

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "H", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA No.6615/M/2018
Assessment Year: 1990-91**

Late Shri Harshad S. Mehta, (Through L/H Smt. Jyoti H. Mehta), 32, Madhuli Apartment, Dr. A.B. Road, Worli, Mumbai – 400 018 PAN: ABAPM1848F	Vs.	Dy. CIT, Central Circle -23 [Now DCIT, Central Range-4(1)], Room No.1916, Air India Building, Nariman Point Mumbai - 400021
(Appellant)		(Respondent)

**ITA No.6725/M/2018
Assessment Year: 1990-91**

Dy. CIT, Central Circle-4(1), Central Range-4, Room No.1916, 19 th Floor, Air India Building, Nariman Point Mumbai - 400021	Vs.	Late Shri Harshad S. Mehta, (Through L/H Smt. Jyoti H. Mehta), 32, Madhuli Apartment, Dr. A.B. Road, Worli, Mumbai – 400 018 PAN: ABAPM1848F
(Appellant)		(Respondent)

**ITA No.202/M/2019
Assessment Year: 1990-91**

Late Shri Harshad S. Mehta, (Through L/H Smt. Jyoti H. Mehta), 32, Madhuli Apartment, Dr. A.B. Road, Worli, Mumbai – 400 018 PAN: ABAPM1848F	Vs.	Dy. CIT, Central Circle -4(1), Air India Building, Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

ITA No.209/M/2019
Assessment Year: 1990-91

Dy. CIT, Central Circle -4(1), R.No.1916, 19 th Floor, Air India Building, Nariman Point, Mumbai - 400021	Vs.	Late Shri Harshad S. Mehta, (Through L/H Smt. Jyoti H. Mehta), 32, Madhuli Apartment, Dr. A.B. Road, Worli, Mumbai – 400 018 PAN: ABAPM1848F
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Vijay Mehta A.R.
Shri Dharmesh Shah A.R. &
Ms. Mitali Gopani, A.R

Revenue by : Dr. P. Daniel, D.R.

Date of Hearing : 13.08.2021

Date of Pronouncement : 07.09.2021

ORDER**Per Rajesh Kumar, Accountant Member:**

The above titled appeals have been preferred by the assessee against even order dated 28.09.2018 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 1990-91. First we would take ITA No. 6615/M/2018 for assessment year 1990-91.

ITA No.6615/M/2018 (Assessee's appeal)

2. The assessee has raised the following grounds:

"1. The Ld. Commissioner of Income-Tax (Appeals) has erred in law and in facts in confirming the addition of Rs.5,51,63,286/- made on account of difference between balance in account as per the books and the balance as per bank statement.

2. The appellant craves leave of Your Honour to add to, alter amend and/or delete all or any of the foregoing grounds of appeal."

3. The facts in brief are that the assessee filed his return of income on 30.11.1990 declaring an income of Rs 34,90,090/-, without accompanying with it the balance Sheet and P & L account for the year. When this fact was pointed out to the assessee, the assessee filed a fresh return of income on 12.11.1991 declaring his income at Rs.34,94,650/-. In the meanwhile, a search action u/s 132(1) of the Act was carried out on the assessee by the Investigation Wing, Mumbai on 28.02.1992. During the course of search, various incriminating materials were found and seized including some share certificates and documents relating to investments in shares etc. Subsequently, a search action in this case was also carried out by the Central Bureau of Investigation on 04.06.1992 and some documents/records were seized by them also. The assessment u/s 143(3) r.w.s. 145(2) of the Act was completed by the AO on 26.03.1993 at an assessed income of Rs.1,90,67,99,460/- after rejecting the books of accounts of the assessee. The various additions/disallowances made by the AO *inter alia* included (i) addition of Rs.5,60,33,309/- being the difference as on 31.03.1990 in the balance in its account with UCO Bank, Hamam Street Branch as per books of the assessee and the balance as per the bank statement of the Bank and (ii) interests accrued of Rs.13,11,232/- and Rs. 34,92,079/-, aggregating to Rs.48,03,311/- which were not offered by the assessee on the ground that he was following cash system of accounting. Aggrieved by the order of the AO, the assessee preferred an appeal before the Ld. CIT(A). On the addition of Rs.5,60,33,309/- in respect of the issue related to the difference as on 31.03.1990 as per books of the assessee in UCO Bank and

