R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO. 1081 OF 2016
INCOME TAX APPEAL NO. 1090 OF 2016
INCOME TAX APPEAL NO. 1092 OF 2016
INCOME TAX APPEAL NO. 1292 OF 2016

Dr. Nitin Laxmikant Lad .. Appellant

Versus

Asst. Commissioner of Income Tax, Central Circle-1,
Nashik & Anr. .. Respondents

....

- Mr. Mihir Naniwadekar for the Appellant
- Mr. Sham Walve for the Respondents

....

CORAM : AKIL KURESHI &
B.P. COLABAWALLA, JJ.

DATE : JANUARY 9, 2019.

P.C.:

1. These appeals arise out of common background. We may refer facts from Income Tax Appeal No. 1081 of 2016.

2. The appeal is filed by the assessee challenging the judgment of the Income Tax Appellate Tribunal ("the Tribunal" for short) dated 30.10.2018 raising following questions for our consideration:-

> "(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding levy of penalty under Section 271(1)(c) of the Income Tax Act,

1961?

(ii) Whether on the facts and in the circumstances of the case, penalty levied under Section 271(1)(c) of the Income Tax Act, 1961 is legally valid and justified, when the alleged concealed income was fully disclosed and accepted in the only valid and subsisting return?"

3. Appellant - assessee was subjected to search and seizure operation carried out by the Revenue Authorities on 16.1.2009. Certain documents and books of accounts were seized. Statements of the assessee were recorded. In such statements, the assessee declared certain additional income not previously declared in the return filed. In response to notice under Section 153A of the Income Tax Act, 1961 ("the Act" for short), also the assessee filed return declaring additional income. The assessment was carried out by the Assessing Officer under Section 153A of the Act accepting the declared income. This gave rise to penalty proceedings. The Assessing Officer imposed penalty under Section 271(1)(c) of the Act which was challenged by the assessee. Commissioner (Appeals) reversed the penalty orders primarily on the ground that during search, no incriminating material or documents were found giving rise to the escaped income and under such circumstances, according to the

Commissioner (Appeals), penalty could not have been imposed.

4. The Revenue carried the matter in appeal before the Tribunal. The Tribunal by the impugned judgment, allowed the Revenue's appeal and restored the penalty imposed by the Assessing Officer. The Tribunal referred to and relied upon the Explanation 5A below Section 271(1) of the Act. The Tribunal reversed the Commissioner's view that no incriminating material was found during the search which related to the escaped income.

5. We have heard the learned counsel for the parties. Learned counsel for the appellant had placed considerable stress on the language used in Explanation 5A below Section 271(1) of the Act to contend that when incriminating material was found during search, penalty on the basis of income returned by the assessee in the returns filed in response to Notice under Section 153A of the Act could not have been imposed. Learned counsel for the Revenue, however, argued that the Tribunal came to specific finding that there was incriminating material which led to detection of concealed income.

6. Explanation 5(a) was added in the legislature by Finance Act 2009 w.e.f. 1.6.2007. This explanation reads as under:-

> "Explanation 5A. - Where, in the course of a search initiated under Section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of -
>
> (i) any money, bullion, jewellery or other valuable article or thing (hereinafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income for any previous year; or
>
> (ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year,
>
> which has ended before the date of search and, -
>
> (a) where the return of income for such previous year has been furnished before the said date but such income has not been declared therein; or
>
> (b) the due date for filing the return of income for such previous year has expired but the assessee has not filed the return
>
> then notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income]"

7. By virtue of this explanation, where any income based on any entry in books of account or other documents or transactions is found and the assessee claimed that such entry in the books of account or transactions represents his income from any previous year, then notwithstanding that the income declared in the return filed for a period under consideration is accepted, the assessee would still be liable to penalty under Section 271(1)(c) of the Act. In the present case, going by the order of the Tribunal, this is precisely what has happened. By virtue of this explanation, therefore, penalty could be levied and the fact that in the assessment order, no additional income is assessed in assessment in response to the notice under Section 153A of the Act, would be of no consequence. The contention that there was no incriminating material found during such search which related to the income so declared, cannot be accepted in view of the clear findings of facts from the Tribunal. No question of law arises. Income Tax Appeals are dismissed.

[B.P. COLABAWALLA, J.] **[AKIL KURESHI, J]**