आयकर अपीलीय अधिकरण पुणे न्यायपीठ “ए” पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “A”, PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री आर. के. पांडा, लेखा सदस्य के समक्ष

BEFORE MS. SUSHMA CHOWLA, JM AND SHRI R.K. PANDA, AM

आयकर अपील सं. / ITA Nos.1176 to 1180/PUN/2014

निर्धारण वर्ष / Assessment Years : 2003-04 to 2007-08

Chhoriya Land Developers &
Construction Company,
Kanhaiyalal D. Jain,
C/o. Chhoriya Group, Ist Floor,
Kothari Plaza, Bibwewadi,
Kondhwa Road, Gera Junction,
Lullanagar, Pune – 411 040 ... अपीलार्थी /Appellant

PAN : AADFC1329B

Vs.

The Asst. Commissioner of Income Tax,
Central Circle-3, Nashik ... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos.1181 to 1185/PUN/2014

निर्धारण वर्ष / Assessment Years : 2004-05 to 2008-09

Chhoriya Land Developers &
Associates
Kanhaiyalal D. Jain,
C/o. Chhoriya Group, Ist Floor,
Kothari Plaza, Bibwewadi,
Kondhwa Road, Gera Junction,
Lullanagar, Pune – 411 040 ... अपीलार्थी /Appellant
PAN : AADFC6935B

Vs.

The Asst. Commissioner of Income Tax,
Central Circle-3, Nashik ... प्रत्यर्थी / Respondent

<u>आयकर अपील सं.</u> / <u>ITA Nos.1186 & 1187/PUN/2014</u>
<u>निर्धारण वर्ष</u> / <u>Assessment Years : 2006-07 & 2008-09</u>

Chhoriya Developers &
Construction Company,
Kanhaiyalal D. Jain,
C/o. Chhoriya Group, Ist Floor,
Kothari Plaza, Bibwewadi,
Kondhwa Road, Gera Junction,
Lullanagar, Pune – 411 040 ... अपीलार्थी /Appellant
PAN : AADFC2486M

Vs.

The Asst. Commissioner of Income Tax,
Central Circle-3, Nashik ... प्रत्यर्थी / Respondent

<u>आयकर अपील सं.</u> / <u>ITA Nos.1188 to 1192/PUN/2014</u>
<u>निर्धारण वर्ष</u> / <u>Assessment Years : 2003-04 to 2007-08</u>

Chhoriya Builders & Associates
Kanhaiyalal D. Jain,
C/o. Chhoriya Group, Ist Floor,
Kothari Plaza, Bibwewadi,
Kondhwa Road, Gera Junction,
Lullanagar, Pune – 411 040 ... अपीलार्थी /Appellant

PAN : AADFC9467A

Vs.

The Asst. Commissioner of Income Tax,
Central Circle-3, Nashik ... प्रत्यर्थी / Respondent

<u>आयकर अपील सं.</u> / <u>ITA Nos.1193 to 1195/PUN/2014</u>
<u>निर्धारण वर्ष</u> / <u>Assessment Years : 2003-04, 2004-05 & 2006-07</u>

Smt. Shailaja S. Chhoriya,
Kanhaiyalal D. Jain,
C/o. Chhoriya Group, Ist Floor,
Kothari Plaza, Bibwewadi,
Kondhwa Road, Gera Junction,
Lullanagar, Pune – 411 040 ... अपीलार्थी /Appellant
PAN : AANPC4485G

Vs.

The Asst. Commissioner of Income Tax,
Central Circle-3, Nashik ... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos.1196 to 1200/PUN/2014
निर्धारण वर्ष / Assessment Years : 2003-04, 2007-08

Shri Shantilal D. Jain,
Kanhaiyalal D. Jain,
C/o. Chhoriya Group, Ist Floor,
Kothari Plaza, Bibwewadi,
Kondhwa Road, Gera Junction,
Lullanagar, Pune – 411 040 ... अपीलार्थी /Appellant
PAN : AAYPJ6450D

Vs.

The Asst. Commissioner of Income Tax,
Central Circle-3, Nashik ... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Nikhil Pathak & Shri Deepak Sharma
प्रत्यर्थी की ओर से / Respondent by : Shri Anil Kumar Chaware

सुनवाई की तारीख / Date of Hearing : 21.12.2016		घोषणा की तारीख / Date of Pronouncement: 28.12.2016

आदेश / ORDER

PER SUSHMA CHOWLA, JM :

This bunch of appeals filed by related assessee are against respective consolidated orders of CIT(A)-I, Nashik dated 16.04.2014 relating to assessment years 2003-04 to 2007-08 against levy of penalty under section 271(1)(c) of the Income-tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following grounds of appeal:-

The following grounds are taken without prejudice to each other -
On facts and in law,

1] The learned CIT(A) erred in directing levy of penalty u/s 271 (1) (c) @ 150% of the tax sought to be evaded on the ground that the appellant had concealed its income and also misrepresented the facts of the case.

2] The learned CIT(A) erred in enhancing the penalty levied from 100% to 150% without appreciating that on the facts of the case and in law, he had no power to enhance the penalty levied by the A.O. and *accordingly, the enhancement made by the learned CIT(A) is not justified at all.*

3] The learned CIT(A) erred in holding that the additional income declared by the assessee group in the course of search in respect of on money on sale of plots was not correct and the seized papers indicated unaccounted loans received by the assessee and accordingly, the assessee had misrepresented the facts and therefore, the levy of penalty was justified in law.

4] The learned CIT(A) failed to appreciate that the additional income declared by the group of Rs.13.99 Crs. was to buy peace and to co operate with the dept. and there was no evidence that the assessee had actually earned that income and accordingly, the penalty levied by the A. O. was not justified at all.

5] The learned CIT(A) ought to have appreciated that if its contention is accepted and the notings on the seize papers indicate unaccounted loans received by the assessee, in that event, there is no question of taxing such amounts in the hands of the assessee and consequently, the penalty levied should be deleted.

6] Without prejudice to the above grounds, the assessee submits that in case, penalty is leviable, the same should not be levied on the entire additional income declared by the assessee but only on reasonable net profit percentage to be adopted on the on money received by the assessee.

7] The learned CIT(A) erred in holding that the assessee had misrepresented the facts without appreciating that if his contention is accepted, no income is taxable in the hands of the assessee and therefore, the question of levy of penalty simply does not arise.

8] The learned CIT(A) has erred in passing the order without considering the correct facts of the case.

9] The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.

3. The issue arising in the present bunch of appeals is against levy of penalty under section 271(1)(c) of the Act for lack of satisfaction by the Assessing Officer while passing the assessment order.

4. Briefly, in the facts of the case, search and seizure action under section 132 of the Act was carried out on Chhoriya Group of cases on 22.08.2008. During the course of search, some incriminating documents were found and seized in which there were transactions of purchase and sale of plots and shops at various sites. The receipts on account of sales were much more than what was disclosed by the assessee in the returns of

income filed under section 139(1) of the Act. In the statement recorded on oath on 16.10.2008, Shri K.D. Jain (Chhoriya), partner of the firm had admitted that the assessee had received on-money on sale of plots and shops which were not disclosed in the returns of income. He offered sum of Rs.11,44,93,507/- as additional income. Thereafter, notice under section 153A of the Act was issued to the respective assessee for different assessment years. In response thereto, the group of assessee furnished their returns of income and the total income offered for tax over and above the income returned under section 139(1) of the Act was Rs.13,99,87,648/-. The respective assessee furnished the returns of income in response to the notice issued under section 153A of the Act. The assessments in the hands of each of the assessee for different assessment years were completed under section 143(3) r.w.s. 153A of the Act and the additional income offered by the assessee was added as income of the assessee. The Assessing Officer while completing assessment proceedings observed that the additional income was disclosed pursuant to search and seizure operations, otherwise, the same would have remained concealed with the assessee. Thus, the assessee was found to have concealed particulars of income and furnished inaccurate particulars of such income within meaning of Explanation 5A to section 271(1)(c) of the Act. Accordingly, penalty proceedings under section 271(1)(c) of the Act were separately initiated. Thereafter, the Assessing Officer issued notice under section 274 r.w.s. 271(1)(c) of the Act and the case of assessee before us is that either of the limbs as to whether the assessee has concealed the particulars of income or furnished inaccurate particulars of income, has not been struck off. The Assessing Officer in each of the cases had levied penalty under section

271(1)(c) of the Act which was confirmed by the CIT(A), against which the assessee is in appeal.

5. The assessee has raised additional ground of appeal which reads as under:-

> *1] The assessee submits that the penalty order passed u/s. 271(1)(c) was null and void since the notice issued by the ld. A.O. was bad in law.*

6. The assessee has objected to the recording of satisfaction by the Assessing Officer and the notice issued in the case being bad in law. The additional ground of appeal raised by the assessee is purely legal in nature and hence, the same is admitted for adjudication.

7. The learned Authorized Representative for the assessee stressed that where the Assessing Officer has failed to record satisfaction while initiating penalty proceedings for concealment of income under section 271(1)(c) of the Act, as to whether the assessee has concealed the income or furnished inaccurate particulars of income, the said satisfaction recorded by the Assessing Officer was not correct and the consequent notice issued under section 274 r.w.s. 271(1)(c) of the Act was invalid for not striking of either of portions. The learned Authorized Representative for the assessee stressed that pursuant thereto, order passed under section 271(1)(c) of the Act is invalid as he has not given a finding as to whether the assessee has concealed the particulars of income or furnished inaccurate particulars of income. He referred to the order passed by the Assessing Officer in this regard. Further, he stated that even the CIT(A) has confirmed the levy of penalty observing *appellant not only concealed its particulars of income but also tried to defend its concealment of income by mis-representing the facts.*

Hence, in my considered opinion, the appellant deserves higher rate of penalty atleast at 150%.

8. The assessee is in appeal against the order of CIT(A) and has pointed out that for lack of satisfaction i.e. where there is no proper satisfaction recorded by the Assessing Officer while initiating penalty proceedings and consequent thereto in not coming to a finding under which limb the assessee has either concealed its particulars of income or furnished inaccurate particulars of income, then the penalty order passed in the case lacks jurisdiction.

9. The learned Departmental Representative for the Revenue placed reliance on the provisions of section 271(1)(1B) and also on the orders of authorities below.

10. We have heard the rival contentions and perused the record. In the facts of present bunch of appeals, search and seizure action under section 132 of the Act was carried out on Chhoriya Group of cases on 22.08.2008. During the course of search, some incriminating documents were found and seized in which there were transactions of purchase and sale of plots and shops at various sites. The receipts on account of sales were much more than what disclosed by the assessee in the returns of income filed under section 139(1) of the Act. In the statement recorded on oath on 16.10.2008, Shri K.D. Jain (Chhoriya), partner of the firm had admitted that the assessee had received on-money on sale of plots and shops which were not disclosed in the returns of income. He offered sum of Rs.11,44,93,507/- as additional income. Thereafter, notice under section 153A of the Act was issued to the respective assessee for different assessment years. In response thereto, the

group of assessee furnished their returns of income and the total income offered for tax over and above the income returned under section 139(1) of the Act was Rs.13,99,87,648/-. The respective assessee furnished the returns of income in response to the notice issued under section 153A of the Act. The assessments in the hands of each of the assessee for different assessment years were completed under section 143(3) r.w.s. 153A of the Act and the additional income offered by the assessee was added as income of the assessee. The Assessing Officer while completing assessment proceedings observed that the additional income was disclosed pursuant to search and seizure operations, otherwise, the same would have remained concealed with the assessee. Thus, the assessee was found to have concealed particulars of income and furnished inaccurate particulars of such income within meaning of Explanation 5A to section 271(1)(c) of the Act. Accordingly, penalty proceedings under section 271(1)(c) of the Act were separately initiated. Thereafter, the Assessing Officer issued notice under section 274 r.w.s. 271(1)(c) of the Act and the case of assessee before us is that either of the limbs as to whether the assessee has concealed the particulars of income or furnished inaccurate particulars of income, has not been struck off. The Assessing Officer in each of the cases had levied penalty under section 271(1)(c) of the Act which was confirmed by the CIT(A), against which the assessee is in appeal.

11. We find that similar issue of recording of satisfaction by the Assessing Officer before issue of notice under section 274 r.w.s. 271(1)(c) of the Act arose before the Tribunal in Kanhaiyalal D. Jain Vs. ACIT (supra), wherein it was held as under:-

> *"13. We have heard the rival contentions and perused the record. The issue arising in the present bunch of appeals is jurisdictional issue of levy of penalty under section 271(1)(c) of the Act. The requirement of section is that*

where the Assessing Officer or the Commissioner of Appeals or the Principal Commissioner or Commissioner, in the course of any proceedings under the Act, is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income, then he may direct that such person shall pay by way of penalty the amounts as specified in sub-clause (iii) which would be in addition to tax, if any, payable by the said person. The section thus requires the concerned Officer to record satisfaction in the course of any proceedings under the Act, that the person has concealed the particulars of his income or furnished inaccurate particulars of his income. After recording the satisfaction, during the course of penalty proceedings also, the concerned Officer has come to a finding that as to whether the person has concealed the particulars of his income or furnished inaccurate particulars of such income and thereafter, levy the penalty accordingly. The word used between the two acts i.e. concealment of particulars of income and furnishing of inaccurate particulars of such income is 'or'. So the penalty levied by the concerned Officer is on satisfaction of any of the limbs and not the satisfaction of both the limbs. Where the assessee had concealed the particulars of income in particular circumstances, then the Assessing Officer may record satisfaction to that effect and initiate penalty proceedings and thereafter on fixation of charge, levy the penalty for such act of concealing the particulars of income. Similarly, in cases where the assessee concerned had furnished inaccurate particulars of such income, then similar exercise has to be carried out by the concerned Officer.

14. The first stage of invocation of provisions of section 271(1)(c) of the Act is the satisfaction to be recorded by the Assessing Officer, which admittedly, has to be during the course of assessment proceedings. So, where the assessment proceedings are pending, then the Assessing Officer has to apply his mind and on being satisfied, he has to give a finding that the assessee before him has either concealed the particulars of income or furnished inaccurate particulars of income in respect of the issue before him. Thereafter, the notice should be issued to such person by the concerned Officer, wherein it should be clear that the assessee has to justify its case either for concealment of income or furnishing of inaccurate particulars of income. There may be cases where there is issue of both concealment of income and furnishing of inaccurate particulars of income, based on the nature of additions, then in such cases, satisfaction and notice thereon should specify exact charge against the assessee. The charge has to be further specified while completing penalty proceedings and the Assessing Officer has to come to a conclusion as to whether it is case of concealment of income or furnishing of inaccurate particulars of income. The question which further arises where the satisfaction recorded by the Assessing Officer and the notice issued thereafter is without application of mind, then can the subsequent order passed levying penalty be held to be valid?. The Hon'ble Karnataka High Court in CIT & Anr. Vs. Manjunatha Cotton and Ginning Factory (supra) had dealt upon the issue of notice under section 274 of the Act for the purpose of levying penalty for concealment and observed as under:-

> *"59. As the provision stands, the penalty proceedings can be initiated on various ground set out therein. If the order passed by the Authority categorically records a finding regarding the existence of any said grounds mentioned therein and then penalty proceedings is initiated, in the notice to be issued under Section 274, they could conveniently refer to the said order which contains the satisfaction of the authority which has passed the order. However, if the existence of the conditions could not be discerned from the said order and if it is a case of relying on deeming provision contained in Explanation-1 or in*

Explanation-1(B), then though penalty proceedings are in the nature of civil liability, in fact, it is penal in nature. In either event, the person who is accused of the conditions mentioned in Section 271 should be made known about the grounds on which they intend imposing penalty on him as the Section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in Section 271(1)(c) do not exist as such he is not liable to pay penalty. The practice of the Department sending a printed farm where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law when the consequences of the assessee not rebutting the initial presumption is serious in nature and he had to pay penalty from 100% to 300% of the tax liability. As the said provisions have to be held to be strictly construed, notice issued under Section 274 should satisfy the grounds which he has to meet specifically Otherwise, principles of natural justice is offended if the show cause notice is vague. On the basis of such proceedings, no penalty could be imposed on the assessee.

60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet those grounds. After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the grounds on which he is called upon to answer. It is not open to the authority, at the time of imposing penalty to impose penalty on the grounds other than what assessee was called upon to meet. Otherwise though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would offend principles of natural justice and cannot be sustained. Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order was passed and further discovery of facts subsequent to the imposition of penalty cannot validate the order of penalty which, when passed, was not sustainable.

61. The Assessing Officer is empowered under the Act to initiate penalty proceedings once he is satisfied in the course of any proceedings that there is concealment of income or furnishing of inaccurate particulars of total income under clause (c). Concealment, furnishing inaccurate particulars of income are different. Thus the Assessing Officer while issuing notice has to come to the conclusion that whether is it a case of concealment of income or is it a case of furnishing of inaccurate particulars. The Apex Court in the case of

> *Ashok Pai reported in [2007] 292 ITR 11 (SC) at page 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujarat High Court in the case of Manu Engineering Works reported in [1980] 122 ITR 306 (Guj) and the Delhi High Court in the case of CIT v. Virgo Marketing P. Ltd. reported in [2008] 171 Taxman 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. <u>Therefore, when the Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind</u>."*

15. The Hon'ble Karnataka High Court has laid down the proposition that the Assessing Officer is to be satisfied in the course of proceedings that there is either concealment of income or furnishing of inaccurate particulars of income under clause (c) to section 271(1) of the Act. It has been categorically held that concealment of income and furnishing of inaccurate particulars of income are different. The Hon'ble High Court has thus, laid down that the Assessing Officer while issuing notice has to come to conclusion that whether it is case of concealment of income or case of furnishing of inaccurate particulars of income. The reliance in this regard was placed on the ratio laid down by the Hon'ble Supreme Court in T. Ashok Pai Vs. CIT (2007) 292 ITR 11 (SC), wherein at page 19 it was held that concealment of income and furnishing inaccurate particulars of income carry different connotation. Applying the said proposition, it was held that where the Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similarly, for furnishing inaccurate particulars of income, the standard proforma without striking of relevant clauses, as per the Hon'ble High Court would lead to inference as to non-application of mind.

16. Further, the Hon'ble Karnataka High Court in CIT Vs. SSA'S Emerald Meadows (supra) has dismissed the appeal of Revenue, where the Tribunal had allowed the appeal of assessee holding that the notice issued by the Assessing Officer under section 274 r.w.s. 271(1)(c) of the Act to be bad in law as it does not satisfy which limb of section 271(1)(c) of the Act under which it has been initiated The Hon'ble High Court had relied on decision of Division Bench of the Court rendered in CIT & Anr. Vs. Manjunatha Cotton and Ginning Factory (supra). The Hon'ble Supreme Court in CIT Vs. SSA'S Emerald Meadows (supra) has dismissed the Special Leave Petition.

17. The Pune Bench of Tribunal in M/s. Sai Venkata Construction Vs. Addl. CIT (supra) and in Sanjog Tarachand Lodha Vs. ITO (supra) have applied the ratio laid down by the Hon'ble Karnataka High Court (supra) and held that where there is no striking off of either of limbs, then notice issued under section 274 r.w.s. 271(1)(c) of the Act was invalid and subsequent penalty proceedings were held to be vitiated.

18. The Mumbai Bench of Tribunal in Sanghavi Savla Commodity Brokers P. Ltd. Vs. ACIT in ITA No.1746/ Mum/2011, relating to assessment year 2007-08, order dated 22.12.2015 while deciding similar issue, wherein the Assessing Officer had initiated penalty proceedings for concealment of particulars of income without striking inappropriate words or any parts of notice and proceeded to levy penalty for concealment, then following the ratio laid down by the Hon'ble Karnataka High Court, the Tribunal held that notice issued for initiating penalty proceedings were invalid and consequently penalty proceedings were invalid.

19. Similar proposition has been laid down by Kolkata Bench of Tribunal in Shri Deepak Kumar Patwari Vs. ACIT in ITA Nos.616 to 618/Kol/2013, relating to assessment years 2007-08 to 2009-10, order dated 03.02.2016 and it has been further held that the provisions of section 292B of the Act cannot cure the basic defect in assumption of jurisdiction and could only cure the mistake, defect or omission in the return of income, assessment, notice or the proceedings. The Tribunal further held that show cause notice and the reasons mentioned in the show cause notice were part of process of natural justice and the defect in such notice could not be overlooked. Similar proposition has further been laid down in other decisions of various Benches of Tribunal which have been relied upon by the assessee before us.

20. The learned Departmental Representative for the Revenue placed heavy reliance on the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. Smt. Kaushalya (supra). In the facts of the case before the Hon'ble Bombay High Court, the Hon'ble High Court quashed the penalty levied for assessment year 1967-68 as the same was imposed without affording reasonable opportunity of hearing to the assessee. In respect of other two years where there was non-striking of inaccurate portion, the Hon'ble High Court held that the same would not invalidate the notice issued under section 274 of the Act. It was further held that the assessment orders were also made and reasons for issuing notice under section 274 r.w.s. 271(1)(c) of the Act were recorded by the Assessing Officer and since the assessee fully knew in detail the exact charge of Department against him, it could not be said that either there was non-application of mind by the ITO or so-called ambiguity wording in the notice impaired or prejudiced the right of assessee of reasonable opportunity of being heard. The jurisdictional High Court deliberated upon the provisions of section 274 of the Act which contained principle of natural justice of the assessee being heard before levying penalty. It also held that mere mistake in the language used or mere non-striking of inappropriate portion could not itself be invalidated the notice. It was held that the entire factual background would fall for consideration in the matter and no one aspect would be decisive.

21. In respect of assessment year 1967-68, the Hon'ble High Court in CIT Vs. Smt. Kaushalya (supra) acknowledged that there could exist a case where vagueness and ambiguity in the notice could demonstrate non-application of mind by the authority and / or ultimate prejudice to the right of opportunity of hearing contemplated under section 274 of the Act. The show cause notice for assessment year 1967-68 was issued even before the assessment order was made and where the assessee had no knowledge of exact charge of Department against him as in the notice not only there was use of word 'or' between the group of cases but there was use of word 'deliberately' also. The Hon'ble High Court held that notice clearly demonstrated non-application of mind on the part of Assessing Officer. The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity to the assessee since he did not know of exact charges he had to face. In this background, quashing of penalty proceedings for assessment year 1967-68 was held to be justified. Applying the said principle laid down by the Jurisdictional High Court, application of mind before issuing the notice under section 274 of the Act has to be considered. The Hon'ble High Court clearly held that where there is vagueness and ambiguity in the notice issued which could demonstrate non-application of mind by the authority which in turn, would ultimately prejudice the right of opportunity of hearing of the assessee as contemplated under section 274 of the Act, then such notice is invalid.

22. Now, coming to the facts of the case before us, wherein search and seizure operations were carried out on Chhoriya group of concerns on

22.08.2008 and declaration of Rs.11.44 crores was made in the hands of whole group for various years. Consequent to the notices issued under section 153A of the Act for various years, different entities filed the return of income for the respective years and cumulatively for Rs.13.99 crores as additional income. The income was declared on account of on-money on sale of plots, which was detected from the documents seized during the course of search. Admittedly, Explanation 5A to section 271(1)(c) of the Act is attracted in such cases. However, the case of assessee before us is that the Assessing Officer while completing the assessment proceedings had to be satisfied that the assessee had either concealed the income or furnished inaccurate particulars of income and is liable to levy of penalty under section 271(1)(c) r.w.s. Explanation 5A of the Act. The notice is to be issued to the assessee under section 274 of the Act. Before issuing such notice, satisfaction has to come out from the proceedings going on before the Assessing Officer. The perusal of assessment order passed in the present case reflects that the Assessing Officer while initiating proceedings has recorded satisfaction as to the assessee has furnished inaccurate particulars of income and has also concealed the income. The only source of addition in the hands of assessee is additional income offered by the assessee pursuant to search operations. In such circumstances, it is categorically a case of concealment. However, the Assessing Officer refers to both the limbs of section 271(1)(c) of the Act and the satisfaction recorded in this case suffers from infirmity. Further, even in the notice issued under section 274 of the Act, irrelevant part has not been struck off. While completing penalty proceedings also, the Assessing Officer makes reference to both the limbs i.e. concealment of income and furnishing of inaccurate particulars of income and in the final, levies penalty for concealment of income.

23. However, the question which is raised before us by way of additional ground of appeal is root of start of the proceedings i.e. recording of satisfaction and the issue of notice, which has been challenged by the assessee to be invalid. Applying the ratio laid down by the Hon'ble Karnataka High Court in CIT & Anr. Vs. Manjunath Cotton and Ginning Factory (supra) and CIT Vs. SSA'S Emerald Meadows (supra) and in view of SLP being dismissed, we find merit in the plea of assessee that the satisfaction recorded in the present case to initiate penalty proceedings both for concealment of income and furnishing of particulars of income against additional income offered by the assessee is incorrect. Further, where the assessee is not aware of exact charge against him, the ambiguity in the notice issued under section 274 r.w.s. 271(1)(c) of the Act by not striking of portion which is not applicable, prejudice the right of reasonable opportunity to the assessee, as he was not made aware of exact charge he had to face. It is a clear-cut case of concealment since the assessee had offered additional income pursuant to search carried out at its premises. It is not the case of furnishing of inaccurate particulars of income and hence, the Assessing Officer should have recorded the satisfaction accordingly and issued the notice accordingly.

24. We find no merit on the partial reliance placed upon by the learned Departmental Representative for the Revenue on the decision of Jurisdictional High Court in CIT Vs. Smt. Kaushalya (supra). The Hon'ble High Court has clearly laid down the proposition that the Assessing Officer has to make the assessee fully aware of exact charge of the Department against him. As pointed out, in present case, in the assessment order itself while recording satisfaction for initiating proceedings under section 271(1)(c) of the Act, exact charge of the Department against the assessee is not clear. The Assessing Officer records the satisfaction for initiating penalty proceedings on both the counts i.e. concealment of income and furnishing of inaccurate particulars of income. The Hon'ble Bombay High Court had also *upheld the quashing of penalty proceedings for assessment year 1967-68 to be justified on account of vagueness and ambiguity in the notice issued. But the Hon'ble High Court further held that where the assessee was fully aware of exact charge of the Department against him, then technical non-striking of certain terms in the notice would not invalidate the proceedings. Where there is default in the first stage of making the assessee aware of exact charge of the Department, then initiation of penalty proceedings are vitiated and the same are to be quashed. The issue of notice under section 274 of the Act on such vagueness and ambiguity makes such notice invalid and proceedings thereafter are to be quashed.*

25. The Hon'ble Supreme Court in T. Ashok Pai Vs. CIT (supra) had held as under:-

> *"23. Section 271(1)(c) remains a penal statute. The rule of strict construction shall apply thereto. The ingredients for imposing penalty remain the same. The purpose of the Legislature that it is meant to be a deterrent to tax evasion is evidenced by the increase in the quantum of penalty, from 20 per cent under the 1922 Act to 300 per cent in 1985.*
>
> *24. "Concealment of income" and "furnishing of inaccurate particulars" carry different connotations. Concealment refers to a deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of suppression very or suggestion falsi."*

26. Where concealment of income and furnishing of inaccurate particulars of income are two different connotations, then as per provisions of the Act, the satisfaction has to be recorded by the Assessing Officer before initiating penalty proceedings as to under which limb the case of assessee falls. In the present set of facts, the satisfaction as recorded by the Assessing Officer which is evident from the assessment order itself does not establish the case of Revenue against the assessee that it is liable for levy of penalty for concealment under which limb i.e. for concealment of income or for furnishing of inaccurate particulars of income. The notice issued under section 274 of the Act by the Assessing Officer also does not show cause the assessee as to make him aware of exact charge levied against him. In the absence of same, it causes prejudice to the right of reasonable opportunity to be allowed to the assessee before levy of penalty under section 271(1)(c) of the Act. Consequently, penalty notice issued in the present case suffers from infirmities i.e. lack of satisfaction and lack of notice being issued in making the assessee aware of exact charge against him, hence the same is quashed. The penalty proceedings completed pursuant to such notice are vitiated and the same are held to be invalid".

12. Further, in bunch of cases i.e. in Nandkishor Tulsidas Katore Vs. ACIT in ITA Nos.2174 to 2180/PN/2014, relating to assessment years 2002-03 to 2008-09, order dated 14.12.2016, reference was made to the judgment of Hon'ble High Court of Karnataka in CIT Vs. SSA'S Emerald Meadows (2016) 73 taxmann.com 241 (Kar), wherein the issue No.1 raised before the Hon'ble High Court and its reply was as under:-

> *"(1) Whether, omission if Assessing Officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?*
>
> *(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the penalty notice under section 274 r.w.s. 271(1)(c) is bad in law and invalid despite the amendment of Section 271(1B) with retrospective effect and by virtue of the amendment, the Assessing Officer has initiated the penalty by properly recording the satisfaction for the same?"*

13. The Hon'ble High Court had allowed the claim of assessee where the Assessing Officer had not explicitly mentioned that as to whether the penalty proceedings were initiated for concealment of income or for furnishing inaccurate particulars of income, suffers from infirmity even if it is established that the assessee had concealed the income in the facts and circumstances of the case. The Apex court has dismissed the SLP filed by the Department.

14. The learned Departmental Representative for the Revenue has stressed that in view of the provisions of section 271(1)(1B) of the Act, where the order contains directions for initiation of penalty proceedings, such an order of assessment or re-assessment shall be deemed to constitute satisfaction of the Assessing Officer for initiating penalty proceedings under clause (c). Admittedly, the satisfaction has to be recorded in the order of assessment or re-assessment by the Assessing Officer while finalizing the assessment order. However, the Assessing Officer has to at initial stage itself come to a finding as to whether the additions made in the hands of assessee justify the levy of penalty proceedings under section 271(1)(c) of the Act on account of concealment of income or furnishing of inaccurate particulars of income. We find that in the present set of facts, the Assessing Officer has recorded satisfaction for initiating penalty proceedings on account of concealment of income and furnishing of inaccurate particulars of income.

Under the provisions of section 271(1)(c) of the Act, penalty for concealment is leviable where the assessee has fulfilled either conditions i.e. concealment of income or furnishing of inaccurate particulars of income. The Assessing Officer while initiating penalty proceedings has to be satisfied as to under which limb, the penalty is leviable and consequent thereto, issue notice in this regard. However, in the facts of the present case and as pointed out hereinabove, the Assessing Officer has failed to record satisfaction correctly and consequently, we hold that initiation of penalty proceedings against the assessee are not valid for non-recording of satisfaction by the Assessing Officer while completing assessment proceedings. Further, the Assessing Officer has failed to strike off either of the limbs of section 271(1)(c) of the Act, which are not satisfied by the assessee and consequently, notice issued under section 274 r.w.s. 271(1)(c) of the Act is bad in law and order levying penalty for concealment thereafter, is infructuous. Accordingly, we hold so. The Statute has provided distinction between concealment of income and furnishing of inaccurate particulars of income, which may be thin line of distinction, but the same has to be kept in mind while recording satisfaction by the Assessing Officer. Following the same parity of reasoning as laid down by the Hon'ble High Court of Karnataka in CIT & Anr. Vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Kar), CIT Vs. SSA'S Emerald Meadows (supra) and the Pune Bench of Tribunal in Kanhaiyalal D. Jain Vs. ACIT (supra), we set aside the order passed under section 271(1)(c) of the Act levying penalty for concealment in the respective years.

15. Now, coming to the merits of case also, the issue was same as in Kanhaiyalal D. Jain Vs. ACIT (supra), wherein it was held as under:-

> *"27. Now, coming to the merits of case, the assessee had offered additional income on account of on-money on sale of plots. The Assessing Officer had accepted the same and had initiated penalty proceedings under*

> *section 271(1)(c) of the Act. The CIT(A) during the course of appellate proceedings relating to section 271(1)(c) of the Act issued enhancement notice to the assessee. Thereafter, he had gone through the seized documents and elaborately referred to them and even reproduced the scanned copies of such documents and comes to conclusion that loans were received from Ratanlal Bafna, but still upholds the penalty levied under section 271(1)(c) of the Act. Once the finding of CIT(A) is that these are loans received from Bafna and are not on-money received on sale of plots, then in cases where penalty proceedings have been initiated on a different footing and the CIT(A) reverses the same and holds the same to be loans received by the assessee, there is change in opinion and basis for levy of penalty for concealment varies. In such circumstances, there is no merit in levy of penalty under section 271(1)(c) of the Act and there is no merit at all in levying the penalty @ 150%. Accordingly, we allow the claim of assessee even on merits. Thus, the grounds of appeal raised by the assessee and additional ground of appeal raised by the assessee are allowed."*

16. Following the same parity of reasoning, we allow the claim of assessee. The grounds of appeal and additional ground of appeal raised by the assessee are thus, allowed.

17. In the result, all the appeals of assessee are allowed.

Order pronounced on this 28th day of December, 2016.

Sd/-	**Sd/-**
(R.K. PANDA)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 28th December, 2016.

GCVSR

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील)- CIT(A)-I, Nashik
4. आयकर आयुक्तs / The CIT (Central), Nagpur
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune