

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'डी', मुंबई।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI**

श्री संदीप गोसाई, न्यायिक सदस्य एवं

श्री जी. मंजूनाथ, लेखा सदस्य, के समक्ष

**Before Shri SANDEEP GOSAIN, Judicial Member AND
Shri G. MANJUNATHA, Accountant Member,**

ITA Nos.4030 to 4032/Mum/2015

Assessment Years: 2004-05, 2005-06 & 2007-08

M/s Mutha Parasram Dhanaji & Co. 201, Narayanwadi, Station Road, Kalyan (W)	बनाम/ Vs.	DCIT, Central Circle-1 Thane,
(निर्धारिती / Assessee)		(राजस्व /Revenue)
P.A. No.AAFFM5521R		

निर्धारिती की ओर से / Assessee by	Shri H. N. Motiwalla & Shri M. P. Chhajer
राजस्व की ओर से / Revenue by	Shri D.G. Pansari CIT-DR

सुनवाई की तारीख / Date of Hearing :	01/05/2019
आदेश की तारीख /Date of Order:	24/05/2019

आदेश / O R D E R

Per G. Manjunatha (Accountant Member)

These three appeals filed by the assessee are directed against separate, but identical order of the Ld. CIT(A)-11, Pune, all dated 31/03/2015 and they pertain to Assessment Years 2004-05, 2005-06 and 2007-08. Since, facts are identical and issues

are common, for the sake of convenience, these appeals were heard together and are disposed of by this consolidated order.

2. The assessee, has more or less filed common grounds of appeal for all Assessment Years. For the sake of brevity, grounds of appeal for Assessment Year 2004-05 are reproduced hereunder:-

“The grounds mentioned hereunder are without prejudice to one another:-

1) On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in confirming Penalty on addition made on account of stock of Jewellery amounting to Rs. 16,96,044/- received by way of loan and security deposit, without appreciating the fact that the Appellant Firm had filed gold loan agreements, balance confirmation of security deposit and also produced the Parties and their written statements were recorded before the learned Assessing Officer.

2) On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in confirming the penalty without appreciating that the learned Assessing Officer had no jurisdiction to levy Penalty, on income enhanced by Commissioner of Income Tax (Appeals) based on torn loose paper.

3) On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in confirming the Penalty on addition of Rs.10,05,568/- based on torn loose papers, without appreciating that the assessing officer made addition in the hands of Partners of appellant firm, which was deleted by Commissioner of Income Tax (Appeals) and enhanced the income of the appellant firm. The quantum addition itself is subject matter of dispute in regard to its taxability and change of opinion and therefore no penalty is imposable

3. The assessee has filed revised form no.36 along with revised grounds of appeal vide its letter dated 26/11/2018 for all Assessment Years. The relevant revised grounds taken by the assessee for Assessment Year 2004-05 are reproduced hereunder:-

“The grounds mentioned hereunder are without prejudice to one another:-

1) On the facts and circumstances of the case, the Notice u/s.274 **r.w.s.** 271(l)(c) of the Income Tax Act, 1961 does not mentions as to why the

Penalty is initiated, in regard to concealment or furnishing of inaccurate particulars and therefore the same is void - ab initio and consequently the Order imposing penalty is bad in law.

2) On the facts and circumstances of the case that the substantial question of law has been admitted by Honourable **Bombay High Court** in the Quantum Proceedings and therefore no penalty is imposable u/s.271(l)(c) as held by the Honourable Bombay High Court in case of Nayan **Builders** & Developers, 368**ITR** 722 .

1) On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in confirming Penalty on addition made on account of stock of Jewellery amounting to **Rs. 16,96,0447-** received by way of loan and security deposit, without appreciating the fact that the Appellant Firm had filed gold loan agreements, balance confirmation of security deposit and also produced the Parties and their written statements were recorded before the learned Assessing Officer.

2) On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in confirming the penalty without appreciating that the learned Assessing Officer had no jurisdiction to levy Penalty, on income enhanced by Commissioner of Income Tax (Appeals) based on torn loose paper.

3) On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in confirming the Penalty on addition of Rs.10,05,568/- based on torn loose papers, without appreciating that the assessing officer made addition in the hands of Partners of appellant firm, which was deleted by Commissioner of Income Tax (Appeals) and enhanced the income of the appellant firm. The quantum addition itself is subject matter of dispute in regard to its taxability and change of opinion and therefore no penalty is imposable.”

4. The brief, facts of the case are that the assessee is partnership firm which is engaged in the business of manufacture and sale of gold jewellery and money lending business. The business premises of the assessee was surveyed u/s 133A and also search action u/s 132 was carried out at the residential premises of the partners on 07/12/2006. Consequent to search and survey, the assessee has filed its return on income for Assessment Year 2004-05 on 30/05/2008, declaring total income at Rs.1,01,370/-. The assessment has been completed u/s 143(3) r.w.s 153A of the Act,

on 31/12/2008, determining total income of Rs.22,09,530/- after making additions towards unaccounted income from money lending business for Rs.4,07,918/- and addition on account of unaccounted stock of jewellery of Rs.16,96,044/-. The assessee carried the matter in appeal before the First Appellate Authority. The Ld. CIT(A) dismissed the appeal filed by the assessee and confirmed the additions made by the AO towards unaccounted income from money lending business and addition on account of unaccounted stock of jewellery. The Ld. CIT(A) enhanced the income of the assessee towards unaccounted income from money lending business for Rs.10,05,568/- for the detailed reasons recorded in his appellate order dated 30/10/2009. The assessee has carried the matter in further appeal before ITAT. The ITAT, for the detailed reasons recorded in its order dated 31/12/2014, partly allowed appeal filed by the assessee, where additions made by the AO towards unaccounted income from money lending business has been scaled down and direct the AO to sustain the addition to the extent of 50% addition made towards unaccounted income from money lending business. In so far as, additions towards difference in value of closing stock, confirmed the additions made by the AO along with enhancement made towards income from money lending business. The assessee has challenged the order of the Tribunal before the Hon'ble Bombay High Court. The substantial question of law raised by the assessee by way of its appeal, has been admitted for adjudication by the Hon'ble High Court.

5. Thereafter, the AO initiated penalty proceedings u/s 271(1)(c) of the Act, in respect of additions made towards unaccounted income from money lending business, additions on account of unaccounted stock of jewellery and also additions on account of enhancements of income made by the Ld. CIT(A) and called upon the assessee to explain as to why penalty shall not be levied for furnishing inaccurate particulars of income and concealment of particulars of such income. In response, the assessee vide its letter dated 24/03/2011 submitted that it has neither concealed particulars of income nor furnished inaccurate particulars of income which warrants levy of penalty u/s 271(1)(c) of the Act. The assessee further submitted that the AO has made additions towards unaccounted income from money lending business on the basis of loose papers found during the course of search which suggested charging interest from money lending business @ 3%, whereas the assessee has accounted interest on regular intervals in its books of accounts at lessor rate. The assessee has explained why no additions could be made on the basis loose papers. The AO without considering the explanation filed by the assessee, made estimation on unaccounted income by extrapolation of information available in the loose papers and extended it to whole year. Therefore, the same cannot be considered as furnishing accurate particulars of income. Similarly, the assessee has filed its explanation in respect of additions made towards difference in value of stock and also enhancement of income made by the Ld. CIT(A). The AO after considering the submissions of the assessee and also taken note of the fact that the assessee has failed to offer any explanation to the satisfaction of the AO in

order to escape from levy of penalty and hence opined that it is a fit case for levy of penalty for furnishing inaccurate particulars of income and also for concealment of particulars of income, accordingly, levied penalty of Rs.11, 15,543/- which is equivalent to 100% tax sought to be evaded u/s 271(1)(c) of the Act.

6. Aggrieved by the penalty order, the assessee preferred an appeal before the Ld. CIT(A). Before the Ld. CIT(A), the assessee reiterated its submissions made before the AO to argue that under given facts and circumstances of the case, levy of penalty u/s 271(1)(c) of the Act is unwarranted, because the AO has made additions towards unaccounted income from money lending business on estimation based on loose papers found during the course of search. Similarly, he AO has made additions towards difference in value of stock disregarding explanation filed by the assessee. Likewise, the Ld. CIT(A) enhanced the income from money lending business on the basis of loose papers, therefore, the same cannot be considered as furnishing inaccurate particulars of income.

7. The Ld. CIT(A) after considering the submissions of the assessee and also taking note of findings of the ITAT in quantum appellate proceedings, partly allowed the appeal filed by the assessee, where deleted the penalty levied by the AO towards addition on account of undisclosed income from money lending business, but confirmed penalty levied in respect of excess stock of gold jewellery and diamonds and income enhance by the Ld. CIT(A). The relevant findings of the Ld. CIT(A) are as under:-

“4.3 The various propositions canvassed by the appellant are carefully examined with reference to the relevant seized documents, other material placed on record and the provisions of sec. 271(1)(c). Section 271(1)(c) visualizes imposition of penalty when the assessee has concealed income or when the assessee has furnished inaccurate particulars of income. In addition to these two situations, penalty can also be imposed, inter alia, when assessee is deemed to have concealed particulars of income under Explanations to sec. 271(1)(c). In this background, it is now examined whether the Assessing Officer is justified in imposing the penalty in respect of various additions made in the assessment order or not.

(I) Addition on account of differential interest (Ground of appeal No. 1):

4.3.1 The first addition to the total income made in the assessment order, in respect of which penalty was levied by the Assessing Officer, is on account of differential interest of Rs. 4,07,980/- on the basis of the documents seized and impounded documents found during the search and survey operation in the appellant group of cases. As already mentioned, the documents found and seized during the search indicated that the appellant was charging interest @ 3% but was recording only @1.5% in the books of a/c and the return of income. Accordingly, the difference in interest of Rs. 4,07,980/-, which is double the interest shown by the appellant in the return of income, was added to the total income in the assessment order and penalty was levied. The contention of the appellant in this regard was that the Assessing Officer is not at all justified in making the addition on the basis of the cash receipts and payments noted only for the period from 23/10/2006 to 6/12/2006. It is the submission of the appellant that when the addition itself was made on extrapolation without any positive material indicating charging of interest @ 3% p. a. for this year, the penalty in respect of such addition is wholly unjustified. There is merit in the contention of the appellant. On perusal of the record, it is found that similar addition was made for A.Y. 2002-03 and A.Y. 2003-04 and on

appeal filed by the appellant, the ITAT SMC bench vide its order dated 30/11/2010 has deleted the quantum addition made for these years on the ground that all the transactions recorded in the seized documents relate to F.Y.2006-07 relevant to A.Y. 2007-08 and there was no document seized by the Department to substantiate that the appellant was in receipt of more interest than what has been disclosed or returned in the year 2002-03 and 2003-04 also and therefore the addition is not justified. In contrast to this, for the year under consideration, the ITAT Division Bench has taken a different view in the matter and reduced the addition made on this ground to the extent of 50% vide its order dated 31/12/2014. The relevant observations of the ITAT are extracted below for ready reference:

“19....We have considered the rival contentions. The AO has made the additions on the basis of the incriminating material found relating to F. Y. 2006- 07. The additions for the year under consideration i.e. A. Y. 2004-05 have been made assuming that similar modus operandi might have been adopted by the assessee during this year.

20. We find force in the contention of the Ld. DR that when some incriminating material is found against the assessee showing some method or modus operandi adopted by the assessee leading to concealment or underassessment of income, then in such a case, the burden is on the assessee to prove that similar modus operandi was not adopted in the past. However the fact which cannot be ignored in this case is that the AO had correlated the entries relating to six persons only. Whereas as per the assessee, there were about 500 to 600 persons to whom the advances were made. In our view, it will not be justified to assume that advances were made at the double rate of interest than shown in the books of accounts in relation to all the borrowers. The chargeability of rate of interest also depends upon time to time market conditions as well on the prevalent bank interest rates. There is also no direct evidence on the file that the assessee in the past had charged the interest at the double rate than shown in the books of

account from all the persons with whom he had made such transactions. Hence, in view of the overall facts and circumstances of the case, in our view, the interest of justice will be best served if the additions are reduced considering the submission of the assessee that it is not possible that the assessee had been charging same rate of interest from all the borrowers in the past. We accordingly reduce the addition made by the lower authorities on this issue to the extent of 50% of the added amount. This ground is accordingly partly allowed in favor of the assessee."

4.3.2 From the above extract of the order, it could be seen that there is difference of opinion between the ITAT SMC and ITAT Division Bench on the taxability of the said differential interest on extrapolation basis when there was no document seized by the Department to substantiate that the appellant was in receipt of more interest than what has been disclosed or returned for this year. Considering the fact that the quantum addition itself was made on extrapolation basis and there is difference of opinion on taxability of such interest for years other than A.Y. 2007-08 to which seized document relates, I am of the considered opinion that the Assessing Officer is not justified in levying the penalty under sec. 271(1)(c) on addition made on account of differential interest of Rs. 4,07,918/-, which was subsequently restricted to Rs. 2,03,959/- by the ITAT. Ground of appeal No. 1 succeeds.

(ii) Excess stock of gold jewellery and diamonds (Ground of appeal No.2)

4.3.3 The next addition made to the total income in the assessment order, which is subject matter of penalty under sec. 271(1)(c), is in respect of excess stock of jewellery amounting to Rs. 16,96,044/-. During the search operations, it was found that there was a difference of Rs. 16,96,044/- in the closing stock of gold jewellery as per GS-12 Register and closing stock shown in the Return of income. The claim of the appellant in this regard was that this difference arose due to 1,400 gms. of jewellery received under loan scheme from

various parties and another 2300 gms. of jewellery received as security deposits from karigars which had not been shown in the Return of income. The Assessing Officer did not however, agree with this contention of the appellant on the premise that the said parties were not having creditworthiness to advance gold jewellery to the appellant though they admitted to have given gold jewellery to the appellant firm. The Assessing Officer also found that though appellant claimed interest @ 6% as given to gold loan parties, the same was not reflected in the books of a/c and even the gold loan was not reflected in the balance sheet. The CIT(A) concurred with the view of the Assessing Officer and on further appeal by the appellant, the Hon'ble. ITAT sustained the addition with the following observations:

27. We have considered the rival submissions and have also gone through the evidences produced on the file. The assessee has explained the difference of 3692.53 gms. of gold stating that out of the said quantity 100 gms were the deposits made by the depositors under the gold loan scheme. The remaining 2300 gms were out of security deposits from Karigars (skilled laborers employed for making of gold jewellery). The assessee has placed on file the copies of the gold loan agreement as well as the confirmations regarding deposit of the gold by the karigars. Both the lower authorities have disbelieved the said documents. Even the said parties to the gold loan agreement and the karigars were also examined by the AO. The AO disbelieved their statements holding that the karigars were of small means and did not have creditworthiness to deposit such high quantity of the gold with. the assessee. The AO also observed that though the assessee had claimed to have been giving interest at the rate of 6% to the parties to the gold loan agreement, however, the same was not found debited in the books of account. Even the gold loan was also not reflected in the balance sheet. He therefore held that it was an afterthought of the assessee. We have perused the copies of the gold loan agreement placed on paper book at page No. 2 to 29. A perusal of the above stated copies of the gold loan agreement reveals that all the gold loan agreements have been written on stamp paper of the value of Rs.50/- . The assessee has placed 8 copies of the said gold loan agreements

entered into with different persons. Surprisingly, every stamp paper for Rs.50/- for each of the gold loan agreement bears the same serial number i.e. 7545. That means all the 8 stamp papers have been shown to be purchased by the assessee against the one and the same entry in the register Of the stamp vendor. Though the agreements have been shown to have been entered on different dates of the month of October and November 2003 but the stamp papers for all the agreements have been purchased in the name of the partner of the assessee firm namely Shri Ramesh H. Snaklesha on the same date i.e. 03.10.03. The assessee has not produced any evidence about the gold loan scheme launched by it. After considering the peculiar fact of purchasing of all the stamp papers against the single entry and thereafter execution of agreements shows that the said agreements are an afterthought action of the assessee. The assessee even had not debited the payment of interest to the books of accounts at the rate of 6% as has been alleged by it. No loan had been reflected in the balance sheet. Hence, we do not find any infirmity in the orders of the lower authorities in disbelieving the explanation of the assessee regarding the gold loan agreement.

28. With regard to the explanation given by assessee regarding the remaining 2300 gms of gold alleged to be received from Karigars as security deposit, we found that assessee has filed letters by its Karigars in the month of November, 2008 to the effect that these Karigars have deposited gold ranging between 100 to 200 gms with the assessee M/s Mutha parasrain Dhanaji & Co. as on 1-4- 2003. As pr these letters, gold was given as a security deposit to remain with the firm till the karigar continues to work with assessee firm and same was returnable on his discontinuing of work with assessee. All these 10 letters are given by the kárigars were typed on the letter pad of the assessee and all are dated Nov. 2008, wherein gold was alleged to be given by Karigars to the assessee between 1st to 8th April, 2003. Language used in all the letters was exactly same. The AO examined the Karigars and observed that these karigars were of small means and did not have creditworthiness to deposit such quantity of gold with the assessee. The AO has also asked further details like proof of purchases from various parties but

the assessee failed to produce any evidence. The AO recorded a categorical finding that none of the Karigars could prove the source of their purchases of gold ranging from 100 to 200 gms and the investment by these persons ranging from Rs. 1,20,000/- to Rs. 1,40,000/-. Vide letter dated 24-10-2008) the assessee was again asked to produce the purchase of gold by these persons, however, nothing was filed by assessee. As per the letters of Karigars so filed by assessee before AO in Nov., 2008 which mentions that gold was given in April, 2003, however, nothing was brought on record by assessee to substantiate that these Karigars were working with the assessee since April, 2003. As per the letter, the gold was to remain with the assessee till he works with him and was returnable thereafter. However, not hina was brought on record by assessee to the effect that these Karigars continued to work with asse.ssee firm since 2003 till 2014, insofar as no gold was returned by assessee firm to these Karigars. All the gold alleged to he given by these Karigars were used by assessee firm for making jewellery which was also found during physical taking of inventory at the time of search/survey. It is also not the case of.-the assessee that the alleged gold was returned to the karigars even after more than 10 years. Since April, 2003, more than 11 years had expired, but nothing was shown either before the lower authorities or before us to contend that gold was again returned to the karigars or continued to be used by assessee firm on the plea of same Karigar continued to work with the assessee firm. In a jewellery business, the jeweler gives gold to the karigar for making jewellery, in the contrast, the assessee has claimed that karigars had given gold to the assessee which was used by it for making jewellery and selling the same in his Showroom. Thus, the story of assessee was not genuine. Accordingly we uphold the decision of lower authorities that assessee had brought unaccounted gold jewellery into business during the previous year relevant to A.Y 2004-05 and the same was added to the income as undisclosed income of the assessee firm.. Nothing was brought on record by Id. AR to persuade us to deviate from the findings recorded by the lower authorities to the effect that no gold was given by Karigar to the assessee in the year 2003. Since the finding of fact recorded by lower authorities which are as per material on record, could not be controverted by id. AR by bringing any positive material, we do

not find any reason to interfere in the findings recorded by lower authorities to justify the alleged deposit of 2300 grns of gold by karigars. Accordingly, we confirm the action of CIT(A) with regard to the addition sustained on account of excess gold not disclosed in the audited accounts and return of income filed with the department.

4.3.4 As could be seen from the above extract of the order, the ITAT has categorically held that whatever document produced by the appellant to substantiate its claim like gold loan agreement, letters of Karigars etc. are an afterthought and not genuine and the appellant has not even debited the payment of interest in the books of accounts at the rate of 6% as has been alleged by it and no loan had been reflected in the balance sheet. It is observed by the Honrble Bench that there is no infirmity in the orders of the lower authorities in disbelieving the explanation of the assessee regarding the gold loan agreement and gold from karigars. Thus, the claim of the appellant for the difference in stock reflected in GS 12 Register is clearly an afterthought to explain away the undisclosed stock and therefore the Assessing Officer is justified on facts and in law in holding that appellant furnished inaccurate particulars of income in the return of income filed for the year. Further, as the appellant failed to prove that the explanation furnished by the appellant for the discrepancy in the stock is bonafide, the appellant is also deemed to have furnished inaccurate particulars of income under Explanation-1 to sec. 271(1)(c). Accordingly, in so far as levy of penalty on addition of Rs, 16,96,044/- is concerned, there is no infirmity in the order of the Assessing Officer and the penalty is hereby endorsed. Ground of appeal No 2 is rejected.

(iii) Income enhanced by CIT(A) (Grounds of appeal No. 3 and 4):

4.3.5 The next addition to the total income, in respect of which penalty was levied" by the Assessing Officer, is on account of income of Rs. 10,05,568/- enhanced by the CIT(A) in the appellate order passed by the CIT(A) on 30/10/2009. The

contentions of the appellant in this regard are twofold. The first legal plea raised by the appellant is that since the income in question was enhanced by the CIT(A), the Assessing Officer is not correct in law in initiating and levying penalty under sec. 271(1)(c) in respect of such enhancement of income. The second argument of the appellant is that even on merits the penalty is not sustainable as the noting made on that torn paper could not be corroborated with any other seized material and therefore, no addition could be made on the basis of the torn paper which had nothing to do with the business income of the appellant.

4.3.6 As regards the first contention that the income was enhanced by the CIT(A) and it is not legally correct on the part of the Assessing Officer to levy penalty under sec. 271(1)(c) in respect of such enhancement, it is to be mentioned that this is not a case where proceedings under sec. 271(1)(c) were initiated by the CIT(A) in the course of the appellate proceedings. The proceedings under sec. 271(1)(c) were initiated by the Assessing Officer while giving effect to the order of the CIT(A) as the Assessing Officer is satisfied that there was prima facie case for initiating the proceedings under sec. 271(1)(c). Therefore, it is not correct to say that the Assessing Officer has no power to levy penalty under sec. 271(1)(c) on the income enhanced by the CIT(A). Thus, this is not a case where proceedings are initiated by CIT(A) but penalty is levied by the Assessing Officer or satisfaction is recorded by the Assessing Officer but penalty is levied by the CIT(A). In such circumstances, the decisions relied upon by the appellant, which were rendered in a different factual context, cannot be applied to the facts of the present case and the penalty was rightly initiated by the Assessing Officer.

4.3.7 As regards the merits of the case, the seized document i.e. torn paper contains receipts and payments clearly noted in the paper and it is not a dumb document and therefore, no further evidence is necessary to corroborate the same. It is also needs to be appreciated that while enhancing the income on this ground, the CIT(A) has considered the evidence in totality

duly taking into consideration both receipts and payments recorded on the paper and also granted telescopic benefit to the extent of the amount which was already enhanced in the preceding year. The order of the CIT(A) was also endorsed by the Hon'ble ITAT vide its order dated 31/12/2014 with the following observations:

"We have heard the Ld. Representatives of both the parties and have also gone through the records. The Ld. A.R. of the assessee has contended that the alleged loose slip was in fact not part of the seized material during the search action. It was added subsequently in the panchnama relating to the case of Shri Ramesh H. Sanklesha. It was a dumb document and cannot be said to be representing any receipt of additional income. At the time of preparation of panchnama, the annexure had only 19 items of seized materials. The loose slip in question was not found to be reflected in the annexure to the panchnama at that point of time which was later on added in the list at serial no. 20. There was no identification mark placed on the said loose slips. Hence, proposed addition based on the seized material was unjustified and against the principle of law. It has been further contended that Shri Ramesh H. Shanklesha was not interrogated on this document while detailed statement was recorded of him on other issues. The seized document was in torn condition and was found in dustbin. Without prejudice, the figures found recorded in documents were similar to the figures of sales recorded in the regular books of account and the figures on the document were likely to be revenue generated by sales for this period. The Ld. AR has further stated that the assessee to buy peace and settle the matter had agreed before the lower authorities to treat Rs. 13,37,007/- and Rs.14,76,7091- as unrecorded sales for the year 2003 and 2005 respectively to be assessed at 20% thereon in the hands of the firm. On the other hand, the Ld. D.R. has relied upon the findings of the Ld. CIT(A).

