

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "G" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA.No.2871/Del./2018
Assessment Year 2014-2015

Shri Sanjeev Kumar Aggarwal, B-26, Swasthya Vihar, New Delhi. PIN 110092. PAN AADPA0478P	vs	The ACIT, Central Circle-6, New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Ved Jain, Advocate
For Revenue :	Shri S.S. Rana, CIT-D.R.

Date of Hearing :	20.08.2018
Date of Pronouncement :	17.09.2018

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Assessee has been directed against the Order of the Ld. CIT(A)-24, New Delhi, Dated 03.04.2018, for the A.Y. 2014-2015, challenging the levy of penalty under section 271(1)(c) of the I.T. Act, 1961.

2. We have heard the Learned Representatives of both the parties and perused the material available on record.

3. Briefly the facts of the case are that search and seizure action under section 132 of the I.T. Act was carried out in the Neha Jewellers group of cases by Investigation Wing, New Delhi on 16.10.2014. Warrant of authorization was also executed in the case of assessee. As per the return filed in previous years, the assessee derived income from salary, income from house property, remuneration from firm, long term capital gains and income from other sources. Assessee has not filed his original return under section 139 for the assessment year under appeal. The assessee filed his return for assessment year under appeal only on 31.08.2016, in response to notice under section 153A of the I.T. Act issued on 22.08.2016. The A.O. issued statutory notice for completion of the assessment. It is noted here that prior to the search on Neha Jewellers group of cases, search and seizure action was carried on R.K. Kedia group of cases from 13.06.2014 to

17.06.2014, Mr. R.K. Kedia deposited before the Income Tax Authorities in his statement on oath that he is a Commission Agent who arranges different type of accommodation entries such as bogus long term capital gain through various entry operators. Mr. R.K. Kedia has further admitted on oath that various paper companies are controlled and managed by various accommodation entry operators not doing any actual working but are being used for providing bogus long term capital gain to various beneficiaries. Neha Jewellers group was also a beneficiary of such bogus long term capital gain arranged by Mr. R.K. Kedia through these companies. During search operations on Mr. R.K. Kedia group of cases, documents seized as Annexure-A-28 etc., reveals that bogus long term capital gain has been obtained by the family members of the assessee as facilitated by Mr. R.K. Kedia. The seized documents evidenced that unaccounted cash has been utilised by the assessee for obtaining long term capital gains in the name of his family members through Mr. R.K. Kedia. Detailed enquiry conducted during search and post search

proceedings in Mr. R.K. Kedia group clearly established that paper companies were penny stock companies utilised by him for organizing bogus long term capital gain.

4. During the course of search proceedings in the Neha Jewellers group of cases, the assessee was confronted with the documents seized in R.K. Kedia group and finding of enquiries were conducted in this regard. In response, the assessee admitted in his statement on oath that he has taken bogus long term capital gain in the name of Smt. Sadhana Rani, Smt. Savita Bansal, Kanika Agarwal and Neha Bansal facilitated by Mr. R.K. Kedia. The relevant portion of the statement is reproduced in the assessment order. The family members of the assessee were also confronted with the documents and all of them admitted in their statements on oath that bogus long term capital gain recorded in their name have been obtained by the assessee and all the decision/investment/expense in this regard has been done by the assessee. The assessee also admitted that these expense/

investments were done by him and this money came through unaccounted sale of gold and silver. The assessee also surrendered the long term capital gain and admitted to pay tax on it. Subsequently, notice under section 153A of the Act was issued on 22.08.2016 for filing of return of income and the assessee in response filed return of income on 31.08.2016 declaring income of Rs.6,83,44,980. The return of income filed included income from other sources of Rs.6,61,35,124/- in respect of income on account of long term capital gain booked but not claimed in the names of Smt. Sadhna Rani, Smt. Savita Bansal, Smt. Neha Bansal. During assessment proceedings, it was noted that assessee has booked some other long term capital gain also from some other penny stock companies in the name of same family members. All these family members as well as the assessee were confronted with the same and the assessee in response thereto, further revised his return of income on 16.12.2016 declaring total income of Rs.7,15,82,750/- including income from other sources of Rs.6,93,73,402/- in respect of shares in the revised return.

The assessee has further disclosed income from other sources of Rs.18,65,587/- in respect of shares in the name of Smt. Kanika Agarwal and commission expenses of Rs.13,80,014/-.

4.1. The A.O. after discussion made the assessment on revised return of income at Rs.7,15,82,750/-. Thus, return of income was accepted. The A.O. however, noted that since the assessee did not file return of income under section 139 of the I.T. Act and return is only filed in response to notice under section 153A of the I.T. Act, therefore, the above surrendered income represents undisclosed income of the assessee as per the provisions of Section 271AAB of the I.T. Act and A.Y. 2014-2015 under appeal is the specified year of the assessee as the assessee is a working partner of M/s. Brijwasi Jewellers. Hence, penalty proceedings under section 271AAB of the I.T. Act is initiated. The A.O. vide separate order levied the penalty under section 271AAB of the I.T. Act, 1961.

5. The assessee challenged the penalty order under section 271AAB of the Act before the Ld. CIT(A) and it was

submitted that penalty under this provision is not leviable as the A.Y. 2014-2015 was not covered under the definition of “specified year” as due date for filing return of income for assessment year under appeal had already been expired before the date of search. The Ld. CIT(A) accepted the contention of the assessee and quashed the penalty order passed by the A.O. under section 271AAB of the I.T. Act, 1961.

5.1. The Ld. CIT(A) thereafter proceeded to note that assessee filed return of income in response to notice under section 153A, therefore, it is clear that although due date of filing of return under section 139(1) had expired, but assessee has not filed return of income till the date of the search on 16.10.2014. After the search, assessee filed return of income declaring income of Rs.6.83 crores which was revised to Rs.7.15 crores. Therefore, it was observed that the general provisions of Section 271(1)(c) of the Act read with Explanation 5A are attracted in the case of the assessee. The Ld. CIT(A), therefore, recorded satisfaction during the appellate

proceedings and penalty proceedings under section 271(1)(c) of the Act were initiated by issuing show cause notice dated 31.01.2018, relevant portion of which is reproduced in the appellate order. The assessee filed reply before Ld. CIT(A) challenging the initiation of penalty proceedings under section 271(1)(c) of the Act. The reply of the assessee is reproduced in the appellate order, in which, the assessee briefly explained that he has income from salary, house property, business, long term capital gains and income from other sources. Notice under section 153A was issued on 22.08.2016 for filing of the return of income which was filed on 31.08.2016 declaring income of Rs.6.83 crores including surrendered long term capital gains of Rs.6.61 crores as income from other sources. The assessee revised the return of income to Rs.7.15 crores and assessment is completed at the revised return filed by the assessee. The assessment and penalty proceedings are independent proceedings. Assessee disclosed all the facts in books of account. Since return of income is accepted, therefore, no penalty proceedings can be initiated against the

assessee. The penalty proceedings have not been initiated under section 271(1)(c) of the Act, therefore, there is no satisfaction recorded by the A.O. The power to initiate penalty proceedings under section 271(1)(c) of the Act is with the A.O. only and not with the appellate authority. The assessee relied upon the decisions of ITAT, Pune Bench in the case of ACIT, Central Circle, Kolhapur vs. D.M. Corporation Private Limited in ITA.Nos.137 to 141/Pune/2016 and in the case of Ajit Ramchandran Jadhv vs. ACIT, Circle-3, Nanded (2017) 82 taxmann.com 58 (Pune – Tribunal). The penalty proceedings could not be initiated for both the limbs of Section 271(1)(c) of the Act. It was submitted that Explanation 5A to Section 271(1)(c) of the Act is not attracted in the case of the assessee. No incriminating material was found during the course of search. Surrender was not based on any material found during the course of search. Since the A.O. accepted the revised return filed by the assessee under section 153A of the I.T. Act, the original return under section 139 abates and become non-est. The assessee relied upon the decision of Hon'ble Delhi High Court in the

case of Pr. CIT vs. Neeraj Jindal & Another (2017) 393 ITR 1 (Del.) (HC).

5.2. The Ld. CIT(A), however, did not accept the contention of assessee and noted that Ld. CIT(A) has power to initiate penalty proceedings 271(1)(c) of the Act. The Ld. CIT(A) has recorded satisfaction during proceedings pending under the Act. Since no return of income was filed in the regular course and it was filed only after search and seizure operation, therefore, it is clear cut case of concealment of income. The Ld. CIT(A) noted that Explanation-5A to Section 271(1)(c) of the Act, is applicable in this case. As per assessment order incriminating material was seized from the premises of Mr. R.K. Kedia which evidenced that unaccounted cash (earned through purchase and sale of gold) of the assessee was utilised for obtaining accommodation entries of bogus long term capital gain in the hands of family members of the assessee and material was confronted to the assessee. Therefore, it is a case of concealment of income under section 271(1)(c) of the

Act. The Ld. CIT(A), therefore, held that as no return of income under normal course i.e., under section 139 was filed, therefore, the entire tax calculated on the assessed income i.e., Rs.7,15,82,750/- is tax sought to be evaded in this case. The Ld. CIT(A) levied the penalty at 150% of the tax sought to be evaded and worked-out the penalty to Rs.3,48,37,535/-.

6. The assessee is in appeal challenging the penalty order under section 271(1)(c) of the Act. Learned Counsel for the Assessee reiterated the submissions made before the authorities below. He has submitted that due date of filing of the income tax return in the case of the assessee was 30.09.2014, since assessee is a partner in the firm “M/s. Brijvasi Jewellers” which was audited under section 44AB of the I.T. Act. The due date was extended by CBDT vide order dated 26.09.2014 from 30.09.2014 to 30.11.2014 and therefore, due date of filing of the income tax return comes after the date of search conducted in the case of the assessee i.e., on 16.10.2014. Copy of the Board Circular is filed on

record. After the closure of the search proceedings, notice under section 153A was issued to assessee on 22.08.2016 for filing of the return of income and in response to this notice, assessee filed the return of income on 31.08.2016 declaring income of Rs.6.83 crores including surrendered long term capital gain of Rs.6.61 crores as income from other sources. The assessee revised the return of income under the Head "Income from other sources" at Rs.6,93,73,702/- and ultimately declared total income of Rs.7,15,82,750/- which is accepted by the A.O. as it is in the Order under section 153A r.w.s. 143(3) of the I.T. Act. The A.O. initiated the penalty proceedings under section 271AAB of the I.T. Act. The A.O. did not initiate the penalty proceedings under section 271(1)(c) of the I.T. Act. The A.O. vide separate order levied the penalty under section 271AAB of the I.T. Act, which have been deleted by the Ld. CIT(A) vide impugned order on the reasons that the time for filing of income tax return for assessment year under appeal has already been expired before date of search and therefore, provisions of Section 271AAB are not applicable to

assessment year under appeal. The Ld. CIT(A), however, initiated the penalty proceedings under section 271(1)(c) of the I.T. Act read with Explanation 5A to Section 271(1)(c) of the I.T. Act. Learned Counsel for the Assessee submitted that Explanation 5A to Section 271(1)(c) of the I.T. Act is not applicable to the facts of the case because no return was filed by assessee before the date of the search. The assessee has not filed the return of income and the return was filed in response to notice under section 153A which would become the first return as per Section 153A itself. Explanation 5A covers previous year before date of search, for which, (i) due date under section 139(1) has not expired but the return of income has been filed concealing income or (ii) due date under section 139(1) has expired but the return of income has either not been filed or has been filed concealing the income. In the case of the assessee, the due date of filing of the return of income was 30.11.2014 and search is conducted prior to it on 16.10.2014, therefore, return of income filed under section 153A on 31.08.2016 is to be treated as return filed for the first

time. It is, therefore, evident that on the date of search on 16.10.2014 neither the due date of filing of the return has expired which is 30.11.2014 nor assessee has filed his return of income which was filed on 31.08.2016 due to the fact that assessment for A.Y. 2014-2015 in appeal has not abated on the date of search and assessee was governed by the provisions of Section 153A of the I.T. Act and therefore, filed his return of income after issue of notice under section 153A within the time allowed under that Section. The case of the assessee, therefore, would not fall under Explanation 5A to Section 271(1)(c) of the I.T. Act. According to Section 271AAB(2) of the I.T. Act, no penalty under section 271(1)(c) of the I.T. Act would be imposed because the case of the assessee would fall within the definition "specified previous year". He has submitted that provisions of Section 271AAB and Section 271(1)(c) of the I.T. Act are mutually exclusive as per subsection (2) to Section 271AAB of the Act. Therefore, if the assessee falls under the provisions of Section 271AAB of the Act, provisions of Section 271(1)(c) of the I.T. Act do not apply.

Learned Counsel for the Assessee further submitted that Authority who has recorded satisfaction alone can levy penalty and relied upon decision of ITAT, Pune Bench in the case of ACIT, Central Circle, Kolhapur vs. DM Corporation Pvt. Ltd., (supra) and Shri Bhupendra S. Shah vs. ITO, Central-1, Nashik 2018-(8)-TMI-842-ITAT-Pune Bench. He has further submitted that that Ld. CIT(A) can levy penalty on the addition made by him and not on the additions made by the A.O. and relied upon decision of the Allahabad High Court in the case of CIT vs. Shadiram Balmukund (1972) 84 ITR 183 (All.). He has submitted that Ld. CIT(A) has no jurisdiction to initiate penalty in another penalty proceedings. Learned Counsel for the Assessee, therefore, submitted that there were no justification for the Ld. CIT(A) to levy penalty under section 271(1)(c) of the I.T. Act.

7. On the other hand, Ld. D.R. relied upon the Order of the Ld. CIT(A). He has submitted that the Board Circular do not apply to assessee as assessee has no business income,

therefore, due date of filing of the return was 31.07.2014. He has submitted that power of Ld. CIT(A) is co-terminus to that of the A.O. The assessee filed revised return which showed concealment of income. He has submitted that since no original return was filed disclosing the returned income, therefore, penalty was rightly imposed. He has relied upon the decision of Hon'ble Calcutta High Court in the case of CIT vs. Prasanna Dugar (2015) 371 ITR 19 (Calcutta) (HC), Order of ITAT, Madras Bench in the case of ACIT vs. Smt. J. Mythili 35 taxmann.com 86, Order of ITAT, Delhi Bench in the case of Smt. Kiran Devi vs. ACIT (2009) 125 TTJ 631 (Del.), Judgment of Hon'ble Kerala High Court in the case of CIT vs. S.J. Prasad (2008) 220 CTR 169 (Kerala), Judgment of Delhi High Court in the case of CIT vs. Smt. Meeradevi (2012) 253 CTR 559 (Del.), Judgment of Delhi High Court in the case of Shourya Towers (P.) Ltd., vs. DCIT (2013) 359 ITR 523 (Del.) and Decision of Punjab & Haryana High Court in the case of Mr. Sanjay Aggarwal vs. CIT (2012) 211 Taxman 178 (P&H) (HC).

8. We have considered the rival submissions and perused the material available on record. Section 271(1)(c) of the I.T. Act provides that *“if the A.O. or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act is satisfied that any person – has concealed the particulars of his income or furnished inaccurate particulars of his income, he may direct that such person shall pay the penalty.”* Explanation 5A to Section 271(1)(c) of the I.T. Act provides 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 (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (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.”

8.1. Section 271AAB of the I.T. Act provides as under :

*'271AAB. Penalty where search has been initiated.—(1)
The Assessing Officer may, notwithstanding anything
contained in any other provisions of this Act, direct that, in
a case where search has been initiated under section 132
on or after the 1st day of July, 2012, the assessee shall
pay by way of penalty, in addition to tax, if any, payable
by him,—*

*(a) a sum computed at the rate of ten per cent of the
undisclosed income of the specified previous year, if
such assessee—*

*(i) in the course of the search, in a statement under
sub-section (4) of section 132, admits the
undisclosed income and specifies the manner in
which such income has been derived;*

*(ii) substantiates the manner in which the
undisclosed income was derived; and*

(iii) *on or before the specified date—*

(A) *pays the tax, together with interest, if any,
in respect of the undisclosed income; and*

(B) *furnishes the return of income for the
specified previous year declaring such
undisclosed income therein;*

(b) *a sum computed at the rate of twenty per cent of
the undisclosed income of the specified previous year, if
such assessee—*

(i) *in the course of the search, in a statement under
sub-section (4) of section 132, does not admit
the undisclosed income; and*

(ii) *on or before the specified date—*

(A) *declares such income in the return of income
furnished for the specified previous year; and*

(B) *pays the tax, together with interest, if any,
in respect of the undisclosed income;*

- (c) *a sum which shall not be less than thirty per cent but which shall not exceed ninety per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).*
- (2) *No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).*
- (3) *The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.*

Explanation.—For the purposes of this section,—

- (a) *"specified date" means the due date of furnishing of return of income under sub-section (1) of section 139 or the date on which the period specified in the notice issued under section 153A for furnishing of return of income expires, as the case may be;*
- (b) *"specified previous year" means the previous year—*

- (i) *which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or*
- (ii) *in which search was conducted;*
- (c) *"undisclosed income" means—*
 - (i) *any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has—*
 - (A) *not been recorded on or before the date of search in the books of account or other*

*documents maintained in the normal course
relating to such previous year; or*

*(B) otherwise not been disclosed to the Chief
Commissioner or Commissioner before the date
of search; or*

*(ii) any income of the specified previous year
represented, either wholly or partly, by any
entry in respect of an expense recorded in the
books of account or other documents
maintained in the normal course relating to the
specified previous year which is found to be
false and would not have been found to be so
had the search not been conducted.”*

8.2. Hon’ble Delhi High Court in the case of Pr. CIT vs.
Neeraj Jindal & Another (2017) 393 ITR 1 (Delhi) held as
under :

“The levy of penalty under section 271(1)(c) of the Income-tax Act, 1961, is not automatic. For levy of penalty under section 271(1)(c), the conditions laid out therein have to be specifically fulfilled. Section 271(1)(c) of the Act, being in the nature of a penal provision, requires strict construction. The word "conceal" in section 271(1)(c) would require the Assessing Officer to prove that specifically there was some conduct on the part of the assessee which would show that the assessee consciously intended to hide his income. When an assessee has filed revised returns after a search has been conducted, and such revised returns have been accepted by the Assessing Officer, merely by virtue of the fact that such return showed a higher income, penalty under section 271(1)(c) cannot be automatically imposed. Considering that the non obstante clause under section 153A excludes the application, inter alia, of section 139, it is clear that the revised return filed

under section 153A takes the place of the original return under section 139, for the purposes of all, other provisions of the Act. Thus it is clear that when the Assessing Officer has accepted the revised return filed by the assessee under section 153A, no occasion arises to refer to the previous return filed under section 139 of the Act. For all purposes, including for the purpose of levying penalty under section 271(1)(c) of the Act, the return that has to be looked at is the one filed under section 153A.

Explanation 5 to section 271(1) was inserted by the Taxation Laws (Amendment) Act, 1984, -with effect from October 1, 1984. This Explanation has been inserted to address situations where consequent to a search, assets and valuables are discovered to be in the possession of the assessee, and thereafter the assessee files a return of income after the date of search. In such cases, even if the

assessee includes the amounts utilised by him in acquiring the assets found in his possession during the search operations as his income in the return filed after the search, the assessee would be deemed to have concealed his income. The words used by the Legislature are "be deemed to have concealed the particulars of his income", which shows that there is a deeming fiction by virtue of which such additional income is considered as concealment. In order for Explanation 5 to apply, it is necessary that there must be certain assets (such as money, bullion, etc.) found in the possession of the assessee during the search, and that the assessee must claim that such assets have been acquired by him by utilising (wholly or in part) his income. Moreover, such income must be in relation to a particular previous year that has either ended before the date of the search or is to end on or after the date of the search and such

income is declared subsequently in the return of income filed after the search.

A search and seizure operation under section 132(4) of the Act was carried out on January 11, 2007 in the premises of the assessee's group companies and directors of the company. A disclosure of Rs. 16 crores was made by the group under section 132(4) of the Act on behalf of different directors and relatives of the directors. The assessee filed his return in response to a notice under section 153A. The Assessing Officer completed the assessment under section 153A read with section 143(3) of the Act accepting the declared income. He imposed penalty under section 271(l)(c). The penalty was deleted by the Commissioner of Income-tax (Appeals) and this was confirmed by the Tribunal. On appeal:

Held, that since the return under section 153A had been accepted by the Assessing Officer there was no

concealment of income. Moreover, for the relevant assessment years, 2005-06 and 2006-07, no material was recovered during the search. Rather, the assessee added Rs.21,65,932 in the return filed pursuant to notice under section 153A. That amount was not relatable to any sum recovered or article seized. Therefore, the question of adding or not adding amounts after the search and falling within the mischief of Explanation 5 to section 271(1)(c) could not arise in the facts and circumstances of this case. The deletion of penalty was justified.”

8.3. ITAT, Chandigadh Bench in the case of Shri Praveen Garg, Moga vs. ACIT, Central Circle-II, Chandigarh in ITA.No.350/Chd./2013 for the A.Y. 2008-2009 vide Order dated 09.09.2015 (Author by one of us J.M.) in paras 9 to 11 held as under :

“9. We have considered the rival submissions and perused the material available on record. It is not in

dispute that the search was conducted on 15.7.2008 at the premises of the assessee. The Assessing Officer levied penalty as per Explanation 5-A to [section 271\(1\)\(c\)](#) of the Act because the return has not been filed by the assessee within the due date of filing of the return i.e. 31.7.2008. The assessee, however, explained that the assessee is a partner in two firms and the books of account of one firm are audited. Therefore, in his case the due date of filing of the return cannot be 31.7.2008 and it would be 30.9.2008. This fact is admitted by the learned CIT (Appeals) in his findings. It is, therefore, clear that in the present case, at the time of search on 15.7.2008, the due date of filing of the return for assessment year under appeal i.e. 2008-09 had not expired because the due date of filing of the return was 30.9.2008. The I.T.A.T., Mumbai Bench in the case of Kshiti R. Maniar (supra) considered the application of Explanation 5-A to [section 271\(1\)\(c\)](#) of the Act and held that the deeming provisions of Explanation 5-A cannot be applied because at the time of search, the relevant

previous year for the assessment year under appeal, the due date of filing of return of income had not expired. The findings of the Tribunal in paras 6 and 7 of the order are reproduced as under :

“6. We have heard the rival contentions and have perused the findings of the Assessing Officer as well as the Commissioner (Appeals). In the present case, penalty has been levied by invoking the provisions of Explanation 5A to [section 271\(l\)\(c\)](#) (and not Explanation 5, as mentioned by the Assessing Officer). Explanation 5A, is a deeming provision where in case of search and seizure operation carried out under [section 132](#) after 1st June 2007, the assessee is deemed to have concealed the particulars of his income or furnished inaccurate particulars of income, if he is found to be the owner of any money bullion jewellery or other valuable article or thing acquired by him utilizing his income in any

previous year or any income based on entry in any books of account or other documents for any previous year. The relevant provisions of Explanation 5A to [section 271\(l\)\(c\)](#) is reproduced below :-

[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 (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (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."

Thus, in case of search conducted on / or after 1st June 2007, penalty for concealment of income and furnishing of inaccurate particulars of income is deemed under Explanation 5A. However, two exceptions or saving clause has been provided wherein the penalty cannot be levied under this section. Firstly, the assessee has shown the assets as mentioned in clause (i) or income as mentioned in clause (ii), in the return of income furnished before the date of search or secondly, the due date for filing of return of income for such previous year has

not expired. If any case falls under these saving clauses, Explanation 5A cannot be invoked.

7. In the present case the search had taken place on 19th June 2007. The due date for filing of return of income for the assessment year 2007-08, had not expired on the date of search as the due date of filing of return of income under [section 139\(1\)](#) was 31st July 2007 and due date under [section 139\(4\)](#) was 31st March 2008. Thus, in the present case, deeming provisions of Explanation 5A cannot be applied here because at the time of search, the relevant previous year for the assessment year 2007-08, the due date of filing of return of income had not expired. Whether the assessee had filed the return of income under [section 139\(1\)](#) or 139(4) after the date of search, will not be of much consequence because the income in question pertains to assessment year 2007-08 for which the due date had not expired at the time of search. The deeming provisions as given any Explanation 5A has to be strictly construed because one has to see what is the status of income on the date of search and not afterwards. The penalty in this case, cannot be

levied under the main provision as the assessee has included this income in the return of income in response to notice under [section 153A](#) and which has been assessed also. There is no variation between the return of income and the assessed income, qua this addition. For levying the penalty in cases of search after 1 st June 2007, the deeming provisions of Explanation 5A can only be invoked, which clearly carves out the exception in the cases where due date of filing of the return of income had not expired at the time of search. Thus, for levy of penalty under Explanation 5A, it has to be seen whether any assets or income found on the date of search has been acquired out of the previous year and not afterwards for which penalty can be levied or initiated under other provisions of [section 271\(1\)\(c\)](#). Thus, in our opinion, once the due date had not expired for filing the return of income for the assessment year 2007-08, at the time of search, penalty cannot be levied under the deeming provisions of Explanation 5A. Consequently, we set aside the impugned order passed by the learned Commissioner (Appeals) and hold that on this

preliminary ground, penalty levied by the Assessing Officer and as confirmed by the Commissioner (Appeals) cannot be sustained and same is deleted.”

10. *Considering the facts of the case in the light of the decision of I.T.A.T., Mumbai Bench in the case of Kshiti R. Maniar (supra), it is clear that in the case of the assessee, search had taken place on 15.7.2008. The due date of filing of the return for assessment year under appeal i.e. 2008-09 had not expired on the date of the search as the due date of filing of the return of income under [section 139\(1\)](#) was 30.9.2008. Thus, in the present case, the deeming provisions of Explanation 5-A cannot be applied because at the time of search, the relevant previous year for the assessment year under appeal, the due date of filing of the return of income had not expired. Thus, the decision of I.T.A.T., Mumbai Bench in the case of Kshiti R. Maniar (supra) is squarely applicable to the facts and circumstances of the case. Further, the assessee explained*

that there was no variation in the return of income and assessed income as per the assessment order passed under [section 153A](#) r.w.s. 143(3) of the Act because the returned income was accepted including the surrendered income. The learned counsel for the assessee also explained that due to the bonafide error, surrendered income was not included in the return filed under [section 139\(1\)](#) or 139(4) of the Act because as per the advice, the surrendered income was to be declared in the return to be filed under [section 153A](#) of the Act. The Assessing Officer levied the penalty under deeming provisions of Explanation 5- A to [section 271\(1\)\(c\)](#) of the Act, which in our view, is not applicable to the facts and circumstances of the case. There is thus, no concealment of income in the case of the assessee for attracting levy of penalty. Therefore, considering the facts and circumstances of the case in the light of the decision in the case of *Kshiti R. Maniar* (supra), we set aside the orders of the authorities below and cancel the penalty.

11. In the result, the appeal filed by the assessee is allowed.”

8.4. ITAT, Chandigadh Bench in the case of Smt. Champa Goel, Panchkula vs. ACIT, Central Circle-II, Chandigarh in ITA.No.696, 476 & 477/CHD./2012 for A.Ys. 2005-06, 2006-07 and 2007-08 vide Order dated 21.06.2016 following its earlier decision in the case of Shri Praveen Garg, Moga vs. ACIT, Central Circle-II, Chandigarh (supra), cancelled the penalty under section 271(1)(c) of the I.T. Act on the same reasoning.

8.5. In the instant case, search was conducted on 16.10.2014. The A.O. noted in the assessment order that assessee is a working partner of M/s. Brijvasi Jewellers. The A.O. also noted that assessee did not file any return of income under section 139 of the I.T. Act. The assessee filed copy of computation of income for assessment year under appeal at page-2 of the paper book in which the assessee has declared profit from firm M/s. Brijvasi Jewellers for the purpose of

taxation. Thus, it is clear that assessee was a partner of M/s. Brijvasi Jewellers and due date of filing of the return in the case of the assessee was 30.09.2014 because assessee was a partner in the firm M/s. Brijvasi Jewellers which was audited under section 44AB of the I.T. Act. Learned Counsel for the Assessee filed copy of the CBDT Order dated 26.09.2014 whereby the due date for furnishing return of income from 30.09.2014 was extended to 30.11.2014 for the A.Y. 2014-2015, in such a case, since assessee was a working partner of the firm i.e., M/s. Brijvasi Jewellers and accounts are to be audited under section 44AB of the I.T. Act. Thus, in the case of the assessee the due date of filing of the return under section 139 was extended up-to 30.11.2014. The A.O. issued notice under section 153A on 22.08.2018 and assessee immediately in response to such notice, filed return of income on 31.08.2016, which was further revised and assessee declared return of income of Rs.7,15,82,750/- including the surrendered income which have been accepted by the A.O. as it is in the assessment order dated 21.12.2016 under section

153A read with Section 143(3) of the I.T. Act. According to second proviso to Section 153A of the I.T. Act, the assessment or re-assessment, if any, relating to any assessment year falling within period of six assessment years referred to in this subsection pending on the date of initiation of search under section 132 or making or requisitioned under section 132A, as the case may be shall abate.

8.6. The Hon'ble Delhi High Court in the case of Pr. CIT vs. Neeraj Jindal & Another (supra) held "*considering that the non-obstante clause under section 153A excludes the application, inter alia, of Section 139, it is clear that the revised return filed under section 153A takes the place of the original return under section 139, for the purposes of all other provisions of the Act. Thus, it is clear that when the A.O. has accepted the revised return filed by the assessee under section 153A, no occasion arises to refer to the previous return filed under section 139 of the Act.*"

9. In the present case, even the due date for filing of the return under section 139 of the Act has not been expired on the date of the search. Therefore, all pending assessment/re-assessment shall abate. Therefore, there were no question for assessee to file return of income under section 139 of the I.T. Act as stated by the authorities below. The Ld. CIT(A) initiated and levied the penalty because no original return of income under section 139 of the I.T. Act was filed and that Explanation-5A to Section 271(1)(c) of the I.T. Act is attracted in this case. Explanation-5A is reproduced above and the requirement of application of such provision has been that during the course of search initiated under section 132 on or after 1st June, 2007, the assessee is found to be owner of any money, jewellery, bullion or other valuable articles or things and the assessee claims that such assets have been acquired by him by utilizing whole or in part his income for any previous year or 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 date of the search and – Where the return of income for such previous year has been furnished before said date but such income has not been declared therein or the due date for filing the return of income for such previous year has expired but assessee has not filed the return of income, then notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he, shall, for the purpose of imposition of penalty under section 271(1)(c) of the I.T. Act be deemed to have concealed the particulars of his income or furnishing inaccurate particulars of such income. Therefore, necessary ingredients for application of Explanation 5A to Section 271(1)(c) has been that the previous year has ended before date of the search and that where return of income for such previous year has been furnished before the said date but such income has not been declared therein or the due date for filing of the return of income of such previous year has expired but assessee has not filed the return of income.

10. In the instant case, considering the facts, Explanation 5A to Section 271(1)(c) of the I.T. Act, is not applicable in the case of the assessee, as the due date of filing of the return in the case of the assessee was extended up to 30.11.2014, which has not expired on the date of search on 16.10.2014. The assessee has filed the return of income on 31.08.2016 under section 153A of the I.T. Act on receiving the notice under section 153A issued on 22.08.2016. The assessee is admittedly a partner in the firm M/s. Brijvasi Jewellers and accounts are to be audited under section 44AB of the I.T. Act, which is admitted by the A.O. in the assessment order. It is, therefore, clear that in the present case, at the time of search on 16.10.2014, the due date of filing of the return for assessment year under appeal i.e., 2014-2015 had not expired because the due date of filing of the return was extended upto 30.11.2014. It is, therefore, evident that on the date of the search on 16.10.2014, neither the due date of filing of the return has expired which was 30.11.2014 nor assessee has filed the return of income which was filed on 31.08.2016 due

to the fact that assessment for assessment year under appeal has abated on the date of the search because the assessee was governed by the provisions of Section 153A of the I.T. Act. Therefore, the assessee has correctly filed return of income after the issue of notice under section 153A of the I.T. Act within the time allowed under that Section. Thus, in the present case, the deeming provisions of Explanation 5A cannot be applied because at the time of search for the relevant previous year under appeal, the due date of filing of the return of income had not expired. Learned Counsel for the Assessee rightly contended that since due date of filing of the return under section 139 has not expired on the date of the search, therefore, assessee could not have filed the return of income under section 139 and as per law, assessee was required to file return of income under section 153A of the I.T. Act only. Therefore, considering the facts and circumstances of the case, in the light of above provisions and Judgment of Hon'ble Delhi High Court in the case of Pr. CIT vs. Neeraj Jindal & Another (supra) and Order of ITAT, Chandigarh Bench in the

case of Shri Praveen Garg, Moga vs. ACIT, Central Circle-II, Chandigarh (supra) and Smt. Champa Goel, Panchkula vs. ACIT, Central Circle-II, Chandigarh (supra), we are of the view that Explanation 5A to Section 271(1)(c) of the I.T. Act is not applicable to the facts. Therefore, no penalty could have been levied by the Ld. CIT(A). The order of the Ld. CIT(A) is thus, liable to be set aside and quashed.

11. It may be noted here that the A.O. did not initiate the penalty proceedings under section 271(1)(c) of the I.T. Act and initiated the penalty proceedings under section 271AAB of the I.T. Act. Section 271AAB of the I.T. Act provides that the A.O. may, notwithstanding anything contained in any other provision of this Act, direct that, in a case where search has been initiated under section 132 on or after 1st July, 2012, assessee shall pay by way of penalty, in addition to tax, if any, payable by him – a sum computed @ 10% of the undisclosed income of the specified previous year. The definition of specified previous year means, the previous year which has

ended before the date of the search, but the date of furnishing the return of income under section 139(1) for such year has not expired before the date of the search and the assessee has not furnished the return of income for the previous year before the date of the search. This provision is attracted in the case of the assessee because the due date of furnishing of the return under section 139(1) of the I.T. Act, for the assessment year under appeal has not expired before date of the search as it was 30.11.2014 and that assessee has not furnished the return of income for such previous year before date of the search because it was filed under section 139A on 31.08.2016. The Ld. CIT(A), however, under some wrong interpretation of the provisions of Law, cancelled the penalty under section 271AAB of the I.T. Act in the same impugned order. Sub-Section 2 of Section 271AAB of the I.T. Act provides that no penalty under section 271(1)(c) of the I.T. Act, shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1). Since in the case of the assessee, penalty proceedings initiated by the A.O. under

section 271AAB of the Act was attracted, therefore, no penalty under section 271(1)(c) of the I.T. Act could have been levied by the Ld. CIT(A). On this count also, the Order of the Ld. CIT(A) cannot be sustained in law.

12. Learned Counsel for the Assessee also contended that the Authority who has recorded satisfaction alone can levy penalty and that Ld. CIT(A) can levy the penalty on the addition made by him and not on the additions made by the A.O. He has also contended that Ld. CIT(A) has no jurisdiction to initiate the penalty in any other penalty proceedings and that no proper satisfaction have been recorded. Since we have already noted above that penalty under section 271(1)(c) of the I.T. Act is not leviable in the facts and circumstances of the case, therefore, these issues are left with academic discussion only. However, we may note that in the present case even there is no proper satisfaction recorded by the Ld. CIT(A) before initiating the penalty proceedings under section 271(1)(c) of the I.T. Act. The Ld. CIT(A) failed to note that the

A.O. has initiated the penalty proceedings under section 271AAB of the I.T. Act as per Law and did not initiate the penalty under section 271(1)(c) of the I.T. Act. Since, in this case the provisions of Section 271AAB are *prima facie* attracted, therefore, Ld. CIT(A) on misinterpretation of provisions of Section 271AAB of the I.T. Act, wrongly initiated the penalty proceedings under section 271(1)(c) of the I.T. Act in the appellate order. Once, the penalty proceedings are rightly initiated by the A.O. under section 271AAB of the I.T. Act, therefore, there is no question of levy of penalty under section 271(1)(c) of the I.T. Act against the assessee. Ld. CIT(A), thus, failed to take note of the relevant provisions of the law and under some misinterpretation of the provisions of Law, quashed the penalty order passed by the A.O. under section 271AAB of the I.T. Act. Therefore, there is no question of Ld. CIT(A) recording a valid satisfaction to initiate penalty proceedings under section 271(1)(c) of the I.T. Act against the assessee. On this ground also the Order of Ld. CIT(A) for levy

of the penalty under section 271(1)(c) of the I.T. Act is invalid and void in law.

13. Considering the facts and circumstances of the case, the decisions relied upon by the Ld. D.R. would not apply to the facts of the case and are clearly distinguishable on facts.

14. In view of the above discussion, we are of the view that the Ld. CIT(A) was not justified to initiate the penalty proceedings under section 271(1)(c) of the I.T. Act and to levy the penalty under section 271(1)(c) of the I.T. Act against the assessee. We, accordingly, set aside the Order of the Ld. CIT(A) and quash the same for levy of the penalty under section 271(1)(c) of the I.T. Act against the assessee. Accordingly, the appeal of the assessee is allowed.

15. In the result, appeal of the Assessee is allowed.
Order pronounced in the open Court.

Sd/-
(L.P. SAHU)
ACCOUNTANT MEMBER
Delhi, Dated 17th September, 2018
VBP/-

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT "G" Bench
6.	Guard File

// BY Order //

Asst. Registrar : ITAT Delhi Benches :
Delhi.