

Kumar Agencies (India) Vs. Assistant Commissioner of Income

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SooperKanoon Citation : sooperkanoon.com/72467

Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Feb-26-2003

Reported in : (2003)87ITD69(Mum.)

Judge : M Chaturvedi, Vice, S Tiwari, G Gupta

Appellant : Kumar Agencies (India)

Respondent : Assistant Commissioner of Income

Judgement :

1. These two appeals have been filed by the assessee against levy of penalty under Section 271(1)(c) for asst. yrs. 1980-81 and 1982-83. As common facts and issues are involved in these two appeals the same were argued together by the learned authorised representative of the assessee and the learned Departmental Representative. We are deciding these two appeals together for convenience.

2. Facts of the case leading to these two appeals, briefly, are that originally the assessment orders were completed for these two assessment years in which the assessee's explanations in respect of fresh loans were accepted. A search under Section 132 of the Act took place on 27th April, 1983. During the course of this search and thereafter, the Department carried out certain investigations. During the course of enquiry thus made, the following four cash creditors denied having made loans to the assessee which as per the assessee's books of account were as follows : 3. By application dt. 29th June, 1983, the assessee filed a petition under Section 273A before the learned CIT, Bombay City-VIII, Bombay, declaring

additional income of Rs. 35 lakhs and odd which included the surrender of claim of loans received in the names of various parties.

Thereafter notices under Section 148 were served Upon the assessee for a large number of assessment years, The learned CIT, however, vide his order dt. 29th Oct., 1985, rejected the assessee's petition under Section 273A on the ground that the disclosure made by the assessee was not voluntary. On completion of reassessments under Section 147 the AO initiated penalty proceedings under Section 271(1)(c). Subsequently, penalties were imposed in the following manner : Aggrieved by penalty imposed in the manner abovementioned, the assessee filed appeal and subsequently the matter was carried on to the Tribunal. The Tribunal, Bombay Bench 'C', Bombay, as per its order dt.

15th March, 1990, in ITA Nos. 2057 to 2063/Bom/1989; 6906 to 6908/Bom/1989 and 8098/Bom/1989 accepted the contentions of the assessee that additional income had been disclosed by the assessee mainly with a view to buy peace and the same did not indicate concealment of income in all other aspects except the four cash credits (supra) in respect of which the creditors denied having made loan to the assessee. The learned Tribunal discussed this issue in the following words : "8. Even otherwise on the facts of the present case, the reports, relied upon by the learned Departmental Representative of the ADI and the DI show that out of the total loans taken by the assessee as appearing in its books of account only loans to the extent of Rs. 15,90,011 have been found to be unverifiable. The other loans were found to be genuine and stood confirmed by the Revenue authorities, after making enquiries. In the letter dt. 12th Aug., 1985 of the ITO placed on record by the Departmental Representative in para 11 it has been stated as follows : 'In this case, the ADI's report dt. 27th March, 1983 does not mention anything regarding the, non-genuineness of the loans. The assessee on his own filed a settlement petition offering Rs. 15 lakhs for taxation. Further, since the assessee has surrendered all the loans which have not been treated as genuine, the assessee's settlement petition may be treated as full and true.' In the report dt. 13th Sept., 1985 of the ITO placed on record again it has been mentioned that the disclosure made is full and true and some of the loans are genuine. As pointed out by the learned counsel for the assessee, the assessee has not been allowed

capitalisation of this additional amount subjected to tax. The assessee has paid taxes on the additional income disclosed of more than Rs. 15 lakhs.

A perusal of the reports of field/investigation officer shows that they were satisfied that the disclosure was voluntary and made before any enquiry in this direction of loans was conducted. The assessment orders were made only on the basis of settlement petition; there is nothing in them to show that besides this petition certain other material vis-a-vis these loans was detected by the Revenue or found in course of action under Section 132 except in the case of the following four parties, viz., As per the report of the ITO dt. 19th June, 1985, placed by the Departmental Representative on record, these parties denied having advanced any of the above loans to the assessee. As per the submissions of the learned counsel for the assessee, copies of their confessional statements were not made available to the assessee, thus denying to it the chance of cross-examination. Insofar as the penalty relatable to these four parties is concerned for the asst.

yrs. 1980-81 and 1982-83, we remit the matter back to the ITO who shall, after giving adequate opportunity of hearing to the assessee, re-decide this issue according to law. As regards others the sequence of events reveal that the amounts were offered for taxation to buy peace and avoid litigation with the condition that no penalty for concealment should be imposed. The additions made are only on the basis of settlement petition; no other evidence independently exists to make these additions. This being the position the assessee cannot be visited with any penalty under Section 271(1)(c) of the Act, for concealment of income." 4. After the receipt of the order of the Tribunal the AO addressed a letter dt. 7th March, 1992 to the assessee and also subsequently furnished copies of statements recorded in respect of the four parties to the assessee. In response, the assessee replied by his letters dt.

10th March, 1992 and 23rd March, 1992. In these letters the assessee reiterated his stand that all these loans were genuine and were supported by such details as parties' confirmations and transactions being through the bank account of the assessee and so on. The assessee argued that in spite of these details the assessee had agreed to the assessment of these loan amounts as representing

the income of the assessee with a view to buy peace and avoid litigation. However, in respect of producing the parties and to cross-examine them, the assessee pleaded inability on the ground that there was lapse of about 10 to 12 years from the date of transaction. On these facts, the learned AO held that the assessee failed to avail of the further opportunity which was granted to the assessee in terms of the Tribunal order dt. 15th March, 1990. He, therefore, levied penalty under Section 271(1)(c) for both these assessment years amounting to Rs. 73,584 for asst. yr. 1980-81 and Rs. 53,849 for asst. yr. 1982-83. The AO, while he imposed penalty for asst. yr. 1982-83 at the minimum rate prescribed, levied penalty for asst. yr. 1980-81 at the maximum rate, the minimum imposable for that year being only Rs. 36,792.

5. Aggrieved by penalty orders the assessee preferred appeal before the learned CIT(A). The learned CIT(A) concurred with the findings of the AO and dismissed the appeals filed by the assessee for both these years. Still aggrieved, assessee is in appeal before us.

6. During the course of hearing before us, the learned authorised representative of the assessee addressed us at large on the merits of the case and relied upon large number of Court pronouncements. In nutshell, the learned authorised representative of the assessee argued that merely because assessee's explanation regarding cash credit was not accepted, did not justify levy of penalty under Section 271(1)(c).

The assessee had agreed to assessment of additional income only with a view to buy peace and the same did not signify admission of any concealed income on the part of the assessee. He argued that after considerable length of time, the assessee could not be burdened with the onus to prove the cash credits. A number of case laws were relied upon for these propositions. He in particular emphasised the judgments of Hon'ble Supreme Court in the cases of CIT v. Suresh Chandra Mittal (2001) 251 ITR 9 (SC); S. Hastimal v. CIT (1963) 49 ITR 273 (Mad) and judgment of Hon'ble Bombay High Court in the case of Orient Trading Co.

v. CIT (1963) 49 ITR 723 (Bom). In addition, the learned authorised representative of the assessee contended before us that he was supplied copies of the statements of these four cash creditors, which had been recorded behind the back of the assessee, only on 20th March, 1992, while the impugned penalty orders had been made by the AO on 31st March, 1992. The assessee was, therefore, not granted proper opportunity to rebut the inferences drawn by the AO on the basis of the statements which had been recorded behind the back of the assessee. The learned authorised representative cited the judgment of Hon'ble Supreme Court in the case of Bhopal Sugar Industries v. ITO (1960) 40 ITR 618 (SC) in this respect. Secondly, the learned authorised representative argued that penalty orders made by the AO on 31st March, 1992 were barred by limitation. He referred to the provisions of Section 275(1)(a) and argued that the AO was required to pass the impugned orders under Section 271(1)(c) within a period of six months from the end of the month in which the order of the Tribunal had been received by the CIT. The Tribunal order had been passed on 15th March, 1990, whereas the orders of penalty had been made on 31st March, 1992.

Therefore, both these orders were barred by limitation of time. In this connection the learned authorised representative particularly emphasised the order of the Tribunal in Smt. Shardaben v. Asstt. CIT (2000) 68 TTJ (And) 859 : (2000) 75 ITD 274 (And) and Hon'ble Supreme Court judgment in the case of K.M. Sharma v. ITO (2002) 254 ITR 772 (SC).

7. The learned Departmental Representative strongly relied upon the orders of the learned AO and the learned CIT(A) in this respect. He argued that in this case enquiries were preceded by surrender of the amounts by the assessee. When the assessee realised that the cash creditors had refuted the claim of the assessee and he was thus caught, instead of making an issue of it at that very stage the assessee preferred to surrender the amounts by way of additional income. It was for this reason that the learned CIT did not accept the petition made by the assessee under Section 273A to be voluntary and rejected the same. The assessee was at liberty to have his say at that stage itself but he chose to surrender the amounts in the wake of the enquiry made by the Department. Thereafter, when the assessee was granted further opportunity, the assessee did

not avail of the same merely under the pretext of lapse of time. Under the provisions of Expln. 1 to Section 271(1)(c), burden to prove that there was no concealment entirely lay upon the assessee. This Explanation was applicable on the assessee all along whether or not he surrendered the amounts voluntarily or otherwise. The learned Departmental Representative placed reliance on the Hon'ble Supreme Court judgment in the case of K.P. Madhusudhanan v. CIT 8. We have carefully considered the rival submissions. In this case we have not heard an appeal against the original orders of penalty under Section 271(1)(c) made by the AO. As pointed out earlier, the AO levied penalty under Section 271(1)(c) involving huge amounts for a very large number of assessment years. The same were heard together by the Tribunal, Bombay Bench 'C' and all the contentions of the assessee, on merits, were considered and after consideration the Tribunal was agreeable to delete penalty levied upon the assessee in all other respects except these four cash creditors. Having regard to the submissions of the learned counsel of the assessee that copies of the confessional statements of the loan creditors had not been made available to the assessee, thus, denying to it the chance of cross-examination, the Tribunal remitted the matter back to the AO to re-decide this issue after giving adequate opportunity of hearing to the assessee. Viewed in this backdrop, we hold that the learned AO was justified in drawing an inference against the assessee and repeating the levy of penalty in this respect as the assessee did not avail of the opportunity to cross-examine the creditors in question. During the course of bearing before us the learned authorised representative of the assessee laid emphasis on the fact that copies of the statements had been given to the assessee only on 20th March, 1992. We find it nothing but lame excuse. Immediately on receipt of the statements, the assessee addressed on 23rd March, 1992, a letter in writing to the AO in which he clearly pleaded difficulty to produce the parties for cross-examination with a view to prove the assessee's bona fides on account of lapse of time and there being search in the case of the assessee. There is not even a hint in the assessee's letter that it required more time to deal with the matter. The assessee also did not request the AO to enforce the attendance of the parties for cross-examination. He simply abandoned the claim of cross-examination before the AO. We, therefore, do not see much force in the contention of the assessee that copy of the statement had

been given only on 20th March, 1992.

9. During the course of hearing before us, the learned authorised representative of the assessee placed considerable reliance on the judgment of Hon'ble Supreme Court in the case of CIT v. Suresh Chandra Mittal (supra). We find that in that judgment the Hon'ble Supreme Court have only held that given the facts and circumstances of that case, interference with the order of the High Court was not called for. This judgment of Hon'ble Supreme Court has to be read with their judgment in the case of K.P. Madhusudhana v. CIT (supra), that after insertion of Explanation, the burden to prove that there was no concealment lies upon the assessee. The legal position emerging is that while from the surrender of additional income with a view to buy peace the Department cannot infer concealment, the burden would nonetheless remain on the assessee to be discharged during the course of penalty proceedings under Section 271(1)(c), and to establish that the additional income as surrendered did not represent concealed income of the assessee. Thus, after having surrendered the amounts of cash credits during the course of assessment proceedings the assessee was free all along to establish that the cash credits were genuine. It was for this purpose that the matter had been remitted back to the AO but the assessee failed to avail of further opportunity directed to be given to it by the Tribunal.

10. We shall now deal with the contention of the assessee that penalty orders passed by the AO on 31st March, 1992 are barred by limitation of time. The learned authorised representative of the assessee has placed reliance on the provisions of Section 275(1)(a) in this respect. The limitation of time envisaged under the provisions of Section 275(1)0 is in respect of penalty orders to be made for the first time. It is not the case of the assessee that original order of penalty itself was barred by limitation of time. No such plea was taken before the Tribunal in the proceedings which culminated in the order of the Tribunal, Bombay Bench 'C', Bombay, on 15th March, 1990. The fresh orders of penalty have been made by the AO in consequence of the Tribunal order dt. 15h March, 1990. We hold that in such a situation the provisions of Section 275(1)(a) had no application at all. It is settled legal position that limitation of time laid down for passing of a particular order would not apply when the order is directed to be made afresh by an

appellate authority. The limitation of time is in respect of original order of penalty only. The decision of the Tribunal reported in (2000) 75 ITD 274 (Ahd) (supra) relied upon by the learned authorised representative of the assessee related to penalty order being made by the AO for the first time. The judgment of Hon'ble Supreme Court in the case of K.M. Sharma (supra) is also, therefore, of no assistance to the assessee. We, therefore, reject the assessee's plea relating to limitation of time.

11. During the course of hearing before us, the learned authorised representative of the assessee took an alternative plea that the AO was not justified in levying penalty at the maximum rate. We find that the penalty for asst. yr. 1982-83 has been imposed at the minimum prescribed rate and, therefore, no interference is called for on this ground. However, for asst. yr. 1980-81, the same AO has levied penalty at the maximum prescribed rate for which we do not see any particular justification. Having regard to the facts and circumstances of the case we are of the view that it would be suffice if the penalty for asst.

yr. 1980-81 is also levied at the minimum prescribed rate. We direct accordingly.

12. In the result, while assessee's appeal in ITA No. 2418/Bom/1995 for asst. yr. 1980-81 is partly allowed, the appeal in ITA No.2419/Bom/1995 for asst, yr. 1982-83 is dismissed.

1. I have perused the proposed order of my learned Brother carefully but could not persuade myself to agree with the conclusions as arrived at by him, The facts as detailed in paras 1 to 7 of the proposed order of my learned Brother may be referred to. However, at the cost of repetition, it is considered necessary to bring to close focus some facts of the case. Originally, a penalty under Section 271(1)(c) was levied on the assessee on account of addition of loan amount and interest paid thereon and the appeal preferred with the CIT(A) was dismissed. The assessee preferred second appeal to the Tribunal against the said order of the CIT(A). The Tribunal, Bombay, vide their order dt. 15th March, 1990, for the asst, yrs. 1972-73 to 1985-86 allowed substantial relief to the assessee and accepted the contention of the assessee that additional income had been disclosed by the assessee in petition under Section 273A of the Act mainly with a view to buy

peace and the same do not indicate concealment of income in all other aspects except the four cash credits in respect of which the creditors denied having made loan to the assessee. The Tribunal noted that as per the submissions of the learned counsel for the assessee, copies of their confessional statements were not made available to the assessee, thus denying to it the chance of cross-examination, The Tribunal, therefore, insofar as penalty relatable to these four parties for the asst. yrs.

1980-81 and 1982-83, remitted the matter back to ITO with the directions to give adequate opportunity of hearing to the assessee and re-decide this issue according to law. The penalty levied for concealment of income under Section 271(1)(c) on all other items of additional income was cancelled by the Tribunal.

2. Thereafter, the AO issued a show-cause notice to the assessee vide letter dt. 7th March, 1992, to show-cause why penalty under Section 271(1)(c) may not be imposed on the assessee. In reply to this notice of the AO, the assessee's chartered accountant filed letter dt. 10th March, 1992, before the AO and requested to furnish the copies of the statements as recorded behind the back of the assessee during the assessment proceedings in the year 1984. The authorised representative of the assessee also explained the facts in detail and further submitted that since these loans were accepted/repaid by account payee cheques, their addresses and their confirmation letters and PAN numbers have been filed before the AO during the course of assessment proceedings and moreover the addition to total income was offered by the assessee purely to buy peace and avoid litigation and, therefore, requested not to impose penalty under Section 271(1)(c). The AO on 20th March, 1992, gave the copies of the statements of the four creditors to the assessee, It is pertinent to note here that the case of penalty was going to be time-barred on 31st March, 1992, and the copies of statements of the four creditors were given only on 20th March, 1992 to the assessee. In these circumstances the assessee pleaded its inability on the ground that there was lapse of about 10-12 years from the date of transaction. The AO rejected the contention of the assessee and held that the assessee has failed to avail of the opportunity which was granted to the assessee in terms of the Tribunal's order dt. 15th March, 1990. He, therefore, levied penalty under Section

271(1)(c) for both these assessment years amounting to Rs. 73,584 for the asst. yr.

1980-81 and Rs. 53,849 for the asst. yr. 1982-83. The penalty for asst.

yr. 1982-83 was levied at the minimum (sic-maximum) rate prescribed while the penalty levied for the asst. yr. 1980-81 was at the minimum rate, the minimum imposable for the year being only Rs. 36,792. The appeal preferred to the CIT(A) was dismissed vide order dt. 12th Dec., 1994. The CIT(A) held that in this case the suspicion of non-genuine loans is far too strong and dismissed the appeals of the assessee.

Against this order passed by the CIT(A), the assessee is in appeal before us.

3. Before concentrating on the merits of the case. I want to make it clear that in my view the contention of the assessee that penalty orders passed by the AO on 31st March, 1992, are barred by limitation of time, has no force. I agree to the legal ground of limitation of time as detailed in para No. 10 of the proposed order of my learned Brother rejecting the plea of the assessee relating to limitation of time.

4. On merits of the case, in my considered opinion, the assessee in the facts of the case cannot be penalised for concealment of income under Section 271(1)(c) of the Act. It is relevant to note that the matter has already been considered and decided by the Tribunal in its first innings wherein it was held by the Tribunal vide its order dt. 15th March, 1990, that adequate opportunity of hearing was not afforded to the assessee and accordingly remitted the matter back to the AO with the directions to re-decide this issue according to law after giving adequate opportunity of hearing to the assessee. In the light of the directions given by the Tribunal we have to decide whether in the facts and in the circumstances of the case it can be said that adequate opportunity of hearing has been allowed to the assessee. We find that the directions of the Tribunal directing as above are dt. 15th March, 1990, and the case was going to be time-barred on 31st March, 1992, and the AO did not give copies of the confessional statements of the four parties to the assessee along with the first notice of hearing issued on 7th March, 1992, after more than 23 months of the Tribunal's order.

The AO had recorded the statements of the four parties behind the back of the assessee during the assessment proceedings in the year 1984 and was bound to furnish the copies thereof to the assessee and the specific directions of the Tribunal in this regard were not complied with. It was only 10 days prior to the passing of the penalty order that the AO furnished the copies of the statements of the four creditors and asked the assessee to produce the parties and to cross-examine them. In these circumstances the assessee pleaded its inability on the ground that there was a lapse of about 10-12 years from the date of transactions. Considering the time allowed by the AO to produce the four creditors for cross-examination after a lapse of 10-12 years from the date of transactions, I have no hesitation to hold that no adequate opportunity of hearing was allowed to the assessee as per the directions of the Tribunal. In these facts, it cannot be said that the assessee did not avail of the opportunity to cross-examine the creditors. By not complying (with) the directions of the Tribunal in letter and spirit, the order of the AO levying penalty for concealment of income is liable to be cancelled on this count alone. The loans in question were accepted per account payee cheques through brokers and their confirmation letters and PAN numbers were filed before the AO during the course of original assessment proceedings. The repayment of these loans were also per account payee cheques. The assessee has explained that the addition to the total income has been offered by the assessee purely to buy peace and avoid litigation and, therefore, requested not to impose penalty under Section 271(1)(c) of the Act. The CIT(A) has confirmed the penalty by concluding that "in this case the suspicion of non-genuine loans is far too strong". In my considered view the suspicion howsoever strong, cannot take place of proof and is not sufficient to uphold the charge of concealment of income. Even on merits of the case since the loans were deposited and repaid per account payee cheques through brokers and the confirmations were filed on record and PAN numbers of the creditors were filed before the AO at the first opportunity during the course of assessment proceedings, in the absence of any proof against the assessee, it cannot be penalised on account of unproved cash credits. The assessee has explained, that it has offered the amount of loan as income purely to buy peace and to avoid litigation, and in these facts the ratio of decision of the Hon'ble Supreme Court in the case of CIT v. Suresh Chandra Mittal (2001) 251

ITR 9 (SC) is applicable. The Explanation to Section 271(1)(c) was not invoked by the AO in this case. The decisions of the Hon'ble Supreme Court in the case of CIT v. Suresh Chandra Mittal (supra) and in the case of K.P. Madhusudhanan v. CIT (2001) 251 ITR 99 (SC) were considered by the Mumbai Tribunal in ITA No. 4016/Mum/2001, dt. 21st Dec., 2001 and it was held that in the act of voluntary surrender done by the assessee in good faith the case of the assessee comes within the ambit and purview of the ratio of the decision laid down by the apex Court in the case of CIT v. Suresh Chandra Mittal (supra) and deleted the penalty under Section 271(1)(c) imposed on the assessee. In these facts I hold that the Department has not discharged its burden of proving concealment on the part of the assessee and accordingly the penalty levied under Section 231(1)(c) of the Act on the assessee is cancelled and the ground of appeal of the assessee is allowed.

Since there is a difference of opinion vis-a-vis conclusions arrived at in ITA Nos. 2418 & 2419/Bom/1995 in the case of Kumar Agencies (India) v. Asstt. CIT, Circle-19(2), Bombay, involving asst. yrs. 1980-81 and 1982-83, we are of the opinion that the following point of difference is required to be referred to the Third Member and for the purpose we direct that the file be put up to the Hon'ble President : "Whether on the facts and in the circumstances of the case and in terms of the order of the Tribunal, Bombay Bench 'C', Bombay, dt, 15th March, 1990, in the case of the assessee, the learned CIT(A) was justified in upholding the orders of penalty under Section 271(1)(c) made by the AO for asst. yrs. 1980-81 and 1982-83 ?" 1. This appeal came before me as a Third Member to express my opinion on the following question : "Whether on the facts and in the circumstances of the case and in terms of the order of the Tribunal, Bombay Bench 'C', Bombay, dt.

15th March, 1990, in the case of the assessee, the learned CIT(A) was justified in upholding the orders of penalty under Section 271(1)(c) made by the AO for asst. yrs. 1980-81 and 1982-83 ?" 2. I have heard the rival submissions in the light of material placed before me and precedents relied upon. Penalty for concealment was levied in respect of the following four cash credits : 3. In the original assessments, the explanation apropos the cash credit was accepted by the Revenue. On 27th April, 1983, a search under Section 132 of the IT Act, 1961

(hereinafter called the Act) was conducted at the premises of the assessee. During the course of the search certain enquiries were made. The aforesaid cash creditors denied having made loans to the assessee. Assessee filed a petition under Section 273A of the Act before the CIT, declaring therein additional income. Among others the aforesaid loans were also surrendered.

Petition under Section 273A of the Act was rejected on the ground that it was not voluntary. Penalties were levied for the asst. yrs, 1972-73 to 1985-86. Tribunal vide its order dt. 15th March, 1990, accepted the fact that the additional income was disclosed by the assessee mainly with a view to buy peace and the same did not indicate concealment of income in all the years, except for the years 1980-81 and 1982-83. In respect of these assessment years, creditors denied having made loans to the assessee. It was found that confessional statements were not made available to the assessee; thus denying to it the chance of cross-examination. As such, the matter was restored to the file of AO, with direction to provide adequate opportunity to hearing to the assessee and to redecide this issue according to law. Assessee contended before the Revenue authorities that these loans were genuine and were supported by confirmations. Parties were assessed to tax.

Transactions were made through brokers. Payments were made through account payee cheques only. Assessee surrendered this amount only with a view to buy peace and to avoid litigation.

4. When AO granted opportunity to the assessee in terms of the Tribunal's order dt. 15th March, 1990, assessee expressed its inability to produce the parties because of lapse of about 10 to 12 years from the date of transactions. It was also submitted that the assessee was not directly known to the parties, Transactions were through brokers.

On this factual backdrop only assessee did surrender the amount. AO, therefore, levied penalty for both these assessment years amounting to Rs. 73,584 for the asst. yr. 1980-81 and Rs. 53,849 for the asst. yr, 1982-83, Penalty for the asst. yr. 1982-83 was levied at the minimum rate prescribed. For the asst. yr, 1980-81 it was levied at the maximum rate prescribed. Learned AM directed the AO to levy penalty for the asst. yr. 1980-81 at the minimum rate. He maintained the penalty

for the asst. yr. 1982-83. Learned JM was of the opinion that penalties in the facts and circumstances of the case are not warranted. As such, the difference has crept and the matter was referred to the Third Member.

5. I have heard the rival submissions in the light of material placed before me and precedents relied upon. Learned AM justified the penalty with reference to the provisions of Expln. 1 to Section 271(1)(c) of the Act. It is stated in the order that burden to prove that there was no concealment entirely lay upon the assessee. This Explanation was held to be applicable on the assessee whether or not he surrendered the amount voluntarily or otherwise.

"Explanation 1 : Where in respect of any facts material to the computation of the total income of any person under this Act : (A) such person fails to offer an explanation or offers an explanation which is found by the AO or the CIT(A) to be false, or (B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him.

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of Clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.

Provided that nothing contained in this Explanation shall apply to a case referred to in Clause (B) in respect of any amount added or disallowed as a result of the rejection of any explanation offered by such person, if such explanation is bona fide and all the facts relating to the same and material to the computation of his total income have been disclosed by him." 7. As because penalty was levied on the basis of the confessions made by the creditors, as such the learned AM. invoked the Expln. 1. He found the explanation offered in the context as false and bereft of bona fide, therefore, he applied the ratio laid down in the case of K.P. Madhusudhanan v. CIT (2001) 251 ITR 99 (SC). Learned JM discussed the factual aspects and applied the decision rendered in the case of CIT v. Suresh Chandra Mittal (2001) 251 ITR 9 (SC).

8. According to Black's Law Dictionary, "false" means not true. The word "false" has two distinct and well-recognized meanings : (i) intentionally or knowingly or negligently untrue; (ii) untrue by mistake or accident. A thing is called "false" when it is done, or made, with knowledge, actual or constructive, that it is untrue or illegal, or is said to be done falsely when the meaning is that the party is in fault for its error. A statement is "false" if it was untrue by the person making it, or causing it to be made.

9. In wider sense, the word "false" will embrace all types of falsehoods intentional or unintentional but in narrower sense it covers only intentional falsehood. In Expln. 1 to Section 271(1)(c), the word is used as an ingredient to penal offence and, therefore, a guilty element, is sine qua non, to constitute the falsehood. A person is said to give false evidence, if he, (i) legally bound by an oath or by an express provision of law to state the truth, or (ii) being bound by law to make a declaration upon any subject, (iii) makes any statement, which is false, and (iv) which he either knows or believes to be false, or does not believe to be true.

10. Apropos the shifting and weighing of evidence, the law in this regard is canonized in the dictum : "Falsus in uno, Falsus in omnibus".

False in one thing, false in everything. This maxim relates to credibility of witnesses, for a witness caught telling a lie in one thing discredits himself in regard to the rest of his testimony.

Although the doctrine of Falsus in Uno, Falsus in omnibus is applicable in criminal law, in the case of *Amal Kumar Chakraborty v. CIT* (1994) 207 ITR 376, 390 (Cal) it was held that this doctrine is a sound principle to apply in taxation when the matter is one of finding of fact on the basis of statements of a witness and their judicial evaluation. In this case, in 1975, the assessee gave a false statement by stating that he had no connection with the bank deposits, Later he made a volte face and said that the deposits were from the money supposedly declared in 1971. Therefore, the later statement of the assessee could not be held to be credited as the source of the deposit.

The apex Court in the case of *Rajinder v. State of Haryana* JT 1995 (5) SC 272, 283 has held that Court has to endeavour to separate the grain from the chaff and accept that part of the evidence which is found to be truthful and consistent.

11. As per Expln. 1, if the AO finds that the explanation offered by the assessee is false, then penalty can be levied on the amount which is found to be concealed. Therefore, the whole idea behind Expln. 1 is that the AO has to first record reasons for arriving at a conclusion that there is a failure on the part of the assessee. Hence, after seeking an explanation if the authority comes to a conclusion that it is false, then the AO can proceed to levy the penalty. Therefore, this Explanation casts a duty on the AO that he should first record reasons that there has been concealment of income and then the explanation is sought. These are the basic requirements of natural justice desired by the legislature for providing this Explanation. Therefore, the initial burden is on the Department to prima facie record that there was concealment and thereafter the explanation is to be sought and in case the explanation is found to be false, then, to the extent the income is found to have been concealed and the explanation is found to be false, the authority can proceed against the assessee.

12. In the case of *CIT v. Suresh Chandra Mittal* (2000) 241 ITR 124 (MP) action under Section 132 was taken against the assessee. This led to reopening of the assessment. Assessee revised the returns. AO levied the penalty rejecting the contention of the assessee that revised was made suo motu and additional income was offered to buy peace and to avoid litigation. When the matter was carried to the Tribunal, the following view was taken : "The assessee had no chance of carrying through his explanation and the AO too did not record any finding as to the acceptability or otherwise of the explanation of the assessee. Under these circumstances the proviso to Expln. 1 to Section 271 is not attracted. The Revenue did not at all discharge the burden to prove that there was concealment of income by the assessee. It simply rested its conclusion on the act of voluntary surrender by the assessee, which obviously was done in good faith and to buy peace." The Tribunal placed reliance on the decision of the apex Court rendered in the case of *Sir Shadilal Sugar and General Mills Ltd. v. CIT* (1987) 168 ITR 705 (SC), in support holding as under : "We find that the assessee admitted that these

were the incomes of the assessee but that was not an admission that there was deliberate concealment. From agreeing to additions, it does not follow that the amount agreed to be added was concealed income. There may be a hundred and one reasons for such admission, i.e., when the assessee realises the true position, it does not dispute certain disallowances but that does not absolve the Revenue from proving the mens rea of a quasi-criminal offence." Hon'ble High Court agreed with the view taken by the Tribunal, It was held that the initial burden lies on the Revenue to establish that the assessee had concealed the income or had furnished inaccurate particulars of such income. The burden shifts to the assessee only if he fails to offer any explanation for the undisclosed income or offers an explanation, which is found to be false by the AO. However, the proviso to Expln. 1 provides for shifting of this burden again where the explanation offered by the assessee is found to be bona fide.

Hon'ble Supreme Court vide its judgment dt. 26th July, 2001, affirmed the view taken by the Hon'ble Madhya Pradesh High Court in the case of CIT v. Suresh Chandra Mittal (supra). The following order is passed : "We have read the order of the High Court and the statement of case.

Given the facts and circumstances, we do not think that any interference with the order of the High Court is called for." 13. Adverting to the decision of the apex Court rendered in the case of K.P. Madhusudhanan v. CIT (supra), learned Departmental Representative submitted that this decision was rendered on 21st Aug., 2001. Hence, the ratio of this decision is to be followed. In this case, assessee took certain bank drafts for payments to suppliers of rice in Andhra Pradesh. Entries were made in the accounts not on the dates on which the drafts were obtained but a few days later. It was explained that sufficient cash balance was not available on those dates. Loans were obtained from friends. These loans were payable within a short time, as such no entries were made in the books. Since the assessee was unable to furnish evidence of such loans, it offered the amount for addition.

Penalty proceedings were initiated. AO did not accept the explanation of the assessee. Penalty was imposed. The Tribunal cancelled the penalty on the ground

that in the notice initiating penalty proceedings assessee was not . intimated about the proposed action under Expln.

1(B) to Section 271(1)(c). High Court held the imposition of penalty valid. Apex Court affirmed the decision of the High Court, Apex Court has held that by reason of the addition of Explanation to Section 271(1)(c), the view taken in the case of Sir Shadilal Sugar and General Mills Ltd. v. CIT (supra), can no longer be said to be applicable. The implication of this decision is that if the case of the assessee comes within the ken of Explanation, then shelter of Sir Shadilal Sugar and General Mills Ltd's decision cannot be taken. However, if assessee's explanation is found not to be false and bona fide is proved, then there can be no penalty for concealment. Kamgar Sabha v. Abdulbhai Firzullabhai AIR 1976 SC 1455 (at pp. 1467-68) has held that the ruling of a superior Court is not of scriptural sanctity but it is of ratio-wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Each case depends on its own facts and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire aspect. In deciding such case, one should avoid temptation as said by Cardozo, by matching the colour of one case against the colour of another.

15. I find that there is absolutely no conflict between the decisions of the apex Court rendered in the case of CIT v. Suresh Chandra Mittal (supra) and K.P. Madhusudhana v. CIT (supra). These two decisions were rendered in the context of two different situations. Therefore, it is necessary to see the text and context of the decisions before applying the ratio decidendi.

16. In the present case I find that the addition was made purely on the basis of declaration made by the assessee. There is no clinching evidence as regards to the concealment. Principles of natural justice require that confessional statement should be made available to the assessee and it should be provided with an opportunity to cross-examine the witness. It is admitted fact that the loan transactions were made through brokers. After lapse of period over a decade the assessee expressed inability to produce the parties for cross-examination. It is to be viewed in the context that the parties were not directly known to the assessee.

In the context of the provisions of Section 68 of the Act, it would not be out of place to mention that one has to keep in mind the legal maxim "lex non cogit ad impossibilia" (which means the law does not compel a man to do which he cannot possibly perform).

Experiencing these difficulties the assessee surrendered the amount for taxation. As said in the petition, the purpose was to buy peace and avoid litigation. Indisputably the loans were deposited and repaid by account payee cheques. Confirmations were filed: These confirmations bear the Permanent Account Numbers of the creditors. AO did not record any finding that the explanation offered by the assessee was false and the bona fide was not proved. As such, the conditions precedent for invoking Expln. 1 to Section 271(1)(c) of the Act did not exist in the facts and circumstances of the present case. Once it is held that the case of the assessee falls beyond the ken of Expln. 1 to Section 271(1)(c), the conclusion is irresistible that the case does not come within the sweep of the ratio laid down by the apex Court in the case of K.P. Madhusudhanan v. CIT (supra). It comes within the ambit of the decision laid down in the case of CIT v. Suresh Chandra Mittal (supra).

On this factual backdrop I am inclined to agree with the view expressed by the learned JM.17. The matter will now come before the regular Bench for deciding the appeals in accordance with the opinion of the majority.

1. These appeals have been filed by the assessee on 8th March, 1995, against the orders of the learned CIT(A)-XIX, Bombay, dt. 14th Dec., 1994, in relation to the orders of penalty under Section 271(1)(c) made by the learned AO for asst. yrs. 1980-81 and 1982-83. .

2. These appeals were earlier heard by us and there being a difference of opinion between us the matter was referred to Third Member for his opinion on the points of difference, within the meaning of the provision of Section 255(4) of the Act. The Hon'ble Third Member has passed his order under Section 255(4) on 27th Nov., 2002. Respectfully following the order of the Hon'ble Third Member we reverse the impugned orders of the learned CIT(A) and cancel the penalty under Section 271(1)(c) for both these assessment years.

