TOYOTA Kirloskar Motor Private Limited Vs Union Of India

Court: Karnataka High Court

Date of Decision: June 11, 2019

Acts Referred: Income Tax Act, 1961 â€" Section 4, 5, 9, 44(G), 49A, 90, 90(a), 92B, 92C, 92[CA], 143, 143[2], 144, 245C, 245D, 245D(6), 245I, 245D(4), 245F(1), 245F(4), 246A, 271, 271[1][c], 274
Central Excise Act, 1944 â€" Section 11[a][c]
Income Tax Rules, 1962 â€" Rule 44H, 44H[4], 44H[5]
Constitution Of India, 1950 â€" Article 3[d], 6, 7, 8, 9, 10, 11, 22(2), 24, 25, 253

Hon'ble Judges: S. Sujatha, J

Bench: Single Bench

Advocate: Naganand, U.R. Vikram, K.V. Aravind

Final Decision: Dismissed

Judgement

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1. These petitions involving similar and akin issues, have been considered together and disposed of by this common order.",

In W.P.No.57865/2015, the petitioner has challenged the constitutional validity of Section 271[1][c] of the Income Tax Act, 1961 insofar as it relates",

to imposing of penalty on amounts determined pursuant to convention for avoidance of Double Taxation between Union of India and other sovereign,

countries which is enforced in Indian territory by Section 90 of the Income Tax Act, 1961 and the Rules made thereunder alternatively, to read down",

Section 271[1][c] of the Income Tax Act, 1961 and hold that the said provision has no application in respect of amounts determined pursuant to",

convention for avoidance of double taxation between Union of India and other sovereign countries which is enforced in Indian territory by Section 90,

of the Income Tax Act, 1961 and the Rules made thereunder inter alia challenging the notice and order dated 18.10.2010 and 22.09.2015 respectively,",

issued/passed by the Director [Transfer Pricing-II] relating to the assessment year 2006-07, further seeking for a direction to the respondents to",

refund Rs.30,89,98,800/-withheld by virtue of order dated 22.09.2015 with interest at 18% per annum from date of payment till the date of refund.",

In W.P.No.56348/2015, the petitioner has challenged the notice dated 27.10.2015 issued under Section 274 read with Section 271 [1][c] of the Income",

Tax Act, 1961 relating to the assessment year 2005-06.",

2. The facts relating to W.P.No.57865/2015 are as under:,

The petitioner is engaged in the business of manufacture and trade of passenger cars and multi-utility vehicles and is a subsidiary of Toyota Motor,

Corporation, Japan. For the assessment year 2006-07, the petitioner filed return of income on 22.11.2006. Pursuant to the same, notice was issued",

under Section 143[2] of the Income Tax Act, 1961, ['Act' for short] as the transactions entered into by the petitioner included international transaction",

with the associated enterprises, the matter was referred to the Transfer Pricing Officer for the purpose of computation of Arms Length Price [ALP].",

Respondent No.6 in exercise of power under Section 92[CA] of the Act was pleased to pass an order determining the shortfall for adjustment. The,

Assessing Authority passed a draft order of assessment and objections were filed by the petitioner to the same before the Dispute Resolution Panel,

contending that the additions proposed were not tenable. The Dispute Resolution Panel considered the same and confirmed the order of the sixth,

respondent with regard to Transfer Pricing Adjustment. Pursuant to which, the respondent No.4Ã¢â‚¬"Assessing Authority passed final assessment",

order. Along with the order of assessment, penalty notice was issued calling upon the petitioner to show cause as to why penalty should not be",

imposed under Section 271[1][c] of the Act. In addition to filing objections to the same, the petitioner challenged the final assessment order by filing an",

appeal before the Income Tax Appellate Tribunal ['ITAT' for short] at Bangalore.,

3. It transpires that M/s Toyota Motor Corporation, Japan in the meanwhile had invoked the Mutual Agreement Procedure [MAP] under the India-",

Japan Double Taxation Avoidance Treaty before the National Tax Agency of Japan during October 2013 seeking re-determination of transfer pricing,

adjustment determined by the respondent No.6. The Indian Competent Authority and the National Tax Authority of Japan after deliberations came to,

the conclusion that the transfer pricing adjustment to be affected was Rs.91,80,00,000/- as against Rs.240,11,91,692/- determined by the Transfer",

Pricing Officer. In furtherance of the same, the assessing officer sought acceptance of the said resolution and also sought proof of withdrawal of the",

appeal pending before the ITAT, Bangalore Bench. In the circumstances, appeal which was pending before the ITAT, Bangalore Bench was",

dismissed as withdrawn.,

4. It is the grievance of the petitioner that after having resolved the transfer pricing issue through the resolution passed by mutual discussions between,

two sovereign nations under the India Ã¢â‚¬" Japan Double Taxation Agreement, as specifically provided under Article 25 of the Treaty, a notice was",

issued by the Deputy Commissioner of Income Tax (Respondent No.5) affording an opportunity to hear the petitioner in respect of imposing penalty,

under Section 271[1][c] of the Act which was objected to, by the petitioner. Respondent No.5 rejecting the contentions raised by the petitioners, has",

passed an order, imposing penalty of Rs.30,89,98,800/-in respect of the transfer pricing adjustment of Rs.91,80,00,000/- on the ground that the",

petitioner has concealed income in respect of the same within the meaning of Explanation 7 to Section 271[1][c] of the Act.,

5. Aggrieved by the said imposition of penalty, the petitioner preferred an appeal before the Appellate Authority under Section 246A of the Act",

challenging the order on merits. In addition to the same, the petitioner has filed the present petition challenging the Constitutional validity of Section",

271[1][c] along with Explanation 7 of the Act in so far as the same being applied to mutual agreement between sovereign Nations by virtue of,

conventions or avoidance of double taxations. The refund has been sought in as much as the recovery of Rs.30,89,98,800/-towards penalty as the",

imposition of penalty is wholly illegal and also unconstitutional.,

6. Learned Senior Counsel Sri.Naganand representing the learned counsel for the petitioner argued that basic initiation of penalty proceedings is wrong,

by virtue of the final, conclusive decision of the MAP order which was enforced, culminating in the assessment order in terms of Rule 44H[4] and [5]",

of the Income Tax Rules, 1962 ['Rules' for short] on the basis of the negotiations and concessions made by two sovereign states. It was argued that in",

the absence of any pre-determined penalty in the MAP order issued by the Indian Competent Authority, the question of re-determining the same does",

not fall within the scope of provisions of the Act and the Rules made there under; the entire action of imposing penalty is without jurisdiction, ultravires",

the provisions of the Act and the Rules and is also unconstitutional. It was further argued that Article 253 of the Constitution of India provides that the,

parliament has the power to make any law for the whole or part of territory of India for implementation of a treaty, agreement or convention with any",

country or any decision made at any international conference, association or other body. Union of India and Government of Japan have entered into a",

convention for the purpose of avoiding double taxation. It is also agreed to have a mutually accepted procedure for resolution of any dispute and the,

same is recognized by the parliament by enacting Section 90 of the Act. Rule 44H has been framed to implement the decision taken by virtue of,

conventions. That being the position, the provisions of Section 271[1][c] of the Act sought to be invoked in respect of an agreement between two",

sovereign States which has been directed to be implemented by the Assessing Authority based on an adjudication made by the Transfer Pricing,

Officer under Section 92C of the Act would be contrary to the DTAA and violative of Article 253 of the Constitution read with Section 90 of the Act.,

Hence, the Act has to be read with Article 253 to sustain its Constitutionality. Referring to Explanation 7 to Section 271[1][c] of the Act, it was",

submitted that in view of the assessment order being passed in terms of the directions issued by the Government of India to the assessing officer, to",

give effect to the agreement between the two sovereign states in terms of Rule 44H [4 and 5] of the Rules, 1962, the said Explanation 7 is not",

applicable. It was contended that the said agreement has not contemplated either levy of penalty or independent determination of the same in collateral,

proceedings.,

7. Learned Senior Counsel Mr.K.P.Kumar representing the petitioner in W.P.No.56348/2015 supported the arguments of the learned Senior Counsel,

Sri.Naganand.,

8. Learned Senior Counsel in support of his contentions, has placed reliance on the following judgments:",

1. [2004] 2 SCC 731 K.C.Builders and Another V/s. Assistant Commissioner of Income Tax;,

Adjustment made by TPO,": Rs.240,11,91,692/-

Amount of relief to be given by India,": Rs.148,31,91,692/-

Amount of relief to be given by Japan,": Rs.91,80,00,000/-

Ã¢â‚¬Å“253. Legislation for giving effect to international agreements. Ã¢â‚¬",

Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory",

of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international",

conference, association or other body.Ã¢â‚¬â€<",

15. Section 90 of the Act reads thus:,

Ã¢â‚¬Å“90. Agreement with foreign countries or specified territories.Ã¢â‚¬",

(1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,Ã¢â‚¬"",

(a) for the granting of relief in respect ofÃ¢â‚¬",

(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or",

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to",

promote mutual economic relations, trade and investment, or",

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as",

the case may be, or",

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in,

force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or",

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be, and",

may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.",

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside,

India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the",

assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.",

(3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not",

inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central",

Government in the Official Gazette in this behalf.Ã¢â‚¬â€‹,

16. Section 271[1][c] of the Act and the Explanation 7 thereunder runs as under:,

Ã¢â‚¬Å“271.Failure to furnish returns, comply with notices, concealment of income, etc.,",

(1) If the Assessing Officer or the Commissioner [Appeals] or the Principal Commissioner or Commissioner in the course of any proceedings under,

this Act, is satisfied that any person Ã¢â‚¬"",

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, Explanation 7.Ã¢â‚¬" Where in the case of an",

assessee who has entered into an international transaction or specified domestic transaction defined in section 92B, any amount is added or disallowed",

in computing the total income under sub-section (4) of section 92C, then, the amount so added or disallowed shall, for the purposes of clause (c) of this",

sub-section, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished,",

unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or,

Commissioner that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the,

manner prescribed under that section, in good faith and with due diligence.]",

17. It is not in dispute that an order under Rule 44H of the Rules has been passed by the Assessing Authority pursuant to the determination made by,

the consent of two Sovereign States under a convention which is in the nature of composition but the said resolution is silent on the aspect of,

imposition of penalty.,

18. In the case of R.M.Muthaiah supra, the Hon'ble Apex Court has observed thus:",

Ã¢â‚¬Å“9. Section 90(a) of the Income-tax Act also refers to the granting of relief in respect of income on which Income-tax has been paid both under the,

said Act and under the Income-tax Act of the other country.,

Similarly, clause (b) also refers to the avoidance of double taxation. We are not concerned with the other clauses of section 90 in the instant case. In",

other words, the parties to an agreement to avoid double taxation is to grant relief to the assessee in case the law of two countries operates on the",

same income and the assessee may have to pay tax in both countries. The Revenue's contention in the instant case is entirely based on sections 4 and,

5. But these provisions shall have to be read subject to the provisions of the agreement in question. The agreement in question, by necessary",

implication, takes away the power of the Indian Government to levy tax on the income in respect of certain categories as per articles 6, 7, 8, 9, 10, 11,",

etc., of the agreement. In case the income from a source is not covered by any of the provisions of the agreement, then the provisions of sections 4",

and 5 of the Income-tax Act would operate on the said income and the tax certainly could be levied by the Indian Government. In such an event to,

claim the benefit against double taxation, clause 2 of article 22 of the agreement shall have to be satisfied. The effect of an ""agreement"" entered into",

by virtue of section 90 of the Act would be: (i) if no tax liability is imposed under this Act, the question of resorting to the agreement would not arise.",

No provision of the agreement can possibly fasten a tax liability where the liability is not imposed by this Act; (ii) if a tax liability is imposed by this,

Act, the agreement may be resorted to for negativing or reducing it; (iii) in case of difference between the provisions of the Act and of the agreement,",

the provisions of the agreement prevail over the provisions of this Act and can be enforced by the appellate authorities and the court. To the same,

effect is the circular issued by the Central Board of Direct Taxes as per Circular No. 333, dated April 2, 1982 (see [1982] 137 ITR (St.), which reads",

thus, Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬â€‹",

19. In the case of Union of India and Another V/s. Azadi Bachao Andolan and another supra, the Hon'ble Apex Court has held thus;",

Ã¢â‚¬Å“19. When it comes to fiscal treaties dealing with double taxation avoidance, different countries have varying procedures. In the United States such",

a treaty becomes a part of municipal law upon ratification by the Senate. In the United Kingdom such a treaty would have to be endorsed by an order,

made by the Queen in Council. Since in India such a treaty would have to be translated into an Act of Parliament, a procedure which would be time",

consuming and cumbersome, a special procedure was evolved by enacting section 90 of the Act.",

20. The purpose of section 90 becomes clear by reference to its legislative history. Section 49A of the Income-tax Act, 1922 enabled the Central",

Government to enter into an agreement with the government of any country outside India for the granting of relief in respect of income on which, both",

income-tax (including super-tax) under the Act and income-tax in that country, under the Income-tax Act and the corresponding law in force in that",

country, had been paid. The Central Government could make such provisions as necessary for implementing the agreement by notification in the",

Official Gazette. When the Income-tax Act, 1961 was introduced, section 90 contained therein initially was a reproduction of section 49A of 1922",

Act. The Finance Act, 1972 (Act 16 of 1972) modified section 90 and brought it into force with effect from 1.4.1972. The object and scope of the",

substitution was explained by a circular of the Central Board of Taxes (No.108 dated 20.3.1973) as to empower the Central Government to enter into,

agreements with foreign countries, not only for the purpose of avoidance of double taxation of income, but also for enabling the tax authorities to",

exchange information for the prevention of evasion or avoidance of taxes on income or for investigation of cases involving tax evasion or avoidance or,

for recovery of taxes in foreign countries on a reciprocal basis. In 1991, the existing section 90 was renumbered as sub-section(1) and sub-section(2)",

was inserted by Finance Act, 1991 with retrospective effect from April 1, 1972. CBDT Circular No. 621 dated 19.12.1991 explains its purpose as",

follows:,

43. Taxation of foreign companies and other non- resident taxpayers Ã¢â‚¬" Tax treaties generally contain a provision to the effect that the laws of the",

two contracting States will govern the taxation of income in the respective State except when express provision to the contrary is made in the treaty.,

It may so happen that the tax treaty with a foreign country may contain a provision giving concessional treatment to any income as compared to the,

position under the Indian law existing at that point of time. However, the Indian law may subsequently be amended, reducing the incidence of tax to a",

level lower than what has been provided in the tax treaty.,

43.1. Since the tax treaties are intended to grant tax relief and not put residents of a contracting country at a disadvantage vis-Ãƒ -vis other taxpayers,",

section 90 of the Income-tax Act has been amended to clarify that any beneficial provision in the law will not be denied to a resident of a contracting,

country merely because the corresponding provision in the tax treaty is less beneficial.""",

22. The Andhra Pradesh High Court in Commissioner of Income Tax v. Visakhapatnam Port Trust held that provisions of section 4 and 5 of Income-,

tax Act are expressly made 'subject to the provisions of the Act' which means that they are subject to provisions of section 90. By necessary,

implication, they are subject to the terms of the Double Taxation Avoidance Agreement, if any, entered into by the Government of India. Therefore,",

the total income specified in Sections 4 and 5 chargeable to income tax is also subject to the provisions of the agreement to the contrary, if any.",

25. In Commissioner of Income Tax v. R.M. Muthaiah [1993] 202 ITR 508 [Kar], the Karnataka High Court was concerned with the DTAT between",

Government of India and Government of Malaysia. The High Court held that under the terms of agreement, if there was a recognition of the power of",

taxation with the Malaysian Government, by implication it takes away the corresponding power of the Indian Government. The Agreement was thus",

held to operate as a bar on the power of the Indian Government to tax and that the bar would operate on Sections 4 and 5 of the Income Tax Act,",

1961, and take away the power of the Indian Government to levy tax on the income in respect of certain categories as referred to in certain Articles",

of the Agreement. The High Court summed up the situation by observing (at p.512-513):,

The effect of an ""agreement"" entered into by virtue of section 90 of the Act would be : (1) If no tax liability is imposed under this Act, the question of",

resorting to the agreement would not arise. No provision of the agreement can possibly fasten a tax liability where the liability is not imposed by this,

Act; (ii) if a tax liability is imposed by this Act, the agreement may be resorted to for negativing or reducing it; (iii) in case of difference between the",

provisions of the Act and of the agreement, the provisions of the agreement prevail over the provisions of this Act and can be enforced by the",

appellate authorities and the court.""",

27. In Arabian Express Line Ltd. of United Kingdom and Others v. Union of India [1995] 212 ITR 31 [Guj], the Gujarat High Court, interpreting",

section 90, in the light of circular No.333 dated April 2, 1982 issued by the CBDT, held that the procedure of assessing the income of a NRI because",

of his occasional activities in establishing business in India would not be applicable in a case where there is a convention between the Government of,

India and the foreign country as provided under Section 90 of the Income-tax Act, 1961. In case of such an agreement, section 90 would have an",

overriding effect. Interestingly, in this case a certificate issued by the H.M. Inspector of Taxes certifying that the company was a resident of the",

United Kingdom for purposes of tax and that it had paid advance corporate tax in the office of the English Revenue Accounts Office, was held to be",

sufficient to take away the jurisdiction of the Income-tax Officer.,

28. A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that section 90 is specifically intended to enable and,

empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that,

happens, the provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions",

of the Income-tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a,

departure from the general principle of chargeability to tax under section 4 and the general principle of ascertainment of total income under section 5,

of the Act, then there was no purpose in making those sections ""subject to the provisions"" of the Act"". The very object of grafting the said two",

sections with the said clause is to enable the Central Government to issue a notification under section 90 towards implementation of the terms of the,

DTAs which would automatically override the provisions of the Income- tax Act in the matter of ascertainment of chargeability to income tax and,

ascertainment of total income, to the extent of inconsistency with the terms of the DTAC.Ã¢â‚¬â€‹",

20. Thus, the Hon'ble Apex Court has approved the law in as much as the intention of the legislature to make a departure from the general principles",

of chargability to tax under Section 4 and the general principles of ascertainment of total income under Section 5 of the Act by virtue of engrafting,

Section 90 of the Act enabling and empowering the Central Government to issue a notification for implementation of the terms of the Double Taxation,

Avoidance Agreement.,

21. In the case of Infrasoft limited supra, the Hon'ble Apex Court considering the scope and effect of the comprehensive Double Taxation Avoidance",

Agreement with various countries vis-Ãƒ -vis Section 90 of the Act observed thus:,

Ã¢â‚¬Å“34. Section 90 of the Act gives relief to the taxpayer who have paid the tax to a country with which India has signed the double taxation,

avoidance agreement. Section 90 confers the power on the Central government to enter into any agreement with the government of another country,

for granting relief to an Assessee who has paid income tax under this Act and also income tax in that other country and also in respect of income tax,

which is chargeable under this Act and under the corresponding law of that country. This has been done with a view to promote mutual economic,

relations, trade and investment and for avoidance of double taxation of income under this Act as well as the act of the said contracting country.",

Section 90 (2) lays down that where the Central Government has entered into an agreement with the government of any other country for granting,

relief of tax or for avoidance of double taxation, then the provisions of this Act shall apply to the Assessee only to the extent that they are more",

beneficial to the said Assessee. In case the provisions of this Act are more onerous and burdensome then the provisions of this Act would not apply,

and the Assessee would be governed squarely by the provisions of the double taxation avoidance agreement.Ã¢â‚¬â€‹,

And further in para 40, it has held that:",

Ã¢â‚¬Å“40. Thus, where a Double Taxation Avoidance Agreement provides is more advantageous to an assessee, irrespective of the provisions in the",

Act, the agreement prevails. Where there is no provision in the Agreement, it is the basic law i.e. the Income Tax Act, that will govern the taxation of",

income.Ã¢â‚¬â€‹,

22. Thus, where a Double Taxation Avoidance Agreement is more advantageous to an assessee, irrespective of the provisions of the Act, the",

agreement prevails. Where there is no provision in the agreement, it is the basic law i.e., the Act, that will govern the taxation of income. As is clear",

from Section 271[1][c] of the Act, the said provision is attracted only when the conditions stipulated therein are attracted, in the absence of fulfilling",

those conditions stipulated, question of exercising power under the said provision to impose penalty does not arise. The necessary ingredients to be",

satisfied for invoking Section 271[1][c] of the Act are that: [1] Any person has concealed the particulars of his income or [2] furnished inaccurate,

particulars of such income, Explanation 1 sets out the circumstances which justifies levy of penalty.",

Explanations 1 to 7 recognizes the Condition/s precedent for the Assessing Officer or other concerned authority assuming jurisdiction to initiate penalty,

proceedings for concealment of income. The primary Condition precedent is that Assessing Officer must be satisfied that a person has concealed the,

particulars of his income or furnished inaccurate particulars of such income. Indeed, the levy of penalty is not a matter of course.",

23. Explanation 7 to Section 271(1) cannot be applied blindly in a routine manner to levy penalty on the additions made in the absence of any material,

to establish the concealing of the income or furnishing the inaccurate particulars by the assessee unless the assessee fails to prove that in good faith,

and with due diligence the price charged or paid in the transaction was computed in accordance with Section 92C of the Act. However, these issues",

requires to be analyzed based on the facts and circumstances of the case. There cannot be any straight jacket formula to levy and determine the,

penalty. A speaking order requires to be passed for levying the penalty under section 271[1][c] of the Act which is a self-contained code.,

24. It is desirable to quote paragraphs 60 and 61 of Manjunatha Cotton and Ginning supra, which reads as under:",

Ã¢â‚¬Å“60. The penalty proceedings are distinct from assessment proceedings, and independent therefrom. The assessment proceedings are taxing",

proceedings. The proceedings for imposition of penalty though emanating from proceedings of assessment are independent and separate aspects of,

the proceeding. Separate provision is made for the imposition of penalty and separate notices of demand are made for recovery of tax and amount of,

penalty. Also separate appeal is provided against order of imposition of penalty. Above all, normally, assessment proceedings must precede penalty",

proceedings. Assessee is entitled to submit fresh evidence in the course of penalty proceedings. It is because penalty proceedings are independent,

proceedings. The assessee cannot question the assessment jurisdiction in penalty proceedings. Jurisdiction under penalty proceedings can only be,

limited to the issue of penalty, so that validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter",

in penalty proceedings. It is not possible to give a finding that the re-assessment is invalid in such penalty proceedings. Clearly, there is no identity",

between the assessment proceedings and the penalty proceedings. The latter are separate proceedings that may, in some cases, follow as a",

consequence of the assessment proceedings. Though it is usual for the Assessing Officer to record in the assessment order that penalty proceedings,

are being initiated, this is more a matter of convenience than of legal requirement. All that the law requires, so far as the penalty proceedings are",

concerned, is that they should be initiated in the course of the proceedings for assessment. It is sufficient, if there is some record somewhere, even",

apart from the assessment order itself, that the Assessing Officer has recorded his satisfaction that the assessee is guilty of concealment or other",

default for which penalty action is called for. Indeed, in certain cases, it is possible for the Assessing Officer to issue a penalty notice or initiate",

penalty proceedings even long before the assessment is completed. There is no statutory requirement that the penalty order should precede or be,

simultaneous with the assessment order. In point of fact, having regard to the mode of computation of penalty outlined in the statute, the actual penalty",

order cannot be passed until the assessment is finalised.,

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

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

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

c) Willful concealment is not an essential ingredient for attracting civil liability.,

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

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

f) Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(1)(c), at least the facts set out in Explanation",

1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.,

g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(1)(c) is a sine qua",

non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).,

h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.,

i) The imposition of penalty is not automatic.,

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

k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be,

sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on",

account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if,

not it would have escaped from tax net and as opined by the assessing officer in the assessment order.,

l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered,

is not bonafide, an order imposing penalty could be passed.",

m) If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material",

to the computation of his total income have been disclosed by him, no penalty could be imposed.",

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

o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate",

authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.",

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

income or for furnishing of incorrect particulars of income.,

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

r) The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such",

proceedings, no penalty could be imposed to the assessee.",

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

t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings,

of assessment, it is independent and separate aspect of the proceedings.",

u) The findings recorded in the assessment proceedings in so far as Ã¢â‚¬Å“concealment of incomeÃ¢â‚¬ and Ã¢â‚¬Å“furnishing of incorrect particularsÃ¢â‚¬ would,

not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the",

assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or",

reassessment cannot be declared as invalid in the penalty proceedings.Ã¢â‚¬â€‹,

25. In the case of Brij Lal and others supra, in the context of conclusion arrived by the Settlement Commission invoking the special procedure for",

computation of total income by, under Sections 245C and 245D in Chapter xix-A of the Act, the HonÃ¢â‚¬â„¢ble Apex Court has observed thus:",

Ã¢â‚¬Å“23. Descriptively, it can be stated that assessment in law is different from assessment by way of settlement. If one reads section 245D(6) with",

section 245I, it becomes clear that every order of settlement passed under section 245D(4) shall be final and conclusive as to the matters contained",

therein and that the same shall not be re-opened except in the case of fraud and misrepresentation. Under section 245F(1), in addition to the powers",

conferred on the Settlement Commission under Chapter XIX-A, it shall also have all the powers which are vested in the income tax authority under",

the Act. In this connection, however, we need to keep in mind the difference between ""procedure for assessment"" under Chapter XIV and ""procedure",

for settlement"" under Chapter XIX-A (see section 245D). Under section 245F(4), it is clarified that nothing in Chapter XIX-A shall affect the",

operation of any other provision of the Act requiring the applicant to pay tax on the basis of self-assessment in relation to matters before the,

Settlement Commission.Ã¢â‚¬â€‹,

26. It is thus held that the nature of the orders under Section 143 and 144 is different from the orders of the Settlement Commission under Section,

245-D4 of the Act.,

27. In K.C. Builders and Another supra, the Hon'ble Apex Court has observed that the condition precedent for imposing penalty under Section 271[1]",

[c] would be that the assessee has made conscious concealment or furnished inaccurate particulars of his income, where the additions made in the",

assessment order, on the basis of which penalty for concealment was levied is finally annulled, or deleted, there remains no basis set out for levying",

the penalty for concealment, and, therefore in such a case no such penalty can survive and the same is liable to be cancelled. Thus, it is settled law",

that penalty cannot stand if the assessment is set aside.,

28. In UNION OF INDIA VS. DHARMENDRA TEXTILES PROCESSORS & OTHERS reported in (2008) 306 ITR 277 (SC), the Hon'ble Apex",

Court was dealing with the penalty provisions contained in Section 11 [a][c] of the Central Excise Act, 1944, reference was made to the penalty",

provision in the Act, 1961 and the Hon'ble Apex Court has held that mens era is not an essential element for imposing penalty for breach of civil",

obligations. In the case of Manjunatha Cotton and Ginning Factory supra, the Division Bench of this Court considering the various judgments of the",

Hon'ble Apex Court and more particularly Dharmendra Textiles case supra, held that the decision in the Dharmendra Textiles case is to be understood",

as a decision under Section 11[a][c] of the Central Excise Act, 1944 and Rajasthan Spinning and Ginning case of the Hon'ble Apex Court has been",

referred to, while arriving at such a decision. In paragraph 65, the Division Bench has observed that the subject matter of the penalty proceedings is",

the order of the Appellate Authority and not the order passed by the Assessing Authority. If the Appellate Authority was satisfied with the addition, it",

has to be made on the ground of undervaluation of the closing stock which was not the finding recorded by the Assessing Authority, which was not",

the basis for the initiation of the penalty proceedings by the Assessing Authority. In such circumstances, it was held that the Appellate Authority ought",

to have initiated penalty proceedings and issued notice to the assessee to show cause why penalty should not be imposed. The said procedure not,

being followed and, therefore, though for different reasons, the First Appellate Authority has set aside the order levying penalty, the Tribunal correctly",

appreciated the facts in a proper perspective and was justified in not interfering with the order of the appellate authority in setting aside the penalty,

order.,

29. Thus, it is clear that unless a specific provision is made in the Double Taxation Avoidance Agreement in as much as penalty is concerned, the",

provisions of Section 271[1][c] of the Act shall continue to apply or in other words, where a specific provision is made in the DTA Agreement,",

waiving of penalty, the same shall prevail over the penalty provisions of the Income Tax Act are concerned. Only in such circumstances, Section 271",

[1] [c] of the Act cannot be invoked. Merely for the reason that Article 253 of the Constitution of India provides for enacting any law for,

implementing any agreement, treating or convention with foreign countries and Section 90 is engrafted to avoid Double Taxation it cannot be held that",

Section 271[[1][c] of the Act is ultravires the constitution as far as levy of penalty subsequent to passing of the order under Section 44(G) and (H) of,

the Rules. The competency of the legislature to levy penalty under Section 271[1][c] of the Act cannot be disputed as the said provision itself is a self-,

contained code distinct from the assessment provisions. This view is supported by the Division Bench ruling of this Court in the case of Manjunatha,

Cotton and Ginning Factory supra. Rule 44H[5] of the Rules further makes it clear that the amount of tax, interest or penalty already determined shall",

be adjusted after incorporating the decision taken under the MAP in the manner provided under the Act or the rules made there under to the extent,

that they are not contrary to the Resolution arrived at. What could be inferred from the said Rules is that the resolution shall explicitly spell-out the,

decision taken under the MAP and it is based on such decision, the competent authority of India shall give effect to the decision under the Agreement.",

30. The penalty proceedings are distinct from assessment proceedings and independent there from. The proceedings for imposition of penalty though,

emanating from proceedings of assessment are independent and separate aspects of the proceedings. Merely alternative dispute resolution has been,

opted by the assesse, it would not invalidate the penalty proceedings unless it has been considered, analyzed and a decision is arrived at by the two",

sovereign States under the MAP. The order passed by the mechanism provided under Section 90 can be construed as an adjustment to the,

assessment order but not an annulment of the assessment order. If by such an adjustment, the assessment order is annulled in its entirety, setting aside",

the tax levied on income, then the arguments of the petitioners can hold good prohibiting the authorities to invoke the penal proceedings irrespective of",

any explicit finding regarding the penal consequences in the order of MAP. However, in the present set of facts, such a situation would not arise in",

view of the adjustment made to certain extent in the order passed under Rule 44H(5), implementing the order of MAP reducing the transfer pricing",

adjustment to Rs.91,80,00,000/- as against Rs.240,11,91,692/-. The onus lies on the assessee to establish that the said addition now finally decided by",

MAP is not due to concealment of income or furnishing of inaccurate particulars and moreover, the computation was made under Section 92C in the",

manner prescribed under that Section, in good faith and with due diligence. At the same time, Explanation 7 would not empower the concerned",

authorities to levy penalty automatically for such transactions. A decision has to be taken by the authorities after application of mind. These aspects,

involving questions of fact requires to be considered by the Authorities concerned and rightly the petitioner has preferred an appeal against the penalty,

proceedings in W.P.No.57865/2015. Since the notice issued under Section 271[1][c] of the Act being challenged in W.P.No.56348/2015, the petitioner",

is at liberty to file objections/reply to the notice impugned within a period of two weeks from the date of receipt of certified copy of the order. If such,

reply/objections are filed as aforesaid, the same shall be considered by the Assessing Officer in accordance with law in an expedite manner.",

Hence, the following.",

ORDER,

i) Section 271(1)(C) of the Income Tax Act, 1961 is held intra vires the constitution in so far as imposing of penalty on amounts determined pursuant",

to Convention for avoidance of Double Taxation between Union of India and other sovereign countries which is enforced in Indian territory by Section,

90 of the Income Tax Act, 1961 and the Rules made thereunder.",

ii) Appellate Authority shall consider the appeal preferred by the petitioner against the order of penalty dated 22.09.2015 at Annexure Ã¢â‚¬" S,

[W.P.No.57865/2015] on merits and shall take a decision in accordance with law in an expedite manner.,

iii) The petitioner in W.P.No.56348/2015 is at liberty to file reply/objections to the notice dated 27.10.2015 at Annexure-G within a period of two,

weeks from the date of receipt of certified copy of the order. On filing of such reply/objections, the Assessing Officer shall consider the same and",

take a decision in accordance with law in an expedite manner.,

iv) With the aforesaid observations, writ petition stands dismissed.",