

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'F': NEW DELHI)**

**BEFORE SHRI K.N. CHARY, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No:- 1002/Del/2014
(Assessment Year: 2006-07)**

M/s Padmini Infrastructure Developers India Ltd., LG-1 & 3, R-23, Nehru Enclave, New Delhi-110019.	Vs.	DCIT, Circle-14(1), New Delhi.
PAN No: AAACP 3561 G		
APPELLANT		RESPONDENT

Assessee by : Dr. Rakesh Gupta, FCA and
Shri Somil Agarwal, CA.
Revenue by : Shri Surender Pal, Sr. DR

ORDER

PER: ANADEE NATH MISSHRA, AM

This appeal by the Assessee is filed against the order of Learned Commissioner of Income Tax (Appeals)-XVII, Delhi-110092, ["Ld. CIT(A)", for short] dated 25.11.2013 for Assessment Year 2006-07, on the following grounds:

- "i. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in levying penalty of Rs. 60,77,308/- u/s 271(1)(c) and that too without assuming jurisdiction as per law and without appreciating the facts and circumstances of the case.*

- ii. *That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in levying the penalty u/s 271(1)(c) is bad in law and against the facts and circumstances of the case.*
- iii. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in levying penalty u/s 271(1)(c) in as much as the impugned assessment order u/s 143(3) dated 26-09-2008 is also contrary to law and facts, void ab initio and not sustainable on various legal and factual grounds.*
- iv. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in levying penalty u/s 271(1)(c) which is bad in law being beyond jurisdiction and barred by limitation and contrary to the principles of natural justice and has been passed by recording incorrect facts and findings and without giving adequate opportunity to the assessee and the same is not sustainable on various legal and factual grounds.*
- v. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not reversing the action of Ld. AO in imposing a penalty of Rs. 60,77,308/- that too without recording mandatory "satisfaction" as per.*
- vi. *That the assessee craves the leave to add, alter or amend the grounds of appeal at any stage and all the grounds are without prejudice to each other."*

(2) The Assessee filed return of income on 23.11.2006, wherein deduction amounting to Rs. 3,44,56,419/- was claimed U/s 80IB(10) of The Income Tax Act, 1961 ("I.T. Act", for short). Vide Assessment Order dated 26.09.2008 passed U/s 143(3) of I.T. Act; the deduction claimed by the assessee U/s 80IB(10) of the I.T. Act was disallowed. In this Assessment Order, the Book Profit for the purposes of Section 115JB was determined at Rs. 3,61,09,972/-. Penalty proceedings U/s 271(1)(c) of I.T. Act were also initiated by the Assessing Officer ("AO", for short). Vide order dated 08.06.2010, in appeal no. 54/CIT(A)XVII/Del/08-09, Ld. CIT(A)

deleted the addition of Rs. 34456419/- which was made by AO under normal provisions. However, addition made in book profit (assessed at Rs. 36109972/- as against returned book profit of Rs. nil) was confirmed by CIT(A). Income was recomputed on 07.09.2010 vide order u/s 250/143(3) at Rs. 1959220/- under normal provision and of Rs. 36109972- u/s 115JB. Vide order dated 25.10.2017 of Co-ordinate Bench of Income Tax Appellate Tribunal, Delhi ("ITAT", for short), in ITA No. 4065/Del/2010, Revenue's appeal against the aforesaid order dated 08.06.2010 of the Ld. CIT(A) was dismissed; and thus, the assessee's claim U/s 80IB(10) of I.T. Act, was upheld. In the meantime, however, the Assessing Officer passed order U/s 271(1)(c) of I.T. Act, dated 28.03.2012, imposing penalty amounting to Rs. 60,77,308/-. This penalty was levied in respect of addition u/s 115JB of I.T. Act. The relevant portions of the aforesaid Assessment Order dated 26.09.2008 and the aforesaid order dated 28.03.2012 U/s 271(1)(c) of I.T. Act, on Section 115JB of I.T. Act, are reproduced as under:

Relevant portions of Assessment order dated 26.09.2008

"Taxability u/s 115JB

Vide order sheet entry 10.07.08 assessee was asked to explain as to why the assessee has not paid tax u/s 115JB and as to how the assessee has filed Book Profit of NIL in its return of income, when the company is having profit as per companies Act of Rs. 3,61,09,972 which includes Income from business as per Income tax Act of Rs. 3,44,56,419 and Income from other sources of Rs. 19,59,218 thereby showing. Gross total Income of the year of Rs. 3,64,15,637. Vide letter

dated 7.7.08, assessee replied that assessee has not paid any applicable tax u/s 115JB. Summons u/s 131 dated 10.07.08 and 18.07.08 were issued to Sh. Girish Batra, MD of the assessee company to file details of payment of taxes u/s 115JB for A.Y. 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08 and to explain the reason for non-payment of taxes. Sh. Girish Batra neither appeared in response to summons nor assessee filed any reasons for non-payment of tax u/s 115JB. On 27.08.08 Sh. Rajeev Sharma counsel appeared for the assessee but could not explain as to why taxes u/s 115JB of the Act have not been paid for all these years. On perusal of assessment record, the details of Income, deduction u/s 80IB and payment of tax u/s 115JB is hereby produced.

A.Y.	Gross Total Income	Deduction u/s 80IB	Taxable Income	Tax payable as per MAT Shown by Assessee
2002-03	71,34,329	70,97,621	36,708	NIL
2003-04	11,04,978	11,04,978	NIL	NIL
2004-05	88,77,733	86,38,298	2,39,435	NIL
2005-06	2,68,45,130	2,56,89,743	11,55,387	NIL
2006-07	3,64,15,637	3,44,56,419	19,59,218	NIL

On perusal of section 115JB it is abundantly clear that deduction u/s 80IB(10) is not allowed to be reduced from book profit for computation of tax u/s 115JB and assessee was liable to pay tax u/s 115JB of the Act. In the event of non-filing of details and non-filing of reasons for not paying taxes u/s 115JB I have reason to believe that assessee has concealed/filed inaccurate particulars of income liable for penal action u/s 271(1)(c) of the Act. The conduct of the assessee proves the malafide intention of evading taxes. In light of the above book profit for computation of tax u/s 115JB is assessed at Rs. 3,61,09,972 as against NIL filed by assessee."

Relevant portions of Order Under Section 271(1)(c) of the Income Tax Act, 1961

1. Assessment in the case was made u/s. 143(3) of the Income Tax Act, 1961, on 26.09.2008 (read with corrigendum order dated 07.11.2068 issued vide no. .1393)

on total income of Rs.36415637/- as against returned income of Rs. 1959220/- under normal provisions and at Rs.36109972/- as against returned income of Rs. Nil u/s 115JB. Penalty proceedings u/s 271(l)(c) of the Act was initiated both in respect of addition under normal provisions as well as addition u/s 115JB during the assessment proceedings and notice u/s. 274 read with section 271(l)(c) of the Income Tax Act, 1961 was issued on 26.09.2008 which remained uncomplished with. In response to further show cause notice dated 05.12.2008, assessee vide his letter dated 15.12.2008 requested for keeping the proceedings in abeyance on the ground of appeal being pending before CIT(A).

2. Ld. CIT(A)-XVII vide order dated 08.06.2010 in appeal no. 54/CIT(A) XVII/Del/08-09 deleted the addition of Rs. 34456419/- which was made by AO under normal provisions. However, addition made in book profit (assessed at Rs. 36109972/- as against returned book profit of Rs. nil) was confirmed by CIT(A). Income was recomputed on 07.09.2010 u/s 250/143(3) at Rs. 1959220/- under normal provision and Rs. 36109972/- u/s 115JB.
3. Accordingly, further show cause notices dated 18.01.2012, 06.02.2012 and 14.02.2012 were issued by speed post which also remained uncomplished with. **It shows the non-cooperative and recalcitrant attitude of the assessee. It also goes to show that either the- assessee has admitted his fault or has nothing to say in the matter. During the course of assessment proceeding as well as appeal proceedings assessee has not given any submission/detail/evidence explaining the reasons for showing the book profit at Rs. Nil and also for non-payment of tax u/s 115JB which the assessee was required to pay before filing of return.**
4. The discussion/finding on the issue as given in assessment order reads: "Vide order sheet entry 10.07.08 assessee was asked to explain as to why the assessee has not paid tax u/s 115JB and as to how the assessee has filed Book Profit of NIL in its return of income, when the company is having profit as per companies Act of Rs.3,61,09,972 which includes Income from business as per Income tax Act of Rs.3,44,56,419 and Income from other sources of Rs.19,59,218 thereby showing. Gross total Income of the year of Rs.3,64,15,637. Vide letter dated 7.7.08, assessee replied that assessee has not paid any applicable tax u/s 115JB. **Summons u/s 131 dated 10.7.08 and 18.7.08 were issued to Sh. Girish Batra, MD of the assessee company to file details of payment of taxes u/s 115JB for A.Y. 2002-03, 2003-04, 2004-05, 2005-06, 07, 2007-08 and to explain the reason for non-payment of taxes. Sh. Girish Batra neither appeared in response to summons nor assessee filed any reasons for non-payment of tax u/s 115JB. On Sh. Rajeev Sharma counsel appeared for the assessee but could not explain as to why taxes u/s 115JB of the Act have not been paid for all these years..... On perusal of section 115JB it is abundantly clear that deduction u/s 80IB is not allowed to be reduced from book profit for computation of tax u/s 115JB and assessee was liable to pay tax u/s 115JB of the Act. In the event of non-**

filing of details and non filing of reason for not paying taxes u/s 115JB I have reason to believe that assessee has concealed/filed inaccurate particulars of income liable for penal action u/s 271(l)(c) of the Act. The conduct of the assessee proves the malafide intention of evading taxes. In light of the above book profit for computation of tax u/s 115JB is assessed at Rs. 3,61,09,972 as against NIL filed by assessee."

5. *On this issue the order of CIT(A) also reads "the appellant has n-.A made any submission in respect of above grounds therefore, this ground, of appeal is rejected.*

6. *The assessee has not furnished any explanation with regard to the above addition/disallowance (which stood confirmed by CIT(A)) before the AO as well as before CIT(A) either during the course of assessment proceeding, appeal proceedings or even during the course of penalty proceedings u /s 271(1)©. Rather, the reverse was proved i.e. such amounts were required to be shown in the computation of book profit which it failed to do. Had the A.O missed out in making various queries and in scrutinizing/ examining the information/details minutely, this amounts could not have been brought to tax. It is further borne out from the fact that income is assessed u/s 143(1) at the same figure as disclosed by the assessee. It is only because that case was taken up in scrutiny (ail cases are assessed u/s 143(1) and only about 2% cases are scrutini ed) that such addition/disallowance could be made. Therefore, penalty u/s 271(l)(c) is clearly leviable in such cases.*

7. *Explanation 1 to section 271(1)(c) has introduced a deeming provision which makes an assessee liable for penalty in respect of any amount which is added or disallowed, if the explanation offered by the assessee is either false or which he/it is not able to substantiate. In the present case, assessee was not able to substantiate its claim. Rather the fact of the matter is that no explanation, at all, has been offered by the assessee on this issue.*

8. *Almost every tax payer (except a few small taxpayers) is aware of the fact that only about 2% returns are taken up for scrutiny and this fact induces them to make such wrong/inadmissible claims with the intention of going scot-free, if the case is not taken up for scrutiny, which is apparent from the fact that assessment u/s 143(1) in the case has been made on returned income. Furthermore, disallowance/additions in sue a cases can be made only if the AO is having sufficient time 8s knowledge in catch hold of such deficiencies which is not possible in each and eve; v case. In the present-case, it can be safely inferred that assessee tried i n evade tax by making such inadmissible/wrong claim. Penal provisions a n meant only to have deterrent effect to dissuade tax payers for making sue a claims and will lose its impact if not applied in cases of such violation*

8.1 *The Hon'ble Delhi High Court in the case of Zoom Communication Pvt. Ltd. reported in 2010) 40 DTR (Del) 249, dated May 24, 2010 have observed as under*

"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..... that would give a license to unscrupulous assessee 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 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. "

9. *Mere showing the item in the return/accounts/tax audit report but not offering the same for taxation purpose cannot by itself take out the case from the purview of furnishing inaccurate particulars. Therefore, the omission on the part of assessee not to include an item of receipt/income or to make any patently wrong claim in computation of taxable income though shown in the return/accounts certainly amounts to concealment or deliberate furnishing of inaccurate particulars of income as such omission is clearly attributable to an intention of desire on the part of the assessee to avoid the imposition of tax thereon*

9.1 *Explanation 1 to section 147, (though not directly concerned with the provision of section 271(1)(c), also lays down clearly that mere production/furnishing of books of accounts/details/documents, etc. (from which A.O. could **with due diligence** discover something) does not amount to true, full and correct disclosure on the part of the assessee **so far as taxing of income is concerned.***

10. *The Hon'ble Supreme Court in the case of K.P.Madhusudan vs. CIT", 251 ITR 99 has held that the onus is on the assessee to prove that he has not concealed or furnished inaccurate particulars of his income. The Hon'ble Apex Court in the case of UOI vs. Dharmendra Textile Processor has held that the penalty is a civil liability and mens rea is not required to be established by the revenue. Similarly, Hon'ble Supreme Court in the case of CIT vs. Atul Mohan Bindal (2009) 225 CTR (SC) 248 has held that penalty u/s 271(1)(c) is neither criminal nor quasi criminal but, a civil liability, albeit a strict liability. Such liability being civil in nature, mensrea is not essential - Explanation appended to S.271(1)© indicates element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the return. Dillip N. Shroff has been held to be not laying down good law.*

11. *It view of this it is clear that assessee has furnished inaccurate particulars of its income in respect of the addition/disallowance ; s discussed above and accordingly, it is found to be a fit case for imposition of penalty u/s 271(1)(c) of the Act r.w. Explanations thereto. **Here it is also noted that tax on book profit has not so far been paid by him assessee.** It shows non cooperative and*

recalcitrant attitude of the assessee. Its conduct further shows that its intention to pay the due and correct taxes is not above doubt. Considering the facts of the case an I conduct (furnishing of the required information and payment of due taxes-.) of the assessee, it is found to be a case fit for imposition of penalty at a rate higher than the minimum amount."

(2.1) The Assessee filed appeal before Ld. CIT(A) against the aforesaid order dated 28.03.2012, passed U/s 271(1)(c) of I.T. Act by the AO. Vide order dated 25.11.2013, the Ld. CIT(A) upheld the penalty of the aforesaid amount of Rs. 60,77,308/- and dismissed the Assessee's appeal. The relevant portion of order of the Ld. CIT(A) is reproduced as under:

"5. I shall now take up the various Grounds of Appeal which are all in respect of penalty of Rs.60,77,308/- imposed u/s 271(l)(c).

5.1 The appellant had filed Return of Income declaring income of Rs. 19,59,220/- . Addition u/s 143(3) was made vide order dated 26.09.2008 on total income of Rs.3,64,15,637/- under normal provisions and at Rs.3,61,09,972/-- u/s 115JB. The Ld. CIT(A) deleted the addition under normal provisions but confirmed the addition u/s 115JB stating as under:-

"In the event of non-filing of details and non-filing of reason for not paying taxes u/s 115JB, I have reason to believe that assessee has concealed/filed inaccurate particulars of income liable for penal action 'u/s 271(i)(c) of the Act. The conduct of the assessee proves the mala-fide intention of evading taxes. In light of the above book profit for computation of tax u/s 115JB is assessed at Rs.3,61,09,972/- as against NIL filed by assessee."

5.2 Penalty initiated u/s 271(1)(c) in the order was therefore imposed by the AO. Penalty of Rs.60,77,308/- was imposed on Rs.36109972/- tax was sought to be evaded. The AO passed order u/s 271(l)(c) as under:-

"In view of this, it is dear that appellant has furnished inaccurate particulars of its income in respect of the addition/disallowance as discussed above and accordingly, it is found to be a fit case for imposition of penalty u/s 271(l)(c) of the Act r.w. Explanation 'thereto. Here it is also noted that tax on book profit has not so far been paid by the appellant. It shows non cooperative and recalcitrant attitude of the appellant. Its conduct further shows that its intention to pay the due and correct taxes is not above doubt. Considering the facts of the case and conduct (furnishing of the required information and payment of due taxed) of the appellant, it is found to be a case fit for imposition of penalty at a rate higher than the

minimum amount.

5.3 During the course of assessment proceedings the AO had noted that the appellant had not paid tax under 115JB. On a specific query being raised by the AO the appellant did not give any reasons for non payment of taxes u/s 115JB. Even during appellate proceedings the Ld. CIT(A) had stated that the appellate had not given any details nor any reason for not paying taxes u/s 115JB and had displayed malafide intentions to evade tax and conceal income. The appellant has stated that 115JB was liable only when the company was otherwise not liable to normal tax.

5.4 As per 115JB (1) & (2):

*"115JB. Special provision for payment of tax by certain companies.-
(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2011, is less eighteen per cent, of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-Tax. at the rate of eighteen per cent.*

(2) Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts U and III of Schedule VI to the Companies Act, 1956 (1 of 1956):

Provided that while preparing the annual accounts including profit and loss account,-

- (f) the accounting policies ;*
- (ii) the accounting standards adopted for preparing such accounts including profit and loss account; (Hi) the method and rates adopted for calculating the depreciation,..."*

5.5 Therefore, from the provisions it is clear that every company has to compute profits as per normal provision of the Act and as per 115JB. Section 80IB (10) is not related to the aspect of 115JB. The appellant has been allowed deduction u/s 80IB(10) by the Ld. CIT(A) from its normal profits. The aspect of computation of profit u/s 115JB is entirely different.

5.6 The AO has therefore only initiated and levied penalty only in respect of the fact that the appellant has not computed profits u/s 115JB and paid tax hereon. If the case of the appellant had not been selected for scrutiny, this fact would not have come to the notice of the department. The explanation given by the appellant for not computing profits as per

115JB has no merit. The appellant has clearly furnished inaccurate particulars and is not giving a bonafide explanation for doing so. The appellant has not complied with the provisions of law.

In my view the appellant is liable for penalty u/s 271(l)(c) for giving inaccurate particulars with a view to concealment of income and for not giving a bonafide explanation.

6. *The Hon'ble Supreme Court of India in K. P. Madhusudan vs. CIT (2011) 118 TAXMAN 324 (SC) held that the appellant is by virtue of the notice u/s 271(l)(c) put to notice that if he does not prove, in the circumstances stated in the Explanation, that his failure to return his correct income was not due to fraud or neglect, he shall be not deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and consequently be liable to the penalty provided by that section. In view of the above, the onus is clearly on the appellant to prove that there was no fraud or neglect in filing correct income which the appellant has failed to prove.*
- 6.1 *There was a deliberate attempt by the appellant to file incorrect return of income. The appellant has failed to substantiate its explanation, failed to prove that its explanation is bonafide therefore, the penalty is clearly leviable u/s 271(l)(c) and the AO is fully justified in imposing the penalty.*
- 6.2 *After distinguishing the decision in CIT vs. Reliance Petroproducts (P) Ltd. (2010) 322 ITR 158 where Hon'ble Apex court decision was rendered because two views were possible in that case, Hon'ble Delhi High Court vs. Zoom Communication (P) Ltd. (2010) 191 TAXMAN 179(Delhi), have held:*

"It is true that mere submitting a claim which is incorrect in law would not amount to giving inaccurate particulars of the income to the assessee, but it cannot be disputed that the claim made by the assessee needs to be bonafide. It is the claim besides being incorrect in law is malafide, Explanation 1 to Section 271(1) would come into play and work to the disadvantage of the assessee. 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(l)(c) of the Act. 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 licence to unscrupulous assesseees 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."

- 6.3 *In view of the above factual and legal position since the appellant has furnished inaccurate particulars of income and since the appellant has failed to substantiate its explanation, failed to prove that its explanation is bonafide, therefore, the AO is fully justified in imposing the penalty of Rs.60,77,308/- u/s 271(1)(c) of the I. T. Act, 1961.*
- 6.4 *In the case of K. C. Builders, the Hon'ble Supreme Court has held that:"It is implicit in the word "concealed" that there has been a deliberate act on the part of the assessee."*
- 6.5 *There is an intention and desire on the part of the appellant to hide or conceal the income so as to avoid the imposition of tax thereon. The appellant has consciously and fraudulently made the concealment and furnished inaccurate particulars of her income with a view to avoid imposition of tax.*
- 6.6 *In the case of CIT vs. Gurbachan Lal 2001 (Delhi). It was observed that Burden on the assessee to prove there is no concealment".*
- 6.7. *In the case of B. A. Balasubramanium & Bros Co. vs CIT 236 ITR 977 (SC). It was observed that for "the assessee to prove there is no concealment".*
- 6.8. *In the case of Additional CIT vs. Jeevan Lai Shah 205 ITR 244 (SC), it was observed that "the burden remains on the assessee, unless discharged that failure to return correct income did not arise from fraud or willful neglect on his part".*
- 6.9. *In the case of CIT V Anwar Ali (1970) 76 ITR 696 (SC). It was observed that "finding given in the assessment proceedings is a good evidence".*
- 6.10. *The appellant has failed to prove that there was no concealment and that incorrect particulars were not filed.*
- 6.11. *The appellant has deliberately furnished inaccurate particulars of its income with a view to concealment of income. The explanation of the appellant is not bonafide. In view thereof, penalty of Rs.60,77,308/-, imposed u/s 271(1)(c) on concealed income of Rs.3,61,09,972 is confirmed. The ground of appeal is thus ruled against the appellant.*
7. *As a result, the appeal is dismissed."*

(2.2) Aggrieved, the Assessee has filed this appeal in Income Tax Appellate Tribunal

("ITAT", for short). During the appellate proceedings in ITAT, the Assessee filed a **Paper Book** of case laws compilation consisting of total 188 pages, containing copies of the following decided cases:

1. *Anantharam Veerasinghaiah & Co. vs. CIT, (1980) 123 ITR 0457, Supreme Court of India.*
2. *Tidewater Marine International Inc. vs. DCIT, (2005) 96 ITD 0406, ITAT Delhi Bench.*
3. *ACIT vs. Smt. Surinder Kaur, (2009) 18 DTR 0038, ITAT Lucknow Bench.*
4. *CIT vs. M/s Metal & Chromium Plater (P) Ltd., 97 CCH 0080 High Court of Madras.*
5. *M/s Neha Home Builders (P) Ltd., ITA No. 2964/Mum/2016, dated 22.01.2016, ITAT Delhi Bench.*
6. *ITO vs. Frigsales (India) Ltd, (2005) 4 SOT 0376, ITAT Mumbai Bench.*
7. *Tristar Intech (P) Ltd. vs. ACIT, (2015) 43 ITR (Trib) 0279, ITAT Delhi Bench.*
8. *Sh. Navneet Jhamb vs. ACIT, ITA No. 756/Del/2016, dated 11.07.2016, ITAT Delhi Bench.*
9. *CIT vs. Dalmia Dyechem Industries Ltd., (2015) 0279 CTR 133, High Court of Bombay.*
10. *CIT vs. M/s SSA/s Emerald Meadows, SLP No. 23272/2016, dated 05.08.2016, Supreme Court of India.*
11. *CIT vs. M/s SSA's Emerald Meadows, ITA No. 380/2015, dated 23.11.2015, High Court of Karnataka.*
12. *Pr. CIT vs. Smt Ba setty Revathi, ITA No. 684/2016, dated 13.07.2017, High Court of Andhra Pradesh.*
13. *Aditya Chemicals Ltd. vs. ITO, ITA No. 5006/Del/2013, dated 21.11 2017 ITAT Delhi Bench.*

(2.3) In addition, the copies of the following judicial precedents were also filed from assessee's side.

- Order of Coordinate Bench of ITAT, Delhi Bench, in the case of ACIT vs. M/s Padmini Infrastructure (P) Ltd. in ITA No. 4065/Del/2010, order dated 25/10/2017 for Assessment Year 2006-07,

- Order of Coordinate Bench of ITAT, Delhi Bench, in the case of Millennium Automation & Systems Ltd. vs. DCIT, in ITA No. 5698/Del/2015, order dated 10.10.2017 for Assessment Year 2011-12,
- Order dated 27.10.2017 of Co-ordinate Bench of ITAT, Delhi Bench, in ITA No.- 5988/Del/2016 for Assessment Year 2006-07, in the case of Sanraj Engineering Pvt. Ltd. vs. ITO.
- Order of Coordinate Bench of ITAT, Mumbai Bench, in the case of M/s Neha Home Builders Pvt. Ltd. vs. CIT in ITA No. 2964/Mum/2016 for Assessment Year 2011-12
- Order of Hon'ble High Court of Madras in the case of CIT vs. M/s Metal & Chromiun Plater (P) Ltd.

A copy of notice dated 26.09.2008, U/s 274 read with Section 271 of I.T. Act, was also filed from assessee's side. At the time of hearing before us, the Ld. Counsel for Assessee submitted that, in notice U/s 271(1)(c) of I.T. Act, the AO had not stated the specific charge against the assessee - whether the penalty proceedings were for '*concealment of the particulars of income*' or for '*furnishing of inaccurate particulars of income*'. For this purpose, the Ld. Counsel for Assessee referred to the aforesaid notice dated 26.09.2008. The Ld. Counsel for assessee also drew our attention to Assessment Order dated 26.09.2008, wherein, also the AO did not make specific charge against the assessee - whether the penalty proceedings were for '*concealment of the particulars of income*' or for '*furnishing of inaccurate particulars of income*'. The Ld. Counsel for Assessee further contended that the quantum addition in respect of which penalty has

been levied U/s 271(1)(c) of I.T. Act was disputable and two views were possible. The Ld. Counsel for Assessee submitted that no penalty U/s 271(1)(c) of I.T. Act should be levied, when two views are possible - one being in favour of Assessee and the other being against the Assessee - even if, the view favourable to Assessee was taken by the assessee; but was eventually not accepted by authorities. Ld. Counsel for Assessee took us through the various judicial precedents referred to in the aforesaid **Paper Book** of case laws compilation and the other judicial precedents' copies whereof were filed during appellate proceedings in ITAT. The Ld. Departmental Representative ("DR", for short) supported the order of the AO and the Ld. CIT(A) also placed reliance in the case of CIT vs. Escorts Finance Ltd. 328 ITR 44 (Delhi).

(3) We have heard both sides patiently. We have perused all materials on our records carefully. We have considered all judicial precedents brought to our attention by the two sides. We have also considered the judicial precedents mentioned in the orders of the lower authorities. We find that the penalty proceedings U/s 271(1)(c) of I.T. Act were initiated on two counts. One of the two counts was the disallowance made U/s 80IB(10) of I.T. Act under normal provisions; and the other was the addition made under special provisions of I.T. Act U/s 115JB of the I.T. Act as far as computation of Book Profit is concerned. The Assessee succeeded in the appellate proceedings, as far as the disallowance U/s 80IB(10) of I.T. Act is concerned. This is readily inferred from the order of Co-ordinate Bench of ITAT, Delhi, vide aforesaid order dated 25/10/2017 in ITA No. 4065/Del/2010 for Assessment Year 2006-07 in assessee's

own case; the copy whereof was filed from Assessee's side during appellate proceedings. Therefore, the assessee's claim U/s 80IB of I.T. Act has been upheld by Co-ordinate Bench of ITAT, Delhi. Therefore, no penalty U/s 271(1)(c) of I.T. Act is leviable in respect of quantum additions under normal provisions of Income Tax Act, under which the AO had made addition, on account of disallowance of deduction U/s 80IB of I.T.Act. As far as penalty levied in respect of addition made under special provisions of Section 115JB of I.T. Act is concerned; the moot question was whether the deduction claimed by the assessee U/s 80IB of I.T. Act was to be added to assessee's Book Profit U/s 115JB of I.T. Act, or not. The Assessee took the view that the amount of deduction claimed u/s 80IB of I.T. Act is not to be added in Book Profit for the purpose of Section 115JB of I.T. Act. The AO took the view, on the other hand, that this amount is to be added to Book Profit for the purpose of Section 115JB of I.T. Act. When the matter was carried by the assessee to the Ld. CIT(A), through appeal filed by the assessee, the Ld. CIT(A) confirmed the addition made to Book Profit, as far as the amount of deduction U/s 80IB of I.T. Act is concerned. Therefore, the Assessee is liable to pay taxes in accordance with the quantum addition made under special provision of section 115JB of I.T. Act. The question before us, however, is whether the assessee is also liable for penalty U/s 271(1)(c) of I.T. Act, in respect of quantum addition on account of addition to Book Profit U/s 115JB of I.T. Act.

(4) The Ld. Counsel for Assessee has filed copy of judicial precedents in the case of M/s Neha Home Builders (P) Ltd. (supra), in which view was taken that the amount of

deduction U/s 80IB of I. T. Act is not to be added to Book Profit U/s 115JB of I.T. Act. The Ld. Counsel for Assessee also filed copy of judicial precedents in the cases of ITO vs. Frigsales (India) Ltd (supra) [in which, view was taken that exempt income U/s 50 would remain exempted as per provisions of section 115JA(4) of I.T. Act]; and CIT vs. M/s Metal & Chromium Plater (P) Ltd. (supra) [in which, view was taken that Capital Gains which formed part of the net profit in the profit and loss account of the assessee company, but was exempt U/s 54EC of I.T. Act, is not to be taken in account for calculation of Books Profit u/s 115JB of I.T Act.] In view of these judicial precedents, we are of the view that the issue as to whether amount of deduction U/s 80IB of I.T. Act is to be included as Book Profit for the purpose of Section 115JB of I.T. Act was disputable, on which two different views were legitimately possible; one such view being in favour of the Assessee.

(4.1) On a the disputable issue of quantum addition, on which two different views are legitimately possible, of which the one favourable to the assessee has been adopted by the assessee; eventually, the Assessee may or may not succeed in the quantum proceedings and the disputable issue, on which two different views were possible, may eventually be decided against the Assessee in quantum proceedings. However, the assessee cannot be burdened with penalty U/s 271(1)(c) of I.T. Act, if on a disputable issue of quantum addition, on which two different views were legitimately possible, the Assessee decided to adopt the view which was favourable to the

assessee; in a case in which all necessary details were filed by the Assessee in support of the claim and when no material inaccuracies were found in these details, and when the assessee is not guilty of suppression of any material facts. Thus, in quantum proceedings, when two different views are legitimately possible on a disputable claim made by the assessee; one of which is favourable to the assessee, the multiplicity of legitimate views and disputability of the claim has the effect of excluding the scope of penalty U/s 271(1)(c) of I.T. Act in respect of such disputable claim even if the disputable claim is decided against the assessee in quantum proceedings; because in such a case the disputable claim made by the assessee neither amounts to 'concealment of particulars of income' nor to 'furnishing of inaccurate particulars of income'. We are, in view of the foregoing, of the opinion that the AO erred in imposing penalty U/s 271(1)(c) of I.T. Act and the Ld. CIT(A) erred in upholding the levy of this penalty. For coming to this conclusion, we take support from the judicial precedents in the cases of CIT vs. Reliance Petroproducts 322 ITR 158(SC) [in which the Hon'ble Apex Court held that mere making of a claim which is not sustainable in law, by itself, does not amount to furnishing inaccurate particulars of income]; CIT vs. Samurai Techno Trading (P) Ltd. (2016) 389 ITR 357 [in which it was held that merely because assessee had made certain claims, which were not accepted or were not acceptable to Revenue, that difference would not attract penalty U/s 271(1)(c) of I.T. Act]; PCIT vs. Torque Pharmaceuticals (2016) 389 ITR 46 [in which it was held that mere disallowance of expenditure without bringing any adequate material

against the assessee to prove that it had concealed the particulars of income or had furnished inaccurate particulars of the income would not leave to levy of penalty U/s 271(1)(c) of I.T. Act]; and CIT vs. Mastek Ltd. (2015) 53 taxman.com 142 (Guj.)[in which it was held that no penalty is to be levied to wrong claim of deduction u/s 10A if there was no concealment of income or furnishing of inaccurate particulars]. The reliance placed by the Ld. DR in the case of CIT vs. Escorts Finance Ltd. 328 ITR 44 (Delhi), is not useful to advance the case of Revenue because in the case of CIT vs. Escorts Finance Ltd. (supra), the facts were entirely different. In the case of CIT vs. Escorts Finance Ltd., the claim made by the assessee U/s 35D of I.T. Act was *ex-facie* bogus. It was not a case where two opinions about the applicability of the Section 35D were possible and it could not be said to be a case of a bonafide error on the part of the assessee. In the case before us, however, as we have already held earlier, two legitimate views were possible on whether the amount of deduction U/s 80IB of I.T. Act is to be included as Book Profit under special provisions of Section 115JB of I.T. Act.

(4.2) In view of the foregoing discussions, we cancel the penalty levied U/s 271(1)(c) of I.T. Act by the AO and we set aside the impugned order of Ld. CIT(A), wherein the Ld. CIT(A) had confirmed the penalty.

(5) As regards the contention of the Ld. Counsel for Assessee, that the AO did not make specific charge against the assessee - whether the penalty proceedings were for '*concealment of the particulars of income*' or for '*furnishing of inaccurate particulars of income*'; we find from perusal of order dated 28.03.2012 of the AO, passed U/s

271(1)(c) of I.T. Act, that the assessee was issued four notices U/s 271(1)(c) of I.T. Act, dated 26.09.2008, 18.01.2012, 06.02.2012 and 14.02.2012. Although copy of notice dated 26.09.2008 has been filed from assessee's side during the appellate proceedings in ITAT, the copies of the other three notices are not on our records. We also find that this contention, that the AO did not make the specific charge against the assessee - whether the penalty proceedings were for '*concealment of the particulars of income*' or for '*furnishing of inaccurate particulars of income*', has been raised for the first time before the ITAT and this ground was not taken by the assessee before lower authorities, namely AO and CIT(A). Therefore, information regarding whether the specific charge against the assessee - whether the penalty proceedings were for '*concealment of the particulars of income*' or for '*furnishing of inaccurate particulars of income*' was made by the AO in one or more of the other three notices is not available from either the records of the Tribunal or from perusal of the orders of the lower authorities as this contention was not raised by the assessee before the lower authorities. Moreover, we also find that in the present appeal in ITAT, no specific ground has been taken by the assessee in respect of this contention which was advances at the time of hearing before us. Be that as it may, since we have already deleted the penalty U/s 271(1)(c) of I.T. Act, in the forgoing part of this order, this contention of the Ld. Counsel for assessee is merely academic presently and need not be adjudicated. **When it is already found that the disputable claim made by the assessee neither amounts to '*concealment of particulars of income*' nor to '*furnishing of inaccurate particulars of income*'; it is immaterial whether**

the Assessing Officer made specific charge against the assessee whether the penalty proceedings were for 'concealment of the particulars of income' or for 'furnishing of inaccurate particulars of income'. Therefore, presently we decline to express an opinion on this contention of the Ld. Counsel for assessee; because this is merely any academic issue at present.

(5) In the result, appeal of the Assessee is allowed for statistical purposes.

Order pronounced in the open court on 07 day of February, 2019.

Sd/-
(K.N. CHARY)
JUDICIAL MEMBER

Sd/-
(ANADEE NATH MISSHRA)
ACCOUNTANT MEMBER

Dated: 07.02.2019
Pooja/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	29/01/19
Date on which the typed draft is placed before the dictating Member	31/01/19
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	