the balance as per the bank statement of the said account, the Ld.CIT(A) after duly considering the remand report of the AO qua the reconciliation statement submitted by the assessee, confirmed the addition to the extent of Rs.5,51,63,286/- and allowed marginal relief for the balance amount of Rs.8,70,023/-. On the aggregate addition of accrued interest of Rs.48,03,311/-, the Ld.CIT(A) confirmed the entire addition. Aggrieved by the order of the Ld.CIT(A), the assessee preferred second appeal before the Tribunal. The Tribunal vide its order dated 25.09.2008 decided the assessee's appeal in ITA No.8025/Mum/1994. The coordinate bench, on the issue relating to the difference as on 31.03.1990 as per books of the assessee in its account with UCO and the balance as per the bank statement, has set aside the issue to the Ld.CIT(A) for fresh consideration and adjudication after according reasonable opportunity to the assessee of being heard, to make further enquiries with the Bank and confronting the assessee with the material relied upon by the AO which he had obtained from UCO Bank to draw adverse inference in his remand report. On the issues related to aggregate accrued interest of Rs.48,03,311/-, the tribunal set aside the matter to the file of the Ld.CIT(A) for verification of the system of accounting regularly employed by the assessee in respect of interest income while keeping in mind its own order in the case of the assessee for A.Y. 1989-90.

4. The Ld. CIT(A) again confirmed the addition of Rs.5,51,63,286/- being the difference between the books of accounts of the assessee as on 31.03.1990 and bank statement

of Uco Bank, Harnam Street Branch by observing and holding as under:

"4.6 From the aforesaid submissions, it is observed that the assessee claims that certain transactions of sale of securities were undertaken on behalf of SBI on 27.03.1990, however, subsequently these transactions were cancelled and the entries reversed, it is pertinent to note that this plea now being taken that the said payments of Rs. 5,51,63,286/- relates to proposed transactions of sale of securities for SBI which were subsequently cancelled was never taken either before my Ld. Predecessor or even before the Hon'ble ITAT. Therefore, the onus was on the assessee to substantiate this new claim made in the present proceedings along with proper supporting evidences. The assessee vide order sheet noting dated 17.09.2018 was specifically asked to furnish necessary supporting evidences in respect of the payments claimed to have been made to SBI for an aggregate amount of Rs.5,51,63,286/-. However, other than submitting the client's constituent ledger account from his own books, the assessee has not submitted any other evidence. It is pertinent to point out that this client constituent ledger account cannot be fully relied upon since, the books of the assessee have been rejected by the AO and this action has also been upheld by the Hon'ble ITAT. Therefore, it was imperative for the assessee to submit third party supporting evidences which he has failed to do. Moreover, other than making a bland assertion, the assessee has not submitted any evidences in respect of the alleged transaction of sale of securities for SBI and its subsequent cancellation. It is also pertinent to note that the various discrepancies noted by the AO after examination of the books of the assessee in respect of the reconciliation statement, were neither explained in course of the proceedings in the first round before my Ld. predecessor or even in the current proceedings. Moreover, though the assessee was specifically asked to submit its bank statement for the months of March and April, 1990 vide office fether dated 13.08.2018, the same has not been submitted. It is a fact that the assessee has prepared its accounts for the years relevant to A.Y. 1990-91-which could not have been prepared without the bank statement for the relevant period and therefore, non-submission of the bank statements for the months of March and April, 1990 by the assessee is clearly unacceptable.

4.7 It is further noted that the Hon'ble ITAT had restored the issue to the file of CIT(A) with a direction to decide the issue afresh after affording reasonable opportunity to the assessee of being heard, making enquiries with UCO Bank and confronting the assessee with the material stated to have been obtained by the AO from the bank. It is noted that these directions were issued by the Hon'ble ITAT in the background that the AO had carried out certain enquiries with the UCO Bank and found out that the cheques in respect of the said payments of Rs. 5,51,63,286/- had not at all been debited to the account of the assessee. The assessee had contended before the Hon'ble ITAT that the AO had not confronted him with the evidences gathered from the UCO Bank and therefore, the Hon'ble ITAT had issued the said directions in its order. However, in the present proceedings, in the assessee's letter dated 24.09.2018, it has been submitted that the said payments relate to sale of certain securities undertaken on behalf of SBI on 27.03,1990 which was subsequently cancelled and therefore, the cheques issued to them were not

deposited in the client's bank account Thus, the assessee also does not dispute that the said payments of Rs. 5,51,63,286/- have not been debited in his bank account since the said cheques were never deposited by its client. Since this fact is not disputed, no purpose will be served if the material collected by the AO from UCO Bank on the basis of which he concluded that the said cheques have not been debited in the bank account, is not made available to the assessee since the assessee also accepts that the said cheques were never deposited by its client. Moreover, it is also observed that the various other discrepancies pointed out by the AO in the remand report in the reconciliation statement is after verification of the assessee's own books of accounts. The only external evidence used by the AO to draw an adverse inference was the enquiry carried out from UCO Bank which revealed that the said cheques have not been debited in the account of the assessee and this fact is now not being disputed by the assessee.

4.8 In view of the aforesaid discussion, the following observations are made in respect of the reconciliation submitted by the assessee to explain the difference between the balance as on 31.03.1990 in its bank account as per books and the balance as per the bank statement.

(i) In the first round of proceedings before my Ld. Predecessor, it was submitted that the accounts of the assessee will be rectified for the subsequent year and no plea was taken that the said payments were made on 27.03.1990 on account of proposed sale of certain securities undertaken for SBI which got cancelled. This plea was also not taken up in the proceedings before the Hon'ble ITAT. The assessee in the present proceedings, for the first time, took up the plea that the said payments were made on 27.03.1990 on account of proposed sale of certain securities undertaken for SBI which got cancelled and the entries were reversed. Since, this plea was not taken earlier, the onus was on the assessee to substantiate this new claim made in the present proceedings along with proper supporting evidences. The assessee vide order sheet noting dated 17.09,2018 was specifically asked to furnish necessary supporting evidences in respect of the transactions claimed to have been made for SBI for an aggregate amount of Rs. 5,51,63,2867-. However, other than submitting the client's constituent ledger account from his own books, the assessee has not submitted any other evidence in support of the alleged proposed securities transaction with SBI and its subsequent cancellation, it is pertinent to point out that the client constituent ledger account cannot be fully relied upon since, the books of the assessee have been rejected by the AO and this action has also been upheld by the Hon'ble ITAT. Therefore, it was imperative for the assessee to submit third party supporting evidences which he has failed to do. However, other than making this bland assertion, the assessee has not submitted any third party evidences in respect of the alleged transaction of sale of securities for SBI and its subsequent cancellation. The assessee rather than discharging his onus, has tried to shift the onus on the department.

(ii) The AO, in the remand report in the first round of proceedings before my Ld. Predecessor, after verification of the books of the assessee had pointed out a number of discrepancies in the reconciliation statement submitted by the assessee. These discrepancies were in respect of the dates claimed for the various transactions, the mode of payment and the payee. These discrepancies have been

attributed by the assessee to typographical mistakes. However, the fact remains that in the first round of proceedings before my Id. Predecessor as well as the present proceedings, these discrepancies have not fully been addressed.

4.9 In view of the aforesaid discussion, it is apparent that despite sufficient opportunities, the assessee has not been in a position to substantiate with proper supporting evidences the said reconciliation statement explaining the difference in the balance in its account with UCO bank as per the bank statement and as per the regular books of the assessee especially related to the claim of payments for an aggregate amount of Rs 5,51,63,286/- to SBI on 27.03.1990 for the alleged transaction for sale of securities for SBI which got subsequently cancelled. Accordingly, an amount of Rs.5,51,63,286/- is considered for addition to the total income of the assessee for the relevant year. Accordingly, the said addition made by the AO of Rs.5,60,33,309/- is restricted to an amount of Rs. 5,51,63,286/-."

5. After hearing both the parties and perusing the material on record, we find that undisputedly the addition as confirmed by the Ld. CIT(A) in the second round of appeal is on account of difference between books of accounts of the assessee and statement of UCO Bank, Harnam Street Branch. We note that the assessee has filed a reconciliation statement before the Id CIT(A) which is extracted as under for the sake of ready reference:

			Amount (Rs.)	Amount (Rs.)
Balance as per our bank book as on 31.03.1990				565671.55
<i>Add: Cheque issued but not presented till month end.</i>				
Date	Cheque No.	In favour of		
01.03.90	226196	Nashville Investment & Trading Co.	1000000.00	
01 .03.90	226197	Jalaeg Inv. & Trading Co. Ltd.	1000000.00	
07.03.90	Advice	State Bank of India	55159650.00	
07.03.90	Advice	State Bank of India	3636.90	57163286.90
				57729955.46
<i>Less : Cheques deposited but not credited by Bank till month end</i>				

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Date	From		
31.03.90	Vemity Hotels Ltd.	1000000.00	
31.03.90	Mohini Investments P. Ltd.	750000.00	1750000.00
Balance as per bank statement as on 31.03.90			55978956.45

6. We note that this reconciliation was forwarded to the AO for his verification and AO after doing the necessary verification submitted that there were discrepancies of two payments aggregating to Rs.5,51,63,286/ namely (i) payment of Rs.5,51,59,650/- to SBI vide advice dated 17.03.1990 and (ii) payment of Rs.3,636/- to SBI vide advice dated 17.03.1990. The AO noted in the remand report that in the reconciliation statement the first payment of Rs.5,51,59,650/- was made vide advice dated 17.03.1990 whereas as per the books of accounts, the payment was made by way of cheque No.226184 on 27.03.1990. We also note that AO submitted before the Ld. CIT(A) in the said report that two payments were made to SBI whereas as per the books of accounts of the assessee the said payments have been made to SBACA account No.331 and assessee has not explained to whom this SBACA account No.331 belonged to. We note that AO upon enquiry with UCO bank came to know that cheque No.226184 in favour of SBI has not been debited in the bank account of the assessee even in the

7. We have also examined the books of accounts of the assessee in respect of subsequent year and found that in the month of April these entries were reversed by the assessee in his books of accounts. The Ld. CIT(A) confirmed the addition on the ground that assessee has failed to produce the bank statements to corroborate these entries by overlooking the fact that AO has given a finding in the remand report that these cheques were never encashed and presented in the bank. Therefore, we are not in concurrence with the views of the Ld. CIT(A) on this issue. In fact, the bank statement relates to the year 1993 and therefore we find merit in the contention of the Ld. A.R. that it is rather impossible to produce the statement belonging to 1993 in the year 2018. Moreover, the fact of the cheques not presented in the bank in the subsequent year has been confirmed by the AO after enquiring the same from the UCO bank. Considering the facts of the case and surrounding circumstances, we are of the view that Rs.5,51,63 286/- represented the amount of cheques issued by the assessee which were reversed subsequently for the reason that same were not presented for payment. So far as the discrepancies in the dates are concerned, we do not find that any minor mistake as such would lead to such a heavy addition in the hands of the assessee that too when the verification of facts are almost impossible due to the fact that these entries belong to 1993. Keeping in view the fact that these cheques were never encashed from the bank a finding qua which has been given in the remand report by the AO after carrying out verification from then UCO bank. In our considered opinion an addition can not be made merely because it was not explained by the assessee by overlooking the facts on records which

testified that the difference between the books of account of the assessee and bank statement of UCO bank are attributed to cheques/advices issued but not encashed and presented in the bank. Under these circumstances, we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the disallowance.

8. Accordingly, appeal of the assessee is allowed.

ITA No.6725/M/2018 (Revenue's appeal)

9. The ground raised by the Revenue is as under:

"1. On the facts and in the circumstances of the case and in law, whether the Ld. CIT(A) was justified in holding that interest income of Rs 48,03,311 is to be assessed as cash system of accounting instead of mercantile system of accounting without appreciating the fact that in respect of trading in securities, the Assessee is following mercantile system of accounting.

The appellant, therefore, prays that on the grounds stated above, the order of the CIT(A)-52, Mumbai, may be set aside and that of the Assessing Officer restored."

10. The facts in brief are that the issue raised in this ground pertains to interest accrued of Rs.48,03,311/- comprising accrued interest of Rs.34,92,079/- relating to trading in securities and accrued interest of Rs.13,11,232 /- on NLC bonds. According to the AO the assessee derived interest from the same source which is trading in securities for which the assessee is following mercantile system of accounting. Accordingly, the AO held that when the assessee is following mercantile system of accounting in respect of trading in securities it would be not be correct on the part of the assessee to follow cash system of accounting in respect of interest income of Rs.34,92,079 which is from the same source. The AO also added Rs.13,11,332/- as accrued interest on NLC bonds which was again not offered by the assessee on the ground that

assessee is following cash system of accounting. In the set aside proceedings, the Ld. CIT(A) deleted the addition by observing and holding as under:

“4.12 The Hon'ble ITAT has directed that this issue be adjudicated in line with its decision in the case of the assessee himself for A.Y. 1989-90. From the order of the Hon'ble ITAT for A.Y. 1989-90, it is observed that the Hon'ble ITAT noted that for the preceding year i.e. A.Y. 1988-89, the assessee had not maintained his books of accounts and therefore, the issue was decided against the assessee. It was further noted by the Hon'ble ITAT that its decision for the preceding year cannot be applied for A.Y. 1989-90 since in this year, the books of accounts were being maintained by the assessee. In the said order, it was also held that even when the books of accounts are not maintained or rejected by the AO and income determined on best judgement basis, still the assessee's choice regarding the method of accounting cannot be ignored. Finally, the Hon'ble ITAT in its order for AY 1989-90 has held that the action of the lower authorities of taxing the interest income on accrual basis is not correct.

4.13 For the relevant year, it is observed that the assessee was maintaining books of accounts, however, the same were rejected by the AO and this action was upheld by both the appellate authorities. Since the facts for the relevant year are quite similar to A.Y. 1989-90, therefore, respectfully following the decision of the Hon'ble ITAT for A.Y. 1989-90, the interest income of the assessee is required to be taxed as per cash system of accounting and not as per mercantile system of accounting. It is also pertinent to mention that the Hon'ble ITAT in the case of Sudhir Mehta for AYs 2009-10 to 2011-12 in ITA No. 5799 to 5801/Mum/2015 dated 27/12/2017 has also noted that the assessee is regularly following cash system of accounting. **Accordingly, the addition made by the AO on account of the said accrued aggregate interest of Rs.48.03.311/- is deleted.”**

11. After hearing both the parties and perusing the material on record, we find that the Ld. CIT(A) allowed the appeal of the assessee by following the decision of the co-ordinate Bench of the Tribunal in the case of Sudheer Mehta A.Y. 2009-10 to 2011-12 in ITA No.5799 to 5801/M/2015 dated 27.12.2017. Accordingly, we do not find any infirmity in the order of Ld. CIT(A) and same is upheld by dismissing the appeal of the Revenue.