33.. We find that in the case of the partners of Shri Ramesh H. Sanklesha and Shri Amritlal H. Shanklesha, the said partners have taken a plea before the Assessing Officer that the undisclosed income on the basis of the said loose papers was liable to be assessed at the hands of the firm. In contrast to

their stand taken in their own case, while representing the firm, the said partners have taken the plea that the income, if liable to be assessed, then the same is liable to be assessed in the hands of the partners. As observed above by us, the firm is represented and controlled by the partners. Without partners the firm cannot exist. The acts of the firm are done by the partners of the firm. The partners of the firm are not different persons or third parties. The partners in this case are trying to blow hot and cold in the same breath. They are taking one plea in their own case and contradictory plea in the case of the firm which is being represented through them only. So far so, the contention that the document was a dumb document, we do not find any merit in the said plea. The entries have been found mentioned against the name of partners, some of the entries are on the left side and some of the entries are on the right side, which according to lower authorities are receipts and payments. The Ld. CIT(A) has observed that the document seized from the premises of Shri Ramesh H. Sanklesha, one of the partners of the assessee firm represents the receipt and payment arising out of the business of firm which was the unaccounted payment to the partners by the firm. The argument that the said document has been added subsequently, in our view, does not have any force. No malafide act or intention or enmity can be attributed on the part of search party in this respect.

Now coming to the incriminating material in the form of loose sheets was found at the premises of partner Ramesh H. Shankhlecha. The AO has added income on the basis of this document in the hands of Ramesh H. Shankhlecha. The CIT(A) after observing that amount involved in the seized material is part of the unaccounted income generated from the firm in which assessee as a partner and it has been used as advance to various parties, added the same in the hands of the assessee firm. After discussing the issue at great length at para. 12 of his appellate order, he held that the difference in the debit credit amounting to Rs. 17,52,092/- as income of the assessee firm. After giving benefit of telescoping for a sum of Rs. 7,46,544/- quantified to be assessed in the assessment year 2003- 04, an amount of Rs. 10,05,568/- was added in the income of the assessee firm. Nothing was brought on record by the id. AR to substantiate its contention that entries found

recorded in the loose paper was unaccounted sales of the firm. Once it is held that entries so recorded was actually income of the firm, we do not find any infirmity in the order of CIT(A) for enhancing the income of the assessee firm after giving benefit of telescoping in respect of similar income assessed in the assessment year 2003-04 amounting to Rs. 7,46,544/- . The detailed finding recorded by the CNN are as per material on record, therefore, do not require any interference on our part. Accordingly, we confirm the action of CIT(A) in enhancing the income of assessee firm by Rs. 10,05,568/- in the assessment year 2003-2004."

4.3.8 From the above text of the order, it could be noticed that Hon'ble ITAT categorically held that nothing was brought on record by the appellant to substantiate its contention that entries found recorded in the loose paper were unaccounted sales of the firm. It is also observed that once it is held that entries so recorded was actually income of the firm, there is no infirmity in the order of CIT(A) for enhancing the income of the assessee firm after giving benefit of telescoping in respect of similar income assessed in the assessment year 2003-04 amounting to Rs. 7,46,544/-. In view of the observations of the Hon'ble ITAT and considering the nature of transactions recorded in the seized papers, the Assessing Officer is justified on facts and in law in concluding that the appellant furnished inaccurate particulars in the return of income in respect of this addition too. Further, as the explanation furnished by the appellant that the torn paper in question is a dumb document is found to be not bona-fide, the appellant is also deemed to have furnished inaccurate particulars of income under Explanation-1 to sec. 271(1)(c). Accordingly, the Assessing Officer is justified in levying the penalty under sec. 271(1)(c) in respect of income enhanced by the CIT(A). Grounds of appeal No. 3 and 4 fail.

4.4 In the course of the present proceedings, as already mentioned, the appellant vide its submission dated 19/12/2013 raised an additional ground of appeal stating that the Assessing Officer erred in levying the penalty on the income of Rs. 1,05,570/- suo motto declared by the appellant

firm in the return of income filed u/s 153A of the Income Tax Act 1961, which was declared due to mistakes observed and also on certain seized documents. In this respect, Ld. Counsel relied on the following authorities:

i) Suresh Chandra Mittal (251 ITR 9) (SC)

"Penalty under s. 271(1)(c)—Concealment—Revised return filed showing higher income - Assessee surrendered the income after persistent queries by AO---However, revised returns have been regularized by Revenue— Explanation of the assessee that he has declared additional income to buy peace and to come out of vexed litigation could be treated as bona fide— Penalty rightly cancelled—No interference warranted"

ii) Suresh Chand Bansal, 223 CTR (CAL) 128

"Penalty under s. 271(1)(c)—Concealment—Disclosure of additional income after search in revised return under sec. 153A—Assessee offered additional income for various assessment years which was accepted in entirety—CIT(A) found that no additional facts were brought on record and there. is nothing to indicate that the assessee had no explanation regarding the seized documents—Contents of said documents are nowhere discussed—There was no attempt to obtain the explanation of the assessee—Conclusion that such income belonged to the assessee is based on the Offer of the assessee and not entirely on the seized documents—Offer is said to have been made to avoid litigation and is an estimate of income that might not have been taxed—No attempt was made even to find out the locus of the earning and the person who concealed such earning—Penalty under s. 271(1)(c) rightly cancelled—No substantial question of law arises"

iii) Shabbir A. latiwala vs. DCIT (Rajok ITAT) 16 Taxmann.com 177

there was nothing placed on record which might even remotely indicate about specific nature of additional income offered by assessee while furnishing returns in response to a notice issued

under section 153A, and there was no direct or indirect linkage brought on record with reference to any of specific seized materials so as to establish charge for which penalty had been levied - Whether in view of aforesaid, impugned penalty order was to be set aside - Held, yes

iv) Prem Chand Garg, 119 ITD 97

"Voluntary offer of income in order to buy peace and avoid litigation before taking up assessment by the AO dc hors any material with the AO cannot amount to concealment; assessee having surrendered the amount of NRI gift on a general query raised by AO. on the condition of not initiating penalty proceedings before assessment was taken up, AO could not have imposed penalty under s. 271(1)(c) when there was no material with the AO to arrive at satisfaction about concealment."

4.4.1. Relying on the above precedents, Ld. Counsel submitted that the penalty proceedings need to be dropped on the income returned since the appellant had suo motto declared the additional income in the return filed u/s. 153A and before the assessment proceedings commenced.

4.4.2 However, in the course of the hearing of the case on 12/03/2015, Ld. Counsel for the appellant submitted that appellant does not intend to press this additional ground of appeal. In any case, the tax attributable to income returned of Rs. 1,05,570/- was duly excluded by the Assessing Officer while computing the tax sought to be evaded by the appellant. Accordingly, the additional ground of appeal is rejected as no penalty was levied by the Assessing Officer in respect of this income.

4.5 To sum up, in the case of the appellant, the sequence of events clearly shows that but for search and survey operation in the case of appellant group of cases, the correct income earned by appellant for the year under consideration would have remained undisclosed and escaped taxation. Further, this

is not a case where the undisclosed income was brought to tax on estimate basis or in respect of a debatable legal issue to buy peace or to avoid litigation. Specific evidences containing unaccounted transactions were found during the search and survey and the additions, which are subject-matter of penalty, were based on cogent evidences. The omission of such receipts/income in the regular books of a/c or return .of income was not due to any bona fide or inadvertent mistake on the part of the appellant. Thus, this is a fit case for levy of penalty under sec. 271(1)(c) of the I T Act for furnishing inaccurate particulars of income in respect of the following additions made to the total income:

- i) Excess stock of gold jewellery and diamonds Rs. 16,96,044/-
- ii) Income enhanced by the CIT(A) Rs. 10,05,568/-

4.6 Accordingly, the Assessing Officer is directed to re-compute the penalty imposable under sec. 271(1)(c) on the tax sought to be evaded in respect of addition of Rs. 16,96,044/- on account of excess stock as per GS-12 Register and the addition of Rs. 10,05,568/- on account of enhancement of income by the CIT(A)."

8. Aggrieved by the order of the of the Ld. CIT(A), the assessee in appeal before us.
9. The first issue that came up for our consideration from revised grounds of appeal of the assessee is validity of penalty order passed by the Ld. AO consequent to vague notice issued u/s 274 r.w.s. 271(1)© of the Act. The Ld. AR for the assessee referring to copy of penalty notice issued by the AO u/s 274 r.w.s 271(1)© of the Act, submitted that the AO has issued vague notice without striking of irrelevant portion of the notice to frame specific charge on the assessee, whether the assessee has concealed

particulars of income or furnished inaccurate particulars of income. The Ld. AR further submitted that the AO has issued printed form of noticed without specifying charge under which penalty is proposed to be initiated, therefore, it is clear case of non-application of mind by the AO before initiation of penalty u/s 271(1)(c) of the Act. The Ld. AR further submitted that the provisions of section 271(1)(c) deals with two types cases for which penalty can be levied. The first type of cases is penalty in respect of concealment of particulars of income and second type of cases are penalty for furnishing of inaccurate particulars of income. Therefore, while levying penalty, the AO shall frame specific charge under which he has proposed to levy penalty in respect addition made in the assessment proceedings. In absence of any charge made on the assessee, it is difficult for the assessee to justify its case under which limb, the AO is proposed to levy penalty u/s 271(1)(c) of the Act. Therefore, any penalty proceedings initiated consequent to vague notice is bad in law and liable to be quashed. In this regard, he relied upon the following judicial precedence.

- i. Samson Perinchery (2017) 88 taxmann.com 413(Bom)
- ii. Meherjee Cassinath Holding (P.) Ltd. 88 taxmann.com 777 (Mum. Trib.)
- iii. SSA's Emeralds Meadows (2016) 73 taxmann.com 248(SC)
- iv. SSA's Emerald Meadows (2016) 73 taxmann.com 248(SC)
- v. Chennakesava Pharmaceuticals (2013) 30 taxmann.com 385(AP)

10. The Ld. DR, on the other hand, strongly supporting the order of the Ld. CIT(A), submitted that before initiation of penalty u/s 271(1)(c) of the Act, the AO has recorded his satisfaction, therefore, there is no relevance for the notice issued u/s 274 r.w.s. 271(1)(c) when a clear satisfaction has been arrived at before initiating penalty u/s 271(1)(c) of the Act. The Ld. DR further submitted that once there is a clear satisfaction about charge for which penalty is proposed to be levied then, issue of notice is a formality to communicate the assessee about the proceedings, therefore, merely for the reason non-striking of inapplicable portion of notice, the whole penalty proceedings cannot be vitiated. In this regard, he relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs Smt. Kaushalya & Ors. (1995) (216 ITR 660) (Bom).

11. We have heard both the parties, perused the material available on record and gone through the orders of the authorities below. The penalty proceedings u/s 271(1)(c) is a civil liability which is based on the show-cause notice issued by the AO u/s 274 r.w.s. 271(1)(c) before taking up the proceedings for levy of penalty. The AO shall issue a notice specifying charge under which he has proposed to levy penalty u/s 271(1)(c) of the Act, i.e. whether the penalty is proposed for concealment of particulars of income or for furnishing inaccurate particulars of income. In absence of any specific charge on the assessee, then it would be difficult for the assessee to justify its case before the AO, whether the penalty proceedings has been initiated for concealment of particulars of income or furnishing inaccurate particulars of income. In the above legal background, if you examine the case of the assessee it is abundantly clear that the AO has issued

standard format of notice u/s 274 r.w.s. 271(1)(c) of the Act, which is available in page no.1 to 3 of the paper book filed by the assessee, where it is clearly proved that the AO has not struckout inapplicable portion of the notice. We further noted that even in assessment proceedings, the AO has simply stated in the assessment order that penalty proceedings u/s 271(1)(c) of the Act has been initiated without arriving at a clear satisfaction about the charge/limb under which penalty is proposed to be levied in respect of addition made in assessment proceeding. Further, in the penalty order, the AO has clearly stated that penalty has been levied for furnishing inaccurate particulars of income and concealment of particulars of income. From the above, it is abundantly clear that the AO has initiated penalty consequent to invalid notice u/s 274 r.w.s. 271(1)(c) of the Act, without striking out inappropriate portion of the notice. Therefore, we are of the considered view that it is a clear case of non-application of mind by the AO before initiation of penalty proceedings u/s 271(1)(c), whether penalty is proposed for concealment of particulars of income or furnishing inaccurate particulars of income. We further noted that this issue has been subject matter of deliberations by the Hon'ble Karnataka High Court in the case of CIT vs Manjunatha Cotton & Ginning Factory (2013) 359 ITR 565 (Karn.) where the Hon'ble High Court has discussed the issue of vague notice and after considering the relevant facts, held that penalty proceeding initiated consequent to invalid notice is void ab-initio and liable to be quashed. The Hon'ble Supreme Court in the case of CIT vs SSA's Emerald Meadows (2016) 242 taxman 180 (SC) dismissed SLP filed by the Department and confirmed the findings of

the Hon'ble Karnataka High Court in the case of CIT vs Manjunatha Cotton & Ginning Factory (Supra). Further, Hon'ble Bombay High Court in the case of CIT vs Samson Perinchery (2017) 392 ITR 4(Bom.), held that concealment of income and furnishing of inaccurate particulars of income in section 271(1)(c) carries different meanings/connotations and, therefore, the satisfaction of the Assessing Officer with regard to only one of the two branches mentioned under section 271(1)(c) for initiation of penalty proceedings will not warrant/permit penalty being imposed for the other. The co-ordinate Bench of the Tribunal in the case of Meherjee cassiinath Holdings (P.) Ltd. vs ACIT (2017) 187 TTJ 722 has considered an identical issue and held that non-striking of the irrelevant limb in the said notice did not communicate to the assessee as to which of the two charges it had to respond. The aforesaid infirmity in the notice was reflection of non-application of mind by the AO, therefore, the notice issued by the AO u/s 274 r.w.s. 271(1)(c) was untenable as it suffered from the voice of non-application of mind. Thus, the whole penalty proceedings consequent to invalid notice is void ab-inito and is liable to be quashed.

12. In this view of the matter and considering the facts and circumstances of the cases, we are of the considered view that penalty proceeding initiated by the AO consequent to invalid notice issued notice u/s 274 r.w.s. 271(1)(c) is void ab-inito and is liable to be quashed. Hence, we quashed the order of penalty passed by the AO.

13. In the result, appeal filed by the assessee is allowed.

ITA NOs.4031 and 4032/Mum/2015

14. The facts and issues involved in these two appeal are identical to the issues which we have already considered in ITA No.4030/Mum/2015. The reasons given by us in preceding paragraphs for ITA No.4030/Mum/2015 shall mutatis mutandis apply to these appeals also. Therefore, for the detailed reasons recorded in preceding paragraphs, we quashed the order passed by the AO u/s 271(1)(c) for above assessment year.

15. As a result, all appeals filed by the assessee are allowed.

Order pronounced in the open Court on 24/05/2019.

Sd/-

Sd/-

(Sandeep Gosain)

(G. Manjunatha)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई/Mumbai; दिनांक Dated : 24/05/2019

Shekhar, P.S./नि.स.

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

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITA'
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai