IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 483 of 2023 With
R/TAX APPEAL NO. 485 of 2023 With
R/TAX APPEAL NO. 486 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BIREN VAISHNAV

and
HONOURABLE MRS. JUSTICE MAUNA M. BHATT

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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THE COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION AND TRANSFER PRICING)

Versus

M/S. SHELL GLOBAL SOLUTIONS INTERNATIONAL B.V.

========== Appearance:
MR.VARUN K.PATEL(3802) for the Appellant(s) No. 1
MR.S.N.SOPARKAR, LD. SENIOR ADVOCATE for MR B S SOPARKAR(6851) for the Opponent(s) No. 1
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CORAM:**HONOURABLE MR. JUSTICE BIREN VAISHNAV** and
HONOURABLE MRS. JUSTICE MAUNA M. BHATT

Date : 26/10/2023

COMMON CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)

1. Following substantial questions of law are framed:

(a) Whether in the facts and circumstances of the case, the learned ITAT has erred in setting aside the findings of the CIT(A) and directing the Assessing Officer to delete the penalty u/s. 271(1)(c) of the Income Tax Ac, 1961 levied by him?

(b) Whether in the facts and circumstances ofthe case, the learned ITAT has erred in law and on facts in taking view that there is no furnishing of any inaccurate particulars of income by assessee when assessee had made adequate disclosure of all material facts in Form 3CEB, TPSR and also during TP assessment and scrutiny assessment when substantial proceedings addition/adjustment was confirmed by ITAT?

(c) Whether in the facts and circumstances of thecase, the learned ITAT has erred in law and on facts in holding that Explanation 7 to Sec. 271(1)(c) of the Income Tax Act cannot be invoked while levying penalty in relation to the transfer pricing adjustment when the said explanation was neither referred to nor relied upon at the time of initiation of penalty proceedings under the Act?

(d) Whether in the facts and circumstances ofthe case, the learned ITAT has erred in law and on facts in holding that "Base Erosion" is a debatable issue when Kolkata Special Bench of ITAT and Ahmedabad ITAT itself has already taken a view against the appellant on the same issue in assessee's own case?

(e) Whether in the facts and circumstances of thecase, the learned ITAT has erred in law and on facts in holding that

reimbursement of expenses does not qualify as FTS and hence no penalty can be levied u/s. 271(1)(c) of the Act on such expenses?"

2. The respondent assessee company is a Foreign Company registered in Netherlands, deriving income from Royalties or fees for technical services. A return of income of Rs.9,19,53,530/- was filed. Audit Report

under Section 92E relating to international transactions for 3CEB was filed. The case was selected for scrutiny and a notice under Section 143(2) of the Act was issued on 22.09.2010. On verification of Form 3CEB, it was noticed that the assessee company had entered into international transactions. The case of the assessee was referred to the Transfer Pricing Officer vide letter dated

15.11.2010 for determination of Arm's length price of the international transactions. A draft order was passed under Section 144C(1) and the assessee made objections before the Dispute Resolution Panel. The DRP vide order dated 31.08.2012 issued directions under Section 144C(5) of the Act. A reference was made

under Section 92CA(1) of the Income Tax Act to the Transfer Pricing Officer who passed an order on

10.10.2011 making an upward adjustment of

Rs.29,43,61,998/- on account of variations in service charges. The upward total adjustment by way of an order under Section 92CA(3) of Rs.29,43,61,998/- was

made as above. By assessment order dated 25.10.2012 penalty proceedings were also proposed to be initiated under Section 271(1)(C) for furnishing

inaccurate particulars of income and thereby

concealing income. The assessment order was under challenge before the ITAT which dismissed the appeal and the assessee is in appeal before the High Court in Tax Appeals on quantum which are admitted and

pending for final hearing.

3. In the penalty proceedings it was the case of the

respondent assessee that the whole mechanism known as the Base Erosion Theory was adopted and the application of arm's length principles for making TP adjustment was not proper. Since the assessee had charged additional fees from its Indian AES in order to comply with Arm's Length Standards, the additional fees would have been taxed in India in the hands of the appellant @ 10% on gross basis, while at the same time, the said additional fees would have been allowed or deducted in the hands of the payers HLPL for the purposes of computing their business profits where such allowances or deductions would have obtained tax shields @ 33.99% in the hands of the tax payers. Thus, application of arm's length principles would have resulted in the erosion of taxes payable in India to the extent of 24%.

4. Such an issue which was a subject matter of challenge before a special bench, the assessee had intervened and had failed, as a result of which, the Tribunal had held against the appellant on quantum.

5. The whole issue was therefore a debatable issue where views of various Tribunals were at variance and therefore it was not a concealment of income. In the penalty proceedings invoking Explanation 7 to Section 271(1)(C) to DCIT, International Taxation Division vide order dated 20.07.2017 held the assessee liable to penalty. The CIT(A) confirmed the order of penalty. The Tribunal, however, held that the additions on which penalty had been levied was a debatable issue in light of variance of legal issues and opinions of the Karnataka Bench and the Pune Bench and hence two views were possible and mere difference of opinion does not justify levy of penalty.

The appeal was allowed.

6. The Revenue is in appeal before us.

7. Mr.Varun Patel learned Senior Standing Counsel for the department made the following submissions:

7.1 The appeal pertaining to quantum proceedings are pending and since admitted where the Tribunal held in

favour of the Revenue and the assessee is in appeal, the present appeals must be admitted and tagged to be heard with those appeals.

7.2 Even the case of the assessee before the CIT(A) was that the penalty proceedings be kept in abeyance till the quantum proceedings are adjudicated and therefore the assessee cannot now suggest otherwise and oppose the admission of these appeals.

7.3 Reiterating the legal position, Mr.Patel would submit that reading Explanation 7 to Section 271(1)(c) indicated there was a deemed concealment or giving of inaccurate particulars in reference to Section 92 and hence the question of whether the issue was debatable etc was not available to the assessee.

7.4 Even otherwise the issue was no longer a

debatable issue as the Tribunal after considering the order of the Special Bench where the assessee had intervened, on interpretation of Section 92(3), not accepted the Base Erosion Theory. Mr.Patel would rely on the findings of the CIT(A) where the CIT(A) had observed that these arguments would be of no help as there is no provision under the Transfer Pricing to give compensatory adjustment in the hands of the AE. There is no difference of opinion and hence, penalty proceedings were appropriate.

8. Mr.S.N.Soparkar learned Senior Counsel appearing with Mr.B.S.Soparkar learned advocate for the assessee in the appeals, would make the following submissions:

8.1 That no substantial question of law is involved in the appeals. Merely because the quantum appeals are admitted and pending, that by itself, would not be a consideration of admission of appeals.

8.2 Independent examination in the penalty

proceedings would indicate that the Tribunal has found that in the facts of the case no penalty

proceedings would have been initiated. This was not even a case deserving invoking of Explanation 7 when the assessee had proved that the price changed or paid in such transaction was in accordance with

provisions contained in Section 92C.

8.3 The finding of the Tribunal cannot be held to be perverse.

8.4 Mr.Soparkar would submit that as held by the Supreme Court, in the decision of ***Commissioner of Income Tax, Ahmedabad v. Reliance Petroproducts (P.) Ltd.*** reported in ***(2010) 189 Taxmann 332*** making an incorrect claim in law would not tantamount to concealment.

8.5 Full and complete disclosure of the Transfer Pricing Mechanism was made. Mr.Soparkar would take the Court through the Transfer Pricing Review where the Base Erosion Theory was explained. Clear

comments were offered based on Circular No.14/2001.

8.6 That, there was a divergence of opinion between the Koltaka Bench and the Pune Bench of the Tribunal and the mechanism explained indicated that the income of the assessee was in the nature of fees for technical services and the assessee was a nonresidential. The receipts were chargeable to tax @ 10%. The AE being an Indian company is chargeable to tax at 33.99% and therefore if the assessee had charged higher rates, the AE, would have claimed deduction of higher expense claiming a larger deduction resulting in a lower tax percent at 23.99%.

8.7 With regard to Explanation 7 of Section 271(1)(C) reliance was also placed on a view of the Delhi High Court decision in the case of ***Pr. Commissioner of Income Tax-6 v. Mitsui Prime India Composites India Pvt Ltd. in ITA No.913 of 2016*** dated 17.01.2017 and in the case of ***Pri. Commissioner of Income Tax v. Verizon India***

Pvt. Ltd. in ITA No.460 of 2016 dated 22.08.2016.

On the submission of the Revenue that the appeal be kept pending as quantum appeal is pending, he would

rely on a judgement in the case of ***Principal Commissioner of***

Income Tax-2 v. Sinosteel India

(P) Ltd. reported in (2019) 102 taxmann.com 610 (Delhi). Reliance was also placed on a Division Bench order dated 11.09.2017 of this Court in Tax Appeal No.659 of 2017.

9. Having considered the submissions made by the respective parties, we need to consider whether merely because quantum appeals at the hands of the assessee are admitted, would itself entitle the Revenue to press for admission of the appeals and secondly, whether even independently do the appeals involve a substantial question of law to consider a case fit for admission of the appeals.

10. Facts need not be reiterated but shortly stated, the Transfer Pricing Mechanism adopted by the assessee and the 'Base Erosion' theory was a

debatable issue and therefore on two opinions being available could not be a case of penalty under Section 271(1)(C) read with Explanation 7.

11. In this backdrop, it would be apt to reproduce the relevant discussion of the CIT(A) and that of the Tribunal. Discussions of the CIT(A) read as under:

> *"7. I have gone through the penalty order and duly considered the submissions filed by appellant. On careful consideration of the issue as brought out in the penalty order, the grounds of appeal and the submissions of appellant, the ground raised by the appellant is decided hereunder:*
>
> *8. Ground No. 2 being general in naturedoes not require any specific adjudication.*
>
> *9. Ground No. 1, 5, 6, 7, 8, 9 and 10 dealingwith transfer pricing adjustment are dealt with together.*
>
> *…*
> *1. Reliance is placed on Circular No.14/2001 read with section 92(3) of the Act to contend that the purpose*

of transfer pricing provisions is to be applied in the cases wherein there is over all reduction in the taxes in India. In the instant case, if the
Appellant would have charged higher amount of fees for technical services, HLPL and HPPL would have claimed equivalent amount of deduction. The appellant being a foreign company would have paid taxes at the rate of 10 percent and Indian company would have saved taxes at the rate of 30 percent, hence effectively Indian tax base would have eroded.

2. Computation of arm's length price of itsinternational transaction is bonafide, in good faith and with due diligence. In this regard, reliance is placed on the losses incurred by the Indian AEs of the Appellant and argument that since the payee companies are incurring losses there is no loss to the Indian government.

Further, reliance is placed on various case laws to argue that in the cases where transfer pricing adjustment is proposed and if the Assessee is able to justify that entire analysis was bonafide, in good faith and was with due diligence, penalty cannot be imposed on the Assessee.

3. The Appellant has made adequatedisclosures in Form No. 3CEB and TPSR and also during the course of transfer pricing assessment.

4. The case of the Appellant, case wasdecided by the decision of Hon'ble Kolkata Tribunal, Special Bench in the case of
Instrumentarium. Further, Hon'ble Pune Tribunal in the case of Cummins Inc in the similar facts has decided in favour of the Assessee. In view of the same, it is a case where two views are possible and hence, penalty should be not levied on the
Appellant.

5. Mere difference of opinion does notjustify levy of penalty.

6. Further, reliance was placed on TaxationRuling No. 2007/1 issued by the Austrian Taxation Office.

7. The appeal of the Appellant against theorder of Hon'ble Ahmedabad ITAT is already admitted before Hon'ble Gujarat High Court and hence penalty cannot be levied in such cases. Hence, this is the case of substantial question of law and penalty cannot be levied in such cases.

8. Explanation 7 to Section 271(1)(c) of theAct cannot be invoked while levying penalty in relation to the transfer pricing adjustment, when the said Explanation was neither referred in the notice issued under section 271(1)(c) of the Act nor relied upon at the time of initiation of the penalty proceedings under the Act.

The contention of the Appellant is not accepted for the following reasons.

The argument of base erosion and reliance placed on Circular No. 14/2001 is of no help to the Appellant since the said arguments are already considered and dealt in length by Hon'ble ITAT Kolkata Special Bench in the case of Instrumentarium (supra) and the same was further considered by the Hon'ble Ahmedabad ITAT in the case of the Appellant itself and it was held that arguments are of no help to the Appellant as there is no provision under the provisions of transfer pricing to give compensatory adjustment in the hands of the AE. In view of the same, even if the Appellant is charging lower fees for technical services to its Indian AES and TP adjustment is proposed in the hands of the Appellant, no deduction can be claimed by the Indian AES.

DRP has also rejected the argument of the Appellant on the ground that even if the principle of base erosion is accepted the same is of no help to the appellant as its Indian AEs i.e. both HLPL and HPPL are incurring huge losses. In response to the same, the Appellant has relied on the profits reported by the HLPL and HPPL in the subsequent years and on account of the said profits there would have been base erosion and Indian government would have suffered losses on account of higher deduction that would have been claimed by HLPL and HPPL. However, the said arguments of the Appellant will not be acceptable in light of the decision of the Hon'ble Special Bench and Ahmedabad ITAT mentioned supra that under Indian transfer pricing provisions, corresponding adjustment in the hands of the Indian AEs are not allowed.

…
In this case, Hon'ble ITAT has observed that the deeming fiction under Explanation 7 to Section 271(1)(c) of the Act cannot apply when assessee is able to show that price charged or paid in respect of related international transaction was computed in accordance with the scheme of Section 92C of the Act, and in the manner prescribed therein, in good faith and due diligence. However, as clearly mentioned above that both Special bench and Ahmedabad ITAT has already taken a view against the Appellant and hence now it cannot be claimed that the Appellant has acted in good faith and with due diligence.

Reliance is also placed on the various decisions to argue that penalty should not be levied when two views are possible, However, in the case of the Appellant, there is no difference of opinion as far as transfer pricing adjustment is concerned. Hence, all these decisions are of no help to the appellant.

...

It is also pertinent to mention here the provision of Income Tax Act 1961 for reference:

Section 271(1)(c)) Explanation 7.-Where in the case of an assessee who has entered into an international transaction defined in section 92B(, any amount is added or disallowed in computing the total income under sub-section (4) of section 92C, then, the amount so added or disallowed shall, for the purposes of clause (c) of this subsection, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) [or the Commissioner] that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the prescribed under that section, in good faith and with due diligence.]

In case of Appellant company, the income was assessed by making upward adjustment, hence the price charged by the assessee company was not computed in accordance with the provisions contained in section 92C and in the manner prescribed under that section, in good faith and with due diligence. Therefore the penalty levied by the AO was in accordance with the provisions of the Act.

…

Further, mere admission of appeal by Hon'ble High Court does not justify that the issue involved was purely a question of law and hence penalty cannot be levied in such cases. This interpretation is just like putting an end to the penalty proceedings in each and every case where

appeal is admitted before the High Court. That is never the intention of the law. Admission of any issue before Hon'ble High Court is just a fact that High Court has considered this issue to be dealt as per the provisions of the law. Hence, this argument is of no help to the Appellant.

…

The plea of the appellant contending that penalty proceedings are not maintainable on the ground that AO has not recorded his satisfaction to the effect that there has been concealment of income/furnishing of inaccurate particulars of income by the assessee, has also been considered by Supreme Court in the case of Mak Data Pvt. Limited V/S CIT 38 taxmann.com 448 [2013] wherein it is held as under:

> *10. The AO has to satisfy whether Penalty Proceedings be initiated or not during the course of Assessment Proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing. The scope of Section 271(1)(c) has been elaborately discussed by this Court in Union of India V/S Dharmendra Textile Processors [2008] 13 SCC 369 and CIT V/s Atul Mohan Bindal [2009] 90 SCC 589."*

It can be seen from above finding of Hon'ble Apex Court that while passing the Assessment Order, AO is not at all required to record his satisfaction in writing or in specific manner for which he is initiating Penalty Proceedings. Thus, in present case, AO has categorically stated that he is satisfied that Penalty Proceedings is required to be initiated for additions made in Assessment Order which suffice the levy of penalty. The AO has given detailed findings why

addition confirmed by first appeal and before the Hon'ble ITAT is subject to levy of penalty and also recorded the manner in which such penalty is required to be levied hence Penalty Order passed by AO is within the framework of law and cannot be held as invalid order on the ground that AO has not recorded his satisfaction in penalty notice or he has initiated penalty under one limb and levied penalty under the second limb. This Decision of Hon'ble Supreme Court has not been distinguished by High Courts hence ratio laid down by Hon'ble Apex Court is binding and AO is justified in levying penalty under Section 271(1)(c) of the Act."

12. Discussion of the ITAT reads as under:

"11. We have heard the rival contentions and perused the material on record. During the course of arguments, the Bench called for further information with regard to the price being charged by the assessee to its Associated Enterprises for services rendered for the future assessment years in order to ascertain that the assessee was taking a consistent position, even for the years when the Indian Associated Enterprises of the assessee had started making profits that is to say that in the years when the Indian AE started making profits, the assessee continued to charge the AE's at the same lower average weighted rate as compared to third parties (as was done in the impugned assessment year). The assessee, vide submission dated 3rd October 2022 confirmed that even in the years when the AE of the assessee had started making profits, the assessee was charging at the same weighted average rate for services rendered to them as in the earlier years when the AE's were incurring losses. Accordingly, the assessee had taken a consistent position so far as the principal of base erosion is concerned, in instant set of facts. On the levy of penalty, we are in

agreement with the arguments put forward by the counsel for the assessee to the effect that the assessee has consistently taken the position that the lower mark-up charged in respect of services rendered to associated enterprises, for the reason that transfer pricing provisions are not attracted in cases where there is no base erosion, so far as taxes are concerned. Further, we also observe that the assessee had made adequate disclosure of all the material facts in Form 3CEB, TPSR and also during the course of the transfer pricing assessment proceeding and scrutiny assessment proceedings. Therefore, there is no furnishing of any inaccurate particulars of income by the assessee. We also observe that it has been held by various Courts that Explanation 7 to Section 271(1)(c) of the Act cannot be invoked while levying penalty in relation to the transfer pricing adjustment, when the said Explanation was neither referred nor relied upon at the time of initiation of the penalty proceedings under the Act.

Another noteworthy point is that in our view, the additions on which penalty has been levied is a debatable issue. This is evident from the fact that 'Base Erosion' issue was dealt by the Special Bench Kolkata ITAT. Further, Pune ITAT has also upheld argument of Base Erosion and hence, two views are possible since at the time of hearing before Pune ITAT, it took an independent view since Kolkata SB decision was rendered after the Pune ITAT decision. The fact that Gujarat High Court has admitted the issue for consideration also supports the assessee's contention that the issue involved is debatable. So far as penalty with regards to reimbursement of expenses is being treated as FTS is concerned, in our view, it is a debatable issue whether reimbursement of expenses qualifies as FTS and there are various decisions which have held that reimbursement of expenses does not qualify as FTS.

Accordingly, we are of the considered view that no penalty can be levied u/s 271(1)(c) of the Act on account of treating reimbursement of expenses as FTS.

11.1 In view of the above, we are of the considered view, that in the instant set of facts, no penalty u/s 271(1)(c) of the Act is liable to be imposed on the assessee. Accordingly, we direct that the penalty u/s 271(1)(c) of the Act be deleted in the instant set of facts.

12. In the result, all grounds of appeal of the assessee are allowed."

13. What is evident from the discussion herein above is that the CIT(A) did not accept the arguments on base erosion since the arguments were considered and dealt with in length by the ITAT Kolkatta Special Bench in the case. According to the CIT(A) even if the assessee was charging lower fees for technical services to its Indian AEs and transfer pricing is proposed in the hands of the assessee, no deduction could be claimed by Indian AEs. Reading a particular paragraph of the observations of the AO's order reproduced by the CIT(A) itself would indicate that there were two views possible and that the issue was debatable. The same reads as under:

"*The case referred by the Appellant M/s Instrumentarium Corporation v ADIT (ITA No.1548 and 1549/Kol/2009), was duly considered by the Hon'ble ITAT vide para 6 of the order dated 17.11.2016. For reference the para 6 of the ITAT order is as under:*

> *"6 In the meantime, however, a special bench of this Tribunal, consisting of three members- including one of us, heard and adjudicated upon a similar issue relating to the theory or concept of "base erosion" in the case of Instrumentarium Corporation Ltd Finland Vs ADIT (2016) 71 taxmann.com 193 (SB). This assessee, in its capacity as an intervener, was also heard by the Special Bench, and the arguments of the assessee were duly considered and adjudicated upon by the special bench. The plea of the assessee, on the theory of base erosion and as argued by the assessee, was rejected. Therefore the case law referred by the assessee is not found sustainable and hence rejected.*
>
> *ii) Cummins Inc. v ADIT (ITA No. 2181/PN/2013 - dated 29 July 2016 In the case referred the addition were made in one assessment year and not made in other assessment years. But in the case of assessee, the upward adjustment on similar ground had been suggested by the Transfer Pricing Officer and subsequently the AO has made assessment by adding the income in various assessment years. The order of the Hon'ble Tribunal is a combined order wherein the appeal of the assessee is dismissed for A.Ys. 2007-08, 2008-09, 2009-10 and 2010-1 1. Therefore the facts of the case referred arc different from the facts of the assessee case and hence rejected. iii) 3 Infotech Ltd. v. DCIT (2011) 129 ITD 422 (Mum.),*
>
> *The case referred of 3i Infotech Ltd. v. DCIT is also not applicable in the case of assessee. The matter of the discussion in the said order of Hon'ble Mumbai Tribunal is*

on base erosion. The matter of base erosion was also in the case of Instrumentarium Corporation Ltd Finland Vs ADIT. All these case laws are duly considered by the Hon'ble Ahmedabad Tribunal in combined order dated 17.11.2016 in assessee's own case and the appeal of the assessee was dismissed. Therefore the ease laws referred by the assessee have no relevance to the case of the assessee. The concept of 'base erosion' has been dealt in detail by the Tribunal and not found acceptable."

14. Therefore even if the deemed provision on the basis of Explanation 7 is pressed into service, then also there can be a case based on good faith and it cannot be termed as concealment.

15. What is evident is that the Assessing Officer has found that the view of the ITAT in ***Cummins Inc v. ADIT*** dated 29.07.2016 on facts may not apply. Even though, a Mumbai Bench decision in the case of ***Infotech Ltd. v. DCIT*** was on the subject of base erosion but the AO did not consider it appropriate as the Ahmedabad Bench had relied upon the Special Bench order of Kolkatta. These findings itself suggest that there are in fact more than two opinions on the subject of base erosion.

16. In the case of ***Reliance Petroproducts*** (supra), paras 7 to 11 read as under:

"7. As against this, Learned Counsel appearing on behalf of the respondent pointed out that the language of Section 271(1)(c) had to be strictly construed, this being a taxing statute and more particularly the one providing for penalty. It was pointed out that unless the wording directly covered the assessee and the fact situation herein, there could not be any penalty under the Act. It was pointed out that there was no concealment or any inaccurate particulars regarding the income were submitted in the Return. Section 271(1)(c) is as under:-

> *"271(1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person-*
>
> *(c) has concealed the particulars of his income or furnished inaccurate particulars of such income."*

A glance at this provision would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. Present is not the case of concealment of the income. That is not the case of the Revenue either. However, the Learned Counsel for Revenue suggested that by making incorrect claim for the expenditure on interest, the assessee has furnished inaccurate particulars of the income. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in the Section 271(1) (c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the Return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee

cannot be held guilty of furnishing inaccurate particulars. The Learned Counsel argued that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income". We do not think that such can be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. In Commissioner of Income Tax, Delhi Vs. Atul Mohan Bindal [2009(9) SCC 589], where this Court was considering the same provision, the Court observed that the Assessing Officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. This Court referred to another decision of this Court in Union of India Vs. Dharamendra Textile Processors [2008(13) SCC 369], as also, the decision in Union of India Vs.Rajasthan Spg. & Wvg. Mills [2009(13) SCC 448] and reiterated in para 13 that:-

> *"13. It goes without saying that for applicability of Section 271(1)(c), conditions stated therein must exist."*

8. Therefore, it is obvious that it must be shownthat the conditions under Section 271(1)(c) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the Return filed because that is the only document, where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. In Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. [2007(6) SCC 329], this Court explained the terms "concealment of income" and "furnishing inaccurate particulars". The Court went on to hold therein that in order to attract the penalty under Section 271(1)(c), mens rea was necessary, as according to the Court, the word "inaccurate" signified a deliberate act or omission on behalf of

the assessee. It went on to hold that Clause (iii) of Section 271(1) provided for a discretionary jurisdiction upon the Assessing Authority, inasmuch as the amount of penalty could not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of income, but it may not exceed three times thereof. It was pointed out that the term "inaccurate particulars" was not defined anywhere in the Act and, therefore, it was held that furnishing of an assessment of the value of the property may not by itself be furnishing inaccurate particulars. It was further held that the assessee must be found to have failed to prove that his explanation is not only not bona fide but all the facts relating to the same and material to the computation of his income were not disclosed by him. It was then held that the explanation must be preceded by a finding as to how and in what manner, the assessee had furnished the particulars of his income. The Court ultimately went on to hold that the element of mens rea was essential. It was only on the point of mens rea that the judgment in Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. was upset. In Union of India Vs. Dharamendra Textile Processors (cited supra), after quoting from Section 271 extensively and also considering Section 271(1)(c), the Court came to the conclusion that since Section 271(1)(c) indicated the element of strict liability on the assessee for the concealment or for giving inaccurate particulars while filing Return, there was no necessity of mens rea. The Court went on to hold that the objective behind enactment of Section 271(1)(c) read with Explanations indicated with the said Section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, willful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under Section 276-C of the Act. The basic reason why decision in Dilip N.

Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. (cited supra) was overruled by this Court in Union of India Vs. Dharamendra Textile Processors (cited supra), was that according to this Court the effect and difference between

Section 271(1)(c) and Section 276-C of the Act was lost sight of in case of Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. (cited supra). However, it must be pointed out that in Union of India Vs. Dharamendra Textile Processors (cited supra), no fault was found with the reasoning in the decision in Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. (cited supra), where the Court explained the meaning of the terms "conceal" and inaccurate". It was only the ultimate inference in Dilip N.
Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. (cited supra) to the effect that mens rea was an essential ingredient for the penalty under Section 271(1)(c) that the decision in Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. (cited supra) was overruled.

9. We are not concerned in the present case withthe mens rea. However, we have to only see as to whether in this case, as a matter of fact, the assessee has given inaccurate particulars. In Webster's Dictionary, the word "inaccurate" has been defined as:-

> *"not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript".*

We have already seen the meaning of the word "particulars" in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the Return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its Return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under Section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim

made in the Return cannot amount to the inaccurate particulars.

10. It was tried to be suggested that Section 14A of the Act specifically excluded the deductions in respect of the expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. It was further pointed out that the dividends from the shares did not form the part of the total income. It was, therefore, reiterated before us that the Assessing Officer had correctly reached the conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1) (c). If we accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the Legislature.

11. In this behalf the observations of this Courtmade in Sree Krishna Electricals v. State of Tamil Nadu & Anr. [(2009) 23VST

249 (SC)] as regards the penalty are apposite. In the aforementioned decision which pertained to the penalty proceedings in Tamil Nadu General Sales Tax Act, the Court had found that the authorities below had found that there were some incorrect statements made in the Return. However, the said transactions were reflected in the accounts of the assessee. This Court, therefore, observed:

> *"So far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the appellant's account books. Where certain items which are not included in the turnover are disclosed in the dealer's own account books and the assessing authorities include these items in the dealer's turnover disallowing the exemption, penalty cannot be imposed. The penalty levied stands set aside."*

The situation in the present case is still better as no fault has been found with the particulars submitted by the assessee in its Return."

17. In the case of ***Toyota Kirloskar Motor (P) Ltd. V. Union of India*** reported in ***(2019) 109 taxmann.com 137*** relied upon by Shri Soparkar, Explanation 7 of Section 271(1)(C) was under consideration where the Court held that the Explanation cannot be applied blindly in a routine manner to levy penalty on the additions made in the absence of any material to establish the concealing of

income or furnishing inaccurate particulars. Moreover, they are independent and distinct from the assessment proceedings. Paras 23 to 30 of the Karnataka decision read as under:

> *"23. Explanation 7 to Section 271(1)cannot be applied blindly in a routine manner to levy penalty on the additions made in the absence of any material to establish the concealing of the income or furnishing the inaccurate particulars by the assessee unless the assessee fails to prove that in good faith and with due diligence the price charged or paid in the transaction was computed in accordance with Section 92C of the Act. However, these issues requires to be analyzed based on the facts and circumstances of the case. There cannot be any straight jacket formula to levy and determine the penalty. A speaking order requires to be passed for levying the penalty under section 271[1][c] of the Act which is a self-contained code.*
>
> *24. It is desirable to quote paragraphs 60 and 61 of Manjunatha Cotton and Ginning supra, which reads as under:*
>
> > *"60. The penalty proceedings are distinct from assessment proceedings, and independent therefrom. The assessment proceedings are taxing proceedings. The proceedings for imposition of penalty though emanating from proceedings of assessment are independent and separate aspects of the proceeding. Separate provision is made for the imposition of penalty and separate notices of demand are made for recovery of tax and amount of penalty. Also separate appeal is provided against order of imposition of penalty. Above all, normally, assessment proceedings must precede penalty proceedings. Assessee is entitled to submit fresh evidence in the course of penalty proceedings. It is because penalty proceedings are independent proceedings. The assessee cannot question the assessment jurisdiction in penalty proceedings. Jurisdiction under penalty proceedings can only*

be limited to the issue of penalty, so that validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter in penalty proceedings. It is not possible to give a finding that the re- assessment is invalid in such penalty proceedings. Clearly, there is no identity between the assessment proceedings and the penalty proceedings. The latter are separate proceedings that may, in some cases, follow as a consequence of the assessment proceedings. Though it is usual for the Assessing Officer to record in the assessment order that penalty proceedings are being initiated, this is more a matter of convenience than of legal requirement. All that the law requires, so far as the penalty proceedings are concerned, is that they should be initiated in the course of the proceedings for assessment. It is sufficient, if there is some record somewhere, even apart from the assessment order itself, that the Assessing Officer has recorded his satisfaction that the assessee is guilty of concealment or other default for which penalty action is called for. Indeed, in certain cases, it is possible for the Assessing Officer to issue a penalty notice or initiate penalty proceedings even long before the assessment is completed. There is no statutory requirement that the penalty order should precede or be simultaneous with the assessment order. In point of fact, having regard to the mode of computation of penalty outlined in the statute, the actual penalty order cannot be passed until the assessment is finalised.

61. In the light of what is stated above, what emerges is as under:

a) Penalty under Section 271(1)(c) is a civil liability.

b) Mens rea is not an essential element forimposing penalty for breach of civil obligations or liabilities.

c) Willful concealment is not an essentialingredient for attracting civil liability.

d) Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings under Section 271.

e) The existence of such conditions should bediscernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.

f) Even if there is no specific finding regardingthe existence of the conditions mentioned in Section 271(1)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.

g) Even if these conditions do not exist in theassessment order passed, at least, a direction to initiate proceedings under Section 271(1)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).

h) The said deeming provisions are notapplicable to the orders passed by the Commissioner of Appeals and the Commissioner.

i) The imposition of penalty is not automatic.

j) Imposition of penalty even if the tax liabilityis admitted is not automatic.

k) Even if the assessee has not challenged theorder of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.

l) Only when no explanation is offered or theexplanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.

m) If the explanation offered, even though notsubstantiated by the assessee, but is found to be

bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.

n) The direction referred to in Explanation 1Bto Section 271 of the Act should be clear and without any ambiguity.

o) If the Assessing Officer has not recorded anysatisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.

(p) Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income.

q) Sending printed form where all the groundmentioned in Section 271 are mentioned would not satisfy requirement of law.

r) The assessee should know the grounds whichhe has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.

s) Taking up of penalty proceedings on onelimb and finding the assessee guilty of another limb is bad in law.

t) The penalty proceedings are distinct from theassessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.

u) The findings recorded in the assessmentproceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings."

25. In the case of Brij Lal and others supra, inthe context of conclusion arrived by the Settlement Commission invoking the special procedure for computation of total income by, under Sections 245C and 245D in Chapter xix-A of the Act, the Hon'ble Apex Court has observed thus:

> *"23. Descriptively, it can be stated that assessment in law is different from assessment by way of settlement. If one reads section 245D(6) with section 245I, it becomes clear that every order of settlement passed under section 245D(4) shall be final and conclusive as to the matters contained therein and that the same shall not be re- opened except in the case of fraud and misrepresentation. Under section 245F(1), in addition to the powers conferred on the Settlement Commission under Chapter XIXA, it shall also have all the powers which are vested in the income tax authority under the Act. In this connection, however, we need to keep in mind the difference between*
> *"procedure for assessment" under Chapter XIV and "procedure for settlement" under Chapter*
> *XIX-A (see section 245D). Under section 245F(4), it is clarified that nothing in Chapter XIX-A shall affect the operation of any other provision of the Act requiring the applicant to pay tax on the basis of self-assessment in relation to matters before the Settlement Commission."*

26. It is thus held that the nature of the ordersunder Section 143 and 144 is different from the orders of the Settlement Commission under Section 245-D4 of the Act.

27. In K.C. Builders and Another supra, theHon'ble Apex Court has observed that the condition precedent for imposing penalty under Section 271[1][c] would be that the assessee has made conscious concealment or furnished inaccurate particulars of his income, where the additions made in the assessment order, on the basis of which penalty for concealment was levied is finally annulled, or deleted, there remains no basis set out for levying the penalty for

concealment, and, therefore in such a case no such penalty can survive and the same is liable to be cancelled. Thus, it is settled law that penalty cannot stand if the assessment is set aside.

28. In UNION OF INDIA VS. DHARMENDRATEXTILES PROCESSORS & OTHERS reported in (2008) 306 ITR 277 (SC), the Hon'ble Apex Court was dealing with the penalty provisions contained in Section 11 [a][c] of the Central Excise Act, 1944, reference was made to the penalty provision in the Act, 1961 and the Hon'ble Apex Court has held that mens era is not an essential element for imposing penalty for breach of civil obligations. In the case of Manjunatha Cotton and Ginning Factory supra, the Division Bench of this Court considering the various judgments of the Hon'ble Apex Court and more particularly Dharmendra Textiles case supra, held that the decision in the Dharmendra Textiles case is to be understood as a decision under Section 11[a][c] of the Central Excise Act, 1944 and Rajasthan Spinning and Ginning case of the Hon'ble Apex Court has been referred to, while arriving at such a decision. In paragraph 65, the Division Bench has observed that the subject matter of the penalty proceedings is the order of the Appellate Authority and not the order passed by the Assessing Authority. If the Appellate Authority was satisfied with the addition, it has to be made on the ground of undervaluation of the closing stock which was not the finding recorded by the Assessing Authority, which was not the basis for the initiation of the penalty proceedings by the Assessing Authority. In such circumstances, it was held that the Appellate Authority ought to have initiated penalty proceedings and issued notice to the assessee to show cause why penalty should not be imposed. The said procedure not being followed and, therefore, though for different reasons, the First Appellate Authority has set aside the order levying penalty, the Tribunal correctly appreciated the facts in a proper perspective and was justified in not interfering with the order of the appellate authority in setting aside the penalty order.

...

30. The penalty proceedings are distinct from assessment proceedings and independent there from. The proceedings for imposition of penalty though emanating from proceedings of assessment are independent and separate aspects of the proceedings. Merely alternative dispute resolution has been opted by the assesse, it would not invalidate the penalty proceedings unless it has been considered, analyzed and a decision is arrived at by the two sovereign States under the MAP. The order passed by the mechanism provided under Section 90 can be construed as an adjustment to the assessment order but not an annulment of the assessment order. If by such an adjustment, the assessment order is annulled in its entirety, setting aside the tax levied on income, then the arguments of the petitioners can hold good prohibiting the authorities to invoke the penal proceedings irrespective of any explicit finding regarding the penal consequences in the order of MAP. However, in the present set of facts, such a situation would not arise in view of the adjustment made to certain extent in the order passed under Rule 44H(5), implementing the order of MAP reducing the transfer pricing adjustment to Rs.91,80,00,000/- as against Rs.240,11,91,692/-. The onus lies on the assessee to establish that the said addition now finally decided by MAP is not due to concealment of income or furnishing of inaccurate particulars and moreover, the computation was made under Section 92C in the manner prescribed under that Section, in good faith and with due diligence. At the same time, Explanation 7 would not empower the concerned authorities to levy penalty automatically for such transactions. A decision has to be taken by the authorities after application of mind. These aspects involving questions of fact requires to be considered by the Authorities concerned and rightly the petitioner has preferred an appeal against the penalty proceedings in

W.P.No.57865/2015. Since the notice issued under Section 271[1][c] of the Act being challenged in W.P.No.56348/2015, the petitioner is at liberty to file objections/reply to the notice impugned within a period of two weeks from the date of receipt of certified copy of the order. If such reply/objections are filed as aforesaid, the same shall be considered by the Assessing Officer in accordance with law in an expedite manner. Hence, the following.

ORDER

i) Section 271(1)(C) of the Income Tax Act, 1961is held intra vires the constitution in so far as imposing of penalty on amounts determined pursuant to Convention for avoidance of Double Taxation between Union of India and other sovereign countries which is enforced in Indian territory by Section 90 of the Income Tax Act, 1961 and the Rules made thereunder.

ii) Appellate Authority shall consider the appealpreferred by the petitioner against the order of penalty dated 22.09.2015 at Annexure - S [W.P.No.57865/2015] on merits and shall take a decision in accordance with law in an expedite manner.

iii) The petitioner in W.P.No.56348/2015 is atliberty to file reply/objections to the notice dated 27.10.2015 at Annexure-G within a period of two weeks from the date of receipt of certified copy of the order. On filing of such reply/objections, the Assessing Officer shall consider the same and take a decision in accordance with law in an expedite manner.

iv) With the aforesaid observations, writ petitionstands dismissed."

18. Even in the case of ***Verizon India Pvt. Ltd.*** (supra), the observations are as under:

" The present appeal against the order dated 08.08.2016 of Income Tax Appellate Tribunal is barred because the revenue has refiled it with a delay of 550 days. On this ground alone, the appeal is liable to be rejected.

This Court has considered the merits of the appeal as well. The brief facts are that during the relevant period, i.e. AY 2007-08, the assessee had, in the course of its return, relied upon a transfer pricing report. The report inter alia sought benefit of six comparables, by applying the Transactional Net Margin Method (TNMM) under Section 92C of the Income Tax Act, 1961. The report had relied upon twelve comparables; the Transfer Pricing Officer (TPO) rejected nine of them and based upon the surviving data, determined the Arms Length Pricing (ALP) and made adjustments in the final return. The Assessing Officer (AO), while accepting TPO's determination, was of the opinion that as per Explanation 7 to Section 271(1)(c), the addition was to be deemed to represent income and was, therefore, liable, and consequently penalty was leviable. The AO's order was set-aside by the ITAT.

We have considered the circumstances. The assessee in this case could not, in the opinion of this Court, visualize that out of the twelve comparables furnished, nine would be rejected and the matrix of calculations, as it worked, would radically undergo change. Pertinently, for the previous year 2006-07, the assessee's comparables – including some of those which were rejected in the present order, were in fact accepted when the matter reached finality. In these circumstances, the interpretation adopted by the AO was plainly erroneous. The Court is also of the opinion that in the absence of any overt act, which disclosed conscious and material suppression, invocation of Explanation 7 in a blanket manner could not only be injurious

to the assessee but ultimately would be contrary to the purpose for which it was engrafted in the statute. It might lead to a rather peculiar situation where the assessees who might otherwise accept such determination may be forced to litigate further to escape the clutches of Explanation 7. For the above reasons, we are also satisfied that no substantial question of law arises. The appeal is accordingly dismissed along with the pending application."

19. What is therefore evident from the above is that provisions of Section 271(1)(C) and Explanation 7 is clearly not applicable.

20. Moreover, merely because the appeal of the assessee was admitted on the issue of quantum, the fact that the `Revenue's appeal *ipso-facto* requires to be admitted, is not necessary.

21. In the case of ***Sinosteel India (P) Ltd.*** (supra) a Division Bench of the Delhi High Court in that case held as under:

"Present appeal by the Revenue under Section 260A of the Income Tax Act, 1961(the Act, for short) in the case of M/s Sinosteel India Limited (respondent-assessee, for short) impugns the order dated 29th January, 2018 passed by the Income Tax Appellate Tribunal (Tribunal) deleting penalty for concealment of income under Section 271(1)(c) of the Act. The appeal relates to Assessment Year 2006-07.

2. Penalty for concealment was imposed forfailure to correctly compute arm's length price of international transactions between the respondent-assessee and its holding company M/ s Sino Steel Corporation, China and associated enterprises by excluding internal comparable while applying the Comparable Uncontrolled Price (CUP) method.

3. Respondent-assessee was providing supportand assistance to its holding company and associated enterprises in procuring and supplying metallurgical materials and related activities, for which the respondent-assessee was paid commission in related international transactions @ US$ 0.15 per DMT and US$ 0.33 per WMT.

4. During the year in question, the respondentassessee had entered into a third party independent or unrelated international transaction in which commission @ US$ 0.50 per DMT was paid.

5. The respondent-assessee had receivedcommission of Rs. 1,58,12,470/- and after setting off expenses and permissible deductions, the respondent-assessee had declared a total income of Rs. 42,30,567/- in its return.

6. Details with regard to unrelated third-partytransaction were duly disclosed and informed to the Assessing Officer and Transfer Pricing
Officer.

7. Respondent-assessee had justified exclusion ofinternal unrelated comparable in view of the small volume of transaction. It was an isolated transaction, substantially lower in value in comparison to the volume of the transactions with the associated enterprises, which were enduring and to continue over a period of time. It was normal in business to charge lower commission on larger volumes from parties with long-term business relationship.

8. Transfer Pricing Officer, vide order dated 28thAugust, 2009, however, did not agree with the respondent-assessee. Arm's length price was computed by taking the independent unrelated party comparable into consideration. Dispute Resolution Panel vide order dated 25th November, 2011 also rejected the respondentassessee's challenge to include the internal comparable. By assessment order dated 9th September, 2010 income was assessed at Rs. 3,30,02,880/-. Penalty proceedings under Section 271(1)(c) of the Act were directed to be initiated.

9. In the present appeal, we are not concernedwith the question whether the independent transaction should or should not be considered as a comparable. This would be decided in the quantum appeal pending before the High Court. Obviously, if the respondent-assessee succeeds, the penalty would be quashed for there is no addition, which has been sustained. However, the scope of the present appeal, as stated above, relates to the question of bona fides of the explanation of the respondent-assessee and whether exclusion of the internal comparable was after due diligence.

10. The Assessing Officer had imposed penaltyreferring to Explanation 7 to Section 271(1)(c) of the Act, and without any discussion on the question of explanation given by the assessee, it was observed and held:-

"In view of Explanation 7 of Section 271(1)(c) of the I.T. Act 1961, this amount of Rs.2,87,72,311/shall also be deemed to represent the income in respect of which particulars have been concealed/inaccurate particulars have been furnished. The assessee has failed to establish that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C of the IT Act 1961 and lathe manner prescribed under that section in good faith and with due diligence. In view of the above, I am of the considered opinion that the assessee has concealed particulars of its

income and is liable to penalty u/s 271(1)(c) of the I.T. Act 1961." The Assessing Officer, in our view, had failed to appreciate that imposition of penalty was not automatic in the sense that it was mandatory as addition had been made in the quantum proceedings. 11. The Commissioner of Income Tax (Appeals) vide order dated 6 th October, 2015 upheld the penalty order observing that the respondentassessee merely stated that the lower rate of commission was on account of higher volume. The transfer pricing report had not mentioned that the lower rate of commission was at arm's length when compared to internal comparable. Further, the respondent-assessee had not acted with due diligence. In view of Explanation 7 to Section 271 (1)(c) of the Act, penalty was rightly imposed on the deemed concealed income or income in respect of which inaccurate particulars were furnished. The Commissioner of Income Tax (Appeals), however, did observe that the respondent-assessee had filed fresh evidence in the penalty proceedings explaining and justifying lower rate for higher volume of transactions. This submission was rejected observing that fresh evidence was not part of the Transfer Pricing Report. It was stated that two opinions were not possible.

12. The Tribunal in the impugned order has heldas under:-

"3. We have perused the submissions advanced by both the sides in the light of the records placed before us. 3.1. On perusal of assessment order, we observe that assessee as well as Ld.TPO agreed upon CUP to be the most appropriate method for computing the arm's length price. Further in our view, under CUP, selection of comparables is within strict parameters and has to be accurately made on functional similarities. Admittedly there was lack of comparables internal/external for the type of services rendered by assessee to its AE. It is observed that the transfer pricing adjustment is because of the difference in the computation of ALP due to lack of comparables. 3.2. Ld. A.R. forcefully contended that the

addition based on the difference in arm's length price is a debatable issue and, therefore, the claim of assessee, though not accepted, that by itself would not attract the penalty u/s 271(1)(c) as held by the Hon'ble Supreme Court, in the case of Reliance Petroproducts (P) Ltd. reported in 322 ITR 158. To substantiate this contention that the issue of addition is debatable in nature, Ld. A.R. referred and relied upon the substantial question of law framed by the Hon'ble High Court in the appeal preferred by the assessee against the order of this Tribunal in quantum. The decision of Hon'ble Delhi High Court dated 05.10.2010 in the case of Liquid Investment & Trading Coo (supra) has been relied upon on this point, where Hon'ble Court has observed as under: "Both the CIT(A) as well as the ITAT have set aside the penalty imposed by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961 on the ground that the issue of deduction under section 14A of the Act was a debatable issue. We may also note that against the quantum assessment where under deduction under section 14A of the Act was prescribed to the assessee, the assessee has preferred an appeal in this Court under Section 260A of the Act which has also been admitted and substantial question of law framed. This itself shows that the issue is debatable. For these reasons, we are of the opinion that no question of law arises in the present case." 3.3. Thus, it is the nature of addition/disallowance, which is material to determine whether the issue involved in the addition is a debatable issue and, therefore, the claim of the assessee is a bona fide claim, though not acceptable. Even otherwise legislature has made it clear by inserting Explanation 7 to section 271(1)(c) that any addition in the computation of the total income is made as per the provisions of section 92C. The amounts so added or disallowed shall for the purpose of Clause(c) of section 271(1) would be deemed to represent the income, in respect of which the particulars have been concealed or inaccurate particulars have been furnished unless, the assessee proves to the satisfaction of the taxing authority that the price or charges are paid in international transactions was computed in accordance with

the provisions of section 92C and in the manner prescribed under that section in good faith and with the due diligence. For ready reference, we quote Explanation 7 as under: "Where in the case of an assessee who has entered into an international transaction [or specified domestic transaction] defined in section 92B, any amount is added or disallowed in computing the total income under subsection(4) of section 92C, then, the amount so added or disallowed shall, for the purposes of clause(c) of this subsection, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) for the Commissioner] that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that section, in good, faith and with due diligence." 3.4. The cases of addition/disallowance in computing the total income as per the provisions of section 92C does not fall under the general rule of bona fide explanation as per Explanation 1 to section 271(1)(c). The Explanation 7, itself has prescribed exceptions in the case whether the price has been computed in accordance with the provisions of section 92C and in the manner prescribed there under in good faith and with due diligence. Therefore, if the assessee proves to the satisfaction of the taxing authority that the price charged or paid has been computed as per the provision and manner prescribed under section 92C, in good faith and with due diligence then the addition made under section 94C(4) would not attract the penalty. Once the exclusion from attracting the provisions u/s 271(1)(c) has been provided in the Explanation-7 itself then the first requirement for escaping from the levy of penalty u/ s 271(1)(c), against the addition made as per the provisions of section 92C is that the decision of the assessee in computation of the price in respect of international transactions is as per the provisions and manner prescribed under section 92C and further the said decision is taken in good faith and with due diligence. 3.5. No doubt that in the case of

international transactions regarding purchase of raw material, the most appropriate method for determining the ALP would be Comparable Uncontrolled
Transactions (CUP). However, the selection of the method is further subjected to various factors and one of the factors is the availability, coverage and reliability of data necessary for application of the method. In the facts of the present case entire adjustment has been made due to the lack of reliable data. We find that the decision of the Hon'ble Delhi High Court in Liquid Investments & Trading Co. (supra) clinches the issue in favour of the assessee. In this case it was held by the Hon'ble High Court that where the assessee has preferred an appeal u/s 260A of the Act which has also been admitted a substantial question of law framed; this itself shows that the issue is debatable. In our considered view no penalty u/s 271(1)(c) of the Act could be imposed on a debatable issue. In this view of the order we hold that the case of the assessee is not a fit case for levy of penalty u/ s 271(1)(c) of the Act and accordingly the grounds of the appeal by the assessee stand allowed."

13. Quantum appeal on the question of internalcomparable has been admitted by the High
Court. This is an admitted position.

14. The reasoning given by the Assessing Officerto impose penalty for concealment has been quoted in entirety. It shows complete nonapplication of mind by the said officer on the relevant considerations. The Commissioner of Income Tax (Appeals), however, did go deeper and had rejected the stand of the respondentassessee on bona fides and due diligence. In spite of evidence placed by the respondentassessee on the question of difference in quantum or volume of transactions, etc., it was observed that this evidence was not part of the Transfer Pricing Study.

15. Per contra, the Tribunal after referring to thematerial, had taken an opposite view after examining the factual matrix of the present case.

16. Explanation 7 to Section 271(1)(c) of the Actreads:- "Explanation 7.—Where in the case of an assessee who has entered into an international transaction or specified domestic transaction defined in section 92B, any amount is added or disallowed in computing the total income under sub-section (4) of section 92C, then, the amount so added or disallowed shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that section, in good faith and with due diligence." Thus, addition or disallowance made while computing the income under Section 92C of the Act, is deemed to be concealed income or income of which inaccurate particulars have been furnished. Explanation 7 however states that penalty is not to be imposed where the assessee establishes that the price charged or paid was computed as per provisions of Section 92C and the assessee had acted in good faith and with due diligence. Conduct of the assessee is the distinguishing and relevant factor to be adjudicated in the penalty proceedings. Onus to establish bona fides and exercise of due diligence is on the assessee. Explanation of the assessee on the computation of arms length price may be the same, but appreciation and consideration is from a different point of view, i.e. bona fides and due diligence."

22. Even in the case of ***Principal Commissioner of***

Income Tax-5 v. Kalpana M. Bhatt rendered in **Tax Appeal No.659 of 2017** in an oral order dated 11.09.2017, the Division Bench of this Court held as under:

> *"1. This appeal is filed by the Revenue challenging the judgement of the Income Tax Appellate Tribunal dated 14.12.2016 raising following question for our consideration:*
>
> > *"Whether the Appellate Tribunal was right in law and on facts in deleting the penalty of Rs. 22,44,00/- u/s. 271(1)(c) of the Act levied against the disallowance of exemption u/s. 54 of the Act of Rs. 1,00,00,000/-?"*
>
> *2. The issue pertains to penalty imposed by theAssessing Officer against the respondentassessee. The Tribunal, by the impugned order, confirmed the view of the CIT(Appeals) deleting the penalty. The Tribunal, of course, cited the sole reason of the quantum additions being deleted for confirming the view of the CIT (Appeals). Learned counsel for the Revenue, therefore, would be correct in pointing out that when the Revenue has, challenged the judgment of the Tribunal concerning the quantum additions which appeal is pending before the High Court, the question of penalty should normally be further examined. However, for reasons entirely different from those recorded by the Tribunal it may be possible to confirm the order of the CIT (Appeals) deleting the penalty. This is so because the very issue on which the Assessing Officer had initiated proceedings and ultimately imposed the penalty proceedings for and ultimately imposed penalty was a highly debatable legal issue as can be seen from the Tribunal's following observations in the judgement considering the quantum additions:*

"7. We have considered the rival submissions and perused the material available on record and the paper book containing 1 to 149 pages filed by the assessee. From the facts of the case it is evidence that the grouse of the learned AO for denying exemption u/s. 54 of the Act was due to the following three reasons: (1) the asset which is the subject matter of transfer belonged to the assets of Late Shri Prabhashankar Patni which is separate assessable entity and not the assessee. (2) The asset which is the subject matter of transfer is predominantly is a case of transfer of land and the same cannot be treated as transfer of building with land appurtenant thereto as envisaged u/s. 54 of the Act. (3) The subject matter of assets being transferred was converted to commercial asset and no more remained as house property as defined u/s. 22 of the Act."

3. Thus, the Tribunal outlined three objections ofthe Revenue against granting the exemption to the assessee under section 54 of the Income Tax Act. The Tribunal thereafter proceeded to deal with each one of them threadbare and overruling each of the Revenue's objections. There is no element of any suppression on part of the assessee of material facts. The assessee had neither withheld the source of income nor provide accurate particulars about the income.

4. Under the circumstances, tax appeal isdismissed."

23. For the aforesaid reasons therefore the appeals deserve to be dismissed as no questions of law much less substantial questions of law are involved.

24. In the result, appeals are dismissed.

(BIREN VAISHNAV, J)

(MAUNA M. BHATT,J)

ANKIT SHAH