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ITA No.209/M/2019 (Assessee's appeal)

12. The assessee has challenged the order of Ld. CIT(A) on legal as well as on merit. The first legal issue raised by the Ld. A.R. is that the order passed by the AO under section 271(1)(c) of the Act is barred by limitation and therefore the same is nullity and void ab-initio.

13. The facts in brief are that there was search action on the assessee on 27.09.1990 during which the assessee was found to have indulged in large scale manipulation of transactions of securities on the stock exchange. The assessee filed the return of income on 30.11.1990 declaring an income of Rs.34,90,090/- but the same was not accompanied with the balance sheet and P&L account and therefore was treated as invalid. Therefore, the assessee filed the revised return of income declaring an income of Rs.31,94,650/- The assessment was completed under section 143(3) read with section 145(2) of the Act vide order dated 26.03.1993 determining the total income of the assessee at Rs 190,66,99,460/- which was challenged before the first appellate authority. The Ld. CIT(A) vide order dated 28.10.1994 allowed partial relief to the assessee. While the additions deleted by the Ld. CIT(A) were accepted by the department and no second appeal was filed, the appellant challenged the said order before Hon'ble Tribunal in ITA No. 8025/Mom/1994. The Tribunal vide its order dated 25.09.2008 disposed off the appeal partly deleting the additions made by the A.O. as well as partly confirming the same. Further, some of the issues were set aside by Hon'ble Tribunal to the file of Ld. A.O.

as well as to the file of Ld. CIT(A). In the meantime, while the said appeal was pending before Tribunal, the Ld. A.O. passed the order u/s. 271(l)(c) of the Act vide his order dated 28.04.2006 levying penalty of Rs.77,38,43,158/- based on the total income determined after giving effect to the order of Ld. CIT(A) in the quantum appeal.

14. The appeal filed against the said penalty order before Ld. CIT(A) was disposed off vide his impugned order dated 01.11.2018 thereby partly confirming the penalty and partly deleting the same.

15. The Ld. Counsel, at the outset, submitted the chronology of events before us which is reproduced as under:

Sr. No.	Events	Date
1.	Assessment order passed u/s 143(3) rws 145(2) of the Act	26.03.1993
2.	Notice issued u/s. 271(l)(c) of the Act	26.03.1993
3.	Appellate order passed by Ld. CIT(A) in quantum proceedings	28.10.1994
4.	Order passed by Assessing Officer u/s. 271(l)(c) of the Act	28.04.2006
5.	Order passed by Hon'ble Mumbai Tribunal in the appeal in quantum proceedings	25.09.2008

16. The Id AR submitted that the penalty order u/s. 271(l)(c) of the Act passed by the A.O. on 28.04.2006 is beyond the period of limitation. The Id AR while taking us through the provisions of section 275 of the Act submitted that order imposing penalty has to be passed (a) before the end of the financial year in which proceedings in the course of which action for imposition of penalty have initiated are completed or (b)

before 6 months from the end of the month in which the order of the Ld. CIT(A) or Tribunal is passed whichever is later. The ld AR submitted that as per the above provisions, the A.O. had a choice of either passing the penalty order as per the aforesaid timelines - after disposal of the appeal by the Ld. CIT(A) or after the disposal of the appeal by the Tribunal, as the case may be. The ld AR argued that in the present case, as can be seen from the chronology of events, the impugned penalty order has been passed on 28.04.2006, much before to the disposal of the quantum appeal by the Hon'ble Tribunal on 25.09.2008. The ld AR submitted that admittedly the A.O. chose option of passing the penalty order after the disposal of the appeal by the Ld. CIT(A) without waiting for the disposal of the appeal by Tribunal. The ld. AR submitted that the due date for passing of the penalty order in accordance with s. 275 of the Act are as follows:

Sr. No.	Events	Date
1.	Due Date as per the first limb of section 275 (l)(a) of the Act	31.03.1993
2.	Due Date as per the second limb of section 275 (l)(a) of the Act (presuming that the order of the Ld. CIT(A) was served in November 1994)	31.05.1995

17. In light of the above, the A.O. ought to have passed the penalty order u/s. 271(l)(c) of the Act on or before 31.05.1995. Since the penalty order has been passed on 28.04.2006, the same was beyond the limitation period and hence void ab initio.

