.3 Further, the Assessing Officer also observed that assessee used 'shell entities' for rotation of funds/circuitous transactions. The Assessing Officer identified expenses related to the shell entities including interest amounting to Rs.33,94,396/- and excess depreciation for addition to fixed asset to the extent of Rs.38,02,913/- which was claimed in the name of the shell entities in the return of income filed u/s 139(1) of the Act. The Assessing Officer observed that assessee had made *suo-motu* made disallowance of the above expenses in the return of income filed in response to notice u/s 153A of the Act and therefore, while determining total income under the assessment under section 153A of the Act, the AO did not make any separate additions, but issued the penalty proceedings u/s 271(1)(c) of the Act for furnishing inaccurate particulars of the income in relation to said *suo-motu* disallowance also.

4.4 As no appeal was preferred by the assessee before the Ld. CIT(A) against the addition/disallowance made by the AO, the Assessing Officer issued show cause notice on 03.11.20222 as why the penalty u/s 271(1)(c) of the Act might not be levied for furnishing inaccurate particulars of the income.

4.5 With regard to the disallowance of "salary and wages expenses " amounting to Rs.14,22,444/- and disallowance of "administrative expenses" amounting to Rs.2,17,162/- made u/s 37(1) of the Act, the assessee submitted that same was made on estimate basis and therefore do not satisfy the criteria laid down u/s 271(1)(c) of the Act. Regarding the disallowance of interest of Rs,33,94,396/- and excess depreciation of Rs.38,02,913/-, it was submitted that said income was offered in the return of income to avoid litigation on the matter though the expenses disallowed were genuine expenses and had been properly incurred. It was submitted that as per Explanation 5A of section 271(1)(c) of the Act it was not a fit case for levy of the penalty.

4.6 Those contentions of the assessee were rejected by the Assessing Officer. The AO observed that the assessee had failed to produce relevant supporting evidence and documents during the assessment as well as special audit proceedings. It was further noted that the disallowances were not arbitrary but based on analysis of books, mode of payments (predominantly in cash), and

lack of verifiable evidence. The AO relied on various judicial precedents including **Dharmendra Textile Processors (295 ITR 244)**, **MAK Data (38 taxmann.com 448)**, and **Zoom Communication Pvt. Ltd. (ITA No. 07/2010)**. The relevant finding the Assessing Officer is reproduced as under:

> *"5. The arguments made by the assessee vide the above mentioned submission are duly perused but not found to be tenable for the following reasons:*
>
> *(i) During the assessment proceedings, it was found that the assessee had not fully maintained the requisite details/supporting documents/bills/vouchers etc. to authenticate cash expenses claimed against taxable income. Further, during the Special Audit conducted in the case u/s 142(2A) of the Act, the Special Auditor had also requested for party-wise details (with Name, Address & PAN of the parties), supporting documents etc., to examine correctness & completeness of cash expenses claimed by the assessee. The assessee, however, failed to produce requisite details & explanations with regard to the cash payments made by it.*
>
> *ii) The assessee has submitted that since the disallowance of salaries and wages made u/s 37(1) of the Act are on estimate basis and hence no penalty is leviable. In this regard, it is pertinent to note that the facts of the case under consideration are distinguishable and squarely different. The plain reading of the assessment order is indicative of the fact that the disallowances were not made on mere adhoc basis but after carefully considering the cash expenses claimed during the year and thereafter a percentage of the same was disallowed after due diligence and taking into consideration facts of the case."It is noteworthy that the disallowance of cash expenses towards salaries & wages have been calculated at 4% whereas the disallowance of administrative expenses has been calculated at 10%. Have these disallowances been purely made on estimate basis then the common percentage rate of disallowance would have been made by the AO on the two separate cash expenses instead of different disallowance rate.*
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> *(iii) The assessee has disallowed interest expense of Rs.33,94,396/- & excess depreciation of Rs.38,02,913/- in ITR*

filed u/s 153A of the Act and had there been no search action, the assessee would not have offered this additional income for taxation.

(iv) Further, during the course of search/post search proceedings as well as during the assessment proceedings, it was found that, the assessee had used said shell entities for rotation of funds/circuitous transactions in order to and creation of fictitious asset. On perusal of the ledger account extracted from the Tally data, it was found during search action that the assessee company had made payments to certain entities which are found to be shell entities. The conduct & affairs of these shell entities had established that these shell entities were floated by the assessee group/under control of the assessee group with a purpose to do circular transactions and create fictitious assets. Thus, the argument of the assessee cannot be accepted

(v) To sum up, in the instant case, interest expenses (Rs.33,94,396/-) and extra depreciation (Rs.38,02,913/-) was disallowed by the assessee post search, in the return of income filed in response to notice issued u/s 153A of the Income Tax Act, 1961. The surrendering of this income for taxation after identification of omission on part of the assessee cannot be termed as a "bonafide disclosure" and hence is liable for imposition of penalty for under-reporting of income.

The judgements relied upon by the assessee are not relevant to the present case as the facts are different.

(vi) There has been deliberate omission on the part of the assessee and has furnished inaccurate particulars of income for the year under consideration and therefore all the facts which are material to the income were not disclosed in the original return of income filed.

(vii) In the judgment delivered in the case of Union of India and Others Vs. Dharmendra Textile Processors and Others (2007) 295 ITR 244 (SC) the Hon'ble Apex Court has reiterated as under:

"...the object behind the enactment of section 271(1)(c) read with the Explanations quoted above indicates that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under the said sections is a civil liability. Wilful concealment is not an essential ingredient for attracting the civil liability as is the case in the matter of prosecution

under section 276C of the Act. While considering an appeal against an order made under section 271(1)(c) what is required to be examined is the record which the officer imposing the penalty had before him and if that record can sustain the finding that there had been concealment, that would be sufficient to sustain the penalty.

...The Explanations added to section 271(1)(c) in their entirety also indicate the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing returns."

(viii) Further, in the case of MAK Data P. Ltd vs. CIT (Supreme Court) the Hon'ble Supreme Court has held that:

"It is the statutory duty of the assessee to declare its true income in the return of income filed by it from year to year and if the assessee had concealed true particulars of income than the assessee is liable for penalty proceedings u/s 271 read with s. 274 of the Act."

(ix) Further the Delhi High Court in the case of CIT Vs Zoom Communication Pvt. Ltd. vide ITA No. 07/2010 dated 24.05.2010 has held that:-

"The Court cannot overlook the fact that only a small percentage of the Income Tax Returns are picked up for scrutiny. If the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim is not found to be bonafide, it would be difficult to say that he would still not be liable to penalty under Section 271(1)(c) of the Act. ITA No.7/2010 Page 14 of 18 If we take the view that a claim which is wholly untenable in law and has absolutely no foundation on which it could be made, the assessee would not be liable to imposition of penalty, even if he was not acting bonafide while making a claim of this nature, that would give a license to unscrupulous assessees to make wholly untenable and unsustainable claims without there being any basis for making them, in the hope that their return would not be picked up for scrutiny and they would be assessed on the basis of self- assessment under Section 143(1) of the Act and even if their case is selected for scrutiny, they can get away merely by paying the tax, which in any case, was payable by them. The consequence would be that the persons who make claims of this nature, actuated by a malafide intention to evade tax otherwise payable by them would get away without paying

the tax legally payable by them, if their cases are not picked up for scrutiny. This would take away the deterrent effect, which these penalty provisions in the Act have."

4.7 Consequently, penalty was levied under section 271(1)(c) at 100% of tax sought to be evaded on ₹88,36,915/-, amounting to ₹30,03,667/-. The CIT(A) confirmed the levy, holding that:

(i) , the assessee failed to file any evidence or details justifying the expenses and relied merely on judicial precedents asserting that no penalty can be levied on estimated disallowances.

(ii) Disallowances were not merely on estimate but were necessitated due to non-production of records.

(iii) reliance on judicial precedents was misplaced, noting that unlike in the cited precedents, the present case involved no submissions or records from the assessee whatsoever.

(iv) The absence of books, vouchers, and corroborative evidence compelled the Assessing Officer to resort to a conservative estimation of unverifiable expenditure.

(v) even the filing of return was occasioned only after search proceedings, and no voluntary compliance was made prior thereto. No appeal had been preferred against the assessment order.

(vi) *Suo-motu* disallowance post-search cannot be construed as a bona fide disclosure and Explanation 5A was applicable.

5. As regards the additional ground of the assessee that addition made in order passed u/s 143(3) r.w.s. 153C of the Act itself was not sustainable, we find that assessee has not challenged the order in the appellate proceedings and therefore, it is merely presumption of the assessee as to whether those additions were not likely to be sustainable. The penalty cannot be deleted merely on the presumption of the assessee unless addition challenged by the assessee on the ground of no incriminating material and held to be unsustainable by the appellate authorities. Accordingly, the additional ground raised by the assessee is dismissed.

6. As far as regular ground No. 1 of the appeal in relation to the penalty levied in respect of salary and wages and administrative expenses is concerned, the assessee has challenged mainly on the ground that penalty levied is on the estimate basis. It is undisputed fact that the Assessing Officer has levied the penalty @ 4% out of the salary and wages expenses claimed to have incurred in cash mode. Similarly, disallowance out of administrative expenses has been made @ 10% out of expenses claimed to have been incurred in the cash mode. As far as levy of the penalty in respect of addition made on the estimate basis, the Ld. Counsel relied on the decision of the Tribunal in the case of **Dr. Kaushal Goes v. Asst. CIT (2015) 45 CCH 0363 (Delhi-Trib.)** wherein the Tribunal following the

decision of the Co-ordinate Bench in the case of Smt. Surinder Kaur 31 SOT 23 (Lucknow) deleted the penalty observing as under:

> *"9. Now, the sole question arises for determination in this case is, "as to whether penalty order passed by ACIT is without any jurisdiction, having been passed on the basis of bank slips dated 14.06.2004 showing unaccounted income of Rs.4,95,000/-, the said income having been assessed during the year 2007-08."*
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> *10. Undisputedly, the assessee has reflected the surrendered amount of Rs.4,95,000/- in his income tax return on the basis of which assessment order dated 19.12.2008 qua the assessment year 2007-08 has been passed. Undisputedly, when the unaccounted income of Rs.4,95,000/- was pertaining to the Assessment Year 2005-06 as per bank slips dated 14.06.2004, the A.O. has no jurisdiction to initiate the penalty proceedings on the basis of assessment order dated 19.12.2008 qua the Assessment Year 2007-08. Even otherwise the revenue was empowered to reopen the assessment of the assessee qua the Assessment year 2005-06 to make an addition of Rs.4,95,000/- pertaining to relevant year, but the revenue has not preferred to do so.*
>
> *11. The contention of Ld. D.R. that once the assessee has himself reflected and surrendered the unaccounted income of Rs.4,95,000/- in his Income tax return the defense of lack of jurisdiction is not available to the assessee, is not tenable for the two reasons: one that there is no estoppels against the statute because when defense is available by virtue of statute to the assessee, the penalty proceedings being independent one, he cannot be estopped merely by virtue of the fact that he himself has surrendered the unaccounted income in his income tax return, because the assessee claimed to have surrendered the amount of Rs.4,95,000/- to buy peace of mind and to avoid the protracted litigation; Second, when the revenue has statutory power to proceed against the assessee by reopening the assessment of a particular assessment year and then initiating the penalty proceedings, it cannot be allowed to proceed mechanically to invoke the penal provisions. So initiating the penalty proceedings on the basis of void assessment order are not sustainable in the eyes of law. Assessee is well within his right to take this defence of challenging the assessment order even though assessment*

order has not been challenged, at the time of challenging the penalty order.

12. Coordinate Bench in the case entitled ACIT Vs Smt. Surinder Kaur 120 TTJ 618 decided the identical issue in the identical circumstances in favour of the assessee, which is applicable to the facts and circumstances of the case. So, when the foundation of addition on unaccounted income of Rs.4,95,000/-, though not challenged by the assessee, is not sustainable in the eyes of law, the question of imposing penalty qua the said amount, does not arise.

13. In view of what has been discussed, we are of the considered view that the impugned order passed by Ld. CIT(A) confirming the penalty @300%, the amount of Rs.4,95,000/- is not sustainable in the eyes of law, hence, hereby set aside and the appeal of the assessee is allowed."

6.1 In the instant case before us, the basis of making disallowance of 'salary and wages' and 'administrative expenses' has been mentioned by the AO in assessment order in para 10.2 to 10.5 of the assessment order. Relevant part of show cause notice reproduced in assessment order is extracted as under:

"10.2. The assessee, through its various submissions, represented that 90% - 95% of the salary/ wages are related to the payments made to guards, which are all below the taxable limit. The assessee provided the copy of Salary register for the respective years containing the names of employees, branch details, employee code, month for which salary paid and salary paid amount. However, the salary register does not 7 contain the PAN / Aadhaar No. of the employees. Hence, the identity of the employees is not sufficiently established. Further, the salary register does not contain the details of date of payment and mode of payment. The details of salary & wages as per ledger account submitted by the assessee are summarized here as under:

Particulars	***FY 2013-14***
Payment made through bank	*23.87.36,638*

Payment made through cash	*3,55,61,103*
Payment made through ledger	*1,16,66,604*
Payment made by TDPL on our	*2,51,10,298*
Payment made by TGF on our	
Adjusted through Security	
Received back through bank	*(7,13,024)*
Payment made by us on behalf of TFS reversed	
Adjusted against Security	*(3,18,75,086)*
Other reversals	*(32,12,153)*
Total	***27,52,74,380***

10.3. It is found that considerable amount of salary has been paid in cash in each of the years. It is found that the assessee has not maintained party-wise ledger in the books for recording cash payment of salary in the books of accounts. It is seen that the assessee has passed a consolidated entry in the books for cash payment of salary to multiple parties. The assessee has not provided the complete details of such employees like address, PAN, Aadhaar No., etc. so as to establish the identity of such employees. As mentioned above, the salary register does not contain the details of mode of payment. Hence, it is not ascertainable from the salary register whether the salary paid to the respective employees is in cash or through bank. Consequently, the cash salaries as per salary register could not be fully correlated with the cash salaries as per books of accounts. Further, the assessee has not substantiated in detail as to how the salary payments does not attract TDS provisions. In respect of each of the employee and has only provided a generic remark. Further, as regards the source of salaries paid in cash, the assessee has submitted that the same is out of cash withdrawals from bank accounts at various branches. From the salary register provided by the assessee; it is seen that the employees of the assessee company have been deputed at various cities &

towns across India. However, it is found that in certain locations, the assessee does not have any bank accounts and hence, a question arises as to how the assessee managed to make salary payments through cash in such locations.

10.4. The assessee has further submitted that the guards employed by the assessee are required to give certain amount to the assessee company as security deposits and such security deposits are recovered from them through the salary to be paid to such employees. Hence, the security deposits collectible from the guards are adjusted from the salary payable to them. Accordingly, the assessee has passed consolidated journal entries in the books by debiting Salary a/c and crediting Security Deposit a/c. However, the assessee has neither given the employee wise details of security deposits and the months for which the salary has been adjusted nor produced any supporting documents in relation to the same. Thus, the assessee has not substantiated the salary expenses adjusted through security deposits with proper details and supporting documents.

10.5. It is also seen that the other entities of the assessee group i.e. M/s. Trig Security & Detective Services, M/s. Trig Integrated Facility Management, M/s. Trig Facility Services and M/s. Trig Detective Private Ltd. have made payment of salary on behalf of the assessee. In this regard, the assessee has passed Journal entries in the books by debiting Salary a/c and crediting the Trig group entity as and when the payments are made by the other Trig group entity. However, the assessee has not provided the complete details of such employees like address, PAN, Aadhaar No., etc. so as to establish the identity of such employees. Further, there is no reference in the Salary register provided by the assessee as to how much payment has been made by the assessee and how much payments are made by the other Trig group entity employee-wise. Accordingly, the assessee has not been able to completely correlate in detail the salary register with the books of accounts in respect of such on behalf payments of salary made by the other Trig group entities."

6.2 The response of the assessee for above show cause notice issued has been reproduced by the AO in para 10.3 of the assessment order. For ready reference same is extracted as under:

"10.3. The assessee vide show cause was asked to justify payment of salary and administrative in cash and why a certain percentage of cash salary expenses and administrative expenses incurred in cash claimed during the year should not be disallowed for want of necessary details/documents/explanations. The assessee replied as under.

> *"TRIG Group is one of India's leading security company providing security services all over India and inspite of our best endavour to make all salary through the banking channel. There are is unavoidable circumstance under which we are in force to pay salary in cash, few of such situations are:*
>
> *1. Short Term Event: We are doing one time event like, IPL, Film Fair Awards, Celebrity Weddings, Exhibitions, Mumbai Marathons, Musical Concerts, ISL, etc., which involves employing guards on daily basis. We have to pay contracted daily wages to these guards in cash.*
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> *2. Guard having no bank account: The security guards hired at various locations are coming from remote areas like West Bengal, Assam, Orissa, Bihar, Uttar Pradesh, etc. Since, they migrate from one place to another, some of them do not have any valid proof of residence and therefore, they cannot open any bank account. Hence, we pay their salaries in cash till there bank account is opened.*
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> *3. Cheque bouncing:-There is a lag of 3-4 months between receipt of income and expenses incurred such as salaries and wages, which constitutes 80-90% of total expenses. Salary wages has to be paid regularly on monthly basis while income is received after a gap of 3-4 months. Most of the time we have to avail working capital overdraft facility to pay the salary & wages etc. Some time bank dose not allow overdraft and last moment guards salary cheque get bounced. Against bouncing of cheques we have to pay cash to guards so they can perform duties without hurdle.*
>
> *4. The administrative expenses exclusively and wholly incurred for business purpose only. As we are in service industries and we have branches in all over India, we have to pay cash to various officers reimbursement of expenses like business promotion, printing &*

Stationery, Courier charges, fuels etc on day to day basis for smooth running of business. We have already submitted documentary proof for the same.

Considering the specific circumstances under which the expenses are incurred in cash, we request you not to do any disallowance towards cash expenses incurred in cash as these are reasonable & exclusively incurred for the business purpose"

6.3 After considering submission of assessee, The AO made addition observing as under:

"10.4 After considering the submission of the assessee,4% of "Salary & Wages" expenses claimed to be incurred in CASH mode and 10% of "administrative expenses" claimed to be incurred in CASH mode, are hereby disallowed on estimated basis u/s. 37(1) of the Act and added to the computation of income. Thus following disallowances of expenses and thereby additions to the computation of income are made in the case of assessee on these issues, as under:

(i) Disallowance @ 4% out of "Salary & Wages" expenses claimed to be incurred in Cash Mode - Rs.14,22,444/- (i.e. 4% of Rs.3,55,61,103/-)

(ii) Disallowance 10% out of "administrative Expenses" expenses claimed to be incurred in Cash Mode -Rs.2,17,162/- (i.e. 10% of Rs.21,71,622/-)."

6.4 After careful examination of the show cause notice issued by the AO and assessee's submissions in response to the show cause notice, the AO held that the assessee failed to substantiate the genuineness of the salary and administrative expenses claimed to have been incurred in cash mainly for the reason that the salary registers provided were deficient in particulars such as PAN, Adhar, addresses, dates, and mode of payment. But in our opinion in a large scale organization engaged in supply of manpower, incidence

of part of expenses without PAN or Adhar No. may be possible in normal course of business. Further, the observation of the AO that claim of adjustments against security deposits and payments made by group concerns remained unverified in the absence of documentary evidence, is concerned, we find that the AO has not pointed out any specific incidence and even no disallowance has been made on this account. In view of above, it is evident that the addition in respect of salary and wages and administrative expense has been purely on ad-hoc and estimate basis, without pointing out any specific entry of expenses for disallowance, hence, respectfully, following the decision of coordinate bench of Tribunal referred above, we hereby cancel the penalty in respect of disallowance of 'salary and wages' and 'administrative expenses'.

7. Further, on the issue of penalty in respect of *suo-motu* disallowance of interest of Rs.33,94,396/- and excess depreciation of Rs.38,02,930/- also the Ld. CIT(A) upheld the penalty observing as under:

> *"8.3 I have gone through the submissions filed by the appellant and the relevant records. It is an established fact and various decisions of the Hon'ble Apex court and other courts have held that suo-moto disclosure in the return after search action does not absolve the appellant of the penalty provisions.*
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> *8.4 The appellant has relied upon the decision of Hon'ble Chandigarh Tribunal in the case of DCIT Central Circle-1, Chandigarh v Kulwant Singh wherein it was held that penalty should not be levied on suo-moto income offered in the return*

u/s 153A. As per the appellant case of the Apex court decision in Mak Data P Ltd has been discussed and differentiated.

8.5 It is however noted that facts in that case were different. The relevant paras of the order are reproduced as under:

> *"Applying the similar proposition, even when the Assessing officer is precluded from making any addition in the absence of any incriminating material found during the search action in the assessment proceedings carried out u/s 153A of the Act in which the original assessment proceedings stood completed and not abated, the Assessing officer, in our view, is also precluded from initiate the penalty proceedings u/s 271(1)(c) of the Act in case of already concluded assessment in the absence of any incriminating material found during the search action."*

In the present case seized material is available. Thus, the facts are totally different and not applicable.

8.6 In this regard, reliance is placed on the decision of Hon'ble Supreme Court in the case of MAK Data (P.) Ltd. vs CIT [2013] 38 taxmann.com 448 (SC) which held as under:

"Voluntary disclosure does not release assessee from mischief of penal proceedings under section 271(1)(c)."

8.7 Further Hon'ble ITAT Delhi in the case of Smt. Kiran Devi Vs ACIT [2009] 125 TTJ 631 (Delhi) held that where certain income was disclosed in return filed in response to notice under section 153C following search, which income was not disclosed in original return, it was a clear case of concealment of income attracting penalty under section 271(1)(c); in such a case it was unnecessary to invoke Explanation 5 to section 271(1)(c)

8.8 Hon'ble Calcutta High Court in CIT Vs Prasanna Dugar [2015] 59 taxmann.com 99 (Calcutta), while deciding matter related to section 271(1)(c) Expl 5A held that even where subsequent to search, assessee voluntarily disclosed a sum and offered said sum to tax, since said amount was not disclosed in original return, penalty levied urider section 271(1)(c) was justified.

Hon'ble Supreme Court has upheld the decision of Hon'ble High Court in the above case.

> *8.9 The above judgements have clearly held that in case income is not disclosed in the original return, it is a clear case of concealment of income attracting penalty under section 271(1)(c). Thus, respectfully following the judgments of various courts the penalty levied by the AO is upheld. Accordingly, the ground no. 3 of the appeal is dismissed."*

7.1 In respect of *suo-motu* disallowance of interest and depreciation, the Ld. Counsel for the assessee relied on the decision of the ITAT Lucknow Bench in the case of Asst. CIT v. Smt. Surinder Kaur (supra), wherein applicability of the Explanation 5 has been referred. The relevant finding of the Tribunal (supra) is reproduced as under:

> *"20. Thus, the first requirement for invoking Explanation 5 is that in a valid search, some tangible assets/documents must have been found which would reflect concealed income of the assessee and which have become basis for making addition of concealed income. It is an admitted position that there has not been any seizure of tangible assets/documents in the search which could be said to be belonging to the assessee. Therefore, it cannot be said that assessee has been found to be the owner of tangible assets and that such tangible assets have been acquired by her by utilizing her undisclosed income earned before the date of search, and also there is no claim by the assessee that she has acquired any such asset out of income not disclosed before the Department.*
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> *21. We, therefore, uphold the order of learned CIT(A) in cancelling the penalty which had been levied by the Assessing Officer on the basis of an apparently invalid assessment order and by invoking the provisions of Explanation 5 which, on the face of it, are not applicable, as no tangible asset belonging to assessee has been seized."*

7.2 We have heard rival submissions of the parties and perused the relevant material on record. The Assessing Officer has invoked

Explanation 5A below the section 271(1)© of the Act. For ready reference, said Explanation is reproduced as under:

> *[Explanation 5.-Where in the course of a [71][search [72] initiated under section 132 before the 1st day of June, 2007], the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income,-*
>
> *(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein ; or*
>
> *(b) for any previous year which is to end on or after the date of the search,*
>
> *then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, [73][unless,-*
>
> *(1) such income is, or the transactions resulting in such income are recorded,-*
>
> *(i) in a case falling under clause (a), before the date of the search; and*
>
> *(ii) in a case falling under clause (b), on or before such date,*
>
> *in the books of account, if any, maintained [74] by him for any source of income or such income is otherwise disclosed to the [75][[76][Principal Chief Commissioner or] Chief Commissioner or [76][Principal Commissioner or] Commissioner] before the said date ; or*
>
> *(2) he, in the course of the search [74], makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his [74]income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in [77][***] sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.]*

7.3 From plane reading of above provisions, we find that for invoking explanation 5A , the assessee must be found to be a owner of tangible asset acquired out of the undisclosed income. In the instant case before us is also the issue in dispute is whether the assessee is found to be owner of the tangible assets and whether such tangible assets have been acquired by the assessee using the relevant undisclosed income before the date of the search. The

assessee in the return of income filed in response to notice under section 153A of the Act made variation in total income as compared to the original return of income filed. But detail of variation has not been mentioned by the AO in impugned assessment order. The AO has simply stated that the assessee has withdrawn the expenses on interest and depreciation which were claimed to have been incurred through shell entities, but nowhere brought on record as how said withdrawal of expenses in the return filed u/s 153A was as a consequence to search action. Under the Explanation 5A, the Assessing Officer has to establish that the *suo-motu* disallowance made by the assessee for any money, bullion, jewellery or other valuable article or thing or income was based on the books of account or the documents found during the course of search and unless this condition is satisfied, the penalty levied invoking Explanation 5A is not sustainable in law. The lower authorities have not established the fact that the *suo-motu* disallowance made by the assessee was a result of any tangible assets or documents found during the course of the search, therefore, the *suo-moto* disallowance made by the assessee don't attract penalty u/s 271(1)(c) of the Act unless the conditions provided under Explanation 5A to section 271(1)(c) of the Act are fulfilled. In view of the above, the penalty in respect of interest and the excess depreciation is also cancelled. The relevant grounds of the appeal of the assessee are allowed.

8. The grounds in respect of assessment year 2015-16 are reproduced as under:

> *1. On the facts and circumstances of the case and in law, the learned CIT (A) has erred in confirming the penalty levied on adhoc disallowance of salaries and wages amounting to Rs.19,80,695/- &adhoc disallowance of administrative expenses amounting to Rs.82,804/- made u/s 37(1) of the act on estimated basis.*
>
> *2. On the facts and circumstances of the case and in law, the learned CIT (A) has erred in confirming the penalty leviedon suo-moto disallowance of interest of Rs.50,90,606/- & Excess depreciation of Rs.62,88,051/- in the return of income filed u/s 153A.*

8.1 The grounds being identical to assessment year 2014-15, same are allowed *mutatis mutandis*.

8.2 Similarly, the grounds raised in assessment year 2016-17 are reproduced as under:

> *1. On the facts and circumstances of the case and in law, the learned CIT (A) has erred in confirming the penalty levied on adhoc disallowance of salaries and wages amounting to Rs.13,50,296/- &adhoc disallowance of administrative expenses amounting to Rs.1,69,516/- made u/s 37(1) of the act on estimated basis.*
>
> *2. On the facts and circumstances of the case and in law, the learned CIT (A) has erred in confirming the penalty leviedon suo-moto disallowance of interest of Rs.79,26,246/- & Excess depreciation of Rs. 1,34,58,867/- in the return of income filed u/s 153A.*

8.3 The issues-in-dispute raised in this appeal are identical to grounds raised in assessment year 2014-15 and therefore, following

our finding in AY 2014-15, the grounds raised are allowed on *mutatis mutandis*.

9. The appeals for assessment year 2017-18, 2018-19 and 2019-2020 have been adjudicated by the Ld. CIT(A) through a combined order taking assessment year 2018-19 as lead. Accordingly, we also take up the assessment year 2018-19 as a lead year. The grounds raised by the assessee are reproduced as under:

> *1. On the facts and circumstances of the case and in law, the learned CIT (A) has erred in confirming the penalty levied on adhoc disallowance of salaries and wages amounting to Rs.10,85,164/- &adhoc disallowance of administrative expenses amounting to Rs.1,35,137/- made u/s 37(1) of the act on estimated basis.*
>
> *2. On the facts and circumstances of the case and in law, the learned CIT (A) has erred in confirming the penalty leviedon suo-moto disallowance of interest of Rs.44,65,742/- & Excess depreciation of Rs.97,75,277/- in the return of income filed u/s 153A.*

9.1 While completing the assessment u/s 153A of the Act, the Assessing Officer made addition on three items, ***firstly***, disallowance on estimate basis in respect of cash expense incurred on salary, wages and administrative expenses, ***secondly***, disallowance u/s 40A(ia) for non-deduction of tax at source amounting to Rs.19,050/-, ***thirdly***, disallowance of interest expenses and depreciation expenses incurred through shell companies. Accordingly, in the penalty order passed u/s 270A of the Act, the Assessing Officer held the assessee guilty of under

reporting of the income. The relevant part of the discussion of the Assessing Officer in the penalty order is reproduced as under:

> *"6. The arguments made by the assessee vide the afore-mentioned submission are duly perused but not found to be tenable for the following reasons:*
>
> *(i) During the assessment proceedings, it was found that the assessee had not fully maintained the requisite details/supporting documents/bills/vouchers etc. to authenticate cash expenses claimed against taxable income. Further, during the Special Audit conducted in the case u/s 142(2A) of the Act, the Special Auditor had also requested for party-wise details (with Name, Address & PAN of the parties), supporting documents etc., to examine correctness & completeness of cash expenses claimed by the assessee. The assessee, however, failed to produce requisite details & explanations with regard to the cash payments made by it.*
>
> *(ii) The assessee has submitted that since the disallowance of salaries and wages made u/s 37(1) of the Act are on estimate basis and hence no penalty is leviable. In this regard, it is pertinent to note that the facts of the case under consideration are distinguishable and squarely different. The plain reading of the assessment order is indicative of the fact that the disallowances were not made on mere adhoc basis but after carefully considering the cash expenses claimed during the year and thereafter a percentage of the same was disallowed after due diligence and taking into consideration facts of the case. It is noteworthy that the disallowance of cash expenses towards salaries & wages have been calculated at 4% whereas the disallowance of administrative expenses has been calculated at 10%. Had these disallowances been purely made on estimate basis then the common percentage rate of disallowance would have been made by the AO on the two separate cash expenses instead of different disallowance rate.*
>
> *(iii) It is admitted fact that the disallowance of Rs.85,996/- by the AO pertains to non-compliance of TDS provisions by the assessee. The assessee has submitted that no penalty is leviable by merely making a claim of expenditure. The assessee has also placed reliance on various judicial pronouncements in support of its claim. However, the facts of the instant case are different. It is unbelievable that assessee company which is engaged in providing uniformed guarding*

services to corporate / government/multinational all over India for many years is unaware both about the industry norms as well as the provisions of income tax with respect to TDS deductions.

(iv) The assessee has disallowed interest expense of Rs.44,65,742/- & excess depreciation of Rs.97,75,277/- in ITR filed u/s 153A of the Act.and had there been no search action, the assessee would not have offered this additional income for taxation,

(v) Further, during the course of search/post search proceedings as well as during the assessment proceedings, it was found that, the assessee had used said shell entities for rotation of funds/circuitous transactions in order to and creation of fictitious asset. On perusal of the ledger account extracted from the Tally data, it was found during search action that the assessee company had made payments to certain entities which are found to be shell entities. The conduct & affairs of these shell entities had established that these shell entities were floated by the assessee group/under control of the assessee group with a purpose to do circular transactions and create fictitious assets. Thus, the argument of the assessee cannot be accepted.

(vi) To sum up, in the instant case, interest expenses (Rs.44,65,742/-) and extra depreciation (Rs.97,75,277/-) was disallowed by the assessee post search, in the return of income filed in response to notice issued u/s 153A of the Income Tax Act, 1961. The surrendering of this income for taxation after identification of omission on part of the assessee cannot be termed as a "bonafide disclosure" and hence is liable for imposition of penalty for under- reporting of income.

(vii) The assessee has shown total income at Rs.48,42,160/- in the original return of income filed by the assessee. However, in the return filed in response to notice u/s 153A of the Act, the total income is declared at Rs.53,99,630/-. Thus, the assessee has shown additional income after the issue of notice u/s 153A of the Act and had there been no search action, the assessee would not have offered this additional income for taxation.

(viii) The judgements relied upon by the assessee are not relevant to the prese case as the facts are different.

(ix) Thus, there has been deliberate omission on the part of the assessee and has under-reported the income for the year under consideration and therefore all the facts which are material to the income were not disclosed in the return of income filed."

9.2 Thereafter, the Assessing Officer levied the penalty @ 50% amounting to Rs.34,24,309/- for under reporting income to the extent of Rs.1,92,72,880/-. On further appeal, the Ld. CIT(A) deleted the penalty in respect of disallowance u/s 40A(ia) of the Act but upheld the penalty in respect of disallowance of 'salary and wages' and 'administrative expenses' on estimate basis and 'interest' and 'excess depreciation'. The finding of the ld CIT(A) in respect of salary, wages and administrative expenses is reproduced as under:

"7.5 Before me, appellant has again submitted that since salary and administrative expenses were disallowed on estimation basis only, penalty cannot be levied. Further, appellant has placed reliance of 270A (6) and submitted that it does not cover following underreported incomes:

1. the amount of income in respect of which the assessee offers an explanation and the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, is satisfied that the explanation is bona fide and the assessee has disclosed all the material facts to substantiate the explanation offered;

2. the amount of under-reported income determined on the basis of an estimate, if the accounts are correct and complete to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, but the method employed is such that the income cannot properly be deduced therefrom;

3. the amount of under-reported income determined on the basis of an estimate, if the assessee has, on his own, estimated a lower amount of addition or disallowance on the same issue, has included such amount in the computation of

his income and has disclosed all the facts material to the addition or disallowance;

4. the amount of under-reported income represented by any addition made in conformity with the arm's length price determined by the Transfer Pricing Officer, where the assessee had maintained information and documents as prescribed under section 92D, declared the international transaction under Chapter X, and, disclosed all the material facts relating to the transaction; and

5. the amount of undisclosed income referred to in section 271AAB.

However, in the present case it is important to note that the conditions as per point (b), which is regarding accounts being correct and complete to the satisfaction of AO and point (c) which is regarding disclosure of all facts have not been satisfied by the appellant. During the assessment proceedings, it was found that the appellant had not maintained the requisite details/ supporting documents/bills/voucher to authenticate cash expenses claimed against taxable income. In the absence of complete submission or documentary evidence there was no other way for the AO to work out disallowance other than the methodology adopted. It is noted that the figures of 4% and 10% have been taken conservatively by the AO and only to the extent which was not verifiable in the absence of documentary evidence. Further, during the Special Audit conducted in the case u/s. 142(2A) of the Act, the special Auditor had also requested for party-wise details, supporting documents to examine correctness & completeness of cash expenses claimed by the appellant. The appellant, however, failed to produce requisite details & explanations with regard to cash payment made by it. Importantly, these disallowances have not been challenged by the appellant and no further appeal has been filed. During penalty proceedings before the AO again no documents were submitted. Even before me, no details or documents have been furnished in this regard even though a number of opportunities were granted to the assessee.

7.6 Considering the facts of the case and in the light of assesse's submission, I am of the opinion that the Ld. AO was left with no choice but to estimate the income, to the extent which was not verifiable, as complete details were not submitted by the assessee. It is important to note here that whatever details are available with the department are

available due to search and seizure action. If no search action had been taken by the department, the assesse would not have voluntarily disclosed the income as it had not been filing its return of income. Thus, the action of appellant is clearly deliberate suppression and under reporting of income. Based on above discussion levy of penalty is upheld on this ground. Accordingly, this ground of appeal is dismissed."

9.3 Regarding the penalty in respect of interest of Rs.44,65,742/- and excess depreciation of Rs.97,75,277/-, The Ld. CIT(A) relied on the decision of the Hon'ble Supreme Court in the case of Mak Data Pvt. Ltd. v. CIT (supra) and upheld the penalty levied for under reporting of the income observing as under:

"9.2 Before me, the appellant has submitted that the additional income was offered in the return of income out of abundant precaution and to avoid litigation. It has further been submitted that no penalty may be levied as the declaration of additional income has been done suo-moto. As noted by the AO, during search/post search proceedings and assessment proceedings, it was found that the appellant had used shell entities for rotation of funds/circuitous transactions in order to and creation of fictitious asset. On perusal of the ledger account extracted from the Tally data found during search action, it was found that appellant company had made payments to various shell entities. The appellant had used these shell entities to book inadmissible expenses and to conceal its taxable income. The said inadmissible expenses including interest and excess depreciation amounting to Rs 1,42,41,019/- were suo-moto disallowed by the appellant in the return of income filed in response to notice issued u/s 153A of the Act.

9.3 I have gone through the submissions filed by the appellant and the relevant records. It is an established fact and various decisions of the Hon'ble Apex court and other courts have held that suo-moto disclosure in the return after search action does not absolve the appellant of the penalty provisions.

9.4 The appellant has relied upon the decision of Hon'ble Chandigarh Tribunal in the case of DCIT Central Circle-1, Chandigarh v Kulwant Singh wherein it was held that penalty

should not be levied on suo-moto income offered in the return u/s 153A. As per the appellant case of the Apex court decision in Mak Data P Ltd has been discussed and differentiated.

9.5 It is however noted that facts in that case were different. The relevant paras of the order are reproduced as under:

"Applying the similar proposition, even when the Assessing officer is precluded from making any addition in the absence of any incriminating material found during the search action in the assessment proceedings carried out u/s 153A of the Act in which the original assessment proceedings stood completed and not abated, the Assessing officer, in our view, is also precluded from initiate the penalty proceedings u/s 271(1)(c) of the Act in case of already concluded assessment in the absence of any incriminating material found during the search action."

In the present case seized material is available. Thus, the facts are totally different and not applicable.

9.6 In this regard, reliance is placed on the decision of Hon'ble Supreme Court in the case of MAK Data (P.) Ltd. vs CIT [2013] 38 taxmann.com 448 (SC) which held as under:

"Voluntary disclosure does not release assessee from mischief of penal proceedings under section 271(1)(c)."

9.7 Further Hon'ble ITAT Delhi in the case of Smt. Kiran Devi Vs ACIT [2009] 125 TTJ 631 (Delhi) held that where certain income was disclosed in return filed in response to notice under section 153C following search, which income was not disclosed in original return, it was a clear case of concealment of income attracting penalty under section 271(1)(c); in such a case it was unnecessary to invoke Explanation 5 to section 271(1)(c)

9.8 Hon'ble Calcutta High Court in CIT Vs Prasanna Dugar [2015] 59 taxmann.com 99 (Calcutta), while deciding matter related to section 271(1)(c) Expl 5A held that even where subsequent to search, assessee voluntarily disclosed a sum and offered said sum to tax, since said amount was not disclosed in original return, penalty levied under section 271(1)(c) was justified.

Hon'ble Supreme Court has upheld the decision of Hon'ble High Court in the above case.

9.9 Although the above judgements are in the context of 271(1)(c), the same are applicable in case of penalty u/s 270 A as the both the penalty provisions are analogous. The AO had clearly initiated the penalty u/s 270A for 'under reporting of income' and the final penalty order was also passed for 'under reporting of income and as such the conditions of Section 270A of the Act were fulfilled. Thus respectfully following the judgments of various courts the penalty levied by the AO is upheld. Accordingly, the ground no. 4 of the appeal is dismissed."

10. We have heard the rival submissions advanced on behalf of the parties and perused the material available on record. The issue for our consideration is the validity of the penalty levied under Section 270A of the Income-tax Act, 1961, on account of under-reporting of income by the assessee. The impugned penalty pertains to two components: (i) disallowance on an estimated basis in respect of salary, wages and administrative expenses; and (ii) suo motu disallowance of interest amounting to ₹44,65,742/- and excess depreciation of ₹97,75,277/- in the return filed under Section 153A of the Act.

10.1 We find that from assessment year 2017-18 onward penalty u/s 270A of the Act for under reporting and miss-reporting of income has been introduced. In the present case, the assessee has been held to be under reported his income and accordingly, the penalty has been computed by the Assessing Officer. Under the provisions of section 270A(2) of the Act a person shall be considered to have under reported his income if the income assessed/ processed under clause (a) of sub-section (1) of section 143 is

greater than the income determined in the return of income. Further, sub-section 6 of section 270A prescribe that under reported income shall not include subject to certain conditions. The relevant section is reproduced as under:

(6) The under-reported income, for the purposes of this section, shall not include the following, namely:-

(a) the amount of income in respect of which the assessee offers an explanation and the Assessing Officer or [20][the Joint Commissioner (Appeals) or] the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, is satisfied that the explanation is bona fide and the assessee has disclosed all the material facts to substantiate the explanation offered;

(b) the amount of under-reported income determined on the basis of an estimate, if the accounts are correct and complete to the satisfaction of the Assessing Officer or [21][the Joint Commissioner (Appeals) or] the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, but the method employed is such that the income cannot properly be deduced therefrom;

(c) the amount of under-reported income determined on the basis of an estimate, if the assessee has, on his own, estimated a lower amount of addition or disallowance on the same issue, has included such amount in the computation of his income and has disclosed all the facts material to the addition or disallowance;

(d) the amount of under-reported income represented by any addition made in conformity with the arm's length price determined by the Transfer Pricing Officer, where the assessee had maintained information and documents as prescribed under section 92D, declared the international transaction under Chapter X, and, disclosed all the material facts relating to the transaction; and

(e) the amount of undisclosed income referred to in section 271AAB.

10.2 The Ld. Counsel for the assessee referred to the clause (a) of sub-section 6 and submitted that assessee has duly offered explanation in respect of interest and excess depreciation and *suo-motu* offered income in the return of income filed in response to section 153A of the Act therefore, according to the assessee, the explanation of the assessee is bonafide and the assessee has disclosed all the material fact to substantiate the explanation offered, therefore, no penalty in respect of interest and excess

depreciation should be levied invoking clause (a) sub-section (1) of section 143 of the Act in respect of estimate in respect to salary and wages and administrative expenses. The Ld. Counsel for the assessee referred to clause (a) of section (2) and addition has been made purely on the estimate basis and books of accounts have not been rejected u/s 145(3) of the Act and therefore, accounts have been treated by the Ld. AO as correct and complete to satisfaction and addition has been made on estimate basis from non-production of the vouchers on the expenses on the part of the assessee. The Ld. Counsel submitted that the Assessing Officer has himself estimated part of the expenses as genuine and merely estimated the addition for non-maintenance of the vouchers, therefore, the case of the assessee falls under clause (b) of section 270 and no penalty is leviable due to exclusion carved from the definition of the under-reported income.

10.3 We are of the opinion that addition in respect of salary, wages and administrative expenses have been made by the Assessing Officer on estimate only, due to lack of vouchers maintained by the assessee in respect of cash. If according to the Assessing Officer, the expenditure was not genuine, then the Assessing Officer could have disallowed the entire cash expenses but he did not do so and only estimated disallowance of 4% of the salary and wages and 10% on administrative expenses and no basis for such estimation has been provided by the Assessing Officer. In the circumstances,

addition being merely on the estimate basis cannot be sustained in view of reasons *pari materia* with penalty cancelled u/s 271(1)(c) of the Act and particularly in view of clause of sub-section 2 of section 270 of the Act as in the case of the assessee, the Assessing Officer has made disallowance out of cash expenses and no books of accounts have been rejected invoking section 145(3) of the Act. As regards the penalty levied for interest and excess depreciation *suo motu* offered by the assessee in the return of income filed in response to section 153A of the Act, we find that the assessee has explained the *suo-motu* variation made in the return of income and provided all material facts to substantiate the explanation. Thus explanation being bonafide in nature no penalty is leviable u/s 270A of the Act. Accordingly, the penalty levied by the Assessing Officer for under reporting of the income u/s 270A of the Act is hereby deleted.

10.4 The Ld. CIT(A) in assessment years 2018-19 and 2019-2020 has followed his finding in assessment year 2017-18. Being identical facts and circumstances, following our finding in AY 2017-18, the penalty levied by the Assessing Officer u/s 270A of the Act in assessment years 2017-18 and 2019-2020 is also hereby cancelled and relevant grounds are accordingly allowed.

11. Now, we take up the appeal of the assessee for assessment year 2020-21. The grounds raised by the assessee are reproduced as under:

> *1. On the facts and circumstances of the case and in law, the learned CIT (A) has erred in confirming the initiation of penalty wherein the Assessing Officer has not specified the provision of Section 271AAB of the Income tax Act under which the penalty is levied.*
>
> *2. On the facts and circumstances of the case and in law, the learned CIT (A) has erred in confirming the penalty levied on adhoc disallowance of salaries and wages amounting to Rs.76,70,900/- &adhoc disallowance of administrative expenses amounting to Rs.3,89,240/- made u/s 37(1) of the act on estimated basis.*
>
> *3. On the facts and circumstances of the case and in law, the learned CIT (A) has erred in confirming the penalty leviedon suo-moto disallowance of interest of Rs.16,43,363/- & Excess depreciation of Rs.12,97,357/- made u/s 36(1)(iii) of the act on estimated basis.*

11.1 In the ground No. 1, the assessee has challenged the levy of penalty u/s 271AAB of the Act on the ground that the Assessing Officer has not specified the relevant provisions while levying the penalty. This issue has been adjudicated by the Ld. CIT(A) observing as under:

> *"7.1 The appellant in this ground has contended that the AO has erred in not mentioning the specific provision of Section 271AAB of the Act for initiation of penalty proceedings in the assessment order. It is noted that the appellant had also raised this contention before the AO during the course of penalty proceedings. The AO in his order has already clarified that the provisions of the 271AAB (1A) of the Act have been correctly*

invoked in this case and only the manner and rates vary between the two parts of the section.

7.2 As per provisions of section 271AAB, penalty is levied on 'undisclosed income of the specified year unlike u/s. 271(1)(c) where penalty can be levied for two different charges. Though penalty u/s.271AAB is levied for singular charge, it proposes levy of penalty at different slabs subjected to conditions prescribed therein. Penalty u/s.271AAB is reproduced in tabular manner as under:

7.3 As can be seen from the above chart the charge u/s 271AAB is singular. Only rates of penalty vary depending upon either fulfilment/non-fulfilment of conditions laid down in the section by appellant. Therefore, non-specification of subsection in the penalty notice u/s 271AAB issued by AO in the present case do not vitiate penalty proceedings.

7.4 Reliance is placed on the judgment of Hon'ble ITAT, Jaipur bench in Rambhajo's vs ACIT, ITA 991/JP/2017 which has adjudicated same issue and held as under:

> *"On close reading of provisions of Section 271AAB, we find that the primary condition or charge for levy of penalty is the existence of undisclosed income for the specified previous year found during the course of search in the case of assessee. Once the said primary condition or charge is satisfied, for the purposes of quantifying the penalty, the Assessing officer has to examine the satisfaction of ancillary conditions as specified under clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB. Merely because the quantum of penalty varies from 10% to 30% subject to compliances with the ancillary conditions, it cannot be said that where the AO has initiated the penalty under section 271AAB, there is any ambiguity in the charge or there is any lack of application of mind on part of the Assessing officer."*

11.2 We have heard rival submissions of the parties and perused the relevant materials on record. The contention of the assessee is that penalty u/s 271AAB is levied @ 10%, 20% and 30% depending

on the demonstrations of specified conditions applicable over the facts of the case. The Ld. Counsel for the assessee was of the view that the Assessing Officer was required to specify relevant rate under which penalty was leviable and due to non-specification of the same, relying on the decision of Hon'ble Karnataka High Court in the case of Manjunath Cotton & Ginning Factory(supra), though which is on the section 271(1)(c) of the Act, but being *pari-materia*, is applicable over the facts of this case also. However, we do not agree with the contention of the Ld. Counsel for the assessee for the reason that penalty is levied on charge of undisclosed income defined under the said section and rate of the penalty depends on the other conditions which are fulfilled. Therefore, non-specification of rate or suppression of the same in the penalty notice do not vitiate the penalty proceedings. Accordingly, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute and we accordingly uphold the same.

12. The ground No. 2 of the appeal of the assessee relate to levy of penalty on the ad-hoc disallowance of salaries and wages amounting to Rs.76,70,900/- and ad-hoc disallowance of administrative expenses amounting to Rs.3,89,240/- made u/s 37(1) of the Act on estimated basis. The Ld. CIT(A) upheld the penalty in respect of disallowance of salary and wages and administrative expenses in cash mode observing as under :

"8.2 During the course of assessment proceedings it was noted by the AO that even the returns which had been filed in response to notice u/s. 153A showed wide variation as compared to the original return of income. Variations were also noted in the P& L account, balance sheet, cash and bank balances etc. Since, the books were unreliable, the case was taken up for special audit u/s 142(2)(A). It is further noted that complete details and information with regard to expenses claimed in cash mode were not submitted at any stage i.e. neither during the search proceedings, nor during post search proceedings and not even during assessment proceedings and thus could not be verified. Thus, the AO disallowed 4% of the salary and wages expenses and 10% of administrative expenses, to the extent which were not verifiable, in the absence of necessary documentary evidences.

8.3 During penalty proceedings, the appellant submitted that since the disallowances in the salary and wages made u/s 37(1) of Act are on estimate basis hence no penalty is leviable. The AO after going through the submissions of appellant levied the penalty.

8.4 As discussed in prepares, the appellant had not been able explain the entries during the course of search action. Again, during the course of assessment proceedings, complete details were not filed with AO. Again, during the course of special audit complete details were not filed. Thus, due to lack to data and any clarification from appellant's end, the AO computed income on the total receipts on estimate basis as no relevant data or substantive records were produced by the appellant before him. The appellant has not gone into further appeal against the quantum order of the AO. The appellant has not provided any details even before me except filing a note on the matter.

8.5 The AO in his order has observed that appellant had incurred expenses under the heads 'salary & wages' & 'administrative expenses' in cash mode. The AO has also noted that complete documentary evidences and explanations with regard to such cash expenses was not provided by the appellant. Accordingly, the AO disallowed expenses to the extent which was not verifiable. During the penalty proceedings before the AO, the appellant submitted that it had not gone into

appeal against the quantum order and that penalty cannot be levied on addition made on estimate basis.

8.6 Before me, the only contention of the appellant in his submissions, on this ground, is that penalty cannot be levied on additions made on estimate basis.

8.7 Considering the facts of the case and in the light of assessee' submission, I am of the opinion that the AO was left with no choice but to estimate the income, to the extent which was not verifiable, as complete details were not submitted by the appellant. It is important to note here that whatever details are available with the department are available due to search and seizure action. If no search action had been taken by the department, the assessee would not have voluntarily disclosed the income as it had not been filing its return of income. Thus, the action of appellant is clearly deliberate suppression of income. The ground of the appeal of the appellant is accordingly dismissed."

12.1 Prior to confirming the penalty on salary and wages and administrative expenses, the Ld. CIT(A) referred to the provisions of section 271AAB and definition of the undisclosed income and held that the disallowance made by the assessee satisfied the definition of the 'undisclosed income' and therefore, the disallowance is liable for penalty u/s 271AAB of the Act. The relevant finding of the Ld. CIT(A) is reproduced as under:

"6.2 I have gone through the submissions of assessee, the assessment order, penalty order and the facts of the case. Under section 271AAB of the Act, penalty is levied where undisclosed income is found during the course of a search action u/s 132 of the Act in relation to the specified previous years. As per this section penalty is to be levied only on undisclosed income. The term undisclosed income broadly means income represented either wholly or partly by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or transactions found during

the course of search u/s132 and which has not been recorded on or before the date of search in the books of account or other documents maintained in the normal course.

6.3 On going through the facts and records of the case, I observe that appellant was covered in a search and seizure action u/s 132 of the Act. As noted by the AO, returns were filed in this case based on re-worked unaudited financials in which wide variations were noticed as compared to the original return of income filed. Also, there was variation in various other particulars of the P&L account and Balance Sheet. There was variation even in the cash and bank balances as shown in the previous balance sheet filed and the re- written one filed recently. These variations existed even in cases where the earlier financials filed had been audited. Thus, it was observed that the books of accounts, financials of various entities as well as the subsequent return of income filed, were not reliable and serious doubts existed regarding the correctness of the books of accounts of the appellant group. No details were submitted before the AO to explain the discrepancies. Again, during the course of special audit in the group case complete details were not filed. Thus, due to lack to data and any clarification from appellant's end, the AO computed income on the total receipts on estimate basis as no relevant data or substantive records were produced by the appellant before him. The AO finally noted that during the search proceedings, post search proceedings and during assessment proceedings assessee could not explain the cash transactions and other deficiencies. Since the details furnished were incomplete and not verifiable addition was made.

6.4 In the context of section 271AAB of the Act, undisclosed income would be represented by money, bullion, jewellery or other valuable articles or things or an unrecorded entry as per documents found or a false entry recorded in the books of account. In the case of appellant, it is noted that there was wide variation in the figures of financials as submitted even in cases where audit had been finalized. Thus, the expenses can be treated as false entries as the appellant has not been able to substantiate the same anytime during the search or even later. Thus, in my opinion the AO rightly initiated penalty u/s 271AAB of the Act.

6.5 Appellant's claim that since these are on estimate basis penalty cannot be levied is also incorrect. Considering the facts of the case and in the light of assessee' submission, I am of the opinion that the AO was left with no choice but to estimate the income as complete details were not submitted by the assessee either during search proceedings or before the AO or special auditor. Thus, AO after going through details made addition on account of cash expenses to the extent which was not verifiable. It is also important to note here that whatever details are available with the department are available due to search and seizure action u/s 132 of the Act. If no search action had taken place, the assessee would not have voluntarily disclosed the income, as the appellant had not been filing any returns even though it was receiving huge receipts. Thus, the action of appellant is clearly deliberate suppression of income.

6.6 Thus considering the discussion in the pre-paras, I am of the opinion that section 271AAB of the Act has correctly been levied in this case. Accordingly, this ground of appellant is dismissed."

12.2 We have heard rival submissions of the parties and perused the relevant materials on record. The penalty u/s 271AAB of the Act is independent of the addition made by the Assessing Officer in the assessment order and same could be initiated during the assessment proceeding depending on fulfilling of the conditions provided in the section. The penalty could be levied @ 10% or 20% or 30% to 60% of the undisclosed income for specified previous year. In the case, it is undisputed that the assessment year under consideration is specified year and only dispute is in respect of issue whether the disallowance in respect of which penalty is levied satisfy the definition of the 'undisclosed income'. Therefore, for ready reference said Explanation to section 271AAB defining the undisclosed income is reproduced as under:

*[**Penalty where search has been initiated.***

*[13]**271AAB.** (1) .....*

(a) .....

(b) .....

(c) .....

[18][(1A) .....

(2) .....

(3) .....

Explanation.-For the purposes of this section,-

(a) "specified date" means the due date of furnishing of return of income under sub-section (1) of section 139 or the date on which the period specified in the notice issued [22][under section 148 or under section 153A, as the case may be,] for furnishing of return of income expires, as the case may be;

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

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

(ii) in which search was conducted;

*(c) "**undisclosed income**" means-*

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

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the

normal course relating to such previous year; or

(B) otherwise not been disclosed to the [23][Principal Chief Commissioner or] Chief Commissioner or [23][Principal Commissioner or] Commissioner before the date of search; or

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

12.3 In above definition under sub-section 1 income represented in the form of assets like money, bullion, jewellery or other valuable items or *income representing any entry in the books of account which was not found recorded in the books of accounts before the date of the search* or otherwise not disclosed to the Pr. Chief Commissioner etc. then, the said income falls in the category of undisclosed income. The clause 2 of the section specify that income represented by way of entry in respect of expenses if same is found to be false and would not have been found to so had said search not conducted, then said expenses would amount to undisclosed income.

12.4 In the instant case before us, addition has been made by the Assessing Officer in respect of expenses incurred on salary, wages and administrative expenses but voucher of the same were not produced by the assessee during assessment proceedings and

therefore, disallowance on estimated basis in respect of expenses which were incurred in cash has been made by the AO which has not been disputed by the assessee.

12.5 Thus for disallowance of the expenses on the salary, wages and administrative expenses falling into the definition of the undisclosed income, same should be found to be false and would not have been found to be so if the search had not been conducted. Thus, the two conditions are required to be fulfilled, ***firstly***, said expenses should be found to be false and ***secondly***, said expenses should be found in the course of the search action. We find that both these conditions are not satisfied in the instant case. The Assessing Officer has nowhere held the said cash expenditure is either bogus or false but he made disallowance merely for the lack of verification of the vouchers of the expenses made in cash. The second condition is that the fact of expenses being false should emerge in search action. But nothing has been brought on record that non availability of vouchers was observed in search action, rather, it appears that fact has been recorded in assessment proceeding. Unless, the conditions specified for disallowance to be in the nature of the undisclosed income specified in section 271AAB are satisfied , no penalty could be levied in respect of disallowance merely for the reason that Assessing Officer has made addition in the assessment order. The ground No. 2 of the appeal of the assessee is accordingly allowed.

13. The ground No. 3 of the appeal of the assessee relates to levy of the penalty in respect of interest and depreciation expenses disallowed by the Assessing Officer. The relevant finding of the Ld. CIT(A) is reproduced as under :

> *"10.2 In this regard it is noted that the during the course of search/post search proceedings as well as during the assessment proceedings, it was found that, the appellant had used said shell entities for rotation of funds/circuitous transactions in order to and creation of fictitious asset. During search, on perusal of the ledger account extracted from the Tally data it was found that the appellant had made payments to certain entities which were found to be shell entities. It was established that these shell entities were floated by the appellant group to facilitate circular transactions and to create fictitious assets. The interest expense of Rs. 16,43,363/- and excess depreciation of Rs 12,97,357/- was not disclosed correctly in the original return filed u/s. 139(1) of the Act as well as in the return filed in response to notice issued u/s 153A of the Act. Thus, the AO had disallowed the aforementioned expenses u/s 36(1) (iii) of the Act and also initiated penalty proceedings. During penalty proceedings, it was held that since the appellant had not disclosed the same in its return of income or in books of the accounts, such income/expenses to that extent have remained undisclosed for the year under consideration.*
>
> *10.3 Before me the appellant has only submitted that since it was on estimate basis the penalty cannot be levied. After going through the details, it is clear that these entries were found in the shape of ledgers at the time of search. The same were established to be payments made to shell companies. The appellant had neither disclosed the same in its original return nor in the 153A return. The appellant has not explained the entries and also not disclosed fully in its returns. Further, no appeal has been filed against this addition. Accordingly, I am of the opinion that the AO has correctly levied the penalty. Accordingly, this ground of appeal is dismissed."*

13.1 We have heard rival submissions of the parties and perused the relevant materials on record. The Assessing Officer has levied penalty in respect of disallowance of the expenses on interest made u/s 36(1)(iii) of the Act and *suo-motu* disallowance of depreciation amounting to Rs.12,97,357/-. As regards the interest of Rs.16,43,363/- disallowed u/s 36(1)(iii) of the Act is concerned, we find that the same was disallowed for the reason that loans and advances have been held to be given for non-business purpose and therefore, the interest in respect to those loans and advances was held to be for non-business purpose and accordingly disallowed under section 36(1)(iii) of the Act. There is no finding recorded by the Assessing Officer to cover the said disallowance under the definition of the undisclosed income comprising of the entry of the expenses in the books of accounts. Similarly, regarding the depreciation also the Assessing Officer has made no recording for satisfaction of the entry of the expenses as undisclosed income. The Assessing Officer has not brought on record as how issue of the depreciation has been unearthed during search action. In absence of clear finding of the facts, penalty levied cannot be sustained. Accordingly, the ground No. 3 of the appeal of the assessee is also allowed.

10.2 In the result all appeals of the assesses from AY 2014-15 to AY 2020-21 are partly allowed.

Order pronounced in the open Court on 30/07/2025.

Sd/-	**Sd/-**
(RAJ KUMAR CHAUHAN)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 30/07/2025
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai