IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA

Before Shri P.M. Jagtap, Accountant Member
and Shri S.S. Viswanethra Ravi, Judicial Member

I.T.A. Nos. 1825 & 1826/KOL/2009
Assessment Years: 2005-2006 & 2006-2007

Prithi Paul Singh Sethi,.....Appellant
12A, Amrit Banerjee Lane,
Kolkata-700 026
[PAN : AOAPS 8866 A]

-Vs.-

Deputy Commissioner of Income Tax (Central),.....Respondent
Circle-XXII, Kolkata,
Poddar Court,
18, Rabindra Sarani,
Kolkata-700 001

Appearances by:
Shri A.K. Tibrewal, FCA and Shri Amit Agarwal, Advocate, for the assessee
Shri David Z. Chawngthu, ACIT, Sr. D.R., for the Department

Date of concluding the hearing : January 12, 2016
Date of pronouncing the order : February 24, 2016

O R D E R

Per Shri P.M. Jagtap :-

These two appeals filed by the assessee are directed against the common order of the ld. Commissioner of Income Tax (Appeals), Central-III, Kolkata dated 28.08.2009, whereby he confirmed the penalties of Rs.7,23,020/- and Rs.10,95,440/- imposed by the Assessing Officer under section 271(1)(c) of the Act for assessment years 2005-06 and 2006-07 respectively.

2. The assessee in the present case is an individual, who belongs to Basil/ Appelline Group being the CEO and Director of M/s. Vamshi Chemicals Limited. A search and seizure action under section 132 was conducted in the cases belonging to the said Group on 27.12.2006 including the case of the assessee. Pursuant to the said search, notices under section 153A were issued by the Assessing Officer to the assessee.

During the course of search, additional income of Rs.10,00,00,000/- was offered on behalf of the entire Group and in the returns of income filed in response to the notices issued under section 153A, an amount of Rs.9,36,62,582/- was offered in the hands of the various assessees belonging to the Group. Out of the said amount, a sum of Rs.21,48,000/-, Rs.32,54,418/- and Rs.9,35,000/- was offered in the hands of the assessee for A.Y. 2005-06, 2006-07 and 2007-08 respectively and accordingly the returns in response to notices under section 153A were filed by the assessee declaring total income of Rs.37,64,840/- and Rs.70,77,980/- for the A.Y. 2005-06 and 2006-07 respectively. In the assessments completed under section 153A/143(3) of the Act, the income declared by the assessee in the returns of income for A.Y. 2005-06 and 2006-07 was accepted by the Assessing Officer.

3. Subsequently penalty proceedings under section 271(1)(c) were initiated by the Assessing Officer in respect of additional income offered by the assessee in the returns of income filed in response to notices under section 153A for both the years under consideration. The explanation offered by the assessee in response to the penalty notices issued by the Assessing Officer mainly was that the additional income had been offered voluntarily and the same having been accepted in the assessments, there was no case of any concealment of particulars of income or furnishing of inaccurate particulars of income warranting levy of penalty under section 271(1)(c). This explanation of the assessee was not found acceptable by the Assessing Officer. According to him, the additional income was disclosed by the assessee only as a result of search and so the disclosure made by the assessee could not be considered as voluntary. He, therefore, proceeded to impose penalties of Rs.7,23,020/- and Rs.10,95,440/- under section 271(1)(c) for A.Y. 2005-06 and 2006-07 respectively being 100% of the tax sought to be evaded by the assesese in respect of additional income offered as a result of search.

4. The penalties imposed by the Assessing Officer under section 271(1)(c) for both the years under consideration were challenged by the assessee in the appeals filed before the ld. CIT(Appeals). During the course of appellate proceedings before the ld. CIT(Appeals), the assessee mainly claimed the immunity available under Clause 2 of Explanation 5 to section 271(1)(c) by contending that the income offered during the course of search having been duly declared in the returns of income and tax thereon having been paid, no penalty under section 271(1)(c) was leviable as per Clause 2 of Explanation 5 to section 271(1)(c). This stand of the assessee was not found acceptable by the ld. CIT(Appeals). According to him, the income disclosed by the assessee was on account of personal expenditure and not on account of any income utilized for acquiring money, bullion, jewellery or other valuable article or things found during the course of search. He also noted that the assessee has not explained the source of income from which the personal expenditure was made. He, therefore, held that the conditions stipulated under Clause 2 of Explanation 5 to section 271(1)(c) was not satisfied and the assessee was not entitled or eligible to claim the immunity provided therein. Accordingly, the penalties imposed by the Assessing Officer under section 271(1)(c) for both the years under consideration were confirmed by the ld. CIT(Appeals). Aggrieved by the orders of the ld. CIT(Appeals), the assessee has preferred these appeals before the Tribunal.

5. The ld. Counsel for the assessee mainly raised three contentions in support of the assessee's case that the penalties imposed by the Assessing Officer under section 271(1)(c) and confirmed by the ld. CIT(Appeals) for both the years under consideration are not sustainable. Firstly, he took us through the assessment orders passed by the Assessing Officer to show that the satisfaction required for initiating the penalty proceedings was neither specifically recorded by the Assessing Officer nor the same was discernable from the assessment orders passed by him. Relying on the decision of the Coordinate Bench of this Tribunal in the case of Suvaprasanna Bhattacharya –vs.- ACIT rendered vide its order dated

06.11.2015 in ITA No. 1303/KOL/2010, he contended that in the absence of this basic requirement initiation of penalty proceedings itself was bad in law and the penalties imposed in pursuance thereof are liable to be cancelled. Secondly, he contended that the income declared by the assessee in response to the notices issued by the Assessing Officer under section 153A having been accepted in the assessments by the Assessing Officer without making any further addition, there was no case of any concealment of particulars of his income by the assesee or furnishing of inaccurate particulars of such income warranting levy of penalty as held by the Hon'ble Gujarat High Court in the case of Kirit Dayabhai Patel –vs.- ACIT (Income Tax Appeal Nos. 1181, 1182 & 1185 of 2010 dated 03.12.2014). He contended that the conditions stipulated in Clause 2 of Explanation 5 to section 271(1)(c) were also duly satisfied by the assessee and the immunity available therein was wrongly denied by the ld. CIT(Appeals) to the assessee on the basis of all irrelevant grounds, which are not germane to the issue.

6. The ld. D.R., on the other hand, strongly relied on the orders of the authorities below in support of the Revenue's case that the case of the assesese is a fit case to impose penalties under section 271(1)(c). He contended that the additional income was surrendered and offered by the assesese to tax in the returns of income filed in response to notices under section 153A only as a result of adverse findings of the search and seizure action and the same, therefore, cannot be considered as voluntary disclosure made by the assessee to exonerate him from the levy of penalty under section 271(1)(c).

7. We have considered the rival submissions and also perused the relevant material available on record. As regards the first contention raised by the ld. Counsel for the assessee regarding the lack of satisfaction arrived at by the Assessing Officer for initiating penalty proceedings under section 271(1)(c), it is observed that the Coordinate Bench of this Tribunal in the case of Suvaprasanna Bhattacharya (supra)

has considered this aspect in detail in the light of the provisions of section 271(1B) of the Act as well as the decision of the Hon'ble Delhi High Court in the case of Ms. Madhushree Gupta –vs.- Union of India reported lin 317 ITR 107 (Del.) and that of the Hon'ble Supreme Court in the case of MAK Data Pvt. Limited –vs.- CIT reported in 358 ITR 593 (SC) and it is worthwhile to refer to the observations recorded by the Tribunal in this context in paragraphs no. 6 & 7 of its order, which are extracted below:-

> *"6. We shall now deal with the question whether proper satisfaction was arrived at by the AO for initiating penalty proceedings u/s.271(1)(c), in the course of concluding the assessment proceedings, wherein the additions in respect of which penalty was imposed were made. On the above issue, the first aspect which, we notice is that in the order of assessment, which we have extracted in the earlier part of this order, nowhere spells out or indicates that the AO was of the view that the assessee was guilty of either concealing particulars of income or furnishing inaccurate particulars of income. The offer to tax of income by the assessee has just been accepted. It is no doubt true that it is not the requirement of the law that the satisfaction has to be recorded in a particular manner, especially after the introduction of the provisions of Sec.271(1B) of the Act with retrospective effect from 1.4.1989. Nevertheless, as laid down by the Hon'ble Delhi High Court in the case of Ms.Madhushree Gupta (supra), the position of law both pre and post Sec.271(1B) of the Act is similar, inasmuch, the AO will have to arrive at a prima facie satisfaction during the course of proceedings with regard to the assessee having concealed particulars of income or furnished inaccurate particulars, before he initiates penalty proceedings '**prima facie**' satisfaction of the AO that the case may deserve the imposition of penalty should be discernible from the order passed during the course of the proceedings. At the stage of initiation of penalty proceeding, the order passed by the AO need not reflect satisfaction vis-a-vis each and every item of addition or disallowance, if overall sense gathered from the order is that a further prognosis is called for. The decision of the Hon'ble Supreme Court in the case of MAK Data (P) Ltd. (supra) has to be understood in the context of the facts of the said case. The relevant portion of the judgment in the aforesaid case, reads thus:*
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> > *"9. We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. AO during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer 8 deeds duly signed, have been impounded in the course of survey proceedings under Section 133A conducted on 16.12.2003, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to*

record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The AO, in our view, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under Section 271 read with Section 274 of the Income Tax Act, 1961.

10. The AO has to satisfy whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing……."

7. The Revenue places reliance only on the sentence appearing in para-10 of the judgment without reading it in the context of the observations in the last portion of ***para-9*** *of the said judgment. Therefore even the Hon'ble supreme court's decision suggests that the satisfaction need not be recorded in a particular manner but from a reading of the assessment order as a whole such satisfaction should be clearly discernible. If the AO accepts all the contentions of the assessee and the offer of income that has not been declared in the return of income to tax without indicating either directly or indirectly that the assessee has concealed particulars of income or furnished inaccurate particulars of income, it cannot be said that satisfaction for initiation of penalty proceedings is discernible from the order of assessment. If the assessee in good faith offers income to tax voluntarily prior to any positive detection by the AO, such voluntary offer cannot be taken advantage of by the AO to initiate penalty proceedings against the assessee without specifying the reasons why penalty proceedings are initiated u/s.271(1)(c) of the Act. In the present case, we have read the order of assessment as a whole and are satisfied that satisfaction for initiation of penalty proceedings is not discernible from the order of assessment. We therefore concur with the argument of the learned counsel for the assessee that initiation of penalty proceedings was not proper in the present case and on that ground the imposition of penalty u/s.271(1)(c) of the Act is unsustainable".*

8. Keeping in view the decision of the Tribunal in the case of Suvaprasanna Bhattacharya (supra), the ld. D.R. was required by us to point out any observation or finding recorded by the Assessing Officer in the assessment orders for both the years under consideration, from which the satisfaction as required to be arrived at by him to initiate penalty proceedings under section 271(1)(c) is discernable. However, he has not been able to pinpoint any such observation or finding recorded by the Assessing Officer in this context. A perusal of the assessment order also shows that there is no such observation or finding given by the ld. CIT(Appeals) from which the satisfaction as required to be arrived at by the Assessing Officer is discernable. The decision of the Coordinate Bench of this Tribunal in the case of Suvaprasanna Bhattacharya (supra) thus is

clearly applicable in the present case and respectfully following the same, we hold that in the absence of the requisite satisfaction recorded by the Assessing Officer in the assessment order, the initiation of penalty proceedings itself was bad in law and the penalties imposed in pursuance of such initiation are not sustainable.

9. It is also observed that the income surrendered during the course of search was declared by the assessee in the returns of income filed for both the years under consideration in response to the notices issued by the Assessing Officer under section 153A and the income so declared was accepted by the assessee without making any further addition. In the case of CIT –vs.- Kirit Dayabhai Patel –vs- ACIT (supra) cited by the ld. Counsel for the assessee, it was held by the Hon'ble Gujarat High Court that the penalty under section 271(1)(c) is leviable only on the income assessed over and above the income returned under section 153A. At the time of hearing before us, the ld. D.R. has not brought to our notice any decision of the Hon'ble High Court or Hon'ble Supreme Court taking a different view on this aspect. We, therefore, respectfully follow the decision of the Hon'ble Gujarat High Court in the case of Kirit Dayabhai Patel (supra) to hold that penalties imposed by the Assessing Officer under section 271(1)(c) are not sustainable on this ground also. Accordingly, we cancel the penalties imposed by the Assessing Officer under section 271(1)(c) and confirmed by the ld. CIT(Appeals) for both the years under consideration and allow these appeals of the assessee.

10. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open Court on February 24, 2016.

Sd/-	**Sd/-**
(S.S. Viswanethra Ravi)	**(P.M. Jagtap)**
Judicial Member	**Accountant Member**

Kolkata, the 24th day of February, 2016

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(4) Commissioner of Income Tax, Kolkata
(5) The Departmental Representative
(6) Guard File

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.