The ld AR defense of his arguments relied on the followings decisions:

ACIT v. Jasbir Singh [124 Taxman 124 (Mag.)]
J. Srinivasan v. ACIT [404 ITR 51 (Mad.)]

18. Alternatively and without prejudice ,the ld AR submitted that the notice issued by the A.O. is also not in accordance with the provisions of the Act and therefore invalid as it has been issued in standard format and without application of mind. The perusal of the notice issued by the A.O. on 26.03.1993 showed that the irrelevant limb in the said notice has not been struck off by the A.O. As such, the notice has not been issued in accordance with law and after due application of mind. The ld AR contended that the perusal of the notice clearly showed that the A.O. has merely ticked the entire phrase 'have concealed the particulars of your income or furnished inaccurate particulars of such income' without specifically mentioning the under which limb the penalty was proposed to be levied. The ld AR submitted that it is a settled legal position in favour of the assessee to hold that the notice issued by the A.O. without striking of the correct limb in the notice is invalid and hence the order passed consequent to such notice is also invalid and void ab initio. In defense of his arguments the ld AR relied on the following decisions:

a. Mohd. Farhan A. Shaikh v. DCIT & Ors [434 ITR 1 (Bom.)(FB)] [Page No. 220-278 of PB NO. 2]

b. Shri Jitesh Jayendra Badaliya v. ITO [ITA No. 7272/Mum/2018] dated 03.03.2021[Page No. 279-286 of PB NO. 2]

c. Pavile Projects Private Limited v. DCIT [ITA No. 1181/Murn/2019] dated 20.05.2020 [Page No. 287-292 of PB NO. 2]

- d. Atria Partner v. ACIT [ITA No. 7196/Del/2017] dated 10.05.2019 [Page No. 293-311 of PBNO. 2]
- e. Shri E. Krishnappa v. ITO [ITA No. 313-315/Bang/2014] dated 14.08.2015 [Page No. 312-327 of PBNO. 2]

Finally, the ld AR prayed before the bench that in view of the above submissions and contentions the penalty order may kindly be quashed as invalid and illegal.

19. The ld DR on the other hand relied heavily on the order of CIT(A) and submitted that these jurisdictional issues were not raised before the ld CIT(A) and being raised for the first time before this tribunal and therefore may not be admitted.

20. We have heard the rival contentions and perused the materials on records including the decisions cited by the ld AR in support of his contentions. Admitted and undisputed facts are that the penalty order u/s. 271(l)(c) of the Act was passed by the A.O. on 28.04.2006 whereas the assessment was framed u/s 143(3) r.w.s. 45(2) of the Act on 26.03.1993 and the appellate order was passed by the ld CIT(A) on 28.10.1994. The quantum appeal of the assessee was still pending with the tribunal on the date of passing the penalty order. The contention of the assessee's counsel is that the penalty is barred by limitation in terms of provisions of section 275 of the Act. For the purpose of better understanding of the issues let us understand the provisions of section 275 of the Act which are extracted below:

"275(1) No order imposing a penalty under this Chapter shall be passed (a) in a case where the relevant assessment or other order is the subject matter of an appeal to the Deputy Commissioner (Appeals) or the Commissioner (Appeals) under section 246 or an appeal to the Appellate Tribunal under section 253, **after the expiry of**

the financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, are completed, or six months from the end of the month in which the order of the Deputy Commissioner (Appeals) or the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal is received by the Chief Commissioner or Commissioner, whichever period expires later;

.....
.....”

