IT: Assessee received a villa at Dubai as gift and offered an amount of Rs. 14 lakhs as the notional income of the villa for tax in his return of income for the year under consideration, followed by raising of claim during the course of the assessment proceedings that as neither article 6(1) nor protocol to the India-UAE tax treaty expressly recognized the right of the state of residence of the owner to tax the income from immovable property situated in the state of source, therefore, the notional income of the villa owned by him at Dubai could not be subjected to tax in India. This clearly reveals a bonafide claim raised by him in context of the issue under consideration. Therefore, claim raised by the assessee being clearly backed by a bonafide belief on his part, that the notional income of the villa was not liable to be taxed in India, on said count no penalty under section 271(1)(c) could have been validly imposed on the assessee

■■■

[2018] 93 taxmann.com 320 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'E'

Deputy Commissioner of Income-tax

v.

Shah Rukh Khan

RAVISH SOOD, JUDICIAL MEMBER
AND N.K. PRADHAN, ACCOUNTANT MEMBER
IT APPEAL NO. 5767 (MUM.) OF 2014
[ASSESSMENT YEAR 2010-11]
MAY 21, 2018

V. Justin *for the Revenue.* **Hiro Rai** *for the Assessee.*

ORDER

Ravish Sood, Judicial Member - The present appeal filed by the revenue is directed against the order passed by the CIT (A)-40, Mumbai, dated 30.06.2014, which in itself arises from the order passed by the A.O under Sec. 271(1)(c) of the Income tax Act, 1961 (for short 'Act'), dated 27.08.2013 for A.Y 2010-11. The revenue assailing the order of the CIT (A) had raised before us the following grounds of appeal:-

"*i.* *Whether, on the facts and circumstances of the case and in law, ld the CIT (A), was justified in directing the A.O to delete the penalty u/s. 271(1)(c) of the I.T. Act on account of deemed rental value when treatment of the addition in assessment order was confirmed by himself as concealed income.*

ii. *Whether, on the facts and circumstances of the case and in law, ld the CIT (A), was justified in directing the A.O to delete the penalty u/s. 271(1)(c) of the I.T. Act on account of incorrect deemed rental value offered by the assessee without paying heed to the decision of Hon'ble Supreme Court in the case of CIT* v. *Reliance Petroproducts P. Ltd. 2010 322 ITR 158 SC wherein it has been clearly held that everything would depend upon the return filed by the assessee and when the particulars therein are found to be*

inaccurate the liability would arise.

iii. *Whether, on the facts and circumstances of the case and in law, ld the CIT (A), was justified in directing the A.O to delete the penalty u/s. 271(1)(c) of the I.T Act on account of long term capital gain offered by the assessee on structured product assessee whereas the assessee had no objection to the products being treated as debentures and consequently levying tax @ 10% as per proviso to section 112 of the I.T. Act.*

iv. *Whether, on the facts and circumstances of the case and in law, the direction of ld. the CIT (A) to the A.O to delete the penalty u/s. 271(1)(c) of the IT Act on account of long term capital gain offered by the assessee on structured product assessee does not violate the law laid down by the Hon'ble Supreme Court in the case of CIT* v. *Reliance Petroproducts P. Ltd 2010 322 ITR 158 SC wherein it has been clearly held that everything would depend upon the return filed by the assessee and when the particulars therein are found to be inaccurate the liability would arise.*

v. *The appellant craves to leave to add, to amend and/or to alter any of the grounds of appeal, if need be.*

vi. *The appellant, therefore, prays that on the grounds stated above, the order of the Ld. CIT (A)-40, Mumbai, may be set aside and that of the Assessing Office restored.*

2. Briefly stated, the facts of the case are that the assessee who is a film actor by profession and is following cash method of accounting had filed his return of income for A.Y 2010-11 on 30.09.2010, declaring total income of Rs. 46,91,80,367/-. The assessee had in his return of income shown income from house property, profession, capital gains and other sources. The case of the assessee was taken up for scrutiny assessment under Sec. 143(2) of the Act.

3. The assessee who owned a property, viz. 'Signature Villa' (hereinafter referred to as Villa') at Palm Jumeirah, Dubai, estimated the rateable value of the same at Rs. 20,00,000/- and offered the house property income of Rs. 14,00,000/- in his return of income for the year under consideration. During the course of the assessment proceedings, the assessee was called upon to show cause as to why the deemed annual value of the villa owned by him at Dubai may not be brought to tax as per the provisions of Sec. 23(1)(a) of the Act. The assessee in his reply submitted before the A.O that the villa was received by him as a gift. It was the claim of the assessee that though he was given the possession of the villa on 8th June, 2008, but as the same was situated abroad, therefore, it was not regularly occupied by him. Still further, the assessee drawing force from Paragraph 1 of Article 6 of the Double Taxation Avoidance Agreement (for short 'DTAA') between the Government of Republic of India and the Government of United Arab Emirates, tried to impress upon the A.O that as the income derived by a resident of a contracting state from an immovable property (including income from agriculture or forestry) situated in the other contracting state, may be taxed in that other state, therefore, the notional income of the villa owned by the him at Dubai could not be brought to tax in India. It was submitted by the assessee that the word 'may be' used in the tax treaty was to be construed as per the interpretation accorded to the same by different courts. The assessee taking support of various judicial pronouncements submitted that Article 6(1) of the India-UAE tax treaty vested an exclusive taxing right with the state of source and the state of residence was not empowered to levy any tax, even if the state of source did not exercise its power to levy tax. It was further submitted by the assessee that the protocol of the India-UAE tax treaty provided that notwithstanding the provisions of Article 6 and Article 23, the residential property owned by a national of a contracting state and occupied for self-residence in the other contracting state shall be exempt in the other contracting state from the taxes covered by the agreement. The assessee in order to

drive home his contention that the notional income of the villa owned by him at Dubai could not be brought within the sweep of taxes in India, submitted that just as an Indian national residing in UAE, but owning property in India for self-occupation was not to be subjected to tax under the head income from house property, on a similar footing, an Indian resident owning a property in UAE for self-occupation was not to be subjected to tax in UAE. The assessee in support of his aforesaid claim submitted that neither Article 6(1) nor protocol to the tax treaty expressly recognized the right of the state of residence of the owner to tax income from immovable property situated in the state of source. It was thus the claim of the assessee that the income from an immovable property could be taxed only in the state of source and that too, to the exclusion of the property used for self occupation. The assessee in the backdrop of his aforesaid submissions tried to persuade the A.O to return a finding that the notional income from the villa owned by him at UAE could not be brought to tax in India.

4. The A.O after perusing the contentions advanced by the assessee was however not persuaded to subscribe to the same. It was observed by the A.O that the submissions put forth by the assessee were not found to be in conformity with the provisions of Sec. 5(1) of the Act. The A.O held a conviction that Sec. 5(1) of the Act covered the incomes of a person who was a resident of India and the income of the assessee could not be related to any exception carved out under the statute. The A.O further adverting to the contentions raised by the assessee as regards the manner in which the term 'may be' was used in Paragraph 1 of Article 6 of the India-UAE Tax Treaty, observed that the Central Board of Direct Taxes (for short 'CBDT') had clarified the import of the term 'may' vide its Notifications, viz. (i) Notification No. 90/2008 (i) [(S.O 2124)(E)] [(F.No. 500/82/2004-FTD-1)], dated 28.08.2008; and (ii) Notification No. 91/2008 [(S.O. 2123)E] [(F.No. 500/82/2004-FTD-I)], dated 28.08.2008. The A.O relying on the aforesaid notifications concluded that the claim of the assessee that the notional income of the villa owned by him at Dubai was not liable to be brought to tax in India, thus, did not hold the ground any more. On the basis of his aforesaid observations the A.O held that the income of the assessee from the aforesaid property, viz. Signature Villa at Jumeirah, Dubai was liable to be brought to tax as per the provisions of Sec. 23(1)(a) of the Act. The A.O in the backdrop of his aforesaid deliberations adopted the rateable value of the villa at Rs. 88,09,932/- on the basis of a valuation report of Hamptons International, dated 11.08.2011 that was furnished by the assessee before him, and after allowing 30% statutory deduction under Sec. 24(a) worked out the income of the assessee from house property at Rs. 61,66,952/-. The A.O observing that the assessee had already offered income from house property in respect of the aforementioned villa at Rs. 14,00,000/-, thus made an addition of Rs. 47,66,952/-[i.e. Rs. 61,66,952/-(-) Rs. 14,00,000/-] in the hands of the assessee.

5. The A.O further observed that the assessee had worked out the Long term capital gain (for short 'LTCG') on the sale of a structured product, viz. 0% debentures issued by Deutsche Investments India Pvt. Ltd. after claiming indexation and offered the same to tax at the rate of 20%. The A.O held a conviction that the LTCG on sale of structured product was to be taxed as per the proviso to Sec 112 of the Act and no benefit of indexation could be availed by the assessee. Considering that the maturity proceeds of the 0% debentures amounted to Rs. 2,24,60,000/- and the assessee had incurred a cost of Rs. 2,00,00,000/-, the A.O assessed an amount of Rs. 24,60,000/- as the LTCG taxable @10%. The assessee though did not assail the aforesaid addition in appeal, but disputed the action of the A.O in not allowing the deduction of Rs. 4,00,000/- towards cost of acquisition before the CIT (A). The CIT (A) observing that the assessee had already filed an application for rectification with the A.O on the issue under consideration, therefore, directed the A.O to verify the contention of the assessee and dispose off the rectification application expeditiously. Subsequently, the A.O finding favour with the claim of the assessee revised the LTCG on sale of 0% debentures at Rs. 20,60,000/-, vide his order dated 16/08/2013 passed under Sec. 154 of the Act. The A.O *interalia* after making certain other additions/disallowances assessed the income at Rs. 47,62,00,550/-.

6. Aggrieved, the assessee carried the matter in appeal before the CIT (A). Before the CIT (A), the assessee reiterated the submissions put forth before the A.O to drive home his contention that the notional income of the Signature Villa, Dubai was not to be taxed in India. However, the CIT (A) not being persuaded to be in agreement with the contentions advanced before him by the assessee, observed, that as per the Notification Nos. 90 and 91 of 2008, dated 28.08.2008 issued by the CBDT, the annual letting value of the property owned by the assessee, viz. Signature villa, Dubai was liable to be included in the total income of the assessee. The CIT (A) upholding the view taken by the A.O sustained the addition in the hands of the assessee.

7. The assessee being aggrieved with the order of the CIT (A) carried the matter in appeal before the Tribunal. The Tribunal vide its order dated 17.03.2017, observed that in view of the Notifications Nos. 90/2008 and 91/2008, dated 28.08.2008 of the CBDT, the action of the lower authorities deserved to be upheld. It was held by the Tribunal that the income from Signature Villa, Dubai was liable to be taxed in India, inasmuch as the same was includible in his return of income and whatever taxes that may have been levied in the other contracting state, credit for the same would be allowed to the assessee, as per law. The Tribunal on the basis of its aforesaid observations dismissed the appeal of the assessee.

8. The A.O after the culmination of the assessment proceedings, vide his 'Show cause' notice (for short 'SCN') issued under Sec. 274 r.w. Sec. 271 of the Act, dated 28.02.2013, called upon the assessee to explain as to why penalty may not be imposed on him under Sec. 271(1)(c) of the Act. The assessee in support of his claim that no penalty under Sec. 271(1)(c) was liable to be imposed in his hands, submitted as under:-

(A) As regards house property income:

(*i*) It was submitted by the assessee that the Signature Villa owned by him at Palm Jumeirah, Dubai was gifted to him by Nakheel P.J.S.C and the possession of the same was given to him on 8th June 2008. The assessee stated in his reply that he had on his own estimated the rateable value of villa at Rs. 20,00,000/- and offered an amount of Rs. 14,00,000/- towards notional income under the head house property. However, in the course of the assessment proceedings, based on the provisions of Article 6 of the India-UAE tax treaty and the protocol thereto, the assessing officer was requested not to tax the notional income of the villa owned by him at Dubai. The assessing officer however did not find favour with the claim of the assessee and after estimating the annual letting value of the property at Rs. 88,09,932/-, worked out the income of the assessee chargeable under the head 'house property' at Rs. 61,66,952/-. As the assessee had offered income from the house property at Rs. 14,00,000/-, therefore, the A.O made an addition of Rs. 47,66,952/- under the head income from house property for the year under consideration.

(*ii*) The assessee further submitted in his reply that as per the provisions of the India-UAE tax treaty and specially sub-clause (ii) of the protocol, which clearly stated that notwithstanding the provisions of Article 6 and Article 23, the residential property owned by a national of a contracting state and occupied for self-residence in the other contracting state shall be exempt in the other contracting state from the taxes covered by the tax treaty, therefore, the notional income of the villa owned by him at Dubai could not be taxed in India. It was further stated by the assessee that as per Sec. 90(2) of the Income tax Act, the provisions of the DTAA would prevail over the provisions

of the Act and further, provisions of the protocol shall prevail over the provisions of Article 6 of the DTAA, as per the language used therein. It was the claim of the assessee that the notifications issued by the CBDT which were relied upon by the A.O, could not be allowed to override the provisions of the relevant DTAA and protocol. The assessee further taking support of certain judicial pronouncements claimed that Article 6(1) vested an exclusive taxing right with the state of source and the state of residence was not empowered to levy any tax, even if the state of source did not exercise its power to levy tax. It was further submitted by the assessee that the CIT (A) had confirmed the additions on the ground that except where there was an express provision for not taxing any income in either of the two contracting states, the income cannot be treated as exempt. It was contended by the assessee that the CIT (A) while concluding as hereinabove, had ignored the language of the protocol which clearly stated that the income from the residential property owned by a national of a contracting state and occupied for self-residence in the other contracting state shall be exempt in such other contracting state from being taxed.

(*iii*) The assessee in order to establish that there was at no stage any attempt or intent on his part to conceal any facts, submitted that he had on his own brought the fact of having received the Signature Villa at Dubai as a gift to the notice of the Income tax Department. It was further stated by the assessee that he had initially on his own offered the income of Rs. 14,00,000/- as the notional income of the property under consideration. However, based on the interpretation of the DTAA between India-UAE and considering the (i). Notification No. 90/2008 (i) [(S.O 2124)(E)] [(F.No. 500/82/2004-FTD-1)], dated 28.08.2008; and (ii) Notification No. 91/2008 [(S.O. 2123)E] [(F.No. 500/82/2004-FTD-I)], dated 28.08.2008, the assessee, on the basis of an advice given to him by his counsel, had arrived at a *bonafide* view that on the basis of the DTAA and the protocol between India-UAE, no notional income in respect of the villa owned by him at UAE was liable to be brought to tax in his hands in India. It was stated by the assessee that his *bonafides* could be gathered from the fact that even in the subsequent assessment years, the notional income of the villa was not offered for tax by him. It was claimed by assessee that as the Notifications Nos. 90 and 91, dated 28.08.2008 were subject to interpretation by various judicial authorities, therefore, they could neither be compared with the words of enactments legislated by the Parliament, nor could override the Act, the DTAA or a protocol therein. It was thus the claim of the assessee that as the initial offering of the estimated notional income of the villa at Rs. 14,00,000/- and subsequent withdrawal of the same from the scope of the income taxable in India was based on an interpretation of the provisions of the Act and the DTAA between India-UAE, which was further backed by the judicial interpretation of the aforementioned notifications, therefore, the same could neither be construed as concealment of particulars of income or furnishing of inaccurate particulars of income.

(B) Long Term Capital Gain on sale of non-convertible debentures:

It was stated by the assessee that the Long term capital gain (for short 'LTCG') on the sale of structured products, viz. 0% debentures issued by Deutsche Investments India Pvt. Ltd. was worked out by him after claiming indexation and was offered to tax at the rate of 20%. The A.O held that the LTCG on sale

of the aforesaid non-convertible debentures, being a structured product was to be taxed as per the proviso to Sec 112 of the Act and benefit of indexation could not be claimed while working out the LTCG. Considering that the maturity proceeds of the 0% debentures amounted to Rs. 2,24,60,000/- and that the assessee had incurred a cost of Rs. 2,00,00,000/-, the A.O assessed an amount of Rs. 24,60,000/- as long term capital gain taxable @10%. The assessee though did not assail the aforesaid addition in appeal, but disputed the action of the A.O in not allowing the deduction of cost of Rs. 4,00,000/-, which was allowed by the A.O vide his order passed under Sec. 154, dated 16/08/2013 and the LTCG was revised at Rs. 20,60,000/-. The assessee in the backdrop of the aforesaid facts submitted that now when he had furnished the complete particulars in respect of the transaction under consideration and offered the gain for tax after adjusting the indexed cost, therefore, merely for the reason that the procedure of computing the LTCG by him was dislodged by the A.O, the same on the said count would not partake the colour and character as that of furnishing of inaccurate particulars of income or concealing of income by the assessee. It was stated by the assessee that as the differential tax effect of the transactions which was taxed as per the interpretation of the assessing officer was very small in comparison to the total income of the assessee, therefore, the assessee had not carried the matter in further appeal. The assessee in the backdrop of his aforesaid submissions claimed that no penalty under Sec. 271(1)(c) was liable to be imposed in his hands on account of differential treatment given to the capital gain by the assessing officer, as against that offered by the assessee. The assessee submitted before the A.O that as his claim in respect of both of the aforesaid issues were backed by a *bonafide* belief and the disagreement of the assessing officer had emerged on account of interpretation of the provisions of the Act, the relevant DTAA and the protocol, therefore, no penalty under Sec. 271(1)(c) in respect of either of the two additions was called for in his hands.

9. The A.O after deliberating on the contentions advanced by the assessee was however not persuaded to be in agreement with the same. The A.O after considering the various judicial pronouncements rendered on the issue under consideration, as well as the relevant amendments made in the Income tax Act, 1961 to curb the concealment of income by the assessee, concluded that as the assessee in the case before him had purposively furnished inaccurate particulars and concealed his income, therefore, he was liable for imposition of penalty for furnishing inaccurate particulars of his income within the meaning of Sec. 271(1)(c) of the Act. The A.O on the basis of his aforesaid deliberations imposed a penalty of Rs. 16,36,085/- on the assessee for furnishing of inaccurate particulars of income of Rs. 68,26,952/-.

10. Aggrieved, the assessee carried the matter in appeal before the CIT (A). The CIT (A) after perusing the contentions advanced by the assessee in the backdrop of the orders of the A.O observed, that the villa owned by the assessee at Dubai had not been rented out by the assessee, but was apparently being used by him for his personal purpose. It was further observed by the CIT (A) that the assessee had initially on his own estimated the lettable value of the property at Rs. 20,00,000/- and after claiming 30% deduction under Sec. 24 had returned income of Rs. 14,00,000/- in respect of the same under the head "house property". The CIT (A) held a conviction that the assessee who though had initially on his own, offered an amount of Rs. 14,00,000/- as the notional income of the villa for tax in his return of income, however, thereafter being of the view that as per the provisions of DTAA between India-UAE the income in respect of the villa owned by him at Dubai could only be taxed in the other state, namely, in UAE, had thus sought withdrawal of the notional income of the villa from the scope of his income taxable in India. Still further, the CIT (A) also observed that as per the protocol to the DTAA the self occupied property was also not taxable in UAE. The CIT (A) observed that it was under the aforesaid circumstances that the assessee in the course of the assessment proceedings was persuaded to hold a conviction that no notional income of the villa was liable to be taxed in his hands under Sec. 23(a) of the Act. The CIT (A) after deliberating on the aforesaid facts, held a conviction that the assessee had at no point of time hidden any facts about the ownership of the property or the income therefrom and had rather voluntarily offered the annual lettable value of Rs. 20,00,000/- in his return of income. The CIT

(A) observed that it was a case where the property had remained self occupied by the assessee, and was not a case that he had received an amount in excess of Rs. 20,00,000/- by renting the property under consideration. The CIT (A) was also not impressed by the reliance placed by the A.O on the valuation report for estimating the annual lettable value of the villa at a higher figure of Rs. 88,09,932/-, as the same was not only meant for other purposes, but also had been assailed by the assessee in appeal before the higher appellate authority. The CIT (A) observed that as per the provisions of DTAA between India and UAE the income from the property was liable to be taxed in UAE, therefore, if that be the case, at least on the basis of such plausible view itself the assessee could not be held liable for concealment of income or furnishing of inaccurate particulars of income. It was further observed by the CIT (A) that the annual lettable value of Rs. 20,00,000/- shown by the assessee in his return of income under Sec. 23(a) could not be termed as unreasonable or unfair at the time of filing of the return of income, for the reason that the report which formed the basis of addition made by the A.O was received much later and subsequent to the filing of the return of income by the assessee, and that too in respect of wealth tax purposes. The CIT (A) in the backdrop of his aforesaid observations was of the considered view that because of the provisions of the DTAA, as two possible opinions about the taxability of the income from the property under consideration did emerge, therefore, the assessee could not be held liable for penalty under Sec. 271(1)(c) in respect of deemed income from the property under consideration, for the reason that the same had been brought to tax under Sec. 23(a) of the Act.

11. That as regards the addition made by the A.O on account of the long term capital gain on sale of structured product, viz. 0% debentures of Deutsche Investments Pvt. Ltd, it was observed by the CIT (A) that there was no dispute either as regards the quantum of the sale consideration or the cost of acquisition, but rather, the only issue was whether the assessee was eligible for benefit of indexation, or not. The CIT (A) noted that as the A.O was of the view that the assessee was not eligible for benefit of indexation, therefore, for the said reason the computation of capital gain had increased by an amount of Rs. 20,60,000/- which was added in the hands of the assessee. The CIT (A) taking support of the judgment of the Hon'ble Supreme Court in the case of *Commissioner of Income-tax* v. *Reliance Petro Product P. Ltd.* (2010) 322 ITR 158 (SC), wherein it was observed by the Hon'ble Apex court that making of an incorrect claim in law would not tantamount to furnishing of inaccurate particulars of income, concluded that the increase in capital gain in the case of the assessee was not something which would come within the sweep of concealment of income or furnishing of inaccurate particulars of income. The CIT (A) taking support of certain judicial pronouncements, observed that where a deduction claimed by an assessee was legitimate and *bonafide* and the entire facts stood disclosed, then merely because of a different view taken by the A.O on the basis of the disclosed facts would not lead to imposition of penalty under Sec.271(1)(c). The CIT (A) on the basis of his aforesaid deliberations concluded that the assessee could not be held to have concealed the particulars or furnished inaccurate particulars of his income in respect of the long term capital gain on sale of structured product, viz. O% debentures of Deutsche Investments Pvt. Ltd., and thus deleted the penalty imposed by the A.O under Sec. 271(1)(c) in respect of addition of Rs. 20,60,000/- made towards long term capital gain.

12. The revenue being aggrieved with the order of the CIT (A) had carried the matter in appeal before us. The ld. Departmental Representative (for short 'D.R') at the very outset of the hearing of the appeal took us through the facts of the case. It was submitted by the ld. D.R that as the A.O while framing the assessment had adopted the annual lettable value of the Signature villa owned by the assessee at Dubai on the basis of the valuation report of Hamptons International, dated 11th August 2011, which was furnished by the assessee, therefore, the determination of the notional income of the villa was not based on any estimation, but rather, on a concrete basis. The ld. D.R in order to drive home his contention took us through Page 3 of the assessment order and submitted that the assessee himself had accepted the annual lettable value (for short 'ALV') of the villa as per the aforesaid valuation report at Rs. 88,09,932/-, which after the claim of deduction under Sec.24(a) was computed at Rs. 61,66,952/- as his

income from house property. The ld. D.R submitted that as the addition made in respect of the variation of the annual lettable value of the property was on the basis of the figure provided by the assessee on the basis of a valuation report procured by him, therefore, it could safely be concluded that neither the issue nor the quantification of the ALV was a debatable one. The ld. D.R further adverting to the addition made on account of long term capital gain, submitted that as the assessee had wrongly computed the capital gain on the sale of 0% debentures after claiming indexation on the same, therefore, the A.O had rightly imposed penalty under Sec. 271(1)(c) for furnishing of inaccurate particulars of income in respect of the addition of Rs. 20,60,000/- made on account of long term capital gain on sale of the aforementioned structured product. It was averred by the ld. D.R that the CIT (A) without appreciating the facts of the case in the right perspective had wrongly deleted the penalty under Sec. 271(1)(c) which was imposed by the A.O on the basis of a well reasoned order. The ld. D.R in order to fortify his aforesaid claim relied on the judgment of the Hon'ble High Court of Delhi in the case of CIT Vs. Zoom Communications Ltd (2010) 327 ITR 510 (Del). The ld. D.R taking support of the aforesaid judicial pronouncement submitted that as held by the Hon'ble High Court, if the assessee makes a claim which is not only incorrect in law, but also wholly without any basis and the explanation furnished by him for making such a claim is not found to be *bonafide,* then the *Explanation 1* to Sec. 271(1)(c) would come into play and work to the disadvantage of the assessee. It was submitted by the ld. D.R that as in the present case the assessee had in respect of both the issues under consideration raised claims in his return of income, which were not only found to be without any basis, but rather, even the explanation furnished by him before the A.O for making the respective claims was not found to be *bonafide,* therefore, the A.O had rightly imposed penalty under Sec. 271(1)(c), which however had wrongly been vacated by the CIT (A).

13. Per contra, the ld. Authorized Representative (for short 'A.R') for the assessee Shri Hiro Rai, at the very outset submitted that the A.O had wrongly assumed jurisdiction and imposed penalty under Sec. 271(1)(c) in the hands of the assessee. The ld. A.R taking us through the copy of the 'Show cause' notice (for short 'SCN'), dated 28.02.2013 issued by the A.O (Page 52 of 'APB') submitted that a bare perusal of the same revealed that the A.O by failing to strike off the irrelevant default mentioned therein, had thus failed to put the assessee to notice as regards the default for which he was called upon to explain as to why penalty under Sec.271(1)(c) may not be imposed on him. On a query by the bench as regards the basis for raising of the said issue, it was submitted by the ld. A.R that though the assessee had neither filed a cross-appeal or a cross-objection in the present case, however, he was well within his right in raising the objection which did go to the very root of assumption of jurisdiction by the A.O for imposing penalty under Sec. 271(1)(c). The ld. D.R vehemently objected to the objection sought to be raised by the ld. A.R, for the reason that the revenue had not been put to notice as regards raising of any such objection by the assessee. It was the contention of the ld. D.R that neither of the party can be allowed to raise an issue, without putting the other party to notice. The ld. A.R rebutting the aforesaid objection raised by the revenue submitted that there was no statutory obligation cast upon the assessee to raise an objection in writing, and he was well within his right to raise the same during the course of hearing of the appeal. The ld. A.R in support of his aforesaid contention relied on the following judicial pronouncements: -

(*i*) *Hukumchand Mills Ltd.* v. *Commissioner of Income Tax, Central, Bombay* (1967) 63 ITR 232 (S.C.)

(*ii*) *Commissioner of Income Tax, Mumbai* v. *Mahalaxmi Textiles Mills Ltd.* (1967) 66 ITR 710 (SC).

(*iii*) *Commissioner of Income Tax, Bombay City-1,* v. *Gilbert & Barkar Manufacturing Company, USA* (1978) 111 ITR 529 (Bom.).

(*iv*) *D.M. Neterwalla* v. *Commissioner of Income-tax* (1980) 122 ITR 880 (Bom.).

The ld. A.R further to support his contention that because of the failure on the part of the A.O to strike off the irrelevant default in the body of the 'SCN', the assessee had remained divested of any opportunity of putting forth its case before the A.O that no penalty under the aforesaid statutory provision was liable to be imposed in his hands, relied upon the following judicial pronouncements:-

(*i*) *CIT* v. *Manjunatha Cotton & Ginning Factory* (2013) 359 ITR 565 (Kar.)

(*ii*) *Dilip N. Shroff* v. *JCIT* (2007) 291 ITR 519 (SC)

(*iii*) *Commissioner of Income-tax* v. *Samson Pernchery* (2017) 98 CCH 0039 (Bom.).

(*iv*) *CIT* v. *SSA's Emerald Meadows* 73 Taxman.com 241 (Kar.)

(*v*) *SSA's Emerald Meadows* v. *CIT* 242 Taxman 180 (SC)

(*vi*) *S. Chandrashekar* v. *ACIT* (2017) 293 CTR 409 (Kar.)

(*vii*) *Meherjee Cassinath Holdings Private Ltd.* v. *ACIT* (ITA No. 2555/Mum/2012; dated 28.04.2017).

(*viii*) *Jehangir HC Jehangir* v. *ACIT* 12(3), Mumbai (ITA No. 1261/Mum/2011; dated. 17.05.2017).

(*ix*) *Dr. Sarita Milind Davare* v. *ACIT* CC-40, Mumbai (ITA No. 2187/Mum/2014; dated 21.12.2016).

(*x*) *M/s. Wadhwa Estate & Developers India Pvt. Ltd.* v. *ACIT, Circle-37, Mumbai.*(ITA No. 2158/Mum/2016; dated 24.02.2017).

(*xi*) *M/s. Prince Consultancy P. Ltd.* v. *DCIT-13(1)(2), Mumbai* (ITA No. 6068/Mum/2016; dated 13.01.2017).

(*xii*) *M/s. Universal Music India Pvt. Ltd.* v. *ACIT, Circle 7(3), Mumbai* (ITA No. 6752/um/2014; dated 19.08.2016).

(*xiii*) *Sanghavi Savla Commodity Brokers P. Ltd.* v. *ACIT, Circle 46, Mumbai* (ITA No. 1746/Mum/2011; dated 22.12.2015).

(*xiv*) *Shri Hafeez S. Contractor* v. *ACIT, Central Circle-44, Mumbai* (ITA No. 6222 & 6223/Mum/2013; dated 02.09.2015).

(*xv*) *M/s. Parinee Developers Pvt Ltd.* v. *ACIT, Central Circle 13, Mumbai* (ITA No. 6772/Mum/2013; dated 11.09.2015).

(*xvi*) *Mrs. Indrani Sunil Pillai* v. *Asst. CIT, Circle 2(1), Mumbai* (ITA No. 1339/Mum/2016; dated 19.01.2018).

Per contra, the ld. D.R submitted that the contentions advanced by the ld. A.R as regards the validity of the penalty proceedings not being maintainable, thus may not be admitted. The ld. D.R submitted that though the assessee was at a liberty to raise an objection, but however, the same had to be strictly confined as per Rule 27 of the Appellate Tribunal Rules, 1963. It was submitted by the ld. D.R that raising of an objection for the very first time by the ld. A.R during the course of the hearing of the appeal, and that too orally, without putting the revenue to notice in advance, could not be admitted. The ld. D.R to support his aforesaid contentions relied on the following judicial pronouncements:

(*i*) *CIT, Central-II* v. *Divine Infracon Pvt. Ltd.* (ITA No. 771/Mum/2014, dated 13.08.2018, (High Court of Delhi)

(*ii*) *CIT-4* v. *Jamunadas Virji Shares and Stock Brokers Pvt. Ltd.* (2013) 258 CTR 458 (Bom.)

(*iii*) *DCIT* v. *Sandip M. Patel* (2012) 137 ITD 104 (Ahmedabad)

(*iv*) *CIT* v. *Jindal Ployster Ltd.* (2017) 397 ITR 282 (All.)

(*v*) *Addl. CIT* v. *Gurjargravures (P.) Ltd.* (1978) 111 ITR 1 (SC)

(*vi*) *CIT* v. *Edwert Keventer (Successors) P. Ltd.* (1980) 123 ITR 200 (Delhi)

(*vii*) *Ultratech Cement Ltd.* v. *Addl. CIT, Range-2(2)* (2017) 298 CTR 437 (Bom.)

(*viii*) *Self Knitting Works* v. *CIT* (2014) 227 taxman 253 (P & H)

The ld. D.R relying on the aforesaid judicial pronouncements, submitted that as per the settled position of law, the objection raised by the ld. A.R during the course of hearing of the appeal as regards the validity of the jurisdiction assumed by the A.O for imposing penalty 271(1)(c) was not admissible and thus no cognizance of the same may be drawn. Alternatively, and without prejudice to the objection raised to the admission of the challenge thrown by the ld. A.R to the validity of the assumption of jurisdiction by the A.O for imposing penalty under Sec. 271(1)(c), it was averred by the ld. D.R that even otherwise the failure on the part of the A.O to strike off the irrelevant default did not in any way affected the validity of the penalty imposed by the A.O under Sec. 271(1)(c). The Ld. D.R. in support of his said contention relied on the following judicial pronouncements:-

(*i*) *M/s. Maharaj Garage & Company* v. *The Commissioner of Income Tax, Nagpur* (Income tax reference No. 21 of 2008, dated 22.08.2017.

(*ii*) *Commissioner of Income tax* v. *Smt. Kaushalya & Others* (1995) 216 ITR 660 (Bom.).

(*iii*) *Earthmoving Equipment Service Corporation* v. *DCIT* 22(2), Mumbai (ITA No.6617/Mum/2014, dated 02.05.2017).

(*iv*) *Dhaval K. Jain* v. *ITO.* Ward 16(3)(1), Mumbai (ITA No. 996/Mum/2014, dated 30.09.2016).

It was thus submitted by the ld. D.R, that as the challenge thrown by the ld. A.R to the validity of the assessment proceedings without putting the revenue to notice as regards the same, seriously jeopardised the statutory right of the revenue to defend the same in the absence of any advance notice, therefore, the same may not be admitted. It was however submitted by the ld. D.R that in the backdrop of the aforesaid judicial pronouncements, even otherwise, merely on the basis of a technical default, the penalty imposed by the A.O after necessary deliberations on the facts of the case could not be struck down.

14. The ld. A.R further adverting to the merits of the case relied on the order passed by the CIT (A) and submitted that the latter after duly appreciating the facts of the case in the right perspective had rightly deleted the penalty imposed by the A.O. under Sec.271(1)(c) of the Act. The ld. A.R took us through the relevant observations of the CIT (A) at Page 7 - Para 8.3 - 8.4 of his order, in context of the penalty imposed in respect of addition of Rs. 47,66,952/- made by the A.O towards the deemed annual value of the Signature villa owned by the assessee at Dubai. It was submitted by the ld. A.R that a perusal of Article 6 of the India-UAE tax treaty dealing with the taxability of the income of a person from an immovable property situated in the other contracting state read alongwith the protocol on the one hand, and the Notifications No. 90 and 91, dated 28.08.2008 issued by the CBDT on the other hand, revealed that the issue as regards the taxability of the notional income of the villa owned by the assessee at Dubai, was not free from doubts and debates. The ld. A.R taking support of his aforesaid contention submitted that as the assessee had relied on one set of possible view as regards the taxability of the notional income of the villa owned by him at Dubai, therefore, no penalty under Sec. 271(1)(c) was liable to be imposed in his hands. The ld. A.R submitted that the Notifications No. 90 and 91, dated 28.08.2008 issued by the CBDT and relied upon by the A.O for taxing the notional income of the villa clearly militated against Article 6(1) of the India-UAE tax treaty and the protocol. The ld. A.R further submitted that as the India-UAE tax treaty had been drafted in order to regulate interest of two countries, therefore,

a unilateral attempt on the part of one country to distort the contents of the treaty would not be permissible. It was thus the claim of the ld. A.R that Article 6(1) of the India-UAE tax treaty and the protocol could not be superseded by any such unilateral amendment made to the treaty. It was further averred by the ld. A.R that the issue as to whether the Notifications nos. 90 and 91/2008, dated 28.08.2008 would have a superseding effect over the DTAA entered into by the Government of India with the Government of any other country, was so much debatable that the same had travelled up to the Tribunal in the assessee's own case for the year under consideration. The ld. A.R in order to drive home his aforesaid contention, took us through the order passed by the Tribunal in the assesses own case for the year under consideration at Page 8 - Para 18.4 of APB. It was further submitted by the ld. A.R that a litigation as regards the scope and gamut of the term "may be taxed" used in the Notifications Nos. 90 and 91/2008, dated 28.08.2008 had even came up before the Tribunal in the case of *Essar Oil Ltd.* v. *Addl. CIT* (2013) 28 ITR (Trib.) 609 (Mum.). It was further submitted by the ld. A.R that the aforementioned case of *Essar Oil Ltd.* (*supra*) had travelled up to the Hon'ble High Court of Bombay, which after deliberating on the issue as to whether the Notification No. 91, dated 28.08.2008 was beyond the scope of Sec. 90(3) of the Act, had admitted the appeal (Page 23-24 of APB). The ld. A.R averred that now when the issue under consideration had been admitted by the Hon'ble High Court of Bombay, therefore, at least the fact that the issue involved is highly debatable stands proved to the hilt. It was further submitted by the ld. A.R that a coordinate bench of the Tribunal, viz. ITAT "L" bench, Mumbai, in the case of *Bank of India* v. *DCIT, Mumbai* (ITA No. 2833/Mum/2015, dated 8.11.2017) while dealing with a similar issue emerging in context of India-Kenya DTAA, had observed that any notification or circular cannot alter the nature of income that had been specifically included in the DTAA's. It was submitted by the ld. A.R that the Tribunal had further observed that even an amendment in a section of the Act would not affect the provisions of the tax treaties, unless the same are ratified by both the signatories of the treaty. It was averred by the ld. A.R that the Tribunal in the aforementioned case, on the basis of its aforesaid observations had concluded that the house property income of the assessee before them was liable to be brought to tax as per Article 6 of the DTAA between India and Kenya and was not liable to be taxed in India. The ld. A.R taking us through the copy of the order of the Tribunal in the aforesaid case (Page 24 of APB), submitted that as there were conflicting views of two benches of the Tribunal on the issue under consideration, therefore, it could safely be concluded that the issue was not free from doubts and debate. The ld. A.R taking support of the aforesaid facts, submitted that in case of a debatable issue no penalty under Sec. 271(1)(c) can be imposed in the hands of an assessee. The ld. A.R in order to drive home his aforesaid contention placed reliance on the following case laws:-

(*i*) *CIT* v. *Reliance Petroproducts P. Ltd.* (2010) 322 ITR 158 (SC)
(*ii*) *CIT* v. *Nayan Builders & Developers* (2015) 231 Taxman 665 (Bom.)
(*iii*) *CIT* v. *S.M. Construction* (2015) 233 Taxman 263 (Bom.)
(*iv*) *CIT* v. *Petals Engineers P. Ltd.* (2014) 264 CTR 577 (Bom.)
(*v*) *CIT* v. *Nalin P. Shah (HUF)* (2013) 85 CCH 132 (Bom.)
(*vi*) *CIT* v. *Laresen & Toubro Ltd.* (2014) 366 ITR 502 (Bom.)
(*vii*) *DIT* v. *Administrator of the Estate of Late Mr. E.F. Dinshaw* (2013) 218 Taxman 125 (Bom.) (Mag)
(*viii*) *Sesa Resources Ltd.* v. *ACIT* (2013) 219 Taxman 92 (Bom.) (Mag.)
(*ix*) *CIT* v. *Mansukh Dying & Printing Mills* (2013) 219 Taxman 91 (Bom.)(Mag.).

15. The ld. A.R further adverting to the penalty imposed by the A.O in respect of the addition made in the hands of the assessee on account of reworking of long term capital gain on sale of structured product, viz. 0% debentures of Deutsche Investments India Pvt. Ltd, submitted that the assessee by way

of an inadvertent *bonafide* mistake had wrongly computed the long term capital gain after claiming indexation of the cost of acquisition of the 0% listed debentures, and offered the same for tax @ 20%. It was submitted by the ld. A.R that the moment the assessee realised his mistake, he accepted the same before the A.O and requested that the same may be brought to tax as per the provisions of law. The ld. A.R took us through the submissions made by the assessee before the A.O, as were reproduced by the CIT (A) in the body of his order. It was thus submitted by the ld. A.R that the aforesaid mistake on the part of the assessee to compute the capital gains on the sale of the 0% debentures was clearly in the nature of a *bonafide* mistake. The ld. A.R further submitted that as the assessee had made full and true disclosure of all the details in respect of computation of income under the head capital gain pertaining to the sale of the aforesaid structured product, viz. 0% debentures of Deutcshe Investments India Pvt. Ltd in its return of income, therefore, no penalty on account of such *bonafide* mistake on the part of the assessee was liable to be imposed. The ld. A.R in order to support his contention that no penalty under Sec. 271(1)(c) could be imposed on account of a *bonafide* mistake on the part of an assessee, relied on the following judicial pronouncement:-

(*i*) *Price Waterhouse Coopers P. Ltd.* v. *CIT* (2012) 348 ITR 306 (SC)

(*ii*) *CIT* v. *Bennett Coleman & Co. Ltd.* (2013) 259 CTR 383 (Bom.)

(*iii*) *CIT* v. *Somany Evergree Knits Ltd.* (2013) 352 ITR 592 (Bom.).

(*iv*) *CIT* v. *Rose Lock Factory* (1993) 204 ITR 753 (All.)

The ld. A.R taking support of the aforesaid judicial pronouncements, submitted that no penalty under Sec. 271(1)(c) in respect of the addition made in the hands of the assessee in respect of long term capital gain on sale of the structured product, viz. 0% debentures of Deutsche Investments Pvt. Ltd. was liable to be imposed. It was submitted by the ld. A.R that the CIT (A) after duly appreciating the facts of the case in the right perspective had correctly deleted the penalty imposed by the A.O under Sec. 271(1)(c) in respect of the issue under consideration.

16. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We shall first advert to the maintainability of the objection as regards the validity of assumption of jurisdiction by the A.O for imposing penalty under Sec. 271(1)(c) in the hands of the assessee, as was orally raised by the ld. A.R during the course of the hearing of the appeal before us. We may herein observe that it remains as a matter of a conceded fact that the objection as regards the validity of the assumption of jurisdiction by the A.O was raised by the ld. A.R not in writing, but for the very first time, and that too orally in the course of hearing of the appeal. The ld. D.R as observed by us hereinabove, had vehemently objected to such raising of objection, for the reason that the revenue not having been put to notice in advance as regards raising of such objection and having been taken by surprise had no occasion to meet out the same, both on the aspect of its maintainability and merits. We find that the ld. A.R on being confronted with the objection raised by the revenue that in the absence of any challenge thrown by the assessee in writing as regards the validity of assumption of jurisdiction by the A.O for imposing penalty under Sec. 271(1)(c) and without putting the revenue to notice well in advance as regards raising of such objection, the said objection orally raised during the course of hearing of the appeal would not be maintainable, rebutted the said contention so raised by the revenue by taking support of various judicial pronouncements as had been referred by us hereinabove. It was further averred by the ld. A.R that now when the ld D.R by taking support of certain judicial pronouncements had rebutted the claim of the assessee on merits, therefore, it could safely be concluded that no further requirement of raising of such an objection in writing was required on the part of the assessee respondent. We may herein observe that the ld. A.R while submitting as hereinabove, had lost sight of the fact that the ld. D.R had at the very outset assailed the objection raised by the ld A.R. on the ground that there was neither anything available on record which would reveal raising of such objection by the assessee, nor the department had been put to notice

in advance as regards raising of the objection challenging the assumption of jurisdiction by the A.O as regards imposing of penalty under Sec. 271(1)(c). Rather, the ld. D.R. without foregoing his aforesaid claim had relied upon the aforesaid judicial pronouncements, on merits.

17. We shall now advert to the judicial pronouncements which had been relied upon by the ld. A.R before us, to buttress his contention that it was not obligatory for the assessee to raise the objection in writing and the same without putting the revenue to notice in advance, could be orally raised in the course of the hearing of the appeal. The ld. A.R had relied on the following judicial pronouncements:

(*i*). *Hukumchand Mills Ltd.* v. *CIT* (1966) 62 ITR 232 (SC) :

We find that the Hon'ble Apex Court had in the aforesaid judgment deliberated on the powers of the Tribunal as contemplated in Sec.33(4) of the Income Tax, 1922 r.w. Rule 12 and Rule 27 of the Appellate Tribunal Rules, 1946. The Hon'ble Apex Court had observed that Rule 12 and Rule 27 which were merely procedural in character, did not in any way circumscribe or control the powers of the Tribunal under Sec. 33(4) of the Act. It was further observed by the Hon'ble Apex Court that the Tribunal had jurisdiction to permit a question to be raised for the first time in appeal. However, the Hon'ble Supreme Court while deliberating on the word "thereon" observed that the same restricted the jurisdiction of the Tribunal to the subject matter of the appeal.

(*ii*). *CIT, Madras* v. *Mahalaxmi Textiles Mills Ltd.* (1967) 66 ITR 710 (SC) :

The Hon'ble Apex Court had observed that as per Sec. 33(4) of the Income-tax Act, 1922 the appellate Tribunal is competent to pass such order on appeal "as it thinks fit". It was further observed that there is nothing in the Income tax Act which restricts the Tribunal to the determination of questions raised before the departmental authorities. It was observed by Hon'ble Apex Court that a question, whether on law or on facts, which relate to the assessment of the assessee may be raised before the Tribunal. The Hon'ble Apex Court further held that if for reasons recorded by the departmental authorities in respect of a contention raised by the assessee, grant of relief to him on another ground is justified, it would be open to the departmental authorities and the Tribunal, and indeed they would be under a duty to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him.

(*iii*). *CIT, Bombay City-1* v. *Gilbert and Barker Manufacturing Company, USA* (1978) 111 ITR 529 (Bom.):

The Hon'ble High Court in the aforementioned case had observed that the Appellate Tribunal was vested with a discretion to allow any party to an appeal, may be the appellant or the respondent to raise a new point or new contention provided two conditions are satisfied, viz. (i) no new facts are required to be brought on record for disposing of such new point; and (ii) an opportunity is given to the other side to meet the point.

18. We shall now advert to the judicial pronouncements which had been relied upon by the ld. D.R, in support of his contention that the objection raised by the ld. A.R for the very first time during the course of hearing of the appeal, and that too orally and without putting the revenue to notice in advance, would not be maintainable:

(*i*) *CIT, Central-1* v. *Divine Infracom Pvt. Ltd.* (2016) 131 DTR 395 (Delhi):

The Hon'ble High Court of Delhi relying on its earlier judgment passed in the case of CIT Vs. Edwert Keventer (Successors) Pvt. Ltd. (1980) 123 ITR 200 (Del), had observed that the party which had not filed an appeal cannot be permitted to raise a ground which will work adversely to the interest of the appellant. It was observed by the High Court that a respondent before the Tribunal can by taking recourse to Rule 27 though support the decision assailed against not only on the grounds decided in his favour, but also on grounds decided against it, but however, the same cannot be extended to permit the respondent to expand the scope of an appeal and assail the decision on issues, which are not the subject matter of the appeal. It was observed by the Hon'ble High Court that it would not be open to a respondent to travel outside the scope of the subject matter of the appeal under the guise of invoking Rule 27.

(*ii*) *CIT-4* v. *Jamunadas Virji Shares & Stock Brokers (P.) Ltd.* (2013) 258 ITR 458 (Bom.):

The facts involved in the case before the Hon'ble High Court were that the Commissioner of Income Tax (Appeals) had allowed the appeal of the assessee in part and deleted the disallowance made by the Assessing Officer to the extent of Rs. 13.73 lacs. However, the Commissioner of Income Tax (Appeals) confirmed the disallowance in regard to the balance representing an amount of Rs. 14.96 lacs. The assessee's appeal against the order of the Commissioner of Income Tax (Appeals), was withdrawn, perhaps because it was barred by limitation. It was in the backdrop of the aforesaid facts that the Hon'ble High Court observed that once the appeal was withdrawn by the assessee, it was only open to the assessee to support the order of the Commissioner of Income Tax (Appeals) on any of the grounds decided against him. Hence, while the assessee would support the order, that would mean that the assessee would be entitled to urge that the deletion of the disallowance to the extent of Rs. 13.73 lacs by the CIT (A) was correct and proper. The assessee, however, would not be entitled to avail of the benefit of the provisions of Rule 27 in regard to that part of the order of the CIT (A) which upon consideration of the evidence, confirmed the disallowance of Rs. 14.96 lacs made by the Assessing Officer.

It was thus, in the backdrop of the aforesaid facts, that the Hon'ble High Court of Bombay after referring to its earlier orders in the case of *B.R. Bamasi* v. *Commissioner of Income Tax,* (1972) 83 ITR 223 (Bombay) and *Commissioner of Income Tax* v. *Hazarimal Nagji & Co.* (1962) 46 ITR 1168 (Bombay), had dealt with the scope of powers vested with a respondent under Rule 27 of the Appellate Tribunal Rules, 1963. The High Court had observed that under Rule 27 the respondent is permitted to support the order appealed against, though he may not have appealed against the order, on any of the grounds decided against him.

(*iii*) *DCIT, CC-2(2), Ahd.* v. *Sandip M. Patel* (2012) 137 ITD (104) (Ahd.):-

The facts of the case were that the CIT (A) had decided the issue of applicability of the provisions of Sec. 153C which was one of the ground of appeal raised by the assessee before him, against the assessee. Despite an

adverse order of the CIT (A) on the aforesaid legal ground, the assessee did not carry the matter any further in appeal. However, the revenue assailed the order of the CIT (A) to the extent he had deleted the additions on merits. The assessee under Rule 27 of the Appellate Tribunal rules, 1963 sought to challenge the initiation of proceedings under Sec. 153C as decided by the CIT (A) against him. The Tribunal observed that the word 'thereon' used in Sec. 254(1) restricted the jurisdiction of the Tribunal to the subject-matter of appeal. It was thus held that if the word 'thereon' was to be read in conjunction with Rule 27, then the assessee respondent by confining himself to the subject-matter of appeal, could only to the said extent support the order of the CIT (A). The Tribunal in the backdrop of its aforesaid deliberations declined to admit the application filed by the assessee under Rule 27, observing that as the initiation of the proceedings under Sec. 153C was not the subject matter of appeal before it, therefore, the assessee in the garb of Rule 27 could not have raised an objection as regards the same.

(*iv*) *CIT, Meerut* v. *Jindal Ployster Ltd.* (2017) 397 ITR 282 (All)

The Hon'ble High Court in the aforementioned case had held that a bare reading of Rule 27 manifests that the assessee without having filed any cross appeal or cross objection can support the impugned order on any grounds decided against him. The High Court observed that the respondent may support the order appealed against, on any of the grounds decided against him. It was discernible from a cursory reading of Rule 27, that the respondent can support the impugned order on any of the ground, which was decided against him. It was observed by the High Court that as the assessee in the case before them had taken a ground before Commissioner (Appeals), and though had not further challenged the findings of the CIT (A) on the said ground, then as per Rule 27 of the Income Tax Rules, he could advance his arguments, even though he had not filed cross-objection against the findings recorded against him by the CIT (A). It was thus in the backdrop of the aforesaid facts, that the High Court observed that the Tribunal did not commit any mistake in permitting the assessee to support the order of CIT (A) on the ground that have been decided against him.

(*v*) *Addl. CIT* v. *Gurjar Gravures Pvt. Ltd.* (1978) 111 ITR 1 (SC)

The Hon'ble Apex Court in the aforesaid case observed that where neither any claim was made before the ITO, nor was there any material on record supporting such a claim, then it would not be competent for the Tribunal to hold that the AAC should have entertained the question of relief and directed the ITO to allow the same.

(*vi*) *CIT* v. *Edvert Keventer (successors) Pvt. Ld.* (1980) 123 ITR 200 (Delhi):-

The Hon'ble High Court in the aforementioned case, had observed that the scope and powers of the Tribunal is spelt out in Sec. 33(4) of the 1922 Act and the rules framed under the Appellate Tribunal Rules, 1946. Sec. 33(4) of the 1922 Act enjoins that where an appeal is preferred to it, the Tribunal 'may, after giving both the parties an opportunity of being heard, pass such order thereon as it thinks fit'. The High Court observed that though these words were expressive of the widest possible powers, there scope is restricted by the use of the word 'thereon' which limits the powers of the

Tribunal to the subject-matter of the appeal. It was observed by the High Court that Tribunal must exercise its powers only in respect of matters that arises in appeal and according to the law. It cannot travel outside the scope of the appeal and adjudicate or give findings on a question which is not in dispute and does not form the subject matter of the appeal before it. It was further observed by the High Court that the subject matter of the appeal was constituted by the grounds of appeal filed by the assessee or the ITO aggrieved by the order of the AAC, which thus would clearly identify the question in dispute in the appeal. The High Court further observed that a respondent in an appeal has a right to file a cross appeal, but however, if no such thing is done, he is deemed to be satisfied with the decision. Thus, the respondent is therefore entitled to support the judgment of the first officer on any ground, but he is not entitled to raise a ground which will work adversely to the appellant. In fact, such a ground may be a totally new ground, if it is purely one of law, and does not necessitate the recording of any evidence, even though the nature of the objection may be such that it is not only a defence to appeal itself, but goes further and may affect the validity of the entire proceedings. But the entertainment of such a ground would be given effect to only for the purpose of sustaining the order in appeal and dismissing the appeal and cannot be made use of to distort or to set aside, the order in favour of the appellant. In the backdrop of the aforesaid observations, the High Court held that the said liberty to the respondent was reserved by Rule 27 of the 1946 rules.

(*vii*) *Self Knitting Work* v. *CIT, Ludhiana* (2014) 227 taxman 253 (P & H):-

The High Court upheld the observations of the Tribunal, which had held that a respondent under Rule 27 is empowered to support the order appealed against on any of the grounds decided against him. Rule 27 of the Appellate Tribunal Rules, 1963, lays down that where no appeal has been filed by a respondent, he may support the order appealed against i.e. the order of the CIT (A) on any of the ground decided against him, but cannot invoke the said rule to claim any fresh relief which was denied by the CIT (A) and is not part of the ground so raised by the appellant. The High Court after affirming the aforesaid observations of the Tribunal, held that where the respondent is aggrieved against any disallowance or addition sustained by the CIT (A) which is not under challenge at the behest of the appellant, the only remedy available with the respondent is to either file separate appeal or agitate the issue by way of cross objections in the appeal filed by the appellant impugning the disallowance or the addition sustained. Thus, the High Court on the basis of its aforesaid observations concluded that no error could be related to the view taken by the Tribunal, which had not allowed the assessee respondent to urge the validity of certain additions/disallowances in the garb of Rule 27 of the Appellate Tribunal Rules, 1963.

19. We have given a thoughtful consideration to the issue before us and have deliberated at length on the contentions advanced by the authorized representatives for both the parties, as well as perused the orders of the lower authorities and the material available on record. We shall first advert to the maintainability of the objection raised by the ld. A.R during the course of hearing of the appeal regarding the assumption of jurisdiction by the A.O for imposing penalty under Sec. 271(1)(c) in the hands of the assessee. We may herein observe that the assessee had raised the aforesaid objection neither by way of a

cross-appeal or a cross-objection before us. Rather, the ld. A.R had vehemently submitted that no obligation was cast upon the assessee to have raised the objection in writing and he was well within his right to have orally raised the same during the course of hearing of the appeal. We find that the ld. A.R had tried to impress upon us that as the objection raised before us goes to the very root of the validity of jurisdiction assumed by the A.O, therefore, as per the settled position of law, it was obligatory on the part of the Tribunal to adjudicate the same. The ld. A.R in order to drive home his aforesaid contention had relied on a host of judicial pronouncements, which in the backdrop of the facts involved in the said respective cases had been culled out by us hereinabove. We may herein observe that we are in agreement with the contention raised by the ld. A.R that as per Sec. 254(1) of the Act, the Tribunal while disposing of an appeal is vested with wide powers to pass such orders thereon, as it thinks fit, after giving both the parties to the appeal an opportunity of being heard. Rather, we are persuaded to be in agreement with the contention advanced by the ld. A.R that as held by the Hon'ble Apex Court in the aforementioned judgments, it is obligatory on the part of the Tribunal to discharge such powers as a statutory duty cast upon it. To the said extent we are persuaded to subscribe to the views of the ld. Authorized Representative. However, we are unable to subscribe to the claim of the ld. A.R that an objection could be allowed to be raised for the very first time before the Tribunal, without putting the other party to notice as regards the same. We are unable to comprehend that as to how an objection which was never raised before the lower authorities could be allowed to be raised orally during the course of the hearing of the appeal, because if that be so, it would seriously jeopardise and rather adversely affect the rights of the other party to defend such an objection so raised. We may herein observe that in the case before us, we are confronted with a situation where the assessee respondent had assailed the validity of assumption of jurisdiction by the A.O for imposing of penalty under Sec. 271(1)(c) neither on the basis of a cross-appeal or a cross-objection filed before us, nor on the basis of any objection in writing which could have safely been comprehended by us as an objection raised under Rule 27 of the Appellate Tribunal Rules, 1963. Despite sufficient opportunity, the ld. authorized representative had failed to bring to our notice any judgment of the Hon'ble Apex Court or that of Hon'ble High Courts, or any order of a coordinate bench of the Tribunal, approving the admission of an objection that had orally been raised for the first time by a respondent party before the Tribunal, during the course of hearing of the appeal. We have deliberated at length on the judicial pronouncements which had been relied upon by the ld. A.R to persuade us to return a finding that the respondent assessee was well within his right to have orally raised an objection to the assumption of jurisdiction by the A.O for imposing of penalty under Sec. 271(1)(c). We are afraid that neither of the judicial pronouncements taken support of by the ld. A.R advances the case of the assessee in context of the issue under consideration before us. We find that the Hon'ble Apex court in the case of *Hukumchand Mills Ltd.* v. *CIT, Central, Bombay* (1966) 62 ITR 232 (SC) and *CIT, Madras* v. *Mahalakshmi Textile Mills Ltd.* (1967) 66 ITR 710 (SC), deliberating on the scope of the powers vested with the Tribunal under Sec 33(4) of the Income-tax act, 1922, had observed that the Tribunal is competent to pass such orders on the appeal "as it thinks fit", and it is in no way restricted to the determination of the questions raised before the departmental authorities. Rather, it is observed by the Hon'ble Apex court that all questions whether of law or of fact which relate to the assessment of the assessee may be raised before the Tribunal. We further find that the Hon'ble Apex Court had also observed that Rule 12 and Rule 27 of the Appellate Tribunal rules, 1946 were not exhaustive of the powers of the Appellate Tribunal, and the same being merely procedural in character, do not in any way circumscribe or control the power of the Tribunal under Sec. 33(4) of the Act. Still further, we find that the Hon'ble High Court of Bombay in the case of *Commissioner of Income-tax, Bombay City-1* v. *Gilbert & Barker Manufacturing Co., USA* (1978) 111 ITR 529 (Bom.) as had been relied upon by ld. A.R, had observed that the Tribunal has the discretion to allow any party to an appeal, may be the appellant or the respondent, to raise a new point or new contention, provided two conditions are satisfied:- (1). No new facts are required to be brought on record for disposing of such new point; and (2). An opportunity is given to the other side to meet the

point. We may herein observe, that in the aforesaid judicial pronouncements relied upon by the ld. A.R, the Hon'ble Apex Court after deliberating on the scope of powers of the Tribunal under Sec. 33(4) of the Income-tax Act, 1922, had concluded that Rule 12 and Rule 27 of the Appellate Tribunal rules, 1946 were not exhaustive of the powers of the Appellate Tribunal, and the same being merely procedural in character, do not in any way circumscribe or control the power of the Tribunal under Sec. 33(4) of the Act. Now, this takes us to the powers which are vested with the Tribunal under Sec. 33(4) of the Income tax Act, 1922 [now Sec. 254(1) of the Income-tax act, 1961]. We find that Sec. 254(1) provides that the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. We are of the considered view that by now it stands settled by the aforesaid judgments of the Hon'ble Apex Court that rules contemplated under the Appellate Tribunal Rules, 1963 are not exhaustive of the powers of the Tribunal, and rather being merely procedural in character, does not in any way circumscribe or control the power as stood vested with the Tribunal under Sec. 254(1) of the Act. This takes us to the scope of the powers of the Tribunal under Sec. 254(1) of the Act. As observed by us hereinabove, the Tribunal as per the aforesaid substantive provision, viz. Sec. 254(1) is vested with the exhaustive powers to pass such orders thereon as it thinks fit, but however, it is obligatory on the part of the Tribunal to pass such orders only after giving both the parties to the appeal an opportunity of being heard. We are of the considered view that if the contention of the ld. A.R that the objection orally raised on behalf of the assessee respondent for the first time during the course of hearing of the appeal before us, without putting the revenue appellant to notice in advance is allowed, than not only the same would seriously jeopardise the right of the revenue to meet out the same, but rather, the same would clearly militate against the scope of powers vested with the Tribunal under Sec.254(1), as the revenue appellant would be proceeded against without affording of any opportunity of being heard. We are of the considered view that the words "after giving both the parties to the appeal an opportunity of being heard" as find mentioned in Sec. 254(1), have to be given effect in letter and spirit, and if the objection orally raised by the assessee respondent is allowed by us, than we are afraid that the statutory requirement of affording an opportunity of being heard to the revenue appellant would stand seriously violated. Rather, our aforesaid view stands fortified by the judgment of the Hon'ble High Court of Bombay in the case of *Commissioner of Income-tax, Bombay City-1* v. *Gilbert & Barker Manufacturing Co., USA* (1978) 111 ITR 529 (Bom.) as had been relied upon by the ld. A.R. The Hon'ble High Court of jurisdiction had observed that the Tribunal has the discretion to allow any party to an appeal, may be the appellant or the respondent, to raise a new point or new contention, provided two conditions are satisfied:- (1). No new facts are required to be brought on record for disposing of such new point; and (2). An opportunity is given to the other side to meet the point. Thus, a perusal of the aforesaid judgment reveals that the High Court had specifically stressed that before either of the party is allowed to raise a new point or new contention, the other side is afforded an opportunity to meet the point. We are of the considered view that in the backdrop of the aforesaid judgment of the Hon'ble High Court of Jurisdiction, allowing the assessee respondent to proceed with his objection which was for the very first time orally raised during the course of hearing of the appeal before us, undoubtedly would be nothing short of proceeding with the hearing of the appeal, without affording an opportunity of being heard to the appellant revenue in context of the issue under consideration.

20. We are further of the considered view that though the parties to the appeal before the Tribunal are vested with the right to raise a new point or a new contention, but the same has to be subject to the powers contemplated in the substantive provisions, viz. Sec. 253 r.w the procedural rules contemplated in Appellate Tribunal Rules, 1963. The appellant on the one hand is vested with the right to assail the order of the lower authority before the Tribunal by filing an appeal under Sec. 253(1) of the Act, as well as stands vested with the right to raise additional grounds of appeal under Rule 11 of the Appellate Tribunal Rules, 1963, while for the respondent on the other hand can file a cross-objection under Sec. 253(4) r.w. Rule 22 of Appellate Tribunal Rules, 1963, or support the order appealed against, on any

ground decided against him under Rule 27 of the Appellate Tribunal Rules, 1963.

21. We are of the considered view that now when the maintainability of the objection raised by the assessee respondent does not satisfy the statutory obligation contemplated under Sec. 254(1) of the Act, as had been deliberated at length by us hereinabove, therefore, we shall advert to the admissibility of the same as per the powers vested with a respondent under Sec. 253(4) and Rule 27 of the Appellate Tribunal rules, 1963. As the assessee respondent had admittedly not filed a cross-objection, therefore, the admissibility of the objection raised by him under Sec. 253(4) stands ruled out. We shall now advert to the admissibility of the objection raised by the assessee respondent under Rule 27 of the Appellate Tribunal Rules, 1963, which reads as under:

> *"27. The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him."*

We find that a respondent in exercise of powers vested with him under Rule 27 of the Appellate Tribunal Rules, 1963 can support the order appealed against, on any of the grounds decided against him. The respondent who had neither filed a cross-appeal or a cross-objection before the Tribunal, however, on an appeal by the other party can only support the impugned order on any of the grounds decided against him. We find that the scope of Rule 27 had been deliberated upon by the Hon'ble High Court of Bombay in the case of *CIT-4* v. *Jamunadas Virji Shares & Stock Brokers (P.) Ltd.* (2013) 258 ITR 458 (Bom.). The Hon'ble High Court had observed that under Rule 27 it is only open to the assessee to support the order of the Commissioner of Income Tax (Appeals) on any of the grounds decided against him. We find that the Hon'ble High Court of Bombay after referring to its earlier orders in the case of *B.R. Bamasi* v. *Commissioner of Income Tax,* 1972 (83) ITR 223 (Bombay) and *Commissioner of Income Tax* v. *Hazarimal Nagji & Co.* (1962) 46 ITR 1168 (Bombay), had dealt with the scope of powers vested with a respondent under Rule 27 of the Appellate Tribunal Rules, 1963. The High Court had observed that under Rule 27 the Respondent is permitted to support the order appealed against, though he may not have appealed against the order, on any of the grounds decided against him. Similar view, had also been taken by the High Court of Allahabad in the case of *CIT, Meerut* v. *Jindal Ployster Ltd.* (2017) 397 ITR 282 (All). The High Court in the aforementioned case had held that a bare reading of Rule 27 manifests that the assessee without having filed any cross-appeal or cross-objection can support the impugned order on any ground decided against him. The High Court observed that the respondent may support the order appealed against, on any of the grounds decided against him. The High Court observed that it was discernible from a cursory reading of Rule 27, that the respondent can support the impugned order on any of the ground, which was decided against him. We are of the considered view that as no application under Rule 27 had been filed by the assessee respondent before us, therefore, the same would suffice for us to not proceed any further with admissibility of the objection raised by the assessee respondent in exercise of the said powers. Alternatively, we may herein observe that as the assessee had never assailed the penalty imposed under Sec. 271(1)(c) before the CIT (A), on the ground that the A.O had wrongly assumed jurisdiction to impose penalty under the aforesaid statutory provision, without striking off the irrelevant default, therefore, there being no occasion for the CIT (A) to have decided the said the issue against the assessee, hence the assessee could not support the impugned order of the CIT (A) appealed against, on the said ground, as the same as observed by us hereinabove, was never decided against the assessee by the CIT (A). Be that as it may, in terms of our aforesaid observations, we are of the considered view that the objection raised by the assessee respondent to the validity of the assumption of jurisdiction by the A.O for imposing penalty under Sec. 271(1)(c) would not fall within the realm of a preliminary objection under Rule 27 of the Appellate Tribunal Rules, 1963. We thus in terms of our aforesaid observations, are of the considered view that the objection raised by the assessee respondent as regards the validity of the assumption of jurisdiction by the A.O for imposing penalty under Sec. 271(1)(c), in the absence of striking off of the irrelevant default

in the body of the 'Show cause' notice issued under Sec. 274 r.w Sec. 271 of the Act, has to fail and cannot be admitted. Before parting, we may herein observe that the ld. A.R. after the culmination of the hearing of the appeal, had placed on record a letter dated 21.02.2018, objecting to the assumption of jurisdiction by the A.O for imposing penalty under Sec. 271(1)(c) of the Act. We are afraid that as the aforesaid application had been filed after the culmination of the appellate proceedings and was not there before us during the course of hearing of the appeal, therefore, no cognizance of the same can be taken.

22. We shall now advert to the maintainability of the penalty imposed under Sec. 271(1)(c), on merits. We find that our indulgence in the present appeal had been sought as regards the validity of the penalty imposed under Sec. 271(1)(c) by the A.O on two issues, viz. (i) addition of an amount of Rs. 47,66,952/- towards deemed rental value of the Signature Villa owned by the assessee at Dubai; and (ii) LTCG of Rs. 20,60,000/- assessed by the A.O under Sec 112 of the Act on sale of Structured product i.e. 0% debentures issued by Deutsche Investments India Pvt. Ltd. by the assessee.

23. We shall first take up the validity of penalty imposed by the A.O under Sec. 271(1)(c) in respect of the addition of an amount of Rs. 47,66,952/-made towards deemed rental value of the villa owned by the assessee at Dubai, which however was vacated by the CIT (A). As observed by us hereinabove, as claimed by the assessee, he was gifted a villa, viz. 'Signature Villa' (hereinafter referred to as Villa') at Palm Jumeirah, Dubai by Nakheel P.J.S.C. The possession of the villa is stated to have been given to the assessee on 8th June, 2008. The assessee initially in his return of income for the year under consideration, viz. A.Y 2010-11, had on his own estimated the rateable value of villa at Rs. 20,00,000/- and offered an amount of Rs. 14,00,000/- towards notional income of the villa under the head house property. However, in the course of the assessment proceedings, the assessee taking support of the provisions of Article 6 of the India-UAE tax treaty and the protocol thereto, requested the assessing officer not to tax the notional income of the villa owned by him at Dubai. We find that the assessee was of the view that as per the provisions of the India-UAE tax treaty and specially sub-clause (ii) of the protocol, notwithstanding the provisions of Article 6 and Article 23 of the India-UAE tax treaty, the residential property owned by a national of a contracting state and occupied for self-residence in the other contracting state was exempt in the other contracting state from the taxes covered by the tax treaty. It was thus in the backdrop of his aforesaid conviction, that the assessee had claimed that the notional income of the villa owned by him at Dubai was not liable to be taxed in India. We have deliberated on the orders of the lower authorities and the contentions raised by the assessee before them, and find that the assessee taking support of certain judicial pronouncements had claimed that Article 6(1) vested an exclusive taxing right with the state of source and the state of residence was not empowered to levy any tax, even if the state of source did not exercise its power to levy tax. We further find that it was canvassed by the assessee before the lower authorities that on an interpretation of the DTAA and the protocol between India-UAE and after considering the (i). Notification No. 90/2008 (i) [(S.O 2124)(E)] [(F.No. 500/82/2004-FTD-1)], dated 28.08.2008; and (ii) Notification No. 91/2008 [(S.O. 2123)E] [(F.No. 500/82/2004-FTD-I)], dated 28.08.2008, as per the advice of his counsel, he remained under a *bonafide* belief that the notional income of the villa owned by him at UAE could not be brought to tax in India. We find that the assessee holding a conviction that neither Article 6(1) nor protocol to the India-UAE tax treaty expressly recognized the right of the state of residence of the owner to tax the income from immovable property situated in the state of source, therefore, the notional income of the villa owned by him at Dubai could not be subjected to tax in India. Thus, the assessee was of the view that the income from an immovable property could be taxed only in the state of source and that too, to the exclusion of the property used for self occupation.

24. We have perused the orders of the lower authorities and find that the claim of the assessee that the notional income of the villa at Dubai could not be brought to tax in India, was dislodged by the A.O for the reason that as per him the manner in which the term 'may be' was used in Paragraph 1 of Article 6 of

the India-UAE Tax Treaty was clarified by the CBDT vide its Notifications, viz. (1) Notification No. 90/2008 (i) [(S.O 2124)(E)] [(F.No. 500/82/2004-FTD-1)], dated 28.08.2008; and (2) Notification No. 91/2008 [(S.O. 2123)E] [(F.No. 500/82/2004-FTD-I)], dated 28.08.2008. Thus, the A.O being of the view that as the assessee was a resident of India, therefore, the notional income of the villa owned by him at Dubai was liable to be assessed in his hands under Sec. 5(1) of the Act.

25. We have given a thoughtful consideration to the issue before us and are persuaded to be in agreement with the Ld. A.R. that no penalty under Sec. 271(1)(c) was liable to be imposed as regards the addition made by the A.O towards deemed notional income of the villa owned by the assessee at Dubai. We find substantial force in the contention of the ld. A.R that a perusal of Article 6 of the tax treaty between India-UAE dealing with the taxability of the income of a person from immovable property situated in the other contracting state, read alongwith the protocol on the one hand, and the Notifications No. 90 and 91, dated 28.08.2008 issued by the CBDT on the other hand, revealed that the issue as regards the taxability in India of the notional income of the villa owned by the assessee at Dubai was not free from doubts and debates. The aforesaid claim of the assessee further stands fortified from the fact that the issue as to whether the Notifications nos. 90 and 91/2008, dated 28.08.2008 would have a superseding effect over the DTAA entered into by the government of India with the government of any other country, was so much debatable that the same had travelled up to the Tribunal in the assessee's own case for the year under consideration. We are further persuaded to be in agreement with the ld. A.R that the scope and gamut of the term "may be taxed" used in the Notifications Nos. 90 and 91/2008, dated 28.08.2008, as had been relied upon by the A.O for bringing the notional income of the villa to tax in India, is in itself not free from doubts and debate, can safely be gathered from the fact that the same had even came up before a coordinate bench of the Tribunal in the case of *Essar Oil Ltd.* v. *Addl. CIT* (2013) 28 ITR (Trib.) 609 (Mum). We find that the order of the Tribunal in the case of *Essar Oil Ltd.* (*supra*) was thereafter carried in appeal before the Hon'ble High Court of Bombay, which after deliberating on the issue as to whether the Notification No. 91, dated 28.08.2008 was beyond the scope of Sec. 90(3) of the Act, had admitted the appeal. We are of the considered view that now when the issue under consideration had been admitted by the Hon'ble High Court of Bombay, therefore, it stands proved to the hilt that the issue involved is highly debatable. We further find ourselves to be in agreement with the contention advanced by the ld. A.R that in the backdrop of the fact that as a coordinate bench of the Tribunal, viz. ITAT "L" bench, Mumbai, in the case of *Bank of India* v. *DCIT, Mumbai* (ITA No. 2833/Mum/2015, dated 8.11.2017), while adjudicating a similar issue emerging in context of India-Kenya DTAA and concluding that the income of the assessee was liable to be taxed under Article 6 of the India-Kenya tax treaty, had observed that any notification or circular cannot alter the nature of income that had been specifically included in the DTAA's, therefore, on the basis of conflicting views of two benches of the Tribunal on the issue under consideration, it could safely be concluded that as the issue under consideration was not free from doubts and debates, thus the assessee could not be subjected to levy of penalty under Sec. 271(1)(c) for adopting one of such view. We find that in a case where an addition/disallowance made by the A.O is not free from doubts and debates, no penalty can be imposed under Sec. 271(1)(c). Our aforesaid view stands fortified by the following judgments of the Hon'ble Apex Court and the Hon'ble High Court of Bombay:

(*i*) *CIT* v. *Reliance Petroproducts P. Ltd.* (2010) 322 ITR 158 (SC)
(*ii*) *CIT* v. *Nayan Builders & Developers* (2015) 231 Taxman 665 (Bom.)
(*iii*) *CIT* v. *S.M. Construction* (2015) 233 Taxman 263 (Bom.)
(*iv*) *CIT* v. *Petals Engineers P. Ltd.* (2014) 264 CTR 577 (Bom.)
(*v*) *CIT* v. *Nalin P. Shah (HUF)* (2013) 85 CCH 132 (Bom.)
(*vi*) *CIT* v. *Laresen & Toubro Ltd.* (2014) 366 ITR 502 (Bom.)

(*vii*) *DIT* v. *Administrator of the Estate of Late Mr. E.F. Dinshaw* (2013) 218 Taxman 125 (Bom.) (Mag.).

26. We are further of the considered view that the conduct of the assessee in offering an amount of Rs. 14,00,000/- as the notional income of the villa for tax in his return of income for the year under consideration, followed by raising of claim during the course of the assessment proceedings that as neither Article 6(1) nor protocol to the India-UAE tax treaty expressly recognized the right of the state of residence of the owner to tax the income from immovable property situated in the state of source, therefore, the notional income of the villa owned by him at Dubai could not be subjected to tax in India, clearly reveals a *bonafide* claim raised by him in context of the issue under consideration. We thus are of the considered view that as the claim raised by the assessee was clearly backed by a *bonafide* belief on his part, that the notional income of the villa was not liable to be taxed in India, therefore, on the said count too no penalty under Sec. 271(1)(c) could have been validly imposed on the assessee. We find that our aforesaid view stands fortified by the following judicial pronouncements:

(*i*) *Price Waterhouse Coopers P. Ltd.* v. *CIT* (2012) 348 ITR 306 (SC)

(*ii*) *CIT* v. *Bennett Coleman & Co. Ltd.* (203) 259 CTR 383 (Bom.)

(*iii*) *CIT* v. *Somany Evergree Knits Ltd.* (2013) 352 ITR 592 (Bom.).

(*iv*) *CIT* v. *Rose Lock Factory* (1993) 204 ITR 753 (All)

We thus, in terms of our aforesaid observations conclude that no penalty under Sec. 27(1)(c) of the Act could have been imposed on the assessee in respect of the addition of an amount of Rs. 47,66,952/- made by the A.O towards notional income of the villa owned by the assessee at Dubai. The order of the CIT (A) deleting the penalty imposed by the A.O under Sec. 271(1)(c) is upheld. The **Grounds of appeal No. (i) and (ii)** raised by the revenue are dismissed.

27. We shall now advert to the penalty imposed by the A.O under Sec. 271(1)(c) in respect of the addition of Rs. 20,60,000/- made towards Long Term Capital Gain on sale of structured product, viz. 0% debentures issued by Deutsche Investments India Pvt. Ltd. We find that the assessee who had during the year under consideration sold the aforementioned non-convertible debentures, had worked out the LTCG arising therefrom after claiming indexation and offering the same for tax at the rate of 20%. However, the A.O observed that the LTCG on sale of a structured product was to be taxed as per the proviso to Sec 112 of the Act, and thus benefit of indexation could not be claimed while working out the LTCG. Considering that the maturity proceeds of the 0% debentures amounted to Rs. 2,24,60,000/- and the assessee had incurred a cost of Rs. 2,00,00,000/-, the A.O assessed an amount of Rs. 24,60,000/- as long term capital gain taxable @10%. We find that though the assessee did not assail the aforesaid addition in appeal, but however, disputed the action of the A.O in not allowing the deduction of cost of Rs. 4,00,000/-. The A.O by his order passed under Sec. 154, dated 16/08/2013 allowed the application filed by the assessee and revised the LTCG to an amount Rs. 20,60,000/-.

28. We find that the assessee though had in his return of income for the year under consideration furnished the complete particulars in respect of the transaction under consideration, but however, had inadvertently computed the LTCG after the indexing the cost of acquisition of the same. At this stage, we may herein observe that admittedly, no part of the details furnished by the assessee as regards either the cost of acquisition or the sale proceeds of the structured product, viz. 0% debentures issued by Deutsche Investments India Pvt. Ltd. were found to be false or incorrect. Rather, the A.O had only dislodged the computation of LTCG by the assessee, on the basis of facts and figures disclosed by the assessee, only for the reason that as the same was liable to be computed as per the proviso to Sec. 112 of the Act, therefore, the assessee would not be entitled towards indexation of the cost of acquisition of the same. We may herein observe that the *bonafides* of the assessee can safely be gathered from the fact that the moment he learnt about his mistake in computing the LTCG, he by his letter dated 26/02/2013

submitted before the A.O that he had no objection to the reworking of the LTCG as per Sec. 112 of the Act. We have given a thoughtful consideration to the issue before us and are of the considered view that admittedly, as the "particulars" furnished by the assessee as regards the 0% debentures of Deutsche Investments India Pvt. Ltd. sold by him during the year under consideration were not found to be inaccurate, but however, there was an inadvertent mistake in computation of LTCG by him, therefore, it can safely be concluded that the assessee cannot be subjected to penalty under Sec. 271(1)(c) for furnishing of inaccurate particulars of income. We are of the considered view that raising of an incorrect claim in law cannot be construed as furnishing of inaccurate particulars of income. As it remains an admitted position that no information given by the assessee in its return of income in respect of either the amount of sale proceeds or the cost of acquisition of the structured product, viz. 0% debentures of Deutsche Investments India Pvt. Ltd. is found to be incorrect or inaccurate, therefore, the wrong computation of the LTCG can by no means be characterised as furnishing of inaccurate particulars of income by the assessee. We find that our aforesaid view that where no information given in the return of income was found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars, for the reason that he had on the basis of said facts made an incorrect claim in law, is fortified by the judgment of the Hon'ble Apex Court in the case of *CIT* v. *Reliance Petroproducts Pvt. Ltd.* (2010) 322 ITR 158 (SC). Alternatively, as in the case before us, it clearly emerges that the assessee had inadvertently erred in not computing the LTCG under Sec. 112 of the Act, therefore, even otherwise, as held by the Hon'ble Apex Court in the case of *Price Waterhouse Coopers Pvt. Ltd.* v. *CIT* (2012) 348 ITR 306 (SC), now when the assessee had not attempted to either conceal its income or furnish inaccurate particulars, no penalty would be warranted in his hands. We thus, in terms of our aforesaid observations conclude that no penalty under Sec. 271(1)(c) was liable to be imposed in respect of the LTCG of Rs. 20,60,000/- assessed by the A.O under Sec. 112 in the hands of the assessee. We thus uphold the order of the CIT (A) in context of the issue under consideration. The Grounds of appeal Nos. (iii) and (iv) raised by the revenue are dismissed.

29. The Grounds of appeal Nos (v) and (vi) being general are dismissed as not pressed.

30. The appeal of the revenue is dismissed in terms of our aforesaid observations.

■■