

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'E': NEW DELHI**

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER, AND  
SHRI L.P. SAHU, ACCOUNTANT MEMBER,**

**ITA No. 6010/Del /2013  
Assessment Year: 2007-08**

The I.T.O  
Ward - 5(4)  
New Delhi

Vs.

Multiplex Capital Ltd  
100/28, Keshav Tower  
Rajapur Market, Sector 9  
Rohini, New Delhi

PAN : AAACM 1761 B

[Appellant]

[Respondent]

**Date of Hearing : 17.12.2015**

**Date of Pronouncement: 02.03.2016**

Appellant by : Shri P. DAM Kanunjna, Sr. DR

Respondent by : Shri Ajay Wadhwa, Adv

**ORDER**

**PER CHANDRA MOHAN GARG, JUDICIAL MEMBER**

This appeal filed by the Revenue is directed against the order of the CIT(A)-VIII, New Delhi, dated 27/08/2013 passed in first appeal No. 64/12-13 for A.Y 2007-08.

2. The grounds raised by the revenue read as under:

1. *Whether on the facts and circumstances of the case, the ld. CIT(A) has erred in deleting the penalty u/s 271(1)(c) of the Act imposed by the AO of Rs. 27,58,736/-.*

2.1 *Whether on the facts and circumstances of the case, the ld. CIT(A) has erred in deleting the penalty u/s 271(1)(c) of the Act by ignoring the facts that addition made to the normal income effect the computation of income of coming year*

2.2. *Whether on the facts and circumstances of the case, the ld. CIT(A) has erred in deleting the penalty by holding that the appellant had paid the taxes under deemed income whereas tax has been paid by the appellant under normal provisions.*

3. *That the order of the ld. CIT(A) is erroneous and is not tenable on facts and in law.*

4. *That the grounds of appeal are without prejudice to each other.”*

3. Briefly stated, the facts giving rise to this appeal are that the assessee company filed its return of income for A.Y 2007-08 declaring total income of Rs. 3,66,77,400/- and tax payable at Rs. 3,17,981/- after claiming rebate u/s 88E of the Income-tax Act, 1961 ['the Act' for short] of Rs. 1,07,19,814/-. The deemed total income u/s 115JB of the Act and tax payable as per return were Rs. 3,55,71,182/- and Rs. 35,57,118/- respectively and it was held that the assessee did not pay tax of Rs. 33,57,118/- as per section 115JB of the Act. In the assessment order, the AO had made additions/disallowances on certain issues and the AO had recorded the finding that he was satisfied that the assessee company had filed incorrect particulars of its income and had concealed the income and tax payable therein with respect to the additions made on all the issues and tax payable for the purpose of section 115JB of the Act and thus the AO initiated penalty proceedings against the assessee. Finally, the AO imposed penalty of Rs. 27,58,736/- by observing that as per the observations made by the Id. CIT(A) in the quantum first appeal, it is apparent that the assessee had

furnished inaccurate particulars of its income in respect of Rs. 82,10,528/-. Therefore, the assessee has deliberately concealed the income and furnished inaccurate particulars of income for which the assessee is liable for penalty u/s 271(1)(c) of the Act.

4. Aggrieved, the assessee carried the matter before the first appellate authority and the ld. CIT(A) granted relief to the assessee and directed the AO to delete the penalty.

5. Now the aggrieved Revenue is before this Tribunal in this second appeal with the ground as reproduce hereinabove.

6. At the very outset, the ld. AR pointed out that the assessee challenged the validity of penalty before the ld. CIT(A) in Ground No. 4 as per copy of Form No. 35, by alleging that the same has been passed beyond the prescribed limitation period as mandated by section 275(1)(a) of the Act, therefore, the same is not sustainable being time barred.

7. The ld. AR also pointed out that the assessee has not filed any cross appeal or cross objection but as per Rule 27 of the IT(AT) Rules, 1963, the assessee can raise legal objection which can be decided on the facts and evidence already on record without filing any cross appeal or cross objection and the assessee respondent may support the order appealed against on any of the grounds decided against him. For this proposition, the ld. AR submitted that the ITAT dismissed the appeal of the Revenue by passing order dated 23.12.2011 and the AO initiated penalty proceedings by issuing notice dated 10.10.2012 and passed impugned penalty order in a hasty manner on 30.10.2012 without allowing due opportunity of hearing. Therefore, the impugned penalty order has been passed beyond the prescribed period of six months as per section 275(1)(a) of the Act. The ld. Counsel vehemently pointed out that in view of the above facts, the legal contention of the assessee raised by way of invoking Rule 27 may kindly be allowed and the impugned penalty order being time barred may kindly be quashed as void ab initio and unsustainable as per provisions of the Act.

8. Replying to the above, the ld. CIT(DR) pointed out that without filing any cross appeal or cross objection, the assessee cannot raise any legal objection at second appellate stage before the Tribunal. The ld. DR also pointed out that even if the assessee is allowed to raise legal objection by way of invoking Rule 27 of Rules, then also it may be observed that as per order of the Tribunal dated 23.12.2011 [as per copy of order of Tribunal] it is apparent that the Commissioner received copy of the Tribunal order dated 23.4.2012 and the impugned penalty order has been made on 30.10.2012. In the light of the above facts, when we test the validity of order at the angle of limitation prescribed u/s 275(1)(a) of the Act, then it is apparent that under this provision, the penalty order should be passed within six months from the end of the month in which the order of the Tribunal has been received by the Commissioner or other competent authority.

9. Per contra, the ld. AR submitted that as per the proposition laid down by the Tribunal in the case of ITO Vs. Gurinder Kaur reported as 102 ITD 189 [Delhi-Tri], the assessee can raise legal objections which can be decided on

the evidence and facts already on record by invoking Rule 27 of the Rules and to support the order appealed against on any of the grounds decided against him.

10. The ld. AR has placed reliance on the following judgments for invoking the provisions of Rule 27 of the Rules:

- i) B.R. Bamasi Vs. CIT [972] 63 ITR 223 [Bom]
- ii) Marolia & Sons Vs. CIT [1981] 129 ITR 475 [All]
- iii) Assam Co. India Ltd Vs. CIT [2002] 256 ITR 423 [Raj]
- iv) Dahod Shahakari Kharib Bechan Sangh Vs. CIT [2005] 149 Taxman 456 [Guj]
- v) CIT Vs Cochin Refinery Ltd [1996] 220 ITR 398 [Ker]
- vi) ITO Vs. Smt. Gurinder Kaur 102 ITD 189 [Del-Trib]

Firstly, we may point out that the ITAT Delhi in the case of ITO Vs. Smt. Gurinder Kaur after referring to the proposition laid down by various Hon'ble High Courts in said decisions held as follows:

*“10. Before we proceed further, it is necessary to clear this point, namely, whether the assessee can raise these points before the Tribunal for the first time as a respondent defending the order of the CIT(A) which was based on the only question*

*whether the reasons recorded by the Assessing Officer amounted to reason to believe or reason to suspect. The matter is not res integra. Rule 27 of the Appellate Tribunal Rules, says that the respondent in an appeal can support the order appealed against on any of the grounds decided against him even though he may not have filed an independent appeal or cross-objection. This Rule clearly supports the assessee. In the present case, the assessee has raised the point of non-recording of reason in ground No. 2 before the CIT(A) though this ground is not so categorical as the Ld. Counsel for the assessee wants us to read. Even so, such ground can be inferred from the fact that the assessee has been repeatedly asking for the reasons recorded which were not supplied to her. Even before the Tribunal right from September, 2004, the assessee has been requesting for production of the department's records obviously calling upon the department to show that reasons for reopening have been recorded, but due to some difficulty or the other, the department has not been able to produce the records. The CIT(A) has not recorded any finding on the question whether the reasons were recorded or not, but having regard to the judgment of the Hon'ble Delhi High Court in Rohtak and Hissar Districts Electric Supply Co. (P.) [Ltd, v. CIT](#) , it is possible to hold that he found against the assessee on this point. On this reasoning, it is open to the assessee to raise the question of non-recording of reasons for reopening the assessment before the Tribunal for the first time and seek to support the ultimate decision of the CIT(A). Even the non-disclosure of the reasons can be said to be covered by ground No. 2 taken before the CIT(A) and in the*

*absence of any definite decision by the CIT(A), the same conclusion would follow namely, that it is open to the assessee to invoke Rule 27 even in respect of this point. As regards the approval of the JCIT under [Section 151\(1\)](#), it is fairly admitted on behalf of the assessee that this was not specifically taken either before the Assessing Officer or before the CIT(A) and, therefore, we hold that Rule 27 may not be strictly speaking available to the assessee.*

*11. Even de hors Rule 27 of the Appellate Tribunal Rules, it is open to the respondent in an appeal before the Tribunal to raise a new ground in defence of the order appealed against. It has been so held by the Supreme Court in [Hukam Chand Mills Ltd. v. CIT](#) of the report it was held that even assuming that Rule 27 is not strictly applicable, the Tribunal has inherent powers under [Section 254\(1\)](#) to entertain the argument of the respondent which amounted to a new ground. It was further held by the Supreme Court as follows:*

*It is necessary to state that Rules 12 and 27 are not exhaustive and the powers of the Appellate Tribunal. The rules are merely procedural in character and do not, in any way, circumscribe or control the power of the Tribunal under [Section 33\(4\)](#) of the Act.*

*It is significant to note that in the case before the Supreme Court, the department which was the respondent sought to raise a new plea in defence of the order appealed against. Earlier, in [New India Life Assurance Co. Ltd. v. CIT](#) , the Bombay High Court while pointing out the difference between an appellant and respondent before the appellate court, observed at page 55 that*

*the respondent "may support the decision of the trial court, not only on the ground contained in the judgment of the trial court, but on any other ground". Later, in the case of [B.R. Bamasi v. CIT](#) , the Bombay High Court which was dealing with the case of right of the respondent to defend the order appealed against held that the respondent would be entitled to raise a new ground in defence of the order appealed against, provided it is a ground of law and does not necessitate any other evidence to be recorded, the nature of which would not only be a defence to the appeal itself, but may also affect the validity of the entire assessment proceedings. It was further held that the ground served as a weapon of defence against the appeal and, if accepted should not place the appellant in a worse than he would have been, had he not appealed. [In CIT v. Gilbert and Barkar Mfg. Co.](#) , the Bombay High Court made no distinction between the appellant and respondent in an appeal before the Tribunal and held that both were entitled to raise new points or contentions subject only to the condition firstly that no new facts are required to be brought on record is capable of being disposed of on the facts on record and secondly that an opportunity is given to the other side to meet that point which is allowed to be raised for the first time in the appeal. This was also a case of the respondent. To the same effect are the decisions of the Allahabad, Gauhati, Kerala and Gujarat High Courts cited on behalf of the assessee. Therefore, whether it is the appellant or the respondent before the Tribunal, new points or contentions can be raised provided they did not involve investigation into facts (as contrasted with the record) and that*

*an opportunity is given to the other side to meet the contentions. Applying these principles to the present case, we overrule the preliminary objection of the Ld. Sr. DR and permit the assessee to raise the new points before us as a respondent.”*

11. In the light of the above noted propositions, when we proceed to decide the controversy as to whether the assessee can validly challenge the validity of impugned penalty order notwithstanding the respondent assessee has neither filed cross appeal nor cross objection. For proper adjudication of above legal controversy, we find it appropriate to take note of Rule 27 of the Rules which reads as under:

*“The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him”*

A vigilant reading of the said Rule manifests that the respondent, whether the assessee or revenue without having filed any cross appeal or objection in support of the order under challenge by the opponent appellant on any of the ground decided against him. However, we may point out that

there are two limbs of this Rule viz condition precedent for invoking the Rule and the ambit/scope of interference for the Tribunal in the event when the assessee invokes Rule 27 without filing any cross appeal or cross objection. Regarding first limb, in our humble opinion, the said Rule has been created by the Legislation with an object to dispense justice to the winner who lost some issues or ground in the order appealed before the Tribunal accepted the same as the ultimate conclusion was rendered in his favour who was otherwise correct and on the sound legal footings and entitled for relief or valid claims on the issues decided against him and was legally empowered to challenge that order by way of filing cross objection or cross appeal and which was not filed considering the ultimate favourable conclusion and to put an end to the controversy with a view point to avoid litigation and legal expenses and to buy peace of mind. The words "*though he may not have appealed*" mentioned in Rule 27 have been used for the respondent, and this Rule provides a validly evocable right to the respondent who did not file any cross objection or appeal against the observation or conclusion of an order which was conclusively

in his favour due to above noted reasons or situations to save him from the sword of loser party which is agitating the final conclusion of the ld. CIT(A) favouring the opponent-respondent before the Tribunal. However, we may point out that Rule 27 does not create any right in favour of a respondent where he is otherwise not eligible or debarred from filing cross appeal or cross objection. Meaning thereby, if the respondent does not validly have right to file cross appeal or cross objection, then Rule 27 cannot create any right in favour of the respondent enables him to challenge the conclusion or findings recorded by the ld. CIT(A) against him by taking aid or by invoking provision of Rule 27 of the Rules.

12. The second limb of Rule 27 is mentioned in the words *“the respondent..... support the order appealed against on any of the ground decided against him”* which reveals that the respondent can *“support”* the impugned order or any of the issues or grounds which were decided against him but the dragged respondent accepted the same by consoling himself with the ultimate favourable conclusion recorded by the lower forum. Furthermore, when the said winner is dragged

before the Tribunal challenging the order passed in his favour by the loser party then this Rule 27 of the Rules comes into play to rescue the winner-respondent.

13. On the basis of threadbare analysis of Rule 27 in the light of propositions/dicta laid down by the Hon'ble High Court of Bombay in various decision including the order in the case of B.L. Bamasi [supra] and order of the co-ordinate Bench of ht Tribunal in the case of ITO Vs. Smt. Gurinder Kaur [supra] we reach to a fortified conclusion that in the present case the assessee-respondent can very well challenge the impugned penalty order without filing any cross appeal or cross objection by invoking legally available right as mandated by Rule 27 of the Rules.

14. At the very outset, we are not in agreement with the objection of the ld. CIT-DR that the assessee cannot raise legal objection without filing any cross appeal or cross objection because Rule 27 of the Rules provides that the respondent of an appeal may support the order appealed against by the appellant on any of the grounds decided

against him. In the present case, however, the ld. CIT has not expressly adjudicated the objection of the assessee, placed a Grund No. 4 before the ld. CIT(A) alleging the penalty order being time barred as per provisions of section 275(1)(a) of the Act in absence of any conclusion in the first appellate order it can be safely presumed that the ld. CIT(A) has jettisoned legal objection of the assessee challenging the penalty order being time barred. In this situation, in our considered opinion, the assessee respondent can very well invoke Rule 27 wherein his legal objection has not been decided in his favour by the first appellate authority. In view of the foregoing discussion, we are inclined to hold that the objection of the ld. CIT-DR is not tenable in this regard and the assessee is allowed to raise legal objection regarding limitation alleging penalty order as time barred under provisions of section 275(1)(a) of the Act.

15. While we consider the legal objection of the assessee that the impugned penalty order is time barred, then from the facts as we have already note hereinabove, it is apparent that the Tribunal passed order on 23.12.2011 which was received by the Commissioner [Judicial] dated 23.4.2012 and

the penalty order has been passed on 30.10.2012 i.e. within six months from the end of the month in which the Commissioner received copy of the order of the Tribunal which provoked the AO to initiate penalty proceedings. Thus, we are unable to agree with the legal contention of the ld. AR that the impugned penalty is time barred. Our above noted conclusion also gets strength from the decision of Hon'ble High Court of Delhi in the case of CIT Vs. Mohair Investment reported as 345 ITR 51 [Del].

16. Per contra, it is vivid from the dates as noted above by us that the ld. CIT [J] received copy of the Tribunal order dated 23.4.2012 and from the end of April 2012 six months period was allowed to the AO for passing the impugned penalty order and the AO passed penalty order on 30.10.2012 which is well within the prescribed limit as per section 275(1)(a) of the Act. Hence, the legal objection of the assessee-respondent raised by way of invoking Rule 27 of the Rules is hereby dismissed.

### On Merits

17. We have heard the arguments of both the sides and carefully perused the relevant material placed on record before us. The ld. CIT DR supporting the penalty order

submitted that the ld. CIT(A) in the first appellate order dated 25.06.2010 passed in quantum first appeal No. 86/09-10 recorded clear finding while confirming the additions which lead to conclude that the assessee company had concealed the income and had furnished inaccurate particulars of its income. The ld. CIT-DR further pointed out that after considering the entire facts and circumstances of the case and observations made by the ld. CIT(A) in the quantum appeal it was apparent that the assessee had furnished inaccurate particulars of its income in respect of Rs. 82,10,528/-. Therefore, the AO was quite correct in concluding that the assessee had deliberately concealed income and has furnished inaccurate particulars of its income which attracts penalty u/s 271(1)(c) of the Act. The ld. CIT-DR vehemently contended that the ld. CIT(A) granted relief to the assessee without any basis and justified reasoning. Therefore, the impugned first appellate order may be set aside by restoring that of the AO.

18. Replying the above, the ld. AR placed his reliance on the decision of the Hon'ble High Court of Delhi in the case of

Nalwa Sons Investment Ltd order dated 26.8.2010 in ITA No. 1420/2009 and submitted that the deemed income assessed/s 115JB of the Act which has become basis of assessment as it was higher of the two and tax has been paid on the assessed income u/s 115JB of the Act. The ld. AR also pointed out that when the computation was made u/s115JB of the Act allegation of concealment had no role to play and is totally irrelevant. Therefore, the allegation of concealment is not sustainable and did not lead to tax evasion at all. The ld. AR pointed out that the ld. CIT(A) granted relief to the assessee on the basis of said proposition laid down by the Hon'ble Jurisdictional High Court which has been confirmed by the Hon'ble Supreme Court by dismissing SLP [Civil] No. 1420/2009 order dated 04-05-2012, filed by the department in the case of Nalwa Sons Investment Ltd [supra] vide order dated 04.05.2012.

19. On careful consideration of the above rival submissions, at the very outset, from the order of the Hon'ble Jurisdictional High Court in the case of Nalwa Sons Investment Ltd [supra] which has been confirmed by the

Hon'ble Supreme Court, we observe that the Hon'ble Jurisdictional High Court has upheld the order of the Tribunal which confirmed the order of the ld. CIT(A) by which the AO was directed to delete the penalty. In the present case before us, the AO assessed the income under normal provisions of the Act at Rs. 13,69,104/- on which no exemption u/s 88E of the Act. However, the AO had calculated tax payable by the assessee at Rs. 1,76,040/- under the normal provisions of the Act and calculated tax payable u/s 115JB of the Act at Rs. 47,28,060/- which was duly paid by the assessee. While granting relief to the assessee, the ld. CIT(A) has placed reliance on the judgment of the Hon'ble High Court of Delhi dated 26.08.2010 passed in ITA No. 1420/2009 in the case of CIT Vs. M/s Nalwa Sons Investment Ltd by observing as under:

*“We have considered the rival submissions. Judgment of the Supreme Court in Gold Coin's (supra) clarifies that even if there are losses in a particular year, penalty can be imposed as even in that situation there can be a tax evasion. As per [Section 271](#) (1) (c), the penalty can be imposed when any person has concealed the particulars of his income or furnished incorrect particulars of the income. Once this condition is satisfied, quantum of penalty is to be levied as per clause (3) of [Section 271](#) (1) (c)*

*which stipulates that the penalty shall not exceed three times "the amount of tax sought to be evaded". The expression "the amount of tax sought to be evaded" is clarified and explained in Explanation 4 thereto, as per which it has to have the effect of reducing the loss declared in the return or converting that loss into income. It is in this context that in Gold Coins (supra) the Supreme Court explained the legal position as under:-*

*dated 24.7.1976 reported in 1977 (110) ITR 21 (St.) has also substantial relevance. Same reads as follows:-*

*New Explanation 4 defined "the amount of tax sought to be evaded". According to the definition, this expression will ordinarily mean the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed. In a case, however, where on setting off the concealed income, against any loss incurred by the assessee under other head of income or brought forward from earlier years, the "total income is reduced to a figure lower than the concealed income or even to a minus figure, "the tax sought to be evaded" will mean the tax chargeable on the concealed income as if it were the total income. Another exception to the general definition of the expression „tax sought to be evaded" given earlier is a case to which Explanation 3 applies. Here, the tax sought to be evaded will be the tax chargeable on the entire total income assessed.*

*A combined reading of the Committee's recommendations and the Circular makes the position clear that Explanation 4 (a) to*

[Section 271](#) (1) (c) intended to levy the penalty not only in a case where after addition of concealed income, a loss returned, after assessment becomes positive income but also in a case where addition of concealed income reduces the returned loss and finally the assessed income is also a loss or a minus figure. Therefore, even during the period between 1.4.1976 to 1.4.2003 the position was that the penalty was leviable even in a case where addition of concealed income reduces the returned loss.

When the word "income" is read to include losses as held in Harprasad's case (supra) it becomes crystal clear that even in a case where on account of addition of concealed income the returned loss stands reduced and even if the final assessed income is a loss, still penalty was leviable thereon even during the period 1.4.1976 to 1.4.2003. Even in the Circular dated 24.7.1976, referred to above, the position was clarified by Central Bureau of Direct Taxes (in short „CBDT“). It is stated that in a case where on setting off the concealed income against any loss incurred by the assessee under any other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure the penalty would be imposable because in such a case "the tax sought to be evaded" will be tax chargeable on concealed income as if it is "total income".

21. The question, however, in the present case, would be, as to whether furnishing of such wrong particulars had any the effect on the amount of tax sought to be evaded. Under the scheme of the Act, the total income of the assessee is first computed under

*the normal provisions of the Act and tax payable on such total income is compared with the prescribed percentage of the „book profits“ computed under [section 115JB](#) of the Act. The higher of the two amounts is regarded as total income and tax is payable with reference to such total income. If the tax payable under the normal provisions is higher, such amount is the total income of the assessee, otherwise, “book profits” are deemed as the total income of the appellant in terms of [Section 115JB](#) of the Act.*

*22. In the present case, the income computed as per the normal procedure was less than the income determined by legal fiction namely “book profits” under Section 115 JB of the Act. On the basis of normal provision, the income was assessed in the negative i.e. at a loss of Rs. 369521018. On the other hand, assessment under Section 115 JB of the Act resulted in calculation of profits at Rs. 40163180.*

*23. In view thereof, in conclusion, the assessment order records as follows:-*

*“Assessed at Rs. 40163180 u/s 115 JB, being higher of two. Interest u/s 234B and 234C has been charged as per the provisions of [Income Tax Act](#), 1961. Penalty proceedings u/s 271 (1) © of the [Income Tax Act](#), 1961 have been initiated. Issue necessary forms.”*

*24. The income of the assessee was thus assessed under Secn 115 JB and not under the normal provisions. It is in this context that we have to see and examine the application of Explanation 4.*

25. *Judgment in the case of Gold Coins (supra), obviously, does not deal with such a situation. What is held by the Supreme Court in that case is that even if in the income tax return filed by the assessee losses are shown, penalty can still be imposed in a case where on setting off the concealed income against any loss incurred by the assessee under other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even a minus figure. The court was of the opinion that „the tax sought to be evaded“ will mean the tax chargeable not as if it were the total income. Once, we apply this rationale to Explanation 4 given by the Supreme Court, in the present case, it will be difficult to sustain the penalty proceedings. Reason is simple. No doubt, there was concealment but that had its repercussions only when the assessment was done under the normal procedure. The assessment as per the normal procedure was, however, not acted upon. On the contrary, it is the deemed income assessed under Section 115 JB of the Act which has become the basis of assessment as it was higher of the two. Tax is thus paid on the income assessed under Section 115 JB of the Act. Hence, when the computation was made under Section 115 JB of the Act, the aforesaid concealment had no role to play and was totally irrelevant. Therefore, the concealment did not lead to tax evasion at all.*

26. *The upshot of the aforesaid discussion would be to sustain the order of the Tribunal, though on different grounds. Therefore, while we do not agree with the reasoning and approach of the Tribunal, for our reasons disclosed above, we*

*are of the opinion that penalty could not have been imposed even in respect of claim of depreciation made by the assessee. This appeal is accordingly dismissed.”*

20. In the light of the above proposition laid down by the Hon'ble High Court, when we analyse logically the facts and circumstances of the present case, then we observe that in the quantum proceedings, undisputedly the AO assessed the income under normal provisions of the Act at Rs. 13,69,104/- on which no rebate u/s 88E of the Act was available to the assessee. In this situation, the ACIT/AO had calculated tax payable by the assessee at Rs. 1,76,040/- under normal provisions of the Act and also calculated tax payable by the assessee u/s 115JB of the Act at Rs. 47,28,060/- and undisputedly and admittedly the assessee had paid tax thereon. From the operative part of the first appellate order, we note that the ld. CIT(A) granted relief to the assessee with the following conclusion and observation:

*“I have perused the penalty order u/s 271(1)(c), assessment order, grounds of appeal and written submission filed by the appellant. I discussed the*

*matter with the Id. AR very carefully. The AO has assessed the income under normal provisions of the Income tax at Rs. 13,69,104/- on which No. 88E is available. The AO i.e. Additional CIT, Range 5 had calculated tax payable by the appellant at Rs. 1,76,040/- under normal provisions of Income tax Act and tax payable of Rs. 47,28,060/- u/s 115JB of the Act. Thus, the appellant had paid tax on 115JB of the Act. Hence there is no question of concealment u/s 271(1)(c) of the Act if computation is made u/s 115JB of the Act. This is supported by the Hon'ble High Court of Delhi:*

- 1. CIT Vs. Central Warehousing Corporation*
- 2. CIT Vs. Nalwa Sons Investment Ltd*

*The Addl. CIT being AO had not clearly spelt out total income in the normal provisions of the computation and u/s 115JC of the Act. The AO in future should given total income alongwith exempt income and deductions if any in a summary manner so that there should not be any confusion in following the provisions of the Act. In this case, since the appellant had paid the taxes under deemed income as per book profit u/s 115JB of the Act, the concealment of income or inaccurate particulars of income under normal provisions does not apply, therefore, the penalty imposed by the AO u/s 271(1)(c) of the Act of Rs. 27,58,736/- is hereby deleted. The penalty order is cancelled.”*

21. In view of the above, when we vigilantly peruse the order of the Hon'ble High Court in the case of Nalwa Sons Investment [supra], then we note that their Lordships speaking for the Hon'ble Jurisdictional High Court of Delhi clearly held that there was concealment but that had its repercussions only when the assessment was done under normal provisions and procedure of the Act which were not acted upon. Their Lordships further held that in a situation when the deemed income is assessed u/s 115JB of the Act which has become the basis of assessment as it was higher of the two i.e. income calculated under normal provisions and income assessed u/s 115JB of the Act and thus tax has been paid on the income assessed u/s 115JB of the Act which is higher of the two, then concealment had no role to play and becomes totally irrelevant for imposing penalty u/s 271(1)(c) of the Act as concealment did not lead to tax evasion at all. In the present case also the assessee had paid tax on the income calculated u/s 115JB of the Act which was higher than the income calculated under normal provisions of the Act and as per the dicta laid down by the Hon'ble High Court in the case of CIT Vs. Nalwa Sons [supra] in this situation

penalty u/s 271(1)(c) of the Act is not leviable and thus we concur with the conclusion of the ld. CIT(A). Consequently, all four grounds of appeal of the Revenue being devoid of merits stand dismissed.

22. In the result, the appeal of the Revenue stands dismissed on merits.

**The order is pronounced in the open court on 02.03.2016.**

**Sd/-**

**(L.P. SAHU)  
ACCOUNTANT MEMBER**

**Sd/-**

**(C.M. GARG)  
JUDICIAL MEMBER**

Dated: 02<sup>nd</sup> March, 2016

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,  
ITAT, New Delhi