21. Upon close and careful perusal of the above provisions, we find that the order imposing penalty has to be passed either (a) before the end of the financial year in which proceedings during the course of which action for imposition of penalty have initiated are completed or (b) before 6 months from the end of the month in which the order of the Ld. CIT(A) or Tribunal is passed whichever is later. Thus, the A.O. had a choice of either passing the penalty order as per the aforesaid timelines - after disposal of the appeal by the Ld. CIT(A) or after the disposal of the appeal by the Hon'ble Tribunal, as the case may be. In the instant case the AO passed the impugned penalty order on 28.04.2006, i.e. much before the disposal of the quantum appeal by the Hon'ble Tribunal on 25.09.2008. So it is apparent that the A.O. chose option of passing the penalty order after the disposal of the appeal by the Ld. CIT(A) without waiting for the disposal of the appeal by Tribunal. However, in terms of provisions of section 275 of the Act, the penalty order should have been passed either on or before 31.03.1993 under the 1st limb or by 31.05.1995 as per the second limb whichever is later.

22. Therefore, as per the provisions of section 275 of the Act, the A.O. ought to have passed the penalty order u/s. 271(l)(c) of the Act on or before 31.05.1995 as the Ld. CIT(A) passed the order on 28.10.1994. Since the penalty order has been passed on 28.04.2006, in our considered view, the same was beyond the

limitation period and hence void ab initio. The case of the assessee finds supports from the following decisions:

a) In the case of ACIT v. Jasbir Singh (supra), the coordinate bench has held as under under similar facts:

"In the instant case, as the appeal was pending before the Tribunal, the Assessing Officer could have passed penalty order within six months from the date of receipt of the appellate order. The Assessing Officer had not waited for the date of the passing of the order by the Tribunal, i.e., on 27-02-1995, whereas the penalty order had been passed by the Assessing Officer on 15-10-1993 meaning thereby that the Assessing Officer did not take the advantage of period of limitation of six months which was available to him after the receipt of the order of the Tribunal. On the other hand, it was found that quantum income of the assessee had become final when the first appellate authority passed an order on 11-5-1992. So the passing of the penalty order by the Assessing Officer on 15-10-1993 was certainly beyond the period of limitation of six months prescribed under section 275 (l)(a).

Hence, the Commissioner (Appeals) had rightly held that the penalty order passed by the Assessing Officer was barred by the period of limitation. As per section 275(l)(a)(ii), penalty in such a case could be imposed within six months from the date of receipt of order of the Commissioner (Appeals). Though the Assessing Officer could have waited till the receipt of the order of the Tribunal, but once this course had not been adopted, the order must have been passed within six months from the date of receipt of the order of the first appellate authority. Accordingly, the penalty order was barred by limitation."

b) Identical view was also rendered in the case of J. Srinivasan v. ACIT [404 ITR 51 (Mad.)]

Considering the facts of the instant case in the light of provisions of section 275 of the Act and decisions cited by the ld AR, we are inclined to hold that the penalty order passed beyond the time limit permissible u/s. 275(l)(a) of the Act and is invalid and void ab initio. Consequently the same is quashed. Since we have allowed the appeal of the assessee on limitation, the other without prejudice and alternative contention is not being decided.

23. The appeal is not argued on merits and therefore not being adjudicated.

24. Accordingly, the appeal of the assessee is allowed.

25. Since we have allowed the appeal of the assessee on legal ground of penalty order being barred by limitation, the appeal of the Revenue in ITA No.209/M/2019 becomes infructuous and is dismissed.

26. In the result, all the appeals of the assessee are allowed and that of the Revenue are dismissed.

Order pronounced in the open court on 07.09.2021.

**Sd/-
(Amarjit Singh)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 07.09.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.