

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCH 'B', JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA Nos. 776, 777 & 778/JP/2019
निर्धारण वर्ष/Assessment Years : 2010-11, 11-12 & 12-13.

The DCIT Central Circle-2, Jaipur.	बनाम Vs.	Shri Prakash Chand Sharma, C-42, Gokul Path, Vaishali Nagar, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AGMPS 2776 H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by : Shri B.K. Gupta (CIT)
निर्धारिती की ओर से / Assessee by : Shri PC Parwal (CA)

सुनवाई की तारीख / Date of Hearing : 09.01.2020.
घोषणा की तारीख / Date of Pronouncement : 03/02/2020.

आदेश / ORDER

PER VIJAY PAL RAO, J.M.

These three appeals by the revenue are directed against the composite order of Id. CIT (A)-4, Jaipur dated 27.03.2019 arising from the penalty orders passed under section 271(1)(c) of the IT Act for the assessment years 2010-11 to 12-13 respectively. The revenue has raised common grounds except the quantum of penalty deleted by the Id. CIT (A) in these appeals. The grounds raised for the assessment year 2010-11 are as under :-

1. Whether on the facts and the circumstances of the case Id IT (A), was right in deleting the penalty of Rs. 53,78,285/- imposed u/s 271(1)(c) of the Act ignoring the fact that the assessee himself declared additional income in the ROI filed u/s 153A of the Act and the assessee has duly understood as to what was

the purport and import of the notice and furnished his reply before AO on the charge of concealment of income.

2. Whether on the facts and in the circumstances of the case the CIT (A) is justified in holding that the penalty imposed by the AO is not sustainable because the order passed u/s 143(3) r.w.s. 153A does not specify under which limb the penalty is initiated. Nor does notice u/s 274 do so.

The Appellant crave, leave or reserving the right to amend modify, alter add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."

2. The brief facts leading to the controversy are that the assessee is engaged in the business of financing and is a Director in M/s. Shubhdeep Finance Co. Pvt. Ltd. and M/s. Prakash Deep Finance Co. Ltd. A search and seizure operation was carried out under section 132 of the IT Act in the case of the assessee as well as group concern on 31st July, 2012. During the course of search and seizure action certain documents were found revealing the nature of finance activities carried out by the assessee known as 100 days financing scheme. In the statement recorded under section 132(4) of the IT Act, the assessee surrendered an income of Rs. 10 crores which was spread over to various assessment years and offered to tax in the returns of income filed in response to notices issued under section 153A of the IT Act. The AO while completing the assessment under section 143(3) read with section 153A of the Act made the additions to the total income declared by the assessee on account of undisclosed interest income, on account of disallowance of expenses and on account of deposits made in the bank accounts of the employees of the assessee. The details of the income declared by the assessee and additions made by the AO for the assessment years 2010-11 to 2012-13 are as under :-

A.Y.	Income declared	Addition made by the AO
2010-11	1,30,94,390	26,84,725 + 29,75,859
2011-12	3,20,29,420	82,59,551
2012-13	3,00,06,860	69,54,913

On further appeal in the quantum proceedings, the Id. CIT (A) partly deleted the additions made by the AO and consequently the matter was carried to this Tribunal in cross appeals by the revenue as well as by the assessee. This Tribunal vide composite order dated 30th July, 2018 in ITA Nos. 922, 923 & 924/JP/2016 and ITA Nos. 935, 936 & 937/JP/2016 deleted the additions made by the AO and sustained by the Id. CIT (A) on account of undisclosed interest income as well as on account of deposits made in the bank accounts of the employees of the assessee whereas the additions made by the AO on account of disallowance of expenditure was set aside to the record of the AO for fresh adjudication. In the meantime, the AO initiated the proceedings for levy of penalty under section 271(1)(c) and levied the penalty of Rs. 53,78,285/-, Rs. 1,31,42,199/- and Rs. 1,20,43,429/- for the assessment years 2010-11, 11-12 and 12-13 respectively. The assessee challenged the levy of penalty before the Id. CIT (A) and raised a ground of validity of initiation of penalty as the AO has not specified the default against which the penalty proceedings were initiated by the AO. The Id. CIT (A) deleted the penalty levied by the AO for all these years on this legal issue of validity of initiation of penalty proceedings. Aggrieved by the order of the Id. CIT (A), the revenue has filed these appeals.

3. Before us, the Id. D/R has submitted that the undisclosed income surrendered by the assessee was based on the incriminating material found and seized during the course of search and seizure action and further the AO has also made the additions during the assessment proceedings based on the seizure material itself. Therefore, the issue of validity of initiation of proceedings under section 271(1)(c) does not arise when the assessee himself has surrendered the income being undisclosed income. The Id. D/R has further contended that the Id. CIT (A) has admitted an additional ground regarding validity of initiation of penalty proceedings without giving an opportunity of hearing to the AO. Since the Id. CIT (A) has not adjudicated the matter on merits but deleted the penalty only on the legal issue and that too without giving an opportunity to the AO, therefore, there is a violation of principles of natural justice and Rule 46A of the IT Rules. Thus the Id. CIT/DR has contended that the matter may be remanded to the record of the Id. CIT (A) to decide the same afresh after granting an opportunity of hearing to the AO. The Id. D/R has further contended that even otherwise when the assessee has not raised this issue before the AO, then the same cannot be raised before the Id. CIT (A). In support of his contention, he has relied upon the decision of Delhi Benches of the Tribunal in case of Vijay Aggarwal vs. DCIT, 109 taxmann.com 175 (Delhi Trib.) as well as the decision of Hon'ble Madras High Court in case of Sundaram Finance Ltd. vs. ACIT, 403 ITR 407 (Madras). Thus the Id. D/R has submitted that the Delhi Benches of the Tribunal in case of Vijay Aggarwal vs. DCIT (supra) after following the decision of Hon'ble Madras High Court in case of Sundaram Finance Ltd. (supra) has held that the question whether correct limb has been applied is a question of fact and not a question of law and, therefore, the said question cannot be raised

first time before the Appellate Authority. The Id. D/R has then relied upon the decision dated 22nd May, 2019 of Chennai Benches of the Tribunal in case of ITO vs. Shri Rajan Kalimuthu in ITA No. 2900/Chny/2018 and submitted that the Tribunal has decided the issue of validity of initiation of penalty proceedings in favour of the revenue after considering the decision of Hon'ble Karnataka High Court in case of CIT vs. Manjunatha Cotton and Ginning Factory, 359 ITR 565 (Kar.). Thus relying upon the above said decision, the Id. D/R has contended that once the AO has issued the show cause notice to the assessee and the assessee has duly responded to the show cause notice, then there is no violation of principles of natural justice so far as the opportunity of hearing was given to the assessee. The assessee was very much aware and knew about the default as the entire addition and disclosure of income is based on the search and seizure action under section 132 of the Act. Therefore, it cannot be a case of illegality in the show cause notice issued by the AO. As regards the merits of the case, the Id. D/R has submitted that since it is a case of search and seizure action carried out under section 132 of the Act, consequently the Explanation 5A to section 271(1)(c) is applicable in the case of the assessee. The AO has applied the Explanation 5A in the case of the assessee. He has relied upon the penalty order passed under section 271(1)(c) by the AO.

4. On the other hand, the Id. A/R of the assessee has submitted that the AO has issued identical show cause notices dated 13.03.2015 which are very vague and showing a number of alleged defaults for not furnishing return of income, not complying with the notice issued under section 22(4)/23(2), 142(1)/143(2) of the Act as well as the concealment of particulars of income or furnishing inaccurate particulars of income. Thus the AO has issued show cause notice under section 274

read with section 271 of the IT Act for various defaults without striking off the irrelevant part of the said notice. Thus the AO was not sure about the charges for which the penalty proceedings were proposed to be initiated. He has further contended that neither in the show cause notice the AO has shown about the charges for levy of penalty nor in the penalty order passed under section 271(1)(c) the AO has given a definite finding. He has referred to the concluding para of the order dated 11.08.2017 passed under section 271(1)(c) of the Act and submitted that the AO has again stated that the penalty is levied under section 271(1)(c) for concealment of particulars of income or furnishing inaccurate particulars of such income to the extent of the respective amounts for each year. Therefore, the AO has given an identical finding for all these years whereby it is clear that the AO was not sure even at the time of passing the penalty order what default the assessee has committed. The Id. A/R has relied upon the decision of Hon'ble Jurisdictional High Court dated 6th December, 2016 in case of Sheveta Construction Co. Pvt. Ltd. vs. ITO in DB IT Appeal No. 534/2008. He has also relied upon the decision of Third Member decision of Amritsar Bench of the Tribunal in case of HPCL Mittal Energy Ltd. vs. ACIT, 169 DTR 1 and submitted that the Tribunal has held that even if the AO was not sure at the stage of initiation of penalty proceedings of the precise charge as to 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income', the AO is required to give a definite finding and a conclusive default at the time of passing the penalty order. In the absence of such definite finding of the AO in the penalty order, the same is invalid. Hence the Id. A/R has submitted that the initiation of penalty proceedings itself is very vague and in uncertain terms, even does not specify under which sub-section of section 271 of

the IT Act the AO proposed to initiate the penalty proceedings. Hence he has supported the findings of the Id. CIT (A) on this account.

4.1. As regards the merits of the issue, the Id. A/R has submitted that the Tribunal has already deleted the additions made by the AO on account of undisclosed interest income as well as deposits made in the bank accounts of the employees of the assessee, therefore, the penalty levied by the AO in respect of such additions is not sustainable. Further, the Tribunal has also set aside the issue of disallowance of expenditure and consequently the penalty levied by the AO in respect of the said addition would also not survive.

4.2. As regards the penalty levied against income surrendered by the assessee and offered to tax in the returns of income, the AO has applied Explanation 5A to section 271(1)(c). However, in the absence of making any reference to the seized material disclosing such undisclosed income, the Explanation 5A is not applicable in the case of the assessee. Once the Explanation 5A to section 271(1)(c) is not attracted to the case of the assessee, then the penalty under section 271(1)(c) cannot be levied when the assessee has declared the said income in the return of income filed in response to notice issued under section 153A of the IT Act.

5. We have considered the rival submissions as well as the relevant material on record. Though the Id. CIT (A) has not dealt with the merits of the levy of penalty but deleted the same on the ground of validity of initiation of penalty proceedings as the AO has not specified a default/charge in the show cause notice issued under section 274 read with section 271 of the Act and further no definite finding is given

by the AO in the penalty order passed under section 271(1)(c). However, so far as the penalty levied by the AO in respect of the additions made to the total income of the assessee, this Tribunal in the quantum appeal vide order dated 30th July, 2018 has either deleted the said addition made by the AO or set aside the same to the record of the AO. The relevant findings of the Tribunal in ITA Nos. 922, 923 & 924/JP/2016 and ITA Nos. 935, 936 & 937/JP/2016 are in para 9, 22, 35 and 39 are as under :-

"9. We have considered the rival submissions as well as relevant material on record. There is no dispute that prior to 19/6/2009, no evidence was found during the search and seizure action regarding any income on account of interest from 100 days finance scheme. Though, the assessee has not disputed the fact that the assessee has been carrying out this activity since long time and also shown the income in the books of account, however, the income shown in the books of account is not matching with the entries found in the seized material. The Assessing Officer has estimated the income by taking the opening balance of capital at Rs. 8.00 crores as on 01/4/2006, which was not disputed by the assessee. However, the assessee contended that due to ill health of the assessee during the said period, as the assessee was suffering from Tuberculosis and therefore, was not able to do any business activity. Hence, the assessee's claim that the income declared by the assessee of Rs. 13,36,237/- for the year under consideration is justified and even the total income declared by the assessee for the three assessment years i.e. A.Y. 2007-08 to 2009-10 and part of the A.Y. 2010-11 up to 17/6/2009 is matching with the application of income. The assessee has produced fund flow statement showing the income and application of income for all these years. The Id. CIT(A) has annexed the fund flow chart to the impugned order. It is pertinent to note that the assessment framed by the Assessing Officer U/s 143(3) read with Section 153A for the A.Y. 2007-08 to 2009-10 are falling in the category of reassessment as original assessment as on the date of search were not pending and therefore, in absence of abetment of assessments the orders passed by the Assessing Officer are in the nature of reassessment pursuant to the search and seizure action U/s 132 of the Act. It is

settled proposition of law that in the reassessment proceedings U/s 153A of the Act, the Assessing Officer can assessee an income based on seized material. In absence of any seized material regarding the interest income for the year under consideration, no addition can be made on estimated basis. It is an undisputed fact that the material found during the search and seizure action contains the entries w.e.f. 19/6/2009 and therefore, prior to the said period, no record or material was found to disclose or indicate any income on account of interest on the scheme. Only fact which can be ascertained from the documents is that the assessee was engaged in the business activity of finance under the scheme known as 100 days scheme. However, in absence of any seized material, the Assessing Officer cannot make an addition on estimate basis. The assessee already declared and surrendered an amount of Rs. 10 crores on account of cash, investment and interest income. Hence, having regard to the facts and circumstances of the case when the Assessing Officer as well as the Id. CIT(A) has accepted the fact that the assessee was suffering from the ailment and was undergoing the treatment of Tuberculosis during the period under consideration then the estimation made by the Assessing Officer as well as the confirmed by the Id. CIT(A) without any proper and reasonable basis and particularly in the reassessment proceedings U/s 153A is not permitted. Even the Assessing Officer has not worked out the income on basis of the funds available with the assessee and employed in the business activity by considering the corresponding application of income which was found during the course of search and seizure action as well as recorded in the books of account of the assessee. Therefore, when the Assessing Officer has not found any significant discrepancy in the income offered by the assessee and corresponding application of income then there is no reason for not accepting the income offered by the assessee. Accordingly, in facts and circumstances of the case when the addition was made by the Assessing Officer purely on ad hoc estimation and without any tangible material, the same is not sustainable and consequently is liable to be deleted. Hence we delete the addition made by the Assessing Officer and sustained by the Id. CIT(A) on this account. Accordingly, ground No. 1 of the assessee's appeal is allowed and ground No. 1 of the revenue's appeal is dismissed."

"22. We have considered the rival submissions as well as the relevant material on record. The Assessing Officer has made addition of Rs. 13,26,600/- on account of cash deposits in the bank account of three persons namely Shri Rajendra Jain, Shri

Ashok Sharma and Shri Mahaveer Prasad Sharma. The Assessing Officer treated the deposits made in the bank accounts of these persons as undisclosed income of the assessee on the basis of signed cheques of these persons were found during the search and seizure action at the place of the assessee. Though, the signed cheque book found with the assessee can be a ground for further investigation and inquiry regarding any undisclosed income of the assessee by using the accounts of these persons, however, the cheque book itself cannot be considered as an evidence for undisclosed income. The Assessing Officer has picked up the entries in the bank accounts of these persons where the cash was deposited. All other entries in these bank accounts were accepted by the Assessing Officer as carried out by these persons and not by the assessee, therefore, it is not a case of the Assessing Officer that these accounts were fully operated by the assessee. The assessee has contended that the cheque books were taken from these persons to protect the assessee's interest as these persons were working with the assessee and handling the cash and therefore, in order to protect any loss due to misappropriation of fund by these persons, the assessee has taken signed cheques of these persons. We further note that the assessee produced return of income of all these three persons wherein the incomes were declared for the A.Y. 2007-08 and 2008-09. The Id. CIT(A) while rejecting the contention of the assessee has observed that the income declared by these persons is only equal to the amount deposit in the bank and therefore, it cannot be accepted that those deposits were made from the declared income of these persons as there must be some household expenses by these persons. Thus, the explanation and supporting evidence produced by the assessee was not accepted by the authorities below on the ground that the income declared by these persons in their return of income is only matching with the deposits and therefore, the entire source of deposit is not explained. It is pertinent to note that the assessment under consideration is reassessment U/s 153A of the Act and therefore, the addition of income can be made only on the basis of seized material. The cheque books found during the search and seizure action is not an evidence to disclose any undisclosed income of the assessee in the form of deposits of cash in the bank accounts of these persons. Only inference which can be drawn from the availability of cheque books with the assessee is that the assessee might have used the bank accounts of these persons. However, in absence of any documentary evidence of operating of the bank accounts by the assessee, the mere availability of

cheque books with the assessee cannot be an evidence for making addition of the cash deposits in the accounts of these persons specifically when all these persons are regularly assessed to income tax. The assessee filed the return of income in support of explanation. Further the statement of one of these persons namely Shri Mahaveer Prasad Sharma was recorded by the search party U/s 132(4) of the Act and no such question was asked from the said person regarding the deposits in the bank account. Therefore, when the assessee has discharged its onus by producing the return of income of these persons wherein the declared income was sufficient to cover the deposits made in the bank accounts, then in the absence of any direct evidence or tangible material to disclose the fact that the cash deposit in the bank accounts of these persons belongs to the assessee, the addition made by A.O. is not sustainable. The said deposit is subject matter of assessment in the hands of these persons, accordingly, in the facts and circumstances of the case, we delete the addition made by the Assessing Officer on this account."

"35. We have heard the rival submissions and perused the relevant material available on the record. There is no dispute that the amount of expenditure as claimed by the assessee against the undisclosed income for these three assessment years i.e. 2010-11 to 2012-13 were found recorded in the seized material. The undisclosed income offered by the assessee is also based on the same seized material and therefore, once the income and expenditure both are recorded in the same material, which is found and seized during the course of search and seizure action then the entire record and entries found in the seized material has to be taken into consideration and not a part of the seized material is accepted and part can be rejected. Thus, the seized material cannot be considered or accepted in piecemeal but the evidence which is the basis of undisclosed income has to be considered as a whole. However, the question arises whether the expenses found recorded in the seized material is already taken into account as part of the expenses recorded in the books of account or not. Neither the Assessing Officer nor the Id. CIT(A) has examined the relevant record and details to find out this fact that the expenditure which is found recorded in the seized material is also part of the expenditure claimed in the regular books of account. On the direction of the Bench, the assessee has filed a complete and comparative details of all the expenditure found recorded in the books of account as well as the expenditure which is recorded in the seized material. The year wise comparative statement shows that the some of

the expenditure found recorded under common head in both i.e. the books of account as well as seized material. However, many items which were recorded in the seized material are not claimed in regular books of account. Therefore, it is evident from the comparative details of the expenditure that the entire expenditure which is recorded in the seized material has not been claimed in the books of account. We find that about 50% of the items which are recorded in the seized materials are not recorded in the books of account. However, the remaining items which are recorded in both seized material as well as books of account are under common heads, therefore it requires the verification and examination of further details of each and every sub-head of expenditure under a particular head. Hence, we find that the disallowance of the entire claim of the expenditure by the authorities below is contrary to the record and therefore uncalled for, though the possibility of some of the expenditure found in the seized material may also be claimed in the regular books of account cannot be ruled out. Therefore, to the extent of the expenditure, which is not claimed in the books of account and found recorded in the seized material, the same is an allowable claim and cannot be denied. Remaining claim of expenditure which is recorded under common heads is required further examination and verification. Accordingly in the facts and circumstances, we set aside this issue to the record of Assessing Officer for conducting a proper enquiry of the details of the expenditure and to find out whether any part of the expenditure which is found in the seized material has been claimed in the books of account and then only to that extent the claim of the assessee can be disallowed. Needless to say that the assessee to be given an appropriate opportunity of hearing before deciding this issue."

"39. We have considered the rival submissions as well as relevant material on record. There is no dispute that the sale bills of jewellery was found during the course of search and seizure action and seized as Annexure-AS-39, therefore, it is a seized material and cannot be held as a bogus claim or document manipulated or manufactured by the assessee being afterthought cooked story. Therefore, when the sale of jewellery is found as per the bills seized during the search then the transaction of sale cannot be disputed by the department. The sale proceeds of the jewellery was also undisputedly received by cheque and credited in the bank account of mother in law of the assessee. The only doubt which is raised by the Assessing Officer is that it is beyond human probability that she would not give

anything to other daughters and son and had given entire her belongings to the assessee. Even if, this apprehension of the Assessing Officer is turned out to be correct the issue is only whether the assessee has mischievously taken the entire amount of his mother in law from the bank account by using the signed cheque book with the assessee. Thus, this itself will not change the character of income and source of that amount which was found credited in the bank account of mother in law as a sale proceeds of jewellery. The mother in law of the assessee already expired on 18/8/2009 and even if she had never filed return of income or wealth tax, the same would not impute the tax liability in the hands of the assessee when this is not the income of the assessee but only the amount which was transferred from the bank account of the mother in law to the account of the assessee. The nonsharing of this amount with other daughters and son can be a family dispute and can be settled mutually between themselves and has no bearing on the taxability of the income in the hands of the recipients. Therefore, once the amount was found duly credited in the bank account of Smt. Saraswati Devi Sharma and subsequently it was transferred in the account of the assessee then the transaction cannot be doubted. Even the source of credit in the account of mother in law is found during the search and seizure action. The assessee explained that during the last days of her life, she was residing with the assessee and her daughter Smt. Kalawati Sharma, wife of assessee and thus it is natural that all her belongings and valuables would be at the place of assessee. Accordingly, in view of the above facts and circumstances of the case, we are of the considered opinion that when the seized material itself shows the source of amount deposited in the bank account of Smt. Saraswati Devi Sharma by cheque and subsequent transfer from her account to the account of assessee, the same cannot be treated as undisclosed income of the assessee. Accordingly, we delete the addition made by the Assessing Officer on this account."

In view of the order of the Tribunal in quantum appeals, the additions made by the AO on account of undisclosed interest income and deposits made in the bank account of the employees stand deleted. Therefore, the penalty levied by the AO in respect of such additions is not sustainable and liable to be deleted.

5.1. As regards the addition made by the AO on account of disallowance of certain expenses, since this issue has been set aside by the Tribunal to the record of the AO, therefore the addition itself is no more in existence and consequently the penalty levied under section 271(1)(c) in respect of such addition would not survive. Therefore, the penalty levied by the AO against the additions made to the total income is otherwise liable to be deleted.

5.2. Now we take up the issue of validity of initiation of proceedings for levy of penalty. At the outset, we note that the AO has issued show cause notices dated 13.03.2015 for these three years which are identical in nature and reproduced as under :-

"NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF
THE INCOME-TAX ACT, 1961.

PIN – AGMPS 2776 H

OFFICE OF THE
ASSTT. COMMISSIONER OF INCOME-TAX,
CENTRAL CIRCLE-2, JAIPUR.
Date : 13-03-2015.

To,
Shri Prakash Chand Sharma
C-42, Gokul Path,
Vaishali Nagar, Jaipur.

Whereas in the course of proceedings before me for the assessment year 2010-11 it appears to me that you :-

*have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under section 22(1)/22(2)/34 of the Indian Income-tax Act, 1922 or which you were required to furnish under section 139(1) or by a notice given under section 139(2)/148/143(3) of the Income-tax Act, 1961, No._____ dated _____ or have without reasonable cause failed to furnish it within the time allowed and to the manner required by the said section 139(1) or such notice.

*have without reasonable cause failed to comply with a notice under section 22(4)/23(2) of the Indian Income-tax Act, 1922 or under

section 142(1)/143(2) of the Income-tax Act, 1961 No._____ dated 06.06.2012.

*have concealed the particulars of your income or_____ furnished inaccurate particulars or such income. Penalty u/s 271(1)(c) initiate for undisclosed income of the specified previous year.

You are hereby requested to appear before me at 11.00 AM on 15-05-2015 and show cause why an order imposing penalty on you should not be made under section 271 of the Income-tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through your authorized representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271.

Sd/-
(Praveen Kumar Mittal)
Asstt. Commissioner of Income-tax,
Central Circle-2, Jaipur."

"NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF
THE INCOME-TAX ACT, 1961.

PIN – AGMPS 2776 H

OFFICE OF THE
ASSTT. COMMISSIONER OF INCOME-TAX,
CENTRAL CIRCLE-2, JAIPUR.
Date : 13-03-2015.

To,
Shri Prakash Chand Sharma
C-42, Gokul Path,
Vaishali Nagar, Jaipur.

Whereas in the course of proceedings before me for the assessment year 2011-12 it appears to me that you :-

*have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under section 22(1)/22(2)/34 of the Indian Income-tax Act, 1922 or which you were required to furnish under section 139(1) or by a notice given under section 139(2)/148/143(3) of the Income-tax Act, 1961, No._____ dated _____ or have without reasonable cause failed to furnish it within the time allowed and to the manner required by the said section 139(1) or such notice.

*have without reasonable cause failed to comply with a notice under section 22(4)/23(2) of the Indian Income-tax Act, 1922 or under

section 142(1)/143(2) of the Income-tax Act, 1961 No._____ dated 06.06.2012.

*have concealed the particulars of your income or_____ furnished inaccurate particulars or such income. Penalty u/s 271(1)(c) initiate for undisclosed income of the specified previous year.

You are hereby requested to appear before me at 11.00 AM on 15-05-2015 and show cause why an order imposing penalty on you should not be made under section 271 of the Income-tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through your authorized representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271.

Sd/-
(Praveen Kumar Mittal)
Asstt. Commissioner of Income-tax,
Central Circle-2, Jaipur."

"NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF
THE INCOME-TAX ACT, 1961.

PIN – AGMPS 2776 H

OFFICE OF THE
ASSTT. COMMISSIONER OF INCOME-TAX,
CENTRAL CIRCLE-2, JAIPUR.
Date : 13-03-2015.

To,
Shri Prakash Chand Sharma
C-42, Gokul Path,
Vaishali Nagar, Jaipur.

Whereas in the course of proceedings before me for the assessment year 2012-13 it appears to me that you :-

*have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under section 22(1)/22(2)/34 of the Indian Income-tax Act, 1922 or which you were required to furnish under section 139(1) or by a notice given under section 139(2)/148/143(3) of the Income-tax Act, 1961, No._____ dated _____ or have without reasonable cause failed to furnish it within the time allowed and to the manner required by the said section 139(1) or such notice.

*have without reasonable cause failed to comply with a notice under section 22(4)/23(2) of the Indian Income-tax Act, 1922 or under

section 142(1)/143(2) of the Income-tax Act, 1961 No._____ dated 06.06.2012.

*have concealed the particulars of your income or_____ furnished inaccurate particulars or such income. Penalty u/s 271(1)(c) initiate for undisclosed income of the specified previous year.

You are hereby requested to appear before me at 11.00 AM on 15-05-2015 and show cause why an order imposing penalty on you should not be made under section 271 of the Income-tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through your authorized representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271.

Sd/-
(Praveen Kumar Mittal)
Asstt. Commissioner of Income-tax,
Central Circle-2, Jaipur."

In the said show cause notice the AO has mentioned in the caption as '**Notice under section 274 read with section 271 of the Income-Tax Act, 1961**'.

Further, in the body of the said notice the AO has alleged various defaults for not filing the return of income, not complying the notice issued under section 22(4)/23(2), 142(1)/143(2) of the IT Act and the concealment of particulars of income or furnishing inaccurate particulars of such income. The AO has also given the date of the notices issued under section 142(1)/143(2) as 06.06.2012. It is manifest from these show cause notices that this date of 06.06.2012 has no connection with the assessment proceedings of the assessee when notice under section 153A itself was issued on 10.03.2013. A bare reading of the show cause notice clearly shows that it was issued by the AO without application of mind and even without striking off the irrelevant part of said show cause notice. Although the show cause notice was not in the printed proforma but it was taken as a print out

specifically in the name of the assessee. Thus giving the particulars of the assessee along with the PAN of the assessee in the show cause notice clearly shows that this notice was specifically issued to the assessee, however, the AO has grossly failed to even indicate for what default the show cause notice was issued to the assessee. Therefore, the show cause notice itself suffers from illegality of not specifying the default/charges for which the penalty proceedings were proposed to be initiated by the AO. Once the AO has not indicated the default/breach of the assessee and the initiation of the proceedings under which of the sub-section of section 271 of the IT Act, then in our considered view the show cause notice suffers from patent illegality and not irregularity. We further note that even in the penalty order, the AO has levied the penalty in respect of the amount surrendered by the assessee as well as additions made by the AO in the assessment proceedings and thereby concluded as under :-

" In view of the above, a penalty of Rs. 53,78,285/- is hereby levied u/s 271(1)(c) of the I.T. Act, 1961 for concealment of particulars of income or furnished inaccurate particulars of such income to the extent of Rs. 1,58,23,140/-."

Thus even in the concluding part the AO was not sure about the charge and default of the assessee for which the penalty was levied under section 271(1)(c) of the Act. In case of surrender of the income, there cannot be any uncertainty and the AO ought to have given a specific charge for levy of penalty. Similarly, when the AO has made the additions to the total income of the assessee, then the AO was under obligation to specify the charge and make the assessee known for what default the

penalty was to be levied and has been levied. The AO has failed on both the counts as neither at the time of initiation of penalty proceedings nor at the time of passing the penalty order has specified the charge. The Hon'ble Jurisdictional High Court in case of Sheveta Construction Co. Pvt. Ltd. vs. ITO (supra) while considering an identical issue has held in para 5 to 10 as under :-

- " 5. Counsel for the appellant relied upon the decision of Andhra Pradesh High Court in case of Chennakesava Pharmaceuticals vs. Commissioner of Income Tax reported in (2012) 349 ITR 196, wherein it has been held as under :-

" In Reliance Petro Products Pvt. Ltd.'s case (1 supra), the Supreme Court also held that imposition of penalty is unwarranted when there is no finding in the assessment order that details supplied by the assessee were found to be false. This indicates that the view taken by the Delhi High Court in Ram Commercial Enterprises Ltd.'s case (6 supra) which has been approved in Dilip N. Shroff's case (10 supra) continues to be valid and this part of the judgment in Dilip N. Shroff's case (10 supra) has not been over ruled and continues to be good law. Moreover the decision of the Delhi High Court in Ram Commercial Enterprises (6 supra) was also followed by the same High Court in Commissioner of Income Tax v. M.K. Sharma (9supra) and SLP (c) No. 17591 of 2008 filed against the said decision was dismissed by the Supreme Court on 18.7.2008.

Applying the above principle that the assessing officer should record in the assessment order his satisfaction that the assessee had either concealed the income or furnished inaccurate particulars of income in his return before imposing penalty, we noticed that in the assessment orders passed by the assessing officer for the assessment year 198283 (which is the subject matter of I.T.T.A. No.29 of 2000) and for the assessment year 198384 (which is subject matter of I.T.T.A. No. 33 of 2000), no such satisfaction is recorded."

6. Another decision of Supreme Court in case of Dilip N. Shroff vs. Joint Commissioner of Income Tax & Anr. (2007) 291 ITR 519 (SC) it has been held as under :

" It is of some significance that in the standard proforma used by the Assessing Officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.

The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice.

The Income Tax Officer had merely held that the assessee is guilty of furnishing of inaccurate particulars and not of concealment of income; which finding was arrived at also by the Commissioner of Income Tax and the Income Tax Appellate Tribunal. In the facts and circumstances of the case, there are enough material to show that the action on the part of the appellant may not be said to be such which would attract the penal provision under s. 271(1)(c). For the reasons aforementioned, the impugned judgment cannot be sustained."

7. He contended that while concluding the assessment order the officer must be clear whether it is the concealment of income or furnishing of inaccurate detail. He cannot have both the things.
- 7.1. However, Mr. Singhi appearing for the department submits that a perusal of the order of penalty makes it amply clear that both the things are fulfilled. In that view of the matter the view taken by the Tribunal is required to be accepted.
8. We have heard Mr. Prakul Khurana and Mr. Anuroop Singhi.
9. Taking into consideration the decision of the Andhra Pradesh High Court which virtually considered the subsequent law and the law which was prevailing on the date the decision was

rendered on 27.08.2012. In view of the observations made in the said judgment, we are of the opinion that the contention raised by the appellant is required to be accepted and in the finding of Assessing Officer in the assessment order it is held that the AO, has to give a notice as to whether he proposes to levy penalty for concealment of income or furnishing inaccurate particulars. He cannot have both the conditions and if it is so he has to say so in the notice and record a finding in the penalty order.

10. In that view of the matter, the issue is answered in favour of the assessee and against the department."

Thus it is mandatory requirement that the AO has to specify the default/charge whether he propose to initiate the proceedings for concealment of income or furnishing inaccurate particulars of income. Even in the standard proforma used by the AO, the AO is required to delete the irrelevant and inappropriate word in the paragraph. Similarly, the Third Member decision of Amritsar Bench of the Tribunal in case of HPCL Mittal Energy Ltd. vs. ACIT (supra) has considered this issue and given the concluding finding in para 21 as under :-

"21. Apart from the above three situations in which the AO has clear-cut satisfaction, there can be another fourth situation as well. It may be when it is definitely a case of under-reporting of income by the assessee for which an addition/disallowance has been made, but the AO is not sure at the stage of initiation of penalty proceedings of the precise charge as to 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income'. In such circumstances, he may use slash between the two expressions at the time of initiation of penalty proceedings. However, during the penalty proceedings, he must get decisive, which should be reflected in the penalty order, as to whether the assessee is guilty of 'concealment of particulars of income' or 'furnishing of inaccurate particulars of such income'. Uncertain charge at the time of initiation of penalty, must necessarily be substituted with a conclusive default at the time of passing the penalty order. If the penalty is initiated with doubt

and also concluded with a doubt as to the concealment of particulars of income or furnishing of inaccurate particulars of such income etc., the penalty order is vitiated. If on the other hand, if the penalty is initiated with an uncertain charge of 'concealment of particulars of income/furnishing of inaccurate particulars of income' etc., but the assessee is ultimately found to be guilty of a specific charge of either 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income', then no fault can be found in the penalty order."

Therefore, uncertain charge at the time of initiation of penalty proceedings must necessarily be substituted with a conclusive default at the time of passing the penalty order. If the AO has initiated the penalty with doubt and also concluded with a doubt, then the penalty order suffers from illegality and liable to be quashed. The Id. CIT (A) has decided this issue by following various decisions as held in para 5.5 to 6 as under :-

"5.5 Thus, perusal of the notices indicates that the limb under which penalty u/s 271(1)(c) is proposed to be imposed is not categorical. In other word the notice is not specific in making a charge against the appellant for which penalty u/s 271(1)(c) is proposed to be imposed. As indicated earlier, even the assessment order is also not specific in pointing out that under which limb of section u/s 271(1)(c) the penalty is initiated [i.e. whether penalty initiated for concealment of income or furnishing inaccurate particulars of income.]

5.6 Hon'ble Rajasthan High Court in the judgment of Sweta Construction (ITA 534/2008) has made obser

9. Taking into consideration the decision of the Andhra Pradesh High Court which virtually considered the subsequent law and the law which was prevailing on the date the decision was rendered on 27.08.2012. In view of the observations made in the said judgment, we are of the opinion that the contention raised by the appellant is required to be accepted and in the finding of Assessing Officer in the assessment order it is held that the AO, has to give a notice as to whether he proposes to levy penalty for concealment of income or furnishing inaccurate particulars. He cannot

have both the conditions and if it is so he has to say so in the notice and record a finding in the penalty order.

10. In that view of the matter, the issue is answered in favour of the assessee and against the department.

In this regard, I have perused the said paras 59 to 61 of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra) and the same read as under:

"NOTICE UNDER SECTION 274

59. As the provision stands, the penalty proceedings can be initiated on various ground set out therein. If the order passed by the Authority categorically records a finding regarding the existence of any said grounds mentioned therein and then penalty proceedings is initiated, in the notice to be issued under Section 274, they could conveniently refer to the said order which contains the satisfaction of the authority which has passed the order. However, if the existence of the conditions could not be discerned from the said order and if it is a case of relying on deeming provision contained in Explanation-1 or in Explanation-1(B), then though penalty proceedings are in the nature of civil liability, in fact, it is penal in nature.

In either event, the person who is accused of the conditions mentioned in Section 271 should be made known about the grounds on which they intend imposing penalty on him as the Section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in Section 271(1)(c) do not exist as such he is not liable to pay penalty. The practice of the Department sending a printed form „here all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law when the consequences of the assessee not rebutting the initial presumption is serious in nature and he had to pay penalty from 100% to 300% of the tax liability. As the said provisions have to be held to be strictly construed, notice issued under Section 274 should satisfy the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended if the show cause notice is vague. On the basis of such proceedings, no penalty could be imposed on the assessee.

60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences but in such cases the initiation of the

penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet those grounds. After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the grounds on which he is called upon to answer. It is not open to the authority, at the time of imposing penalty to impose penalty on the grounds other than what assessee was called upon to meet. Otherwise though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would offend principles of natural justice and cannot be sustained. Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order was passed and further discovery of facts subsequent to the imposition of penalty cannot validate the order of penalty which, when passed, was not sustainable.

61. The Assessing Officer is empowered under the Act to initiate penalty proceedings once he is satisfied in the course of any proceedings that there is concealment of income or furnishing of inaccurate particulars of total income under clause (c). Concealment, furnishing inaccurate particulars of income are different. Thus the Assessing Officer while issuing notice has to come to the conclusion that whether it is a case of concealment of income or is it a case of furnishing of inaccurate particulars. The Apex Court in the case of Ashok Pal reported in 292 ITR 11 age 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujrat High Court in the case of MANU ENGINEERING reported in 122 ITR 306 and the Delhi High Court in the case of VIRGO MARKETING reported in 171 Taxmn 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. Therefore, when the Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind."

5.7 Further, the Hon'ble Karnataka High Court in the case of CIT Vs. SSA Emerald Meadows (ITA no. 380/2015) has followed the aforesaid decision holding that the notice issued by the AO under section 274 r.w.s. u/s 271(1)(c) to be bad in law as it does not specify which limb of section u/s 271(1)(c) of the act under which it is initiated. The Hon'ble Supreme Court in CIT Vs. SSA's Emerald Meadows has dismissed the SLP (73 Taxmann.com 248).

5.8 Further, similar view has been adopted by various courts wherein relief has been granted to the appellant in case the penalty notice u/s 271(1)(c) is vague and not specific in pointing out the limb under which penalty I proposed to be imposed. Some of the such decisions, including those by the Hon'ble ITAT Jaipur are :

- 1) Sh Samson Perincherry Vs. CIT (ITA no 1154 of 2014)(M m)
- 2) Shankar Lal Khandelwal Vs DCIT [ITA 878/_IP/2013]
- 3) Shri Murari Lal Mittal [334/JP/2015]
- 4) Narayana Heights & Powers Vs ITO [ITA No. 1033/JP/2016]
- 5) Sai Venkata Construction Vs. Addl CIT (ITA 994 & 995/2013)(Pune)
- 6) Sanjog Tarachand Lodha Vs. ITO (ITA no 688 & 689 of 2014)(Pune)
- 7) Sanghavi Savala Commodities Brokers Vs. ACIT (ITA 1746/Mum/2011)
- 8) Deepak umar Patwari Vs. ACIT (ITA 616 to 618/kol/2013)

Considering the facts and circumstances of the case and respectfully following the binding decision of Hon'ble Rajasthan High Court and jurisdictional Hon'ble ITAT there cannot be other view to take but to hold that penalty imposed u/s 271(1)(c) is bad in law. The appellant thus succeed on legal ground/contention raised. The penalty is therefore directed to be deleted. No adjudication on merit of imposition of penalty U/s 271(1)(c) is considered necessary.”

In view of the facts and circumstances of the case as discussed above as well as various binding precedents, we do not find any error or illegality in the impugned order of the Id. CIT (A).

5.3. As regards the decision relied upon by the Id. D/R, we find that the Tribunal in case of *Vijay Aggarwal vs. DCIT (supra)* has held in para 16 and 17 as under :-

"16. Coming to the plea taken for the first time before us that the penalty notice did not specify under which limb of the section the penalty proceedings have been initiated. In our considered opinion this issue was never raised before the first appellate authority and has been raised for the first time before the Tribunal. We agree with the DR that the question whether correct limb has been applied is a question of fact and not a question of law. For this proposition we draw support from the decision of the Hon'ble Madras High Court in the case of *Sundaram Finance Ltd. v. Asstt. CIT* [2018] 93 taxmann.com 250/403 ITR 407 wherein the Hon'ble High Court, inter alia held as under :—

"(ii) That on the facts, even assuming that there was a defect in the notices, it had caused no prejudice to the assessee, which had understood the purport and import of the notices issued under section 274 read with section 271. In the notices the relevant columns had been marked, more particularly, when the case against the assessee was that they had concealed particulars and had furnished inaccurate particulars of income. The issue was not a question of fact. The assessee had, at no earlier point of time, raised the plea before the authorities that on account of the defect in the notices it was put to prejudice. All violations did not result in nullifying the orders passed by the statutory authorities."

17. The Hon'ble High Court while holding the above has considered the decision of the Hon'ble Karnataka High Court in *CIT v. Manjunatha Cotton & Ginning Factory* [2013] 35 taxmann.com 250/218 Taxman 423/359 ITR 565 and the decision of Hon'ble Supreme Court in the case of *CIT v. SSA's Emerald Meadows* [2016] 73 taxmann.com 248/242 Taxman 180. Considering the judicial decisions (*supra*) we do not find any merit in the fresh claim of the assessee. Moreover neither the assessee has moved any application for raising any additional ground nor he has been able to bring out any question of law which can be raised before the appellate authority for the first time."

It is clear that this plea was raised by the assessee first time before the Tribunal even without raising any additional ground and, therefore, the Tribunal by following

the decision of Hon'ble Madras High Court in case of Sundaram Finance Ltd. vs. ACIT (supra) has not entertained such plea. We further note that the Hon'ble Madras High Court in case of Sundaram Finance Ltd. vs. ACIT (supra) has observed in para 16 as under :-

"16. We have perused the notices and we find that the relevant columns have been marked, more particularly, when the case against the assessee is that they have concealed particulars of income and furnished inaccurate particulars of income. Therefore, the contention raised by the assessee is liable to be rejected on facts. That apart, this issue can never be a question of law in the assessee's case, as it is purely a question of fact. Apart from that, the assessee had at no earlier point of time raised the plea that on account of a defect in the notice, they were put to prejudice. All violations will not result in nullifying the orders passed by statutory authorities. If the case of the assessee is that they have been put to prejudice and principles of natural justice were violated on account of not being able to submit an effective reply, it would be a different matter. This was never the plea of the assessee either before the Assessing Officer or before the first Appellate Authority or before the Tribunal or before this Court when the Tax Case Appeals were filed and it was only after 10 years, when the appeals were listed for final hearing, this issue is sought to be raised. Thus on facts, we could safely conclude that even assuming that there was defect in the notice, it had caused no prejudice to the assessee and the assessee clearly understood what was the purport and import of notice issued under Section 274 r/w, Section 271 of the Act. Therefore, principles of natural justice cannot be read in abstract and the assessee, being a limited company, having wide network in various financial services, should definitely be precluded from raising such a plea at this belated stage."

The Hon'ble High Court has held that since it is a question of fact and was never raised before the authorities below and first time it was raised before the Hon'ble High Court, therefore, the same plea was not entertained by the Hon'ble High Court on account of belated stage. Accordingly, these decisions are not applicable in the facts of the present case when the assessee has challenged the penalty order before the Id. CIT (A) and raised this issue. So far as the violation of principles of natural justice as raised by the Id. D/R, we find that no such ground has been raised by the

AO in these appeals and, therefore, the AO was not aggrieved by the proceedings of the Id. CIT (A) admitting the ground of validity of initiation of penalty proceedings. Further it is also undisputed fact that the AO always receive the notice of the appeal proceedings pending before the Id. CIT (A) and, therefore, it is at the discretion of the AO whether to appear and object the appeals before the Id. CIT (A) or not. Accordingly, when the order itself is questioned before the Id. CIT (A), then the assessee is free to take all the grounds before the Id. CIT (A) and there is no legal bar for raising the issue before the Id. CIT (A) as the Id. CIT (A) is having the coterminous power of the AO.

5.4. As regards the merits of the issue of levy of penalty under section 271(1)(c) against the additional income offered by the assessee to tax, we find that the AO has applied Explanation 5A to section 271(1)(c) and given his finding in para 3 to 12 as under :-

“3. I have considered the submissions of the A/R of the assessee and found not acceptable in view of the facts of the case and also in view of the provisions of section 271(1)(c) of the I.T. Act.

4. The penalty u/s 271(1)(c) has been initiated on concealment of particulars of income to the extent of Rs. 1,16,62,560/- being the additional income disclosed in the return of income filed u/s 153A and which was not declared in the return of income filed u/s 139 of the Act. The contention raised by the assessee on this issue is to the effect that the additional income of Rs. 1,16,62,560/-declared in the ROI filed u/s 153A was made in order to buy peace of mind and avoid prolonged litigation. The assessee is not filed any reply on this issue.

5. It is clear that the additional income of Rs. 1,16,62,560/-declared in the return of income filed u/s 153A of the Act, is not a lumpsum declaration made by the assessee. In fact, additional income under a specific head viz., Other Sources

which was not declared in the return of income u/s 139 has been declared in the ROI u/s 153A. Had the additional income been declared simply to buy peace of mind and to avoid litigation, such additional income would not have been backed up by specific and quantified difference in specific heads of income. The very fact that such additional income was related to specific heads in a quantified manner proves that the additional income declared in the return of income u/s 153A was based on particulars of income concealed in the ROI u/s 139. This fact also proves that the additional income declared u/s 153A was not to buy peace of mind and to avoid litigation. The fundamental contention raised by the assessee, therefore, fails. Consequently, the case laws cited and relied upon by the assessee, also do not find application in the instant case.

6. *Now, So far as the legal position of proceedings u/s 271(1)(c) of the Act are concerned, let us first examine the relevant statutes by way of which, penalty u/s 271(1)(c) in this case can be imposed.*

Explain 5A to section 271(a)(c) is clear & categorical in this regard.

For the sake of immediate reference, the contents of explanation 5A are reproduced as under:-

[Explanation to section 271(1)(c)- Where, in the course of 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 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 of 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. *It is clear from plain reading of the explanation 5A to section 271(1)(c) that, the return of income envisaged in clause (a) of such explanation is return filed u/s 139 of the Act.*

8. *Be that as it may therefore, in a case where a return of income has already been failed u/s 139 of the Act or where no return of income has been filed till the date of search, any additional income declared in any return of income furnished on after the date of search, shall be deemed to be the concealed income or income in respect of which particulars of income have been furnished inaccurately.*

9. *The deeming provision of Explanation 5A to section 271(1)(c), thus demonstrably mandates a comparison between the income declared u/s 139 and the income declared subsequent to the search, which in the instant case is u/s 153A of the Act.*

Hence, for any assessee to say that for the purpose of imposition of penalty u/s 271(1)(c) in a search assessment, the original return of income filed u/s 139 cannot be considered, is wholly incorrect and is in direct contradiction to the mandate of explanation 5A to section 271(1)(c) of the Act.

10. *As regards the contention of the assessee that no incriminating documents was found as a result of search indicating any undisclosed income nor any evidence was brought on record during course of assessment from which it could be alleged that assessee was having undisclosed income, it must be said that the basic thrust of such contention is to limit the scope of penalty u/s 271(1)(c) to the finding of incriminating documents during search. In raising this contention, the assessee is only partly correct to the limited extent of clause (i) of explanation 5A to section 271(1)(c). But, the said explanation also has a second*

limb to it as contained in clause (ii). According to clause (ii) of Explanation 5A to section 271(1)(c), in cases of search conducted after 01-06-2007,

'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 party) for any previous year which has ended before the date of search and where the return of income for such previous year has been furnished before the said date but such income has not been declared therein 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'.

11. There is no dispute on the fact that the instant case is squarely covered by provisions of clause(ii) of Explanation 5A to section 271(1)(c) of the Act. The relevant statute reproduced above is a deeming provision which gets automatically applied in circumstances envisaged therein. In the instant case each of the circumstance envisaged by such deeming provisions is present and hence the application of the provision gets activated. The contention of the assessee is thus found unacceptable and rejected.

12. As analyzed above, it has clearly emerged that explanation 5A to section 271(1)(c), not only authorizes but actually mandates the AO to compare the return filed u/s 139 and u/s 153A to conclude that the assessee had concealed or furnished inaccurate particulars of income. While considering the imposition of penalty u/s 271(1)(c) in a case where assessment is made u/s 143(3) r.w.s. 153A, the default has to be viewed with reference to the income declared u/s 139 vis-a-vis the income declared/assessed u/s 153A. Even when there is no variance between the income returned u/s 153A & the income assessed u/s 153A, the deeming provision of Explanation 5A to section 271(1)(c) mandates levy of penalty if the income declared and assessed u/s 153A is at variance with income returned u/s 139."

The assessee has duly objected before the AO regarding applicability of Explanation 5A and pleaded that since there is no incriminating document found as a result of search indicating any undisclosed income nor any evidence was brought on record

during the course of assessment from which it could be alleged that the assessee was having undisclosed income. The AO while countering these contentions of the assessee has just referred to clause (ii) of Explanation 5A to section 271(1)(c). Therefore, the AO has not disputed these factual contentions of the assessee and also not referred to any incriminating material either in the assessment order or in the penalty proceedings so far as the additional income offered by the assessee in the return of income. It is pertinent to note that the Explanation 5A to section 271(1)(c) is deeming fiction which cannot be extended beyond the scope of the said provision. It is clear from the Explanation 5A that once any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions but the assessee has not declared the said income in the return of income filed prior to the date of search, then even if such income is declared in the return of income filed post search, the assessee would be deemed to have concealed the particulars of his income or furnished inaccurate particulars of income. Therefore, only when the conditions prescribed under Explanation 5A and particularly the income disclosed by the assessee representing the money, bullion, jewellery or other valuable article or thing or income based on any entry in any books of account or other record, the same would attract the said Explanation 5A and assessee cannot escape from the mischief of the penalty provision under section 271(1)(c) merely because the said income is declared in the return of income filed after search. In the case in hand, the AO has even not made any reference to any incriminating material so as to bring the income declared by the assessee in the return of income filed in response to notice under section 153A in the ambit of the Explanation 5A to section 271(1)(c) of the Act.

Accordingly, when the AO has failed to even make any reference to any incriminating material representing the undisclosed material or the income declared by the assessee, the Explanation 5A to section 271(1)(c) would not be applied in the case of the assessee. Hence in the facts and circumstances of the case, we do not find any reason to interfere with the impugned order of the Id. CIT (A).

6. In the result, appeals of the revenue are dismissed.

Order pronounced in the open court on 03/02/2020.

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

Sd/-

(विजय पाल रॉव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 03/02/2020.

das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant-The DCIT, Central Circle-2, Jaipur.
2. प्रत्यर्थी / The Respondent-Shri Prakash Chand Sharma, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File {ITA No. 776, 777 & 778/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar