

<b>IN THE INCOME TAX APPELLATE TRIBUNAL</b>
<b>COCHIN BENCH, COCHIN</b>
<b>BEFORE S/SHRI CHANDRA POOJARI, AM &amp; GEORGE GEORGE K., JM</b>

I.T.A. 54 & 55/Coch/2017
Assessment Years : 2010-11 and 2011-12

Kalliyath Cyril Raju, B-3, Kent Nalukettu, Vennala, Kochi-682 030. [PAN:ABDPR 7480H]	<b>Vs.</b>	The Deputy Commissioner of Income-tax, Central Circle-2, Kochi.
<b>(Assessee-Appellant)</b>		<b>(Revenue-Respondent)</b>

<b>Assessee by</b>	Shri C.B.M. Warriar, FCA
<b>Revenue by</b>	Shri A. Dhanaraj, Sr. DR

<b>Date of hearing</b>	28/05/2018
<b>Date of pronouncement</b>	30/05/2018

## **ORDER**

Per CHANDRA POOJARI, ACCOUNTANT MEMBER:

These two appeals filed by the assessee are directed against the order of the CIT(A)-IV, Kochi dated 21/12/2016, confirming the levy of penalty u/s. 271(1)(c) of the Act for the assessment years 2010-11 and 2011-12 . Since the issues involved in these two appeals are identical, they were heard together and are being disposed of by this common order.

2. The facts of the case are that a search u/s. 132 of the Act was carried out at the residential premises of the assessee and in the office and business premises

of M/s. Kent Construction Pvt. Ltd. on 10/01/2013. Simultaneous searches were conducted at the residence of the Directors namely Shri T.P. Vinayan and the Accounts Manager of the assessee, Shri K.V. Binu. During the course of search vital evidences of investments made in the name of the assessee and family members were found and seized. By invoking the powers vested u/s. 153A of the Act, the assessment of the assessee were re-opened from the assessment year 2007-08 to 2012-13. Thereafter, a notice u/s. 153A was served on the assessee requiring him to furnish a fresh return of income. The assessee filed a return declaring Rs.10,27,780/- and with a self assessment tax payable of Rs.1,18,450/-. The assessee requested to adjust this amount payable out of the seized cash kept with the Department at R.10,49,610/- and the same was adjusted. The assessee had filed the original return of income u/s. 139 of the Act on 30/08/2010 declaring a total income of Rs.8,32,870/- for the assessment year 2010-11. Thus, offering an additional income of Rs.1,94,910/- on account of search. The assessment u/s. 153A r.w.s. 143(3) of the Act was completed and the income was arrived at Rs.10,27,780/-. Similarly for AY 2011-12, the assessee filed the return of income at Rs.15,87,420/- as against the original return of income at Rs.12,66,560/-. Thus, declaring additional income of Rs.3,21,356/-. Penalty proceedings u/s. 271(1)(c) of the Act was initiated by service of notice u/s. 274 r.w.s. 271 of the Act, directing the assessee to explain as to why penalty for concealing the source of income should not be levied. After considering the objections of the Ld. AR, the Assessing Officer levied

penalty for these two assessment years at 100% of tax evaded at Rs.60,227/- and Rs. 99,300/- for the assessment year 2010-11 and 2011-12 respectively.

3. On appeal against the levy of penalty u/s. 271(1)(c) of the Act, the CIT(A) observed that the Assessing Officer has levied penalty u/s. 271(1)(c) of the Act on the basis of Explanation 5A of section 271 which reads as follows:

*".....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 purpose of imposition of penalty under clause (c) of sub-section (1) of the section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of income."*

In view of the above explanation, the CIT(A) held that the onus is not on the Assessing Officer to prove that there was concealment of income, but if there is a difference in the return of income filed before the search and the one filed on or after the search, the difference shall be treated as deemed concealment. Accordingly, the CIT(A) confirmed the penalty levied by the Assessing Officer u/s. 271(1)(c) of the Act amounting to Rs.60,227/- for the assessment year 2010-11 and Rs.99,300/- for the assessment year 2011-12.

4. We have heard the rival submissions and perused the record. In the present case, a search u/s. 132 of the Act was carried out at the residential premises of the assessee as well as in the office and business premises of M/s. Kent Construction Pvt. Ltd. on 10/01/2013. Consequently, notice u/s. 153A was

issued to the assessee and the assessee declared income of Rs.10,27,781/- as against the original declared income of Rs.8,32,870/- for the assessment year 2010-11. Similarly, the assessee declared income of Rs.15,87,920/- u/s. as per the notice u/s. 153A of the Act as against the original declared income of Rs.12,66,560/- for the assessment year 2011-12. Thus there is an additional income of Rs.1,94,910/- declared by the assessee for the assessment year 2010-11 and additional income of Rs.3,21,356/- for the assessment year 2011-12.

4.1 Now we shall go through Explanation 5A of section 271(1)(c) of the Act which reads as follows:

*"Explanation 5A – Where, in the course of a search initiated under section 132 on or after the 1<sup>st</sup> day of June, 2007, the assessee is found to be the owner of –*

*(i) any money, bullion, jewellery or other valuable article or thing (hereinafter in this explanation referred to as assets) and the assessee claims that such assets have been acquired by him by 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."*

4.2 For invoking the Explanation 5A of section 271(1)(c) of the Act, search u/s. 132 of the Act should result in unearthing of unaccounted income or undisclosed income by way of various assets or documents found at the time of search. Admittedly, in the present case, search conducted u/s. 132 has not resulted in unearthing of impugned income. The additional income was offered voluntarily by the assessee, consequent to the notice issued u/s. 153A of the Act which is related to the following items:

AY 2010-11

Bonus	Rs. 74,970/-
Interest	Rs.1,19,940/-
Total	<u>Rs.1,94,190</u>

AY 2011-12

Bonus	Rs. 84,966/-
Short term capital gain	Rs. 65,000/-
Interest	Rs. 71,390/-
Profit from Portfolio	Rs.1,00,000/-
Total	<u>Rs.3,21,356/-</u>

4.3 As the additional income offered by the assessee is not relating to the various items referred in Explanation 5A, there cannot be a levy of penalty u/s. 271(1)(c) of the Act. The CIT(A) confirmed the levy of penalty by placing reliance on Explanation 5A of section 271(1)(c) of the Act. Without resulting in unearthing of any unaccounted income or without making any addition in the assessment order u/s. 153A of the Act, the Assessing Officer accepted the return of income by itself. In our opinion, there cannot be levy of penalty u/s. 271(1)(c) of the Act by invoking the provisions of Explanation 5A of the Act. This view has been fortified by the order of the ITAT, Cuttack Bench in the case of Sarat Chandra Sahoo vs. DCIT in ITA Nos. 130/CTK/2013 and ITA Nos.131 to 137/CTK/2013 dated 17<sup>th</sup> October, 2014 wherein it was held as under:

*"6. We have considered the rival submissions. A perusal of the facts in the present case as has been recorded by the Assessing Officer clearly shows that this was a case of survey under section 133A conducted on 13.08.2008. In the survey, various unexplained investments were found. Consequently the survey was converted into a search. Now the question that would arise is as the assessee offered the additional income as the consequence of the search or was the undisclosed income found in the course of survey itself, which was converted into a search. A perusal of the wordings of Explanation 5A to section 271(1)(c) shows that the wordings used are "in the course of a search initiated under section 132 on or after the 1<sup>st</sup> day of June, 2007, the assessee is found to be the owner", This is not the case in the case of the assessee. The survey itself disclosed everything. That survey itself disclosed that the assessee was not maintaining books. The survey itself so found the Fixed Deposits, etc. It was only for the purpose of seizure and further investigation that the survey was converted into a search. The search did not come out with anything fresh. Consequently Explanation 5A to Section 271(1)(c) cannot be made applicable in the case of the assessee herein. It would be the regular provisions of Section 271(1)(c) of the Act, which would be applicable. True the search resulted in the notice under section 153A being issued to the assessee and the return being filed but that is only procedural and in any case the quantum assessment on the validity thereon is not in appeal. Once a notice under section 153A is issued, then the return filed in response to the*

*notice under section 153A would be deemed to be a return furnished under section 139 of the Act, The assessee has hitherto not filed the return of income and the return filed in response to the notice under section 153A would become the first [return. This is as per the provisions of section 153A itself. Once this is a situation, then no penalty can be levied in respect of the returned income which has been disclosed in the return filed in response to the notice under section 153A. Consequently, we are of the view that for the assessment years 2003-04 to 2008-09 the penalty levied is liable to be cancelled to the extent that the penalty has been levied in respect of the returned income as there is no concealment proved, and we do so."*

4.4 Accordingly, we are inclined to delete the penalty levied u/s. 271(1)(c) of the Act for both the assessment years.

5. In the result, the appeals filed by the assessee are allowed.

Order pronounced in the open Court on this 30<sup>th</sup> May, 2018.

sd/-  
(GEORGE GEORGE K.)  
JUDICIAL MEMBER

sd/-  
(CHANDRA POOJARI)  
ACCOUNTANT MEMBER

Place:

Dated: 30<sup>th</sup> May, 2018

GJ

Copy to:

1. Kalliyath Cyril Raju, B-3, Kent Nalukettu, Vennala, Kochi-682 030.
2. The Deputy Commissioner of Income-tax, Central Circle-2, Kochi.
3. The Commissioner of Income-tax(Appeals),IV, Kochi
4. The Pr. Commissioner of Income-tax, Kochi
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)  
I.T.A.T., Cochin

