

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL,  
JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एव श्री भागचन्द, लेखा सदस्य सदस्य के समक्ष  
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 398,399, 400 & 401/JP/2015  
निर्धारण वर्ष/Assessment Year: 2007-08, 2008-09, 2009-10 & 2010-11

|                                                                 |             |                                     |
|-----------------------------------------------------------------|-------------|-------------------------------------|
| Shri Ramesh Chand Bansal<br>27, Ravidatt, Arya Nagar,<br>Beawar | बनाम<br>Vs. | The DCIT<br>Central Circle<br>Ajmer |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACMPB 6056D             |             |                                     |
| अपीलार्थी / Appellant                                           |             | प्रत्यर्थी / Respondent             |

निर्धारिती की ओर से / Assessee by: Shri Mahendra Gargieya, Advocate  
राजस्व की ओर से / Revenue by: Smt. Seema Meena, JCIT - DR

सुनवाई की तारीख / Date of Hearing : 06/06/2018  
घोषणा की तारीख / Date of Pronouncement : 21/06/2018

आदेश / ORDER

PER BHAGCHAND, AM

These four appeals filed by the assessee emanate from four separate orders of the Id. CIT(A)-2, Udaipur each dated 25.03.2015 whereby, penalties imposed u/s 271(1)(c) by the AO of Rs. 44,793/-, Rs. 82,290/-, Rs. 8,06,490/- and Rs.57,680/- for A.Ys. 2007-08 to 2010-11 respectively, have been confirmed. Since in all the above years, the facts and the controversy is identical therefore, all the appeals are being taken up for adjudication through this consolidated order

However, we have based the facts and the orders of the authorities below relating to **A.Y. 2009-10 in ITA no. 400/JP/2015.**

2.1 The facts of the case are that a search was carried out at the residential premises, whereas a survey u/s 133A was conducted at the business premises of the assessee on 13.10.2010. During the course of search on 13.10.2010, statements of assessee and his wife were recorded u/s 132(4) of the Act, wherein the assessee surrendered a sum of Rs. 25,00,000/- on account of unexplained cash and advances vide ans. to Q. 15. However, later on while filing the returns of income u/s 153A, the additional income so offered was enhanced to Rs. 32,66,194/, which was segregated financial year wise as under:-

|                           |                 |
|---------------------------|-----------------|
| F.Y. 2006-07 (AY 2007-08) | Rs. 2,13,014/-  |
| F.Y. 2007-08 (AY 2008-09) | Rs. 3,25,004/-  |
| F.Y. 2008-09 (AY 2009-10) | Rs. 24,84,676/- |
| F.Y. 2009-10 (AY 2010-11) | Rs. 2,43,500/-  |
|                           | -----           |
| Total                     | Rs. 32,66,194/- |

In A.Y. 2007-08 and 2008-09 the assessee did not file any return of income u/s 139 however, in A.Y. 2009-10 and 2010-11 the assessee filed return of income dated 30.03.2010 and 31.03.2011 respectively. Pursuant to the search, notices u/s 153A were issued in all the years on dated 12.10.2011 requiring the assessee to file the return within 30 days and in response thereto the assessee filled return of income declaring additional income of Rs. 2,13,014/-, Rs. 3,25,004/-, Rs. 24,84,676/- and

Rs. 2,43,500/- for AY 2007-08, AY 2008-09, AY 2009-10 and AY 2010-11 respectively. Accepting the income declared in the returns of income filed u/s 153A, the AO completed the assessments without making any addition, whatsoever. No appeal was preferred by the assessee against the assessment so made. On the other hand, the AO initiated penalty u/s 271(1)(c) invoking Expl. 5A. Accordingly, Show cause notice u/s 274 r/w section 271(1)(c) of the Act were issued for all years on dated 19.03.2013. In response, the assessee filed detailed submission which have been reproduced by the AO in respective penalty orders. After considering the same, the AO imposed penalties u/s 271(1)(c) on the grounds that the additional income so surrendered was not voluntary in as much as in absence of such action, the assessee would not have made this disclosure; merely filling of return of income u/s 153A does not exonerate the assessee from the charge of concealment/ furnishing inaccurate particulars. The AO invoked Expl. 5A to Sec. 271(1)(c) holding that despite declaring of higher income after the search, penalty can be imposed. He also alleged that the decision of CIT vs. Suresh Chandra Mittal (2001) 251 ITR 9 (SC) was not applicable on the facts of the present case.

2.2 Aggrieved, the assessee carried the matter before the Id. CIT(A) who confirmed the penalty in all the 4 years. For the sake of convenience and brevity of the case, the facts as emerges from the order of the Id. CIT(A) for the Assessment

Years 2007-08 to Assessment Year 2010-11 as to confirming the above penalty u/s 271(1) of the Act by the ld. CIT(A) is as under:-

Assessment Year 2007-08

‘5. I have gone through the brief facts narrated by the assessing officer and the appellant and the applicable provision of law on concealment of penalty for search case in which search had been conducted on or after 01-06-2007 but before 01-07-2012.

5.1 It is true that the appellant has honoured the undisclosed income that was surrendered during search and also has disclosed the same in respective previous years. The returns for these years as filed by appellant, includes the undisclosed income that was surrendered has also been accepted as it is.

5.2 However, as explained by the appellant himself, the concealment penalty provision u/s 271AAA rewards only those taxpayer whose undisclosed income falls within the specified previous year and if undisclosed income falls in the previous years other than the specified previous years then the concealment penalty provision of explanation 5A to Section 271(1)© straight way provide deeming provisions for concealment of income. It states where undisclosed income for any previous year is found in a case where search was initiated on or after 10-06-2007 but the tax payer has not filed the return for that previous year, although due date of filing has expired for the purpose of imposition of a penalty u/s 271(1)(c ) of the Act, the tax payer be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

5.3 As per the explanation 5A to section 271(1)( c ) of the Act, where the course of search initiated under section 132 on or after 1-06-2007, the appellant 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 appellant 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 transaction and he claims that such entry in the books of account or other documents or transaction represents his income (wholly or in part) for any previous year, which has ended before the date

of search and the due date for filing the return of income for such year has expired and the appellant 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 section 271(1)(c) of the Act, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

5.4 Precisely for this reason of applicability of the explanation 5A to Section 271(1)(c) of the Act, the assessing officer has levied the penalty as mentioned at page 3 of the penalty order.

5.5 At the cost of repetition, it is to mention here that in the instant case, the Assessment Year involved is A.Y. 2007-08 and the due date of filing the return was 31-07-2007. The search operation was conducted on 13-10-2010 i.e. after the due date for filing the return 31-07-2007. That makes the explanation 5A to section 271(1)(c) of the Act clearly applicable.

5.6 Even no return was filed u/s 139. The total income returned in the return in response to Notice u/s 153A is Rs. 3,13,050/-. Hence, the pleading on the ground of equity also fails.

5.7 Thus though surrender was during the search in course of statements u/s 132(4), the disclosure u/s 132(4), by itself cannot redeem the appellant from deeming provisions of the explanation 5A to section 271(1)(c) of the Act. Factually speaking the statement u/s 132(4) was wrong and incorrect to the extent the undisclosed income was pertaining to previous years other than the specified previous years was included in the statement u/s 132(4). Showing of undisclosed income surrendered in the relevant previous years with paying or relevant tax and interest thereon is merely consequential and cannot pull out the appellant from the yoke of the explanation 5A to section 271(1)(c) of the I.T. Act. Therefore, the penalty levied of **Rs. 44,793/- is sustainable and is hereby confirmed.**''

Assessment Year 2008-09

‘5. I have gone through the brief facts narrated by the assessing officer and the appellant and the applicable provision of law on concealment of penalty for search case in which search had been conducted on or after 01-06-2007 but before 01-07-2012.

5.1 It is true that the appellant has honoured the undisclosed income that was surrendered during search and also has disclosed the same in respective previous years. The returns for these years as filed by appellant,

includes the undisclosed income that was surrendered has also been accepted as it is.

5.2 However, as explained by the appellant himself, the concealment penalty provision u/s 271AAA rewards only those taxpayer whose undisclosed income falls within the specified previous year and if undisclosed income falls in the previous years other than the specified previous years then the concealment penalty provision of explanation 5A to Section 271(1)© straight way provide deeming provisions for concealment of income. It states where undisclosed income for any previous year is found in a case where search was initiated on or after 10-06-2007 but the tax payer has not filed the return for that previous year, although due date of filing has expired for the purpose of imposition of a penalty u/s 271(1)(c ) of the Act, the tax payer be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

5.3 As per the explanation 5A to section 271(1)( c ) of the Act, where the course of search initiated under section 132 on or after 1-06-2007, the appellant 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 appellant 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 transaction and he claims that such entry in the books of account or other documents or transaction represents his income (wholly or in part) for any previous year, which has ended before the date of search and the due date for filing the return of income for such year has expired and the appellant 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 section 271(1)( c ) of the Act, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

5.4 Precisely for this reason of applicability of the explanation 5A to Section 271(1) ( c ) of the Act, the assessing officer has levied the penalty as mentioned at page 3 of the penalty order.

5.5 At the cost of repetition, it is to mention here that in the instant case, the Assessment Year involved is A.Y. 2008-09 and the due date of filing the return was 31-07-2008. The search operation was conducted on

13-10-2010 i.e. after the due date for filing the return 31-07-2008. That makes the explanation 5A to section 271(1)(c) of the Act clearly applicable.

5.6 Even no return was filed u/s 139. The total income returned in the return in response to Notice u/s 153A is Rs. 4,68,040/-. Hence, the pleading on the ground of equity also fails.

5.7 Thus though surrender was during the search in course of statements u/s 132(4), the disclosure u/s 132(4), by itself cannot redeem the appellant from deeming provisions of the explanation 5A to section 271(1)(c) of the Act. Factually speaking the statement u/s 132(4) was wrong and incorrect to the extent the undisclosed income was pertaining to previous years other than the specified previous years was included in the statement u/s 132(4). Showing of undisclosed income surrendered in the relevant previous years with paying or relevant tax and interest thereon is merely consequential and cannot pull out the appellant from the yoke of the explanation 5A to section 271(1)(c) of the I.T. Act. Therefore, the penalty levied of Rs. 82,290/- is sustainable and is hereby confirmed.”

#### Assessment Year 2009-10

“5. I have gone through the brief facts narrated by the assessing officer and the appellant and the applicable provision of law on concealment of penalty for search case in which search had been conducted on or after 01-06-2007 but before 01-07-2012.

5.1 It is true that the appellant has honoured the undisclosed income that was surrendered during search and also has disclosed the same in respective previous years. The returns for these years as filed by appellant, includes the undisclosed income that was surrendered has also been accepted as it is.

5.2 However, as explained by the appellant himself, the concealment penalty provision u/s 271AAA rewards only those taxpayer whose undisclosed income falls within the specified previous year and if undisclosed income falls in the previous years other than the specified previous years then the concealment penalty provision of explanation 5A to Section 271(1)© straight way provide deeming provisions for concealment of income. It states where undisclosed income for any previous year is found in a case where search was initiated on or after 10-06-2007 but the tax payer has not filed the return for that previous year, although due date of filing has expired for the purpose of imposition of a penalty u/s 271(1)(c) of the Act, the tax payer be deemed to have

concealed the particulars of his income or furnished inaccurate particulars of such income.

5.3 As per the explanation 5A to section 271(1)( c ) of the Act, where the course of search initiated under section 132 on or after 1-06-2007, the appellant 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 appellant 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 transaction and he claims that such entry in the books of account or other documents or transaction represents his income (wholly or in part) for any previous year, which has ended before the date of search and the due date for filing the return of income for such year has expired and the appellant 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 section 271(1)( c ) of the Act, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

5.4 Precisely for this reason of applicability of the explanation 5A to Section 271(1) ( c ) of the Act, the assessing officer has levied the penalty as mentioned at page 3 of the penalty order.

5.5 At the cost of repetition, it is to mention here that in the instant case, the Assessment Year involved is A.Y. 2009-10 and the due date of filing the return was 31-07-2009. The search operation was conducted on 13-10-2010 i.e. after the due date for filing the return 31-07-2009. That makes the explanation 5A to section 271(1)(c ) of the Act clearly applicable.

5.6 Even no return was filed on 30-03-2010 u/s 139 was belated one as it was filed after due date for filing the return i.e. 31-07-2009. The total income returned in original return was only Rs. 2,28,500/- that was revised to Rs. 27,13,170/- in the return in response to Notice u/s 153A is Rs. 3,13,050/-. Hence, the pleading on the ground of equity also fails.

5.7 Thus though surrender was during the search in course of statements u/s 132(4), the disclosure u/s 132(4), by itself cannot redeem the appellant from deeming provisions of the explanation 5A to section 271(1)( c ) of the Act. Factually speaking the statement u/s 132(4) was

wrong and incorrect to the extent the undisclosed income was pertaining to previous years other than the specified previous years was included in the statement u/s 132(4). Showing of undisclosed income surrendered in the relevant previous years with paying or relevant tax and interest thereon is merely consequential and cannot pull out the appellant from the yoke of the explanation 5A to section 271(1)(c) of the I.T. Act. Therefore, the penalty levied of Rs. 8,06,490/- is sustainable and is hereby confirmed.”

#### Assessment Year 2010-11

“5. I have gone through the brief facts narrated by the assessing officer and the appellant and the applicable provision of law on concealment of penalty for search case in which search had been conducted on or after 01-06-2007 but before 01-07-2012.

5.1 It is true that the appellant has honoured the undisclosed income that was surrendered during search and also has disclosed the same in respective previous years. The returns for these years as filed by appellant, includes the undisclosed income that was surrendered has also been accepted as it is.

5.2 However, as explained by the appellant himself, the concealment penalty provision u/s 271AAA rewards only those taxpayer whose undisclosed income falls within the specified previous year and if undisclosed income falls in the previous years other than the specified previous years then the concealment penalty provision of explanation 5A to Section 271(1)© straight way provide deeming provisions for concealment of income. It states where undisclosed income for any previous year is found in a case where search was initiated on or after 10-06-2007 but the tax payer has not filed the return for that previous year, although due date of filing has expired for the purpose of imposition of a penalty u/s 271(1)(c) of the Act, the tax payer be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

5.3 As per the explanation 5A to section 271(1)(c) of the Act, where the course of search initiated under section 132 on or after 1-06-2007, the appellant 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 appellant 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 transaction and he claims that such entry in the books of account or other documents or transaction represents his income (wholly or in part) for any previous year, which has ended before the date of search and the due date for filing the return of income for such year has expired and the appellant 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 section 271(1)(c) of the Act, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

5.4 Precisely for this reason of applicability of the explanation 5A to Section 271(1)(c) of the Act, the assessing officer has levied the penalty as mentioned at page 3 of the penalty order.

5.5 At the cost of repetition, it is to mention here that in the instant case, the Assessment Year involved is A.Y. 2010-11 and the due date of filing the return was 31-07-2010. The search operation was conducted on 13-10-2010 i.e. after the due date for filing the return 31-07-2010. That makes the explanation 5A to section 271(1)(c) of the Act clearly applicable.

5.6 Even no return was filed on 31-03-2010 u/s 139 was belated it was filed after the due date for filing the return i.e. 31-07-2010 and much after the date of search date 13-10-2010. The total income returned in original return was only Rs. 13,14,480/- that was revised to Rs. 15,94,500/- in the return in response to notice u/s 153A. Hence, the pleading on the ground of equity also fails.

5.7 Thus though surrender was during the search in course of statements u/s 132(4), the disclosure u/s 132(4), by itself cannot redeem the appellant from deeming provisions of the explanation 5A to section 271(1)(c) of the Act. Factually speaking the statement u/s 132(4) was wrong and incorrect to the extent the undisclosed income was pertaining to previous years other than the specified previous years was included in the statement u/s 132(4). Showing of undisclosed income surrendered in the relevant previous years with paying or relevant tax and interest thereon is merely consequential and cannot pull out the appellant from the yoke of the explanation 5A to section 271(1)(c) of the I.T. Act. Therefore, the penalty levied of Rs. 57,680/- is sustainable and is hereby confirmed.”

It is pertinent to mention that The Id. CIT(A) upheld the impugned penalties, on the same grounds identically. Hence the assessee is in appeal before us for the above Assessment Years

2.3 During the course of the hearing, the assessee prayed for admission of following additional grounds of appeal on dated 27.02.2017, in all the years

*“3. The ld. AO erred in law as well as on the facts of the case in imposing & initiating and the ld. CIT(A) also erred in confirming the penalty imposed u/s 271(1) (c) r/w Explanation 5A of the Act even though the search & seizure, in this case was conducted after 01.06.2007 but before 31.07.2012 i.e. on dated 13.10.2010 and therefore, it is only Sec.271AAA of the Act, which could have been initiated, if at all it was so required. Hence, the impugned penalty so imposed & confirmed being totally contrary to the provisions of law and facts kindly be quashed.*

*4. That the show cause notice issued u/s 274 r/w 271(1)(c) of the Act, is quite vague and did not at all specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment particulars of income or furnishing of inaccurate particulars of income. The impugned penalty based on such a notice being contrary to the provisions of law & facts kindly be quashed.”*

2.4 First of all we take up the additional grounds which is common in all the appeals. The Id. AR who appeared for the assessee submitted that these are purely legal grounds of appeal and do not require any fresh investigation of facts and therefore relying upon the judgment of **National Thermal Power Corporation Ltd. 229 ITR 383 (SC)**, prayed that the same may be admitted, considered and decided.

2.5 We have heard the rival contentions and perused the materials available on record. Moreover, it is also not disputed that the relevant facts to decide the additional grounds are already available on record, otherwise also these are pure legal grounds. Accordingly, in view of the decision of Hon'ble Supreme Court in case of National Thermal Power Co. Ltd. vs. CIT 229 ITR 383 (supra) the additional grounds raised by the assessee are admitted for adjudication.

2.6 Since the additional ground No 4 of the assessee goes to the root of the legality of levy of penalty, therefore, we are deciding the same first. While pleading on behalf of the assessee, the ld AR has submitted written submissions wherein he has made the pleadings, which are reproduced as under:

*'In all the above years, the facts and the controversy is identical therefore, this common WS is filed for all the years i.e. AY 2007-08 to AY 2010-11.*

***Submissions:***

***1. Firstly, we strongly rely upon the written submissions filed before the ld. CIT (A) in all the years placed in the PB 12-45 as also reproduced in the order of the ld. CIT(A).***

***2. The impugned penalty is without jurisdiction:***

***2.1. A perusal of the show cause notices for all the years issued u/s 274 r/w 271(1)(c) dated 19.03.2013 (PB 66-66C), it is not at all clear as to for what precise charge, the appellant was asked to show cause viz. whether the charge is that the assessee has furnished inaccurate particulars of income or it was for concealing particulars of such income in as much as a bare perusal of the said show cause notice clearly reveal that the inappropriate words/unwanted charge has not been struck off. The AO neither scored out nor ticked which particular part of alleged offence, he was relying in as much as the words and/or have been used between the two offences.***

*For better appreciation relevant extract from SCN, is reproduced hereunder:*

“x x x x it appears to me that you have concealed the particulars of your income **and/or** furnished inaccurate particulars of income.”

On the other hand in the assessment orders for AY 2009-10 and 2010-11 at pg 3, the AO has stated as under:

“x x x x penalty proceedings u/s 271(1)(c) for **concealment of income and furnishing inaccurate particulars of his income** are initiated on this point”

However, in the assessment orders for AY 2007-08 and 2008-09 at pg 2 pr 5, it is stated that:

“x x x x The penalty proceedings u/s 271(1)(c) are separately initiated on this issue.”

Further, in the impugned penalty orders for all the years again the position is not better than what was in the assessment orders in as much as on the last page of all the penalty orders, in one Pr. the AO alleged that “the assessee has concealed particulars of income or furnished inaccurate particulars of such income” whereas in the next Pr. he has alleged that “the assessee has concealed particulars of income **and** furnished inaccurate particulars of such income.”

**2.1.2.** It is further submitted that the AO did not appreciate that the two limbs i.e. the concealment of income and furnishing of inaccurate particulars of income carry different connotations, as held in the case of **T. Ashok Pai (2007) 292 ITR 11 (SC)** at page 19. This was taken note in **Manjunatha (Supra)** in Pr. 61. The use of both the limbs by the AO mechanically, clearly shows a complete non application of mind on his part and the requisite satisfaction, this way, is **not at all discernable from the assessment orders nor from the penalty orders of all the years.**

## **2.2. Supporting Case Laws:**

**2.2.1.** The Hon'ble Karnataka High Court in the case of **CIT & Anr. v. Manjunatha Cotton and Ginning Factory 359 ITR 565 (Karn)**, has held that **notice u/s 274 of the Act should specifically state** as to whether penalty is being proposed to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income. The Hon'ble High court has further laid down that certain printed form where all the grounds given in Sec. 271 are given would not satisfy the requirement of law.

In the said case in Pr. 59 it was held that:

“NOTICE UNDER SEC. 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 Expl.-1 or in Expl.-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 where 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.”*

*The Hon’ble court also held that initiating penalty proceedings on one limb and find the assessee guilty on another limb is bad in law. it was held that*

*“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.”*

**2.2.2.** *The above decision was followed in the case of **Suvapasanna Bhattacharya vs. ACIT** ITA No. 1303/Kol/2010 dated 06.10.2015 (**DPB 1-20**).*

**2.2.3.** *Further in the case of **New Sorathia Engineering Co. vs. CIT (2006) 282 ITR 0642 (Guj)**, it was held that*

*“In the absence of any specific finding in the penalty order or the order of the CIT(A) as to whether there was concealment of income or furnishing of inaccurate particulars by the assessee, impugned order of the Tribunal upholding penalty u/s 271(1)(c) is not sustainable.”*

**2.2.4. Covered issue:** *This aspect of the matter is now directly covered by the **Shri Prakash Joy vs. ACIT** ITA No. 585/JP/2013 vide order dated 24.02.2016 (**DPB 21-41**) in Pr. 7.6 thereof, wherein the earlier two decisions i.e. **Manjunatha (Supra)** and **Suvapasanna Bhattacharya (Supra)** have been followed.*

Also kindly refer **Radha Mohan Maheshwari vs. DCIT** in ITA No. 773/JP/13 vide order dated 18.03.2016 for AY 2005-06, **Prashant Tholia vs. ITO** in ITA No. 391/JP/2015 dated 13.06.2016 (DPB 42-46) and **Abhimanyu Singh vs. ITO** in ITA No. 187/JP/2013 dated 21.06.2016 (DPB 47-60) which have taken a similar view.

**2.2.5. Also kindly refer Parinee Developers Pvt Ltd. Vs. ACIT (2015) 174 TTJ 0137 (Mum), Satyananda Achariya Biswas vs. DCIT (2015) 45 CCH 0328 (KolTrib), Uma Shankar Agarwal vs. DCIT (2016) 46 CCH 57 (koltrib), Shri Samson Perinchery (ITA Nos. 4625 to 4630/M/2013), dated 11.10.2013, M/s. Ittina Properties Pvt Ltd (ITA No.36/Bang/2014), dated 21.11.2014 (Bang), Dharini Developers (ITA No.1848 to 1851/M/2012), dated 7.1.2015 (Mum).**

Hence the impugned penalty in all the years deserves to be deleted at this stage itself and hence may kindly be quashed. **However, it may be clarified that the above contention is in the alternative and based on the assumption that the initiation of proceedings by the AO u/s 271(1)(c) is held justified.**

### **3. Imposition of penalty u/s 271(1)(c) is also without jurisdiction:**

**3.1.1.** It is submitted that a new Sec.271AAA was inserted so as to provide that in a case where search has been initiated u/s 132 on or after 01.06.2007 but before 31.07.2012, the assessee shall be liable to pay by way of penalty @ 10% of the undisclosed income of the specified previous year. However, such provision shall not apply if certain conditions mentioned therein are fulfilled. Before referring to those conditions it is firstly submitted that the **admitted facts** of the present case are that a **search was carried out on 13.10.2010** which fall within the prescribed period of 01.06.2007 to 31.07.2012 and accordingly, penalty if at all was to be levied, it was only u/s 271AAA which could have been invoked. The Undisclosed Income as defined in Expl. (a) was found represented by cash and advances in the search year (specified previous year). Even though was surrendered in other years, the law is well settled that there is no estoppel against statute. kindly refer **CIT vs. M. Pyngrope (1993) 200 ITR 106 (Guj.)** approved of the right of the assessee to prefer an appeal though assessment was made on the basis of return filed by the assessee, holding that sec. 246(1) of the Act is very wide. The Hon'ble Bombay High Court in **Nirmala L. Mehta's case (2004) 269- ITR-1 observed** "There cannot be any estoppels against the statute, Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law". The same High Court in **CWT vs. Apar Limited (2002) 175 CTR 312** maintained the right of appeal when return was filed under protest, without prejudice to its legal rights as according to the assessee the disputed asset was not chargeable to tax.

The Hon'ble Calcutta High Court in **Mayank Poddar (HUF) vs. WTO (2003) 181 CTR 362** permitted an appeal when the assessee had included certain asset in his return under mistake, admission or misunderstanding of the assessee, would not justify taxability. The

*Honble Jaipur Bench of ITAT in **Kalindee Rail Nirman (Engineers) Ltd. vs. JCIT (2002) 28 Tax World 280** entertained appeal when the application of net profit rate was agreed subject to allowance of interest and depreciation and the Assessing Officer did not honour the agreement.*

*3.1.2. After the coming of Sec. 271AAA applicability of Sec. 271(1)(c) has been completely ruled out by Sec. 271AAA(3). Moreover, the provisions of **Sec. 271AAA starts with a non-obstante clause** and overrides all other provisions of the Income Tax Act which essentially includes Sec. 271(1)(c) and its Expl. 5A as well.*

*3.1.3. This submission is clearly **supported by a CBDT Circular No.3/2008 dated 12.03.2008 (PB 65)** wherein after discussing the provisions of Sec.271AAA as regards the applicability, the Board has opined/instructed as under:*

*“Applicability- This amendment will take effect from the 1st day of June, 2007 and **will accordingly apply in relation to assessment year 2007-2008 and subsequent years** in cases where search under section 132 is initiated on or after 1st June, 2007.”*

*Needless to say that this **CBDT circular is binding** upon the subordinate authorities and therefore, the authorities below seriously erred in completely ignoring the said circular. The lower authorities in their respective orders there is no whisper at all as to why the CBDT circular shouldn't have been applied.*

*The ld. CIT(A) however, in Pr. 5.2 pg 10 has also visualized situation where there may be a simultaneous application of Sec. 271AAA as also of Sec. 271(1)(c) Expl. 5A which interpretation is running completely contrary to the specific provisions of law and as instructed by the CBDT as above.*

*3.1.4. **Covered issue:** The facts of the present case are otherwise directly covered by a decision in the case of **Shri Ashwani Kumar Arora vs. ACIT** in ITA No. 844/Del/2014 dated 19.05.2016 (DPB 61-68), wherein the Hon'ble ITAT has held as under,*

*“When aforesaid undisputed facts are examined in the light of the amended provisions contained under sub-section (2) and (3) of section 271AAA, the penalty in this case, if at all leviable, it should have been levied under section 271AAA (1) and not u/s 271(1)(c) as has categorically been provided in sub-section (3) of section 271AAA. Intention of the legislative in incorporating the provisions contained u/s 271AA effective during the period 1st June, 2007 to 1st July, 2012 is to provide general amnesty in search and seizure cases, and the case of the assessee undisputedly falls u/s 271AAA and cannot be dealt with u/s 271(1)(c) by any stretch of imagination even.*

*So, we are of the considered view that the very initiation of the penalty proceedings against the assessee u/s 271(1)(c) are vitiated in view of the amended provisions of law applicable effective from 1.6.2007 till 1.7.2012, as the additional income to the tune of Rs.36,80,520/- was disclosed by the assessee on*

*the basis of search operation conducted on 10.02.2009. So, without going into the merits of the case, we are of the considered view that initiation of penalty proceedings as well as penalty orders and impugned order passed by the ld. CIT (A) are not sustainable in the eyes of law. Hence, present appeal is allowed and penalty imposed in this case to the tune of Rs.12,24,600/- is hereby deleted.”*

*The following **similarities** can be found in the facts of the cited case and in the facts of our case, listed below:*

- 1. In both the cases, search was conducted after 01.06.2007 but before 01.07.2012.*
- 2. In both the cases, the assessee made surrender by way of statement recorded u/s 132(4).*
- 3. In both the cases, additional income were declared in response to notice issued u/s 153A after search.*
- 4. All the essential conditions as provided u/s 271AAA(2) were complied with.*
- 5. In our case, search was conducted on dated 13.10.2010 and a penalty for all the years were imposed u/s 271(1)(c). In the cited case, search was conducted dated 10.02.2009 and penalty was imposed for AY 2008-09 u/s 271(1)(c). Thus, in both the cases penalty were imposed in the years other than the year of search.*
- 6. In both the cases, AO initiated and imposed the penalty u/s 271(1)(c) but ignored the new provisions of section 271AAA.*

*Thus, the facts and circumstances being quite identical, the decision of Hon'ble ITAT Bench, Delhi deserves to be applied on the facts of present case as well.*

*Since in our case also, the AO has initiated penalty only u/s 271(1)(c) in all the years and **has not imposed the penalty u/s 271AAA**, the impugned penalties were **completely without jurisdiction** as held by the ITAT Bench, Delhi. Accordingly, impugned penalties in all the years kindly be quashed.*

***3.2.** Even the issue in hand cannot be restored to the file of the AO in as much as it is not a case of irregularity but an illegality which cannot be cured given now. By invoking the provisions of Sec. 271(1)(c) Expl. 5A, the AO has committed an complete illegality and his action is nullity in the eyes of law which is void-ab-initio being without jurisdiction and cannot be cured now by giving him a second chance. There is yet another reason for contending so because allowing the assessee AO an opportunity will be rendering the limitation provisions a nugatory. Moreover, it is the satisfaction of the AO (or at the best of the CIT(A), in the first appeal) who has to satisfied itself as to which particular default in respect to which particular provisions of law, has been committed by the assessee, calling for penalty. There being no satisfaction directly or indirectly discernable otherwise with regard to the default, if any mentioned in Sec. 271AAA, the AO cannot be given a second chance and hence matter cannot be set-aside to the AO.*

**4. Immunity u/s 271AAA(2) available:** *Alternatively, If it is held that the present matter attracted the provisions of Sec. 271AAA, the assessee shall be entitled to immunity granted u/s 271AAA(2) for the simple reason that all the conditions laid there under stood fulfilled. The fulfilment of following conditions is essential:*

- 1) *"The assessee in the course of search, in a statement u/sec. 132(4) admits the undisclosed income and specifies the manner in which such income has been derived;*
- 2) *Substantiates the manner in which the undisclosed income has been derived; and*
- 3) *Pays the tax together with interest, if any, in respect of the undisclosed income."*

*In this case the assessee deserves this immunity in as much as the **assessee has fulfilled all the above conditions and there is absolutely no dispute on this legal and factual state of affair.** The assessee duly made a surrendered in the statement recorded u/s 132 (4) on dated 13.10.2010 when search took place in reply to Q.No.15 (PB 51). The assessee has also paid the entire tax together with interest due thereon. The assessee also substantiated the manner of earning the undisclosed income being the income from the real estate business. Even otherwise no specific question was raised, asking the assessee to substantiate the manner in which the undisclosed income was derived and therefore, even assuming if this condition is not fulfilled, the assessee cannot be denied the benefit of the immunity so granted, as was held in the context of Sec. 271(1)(c) Expl. 5 in some cases.*

**5. Supporting case laws: ACIT vs. Shrithik Rolling Pvt. Ltd. (2015) 44 CCH 0223 (Panaji Trib) (DPB 69-73)"**

**11. Additional Submission:**

*"This is in continuation and in addition of our earlier written submission filled on dated 26.04.2016, it is further submitted that the impugned penalty imposed in the present case, in the facts and circumstances of the case, is **completely without jurisdiction.***

*(For the sake of convenience Pr. Number are mentioned consecutive to the earlier w/s)*

**6.1** Also kindly refer **CIT v/s Shri Samson Perinchery** in ITA No. 1154, 953, 1097, 1226/2014 on dated 05.01.2017 (DPB 10-21).

**6.2** Recently in the case of **CIT & Anr. v/s. M/s SSA's Emerald Meadows in CC No. 11485/2016on dated 05.08.2016 (DPB-II 18)**, it was held that

*"3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not*

*specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of CIT v/s Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565."*

*It is submitted that in the above decisions the **only stress was upon the SCN** wherein only, the occasion arise for the first time for the assessee to reply towards the Show Cause as to why penalty be not imposed w.r.t one or w.r.t both the offences. But by not becoming specific in inviting a reply from the assessee, it is a gross violation of the principles of natural justice and therefore the Hon'ble Courts have treated such a notice to be vague and nullity and consequently the impugned penalty based thereon, has also been held to be without jurisdiction.*

*On the other hand however, at the time of the completion of the assessment, it is only the initiation by the AO in the assessment order, when the assessee is not called upon to show cause against the very initiation hence, whether the penalty was initiated on one limb or the other or both the limbs, is irrelevant. Otherwise also, no appeal lay against the very initiation.*

*Therefore, the law which is now well settled, is only and only w.r.t the vagueness in the SCN and there is no reference at all to the findings recorded or the initiation of the penalty proceeding in the assessment order. Therefore, to refer the initiation in the assessment order by the authorities to justify the imposition of penalty is complete misreading and misinterpretation of law of the land.*

**6.3.1** *The Hon'ble Raj. HC in the case of **Sheveta Construction Co. Pvt. Ltd. v/s ITO** in **DBITA No. 534/2008** vide their order dated 06.12.2016 (DPB-II), it was held that:*

*"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."*

**6.3.2** *In the above case it was concluded that if in the assessment order, the AO has initiated proceedings for both the offenses, **he has to say so in the notice** as to whether he proposes to levy penalty for concealment of income or furnishing inaccurate particulars, **otherwise he cannot have both the conditions.***

Whereas just contrary thereto, **in the facts of present case the AO though initiated proceedings in the assessment orders w.r.t. both the offenses by using the conjunction “AND” i.e. for A.Y.2009-10 & 10-11 however, in the other two years i.e. 2007-08 & 08-09, he did not make clear which of the two he chose to ask the assessee. But in all the four SCN's he did not struck off which offense he wanted the assessee to reply. Further in the all the impugned penalty orders also the AO has used the word “or” and again it is not clear that for which particular offense the penalty was imposed. Thus, on these facts also, the impugned penalty was illegal and unjustified in view of the above decision of the Hon’ble High Court which directly applies on the present case, hence deserves to be quashed.**

**7. Recently this Hon’ble Bench in M/s Gopi Bai Foundation v/s ACIT 57 Taxworld 0001 (JP) (DPB) held that:**

**“Section 271(1)(c) – penalty for concealment of income or furnishing inaccurate particulars of income - section 274 – seeking to impose penalty u/s 271 (1)(c) – contents of the notice – requirements of.**

**Assessee is a trust and running a school – income of assessee is exempt u/s 10(23C)(iiiad) – Search was conducted in the group case of assessee – notice issued u/s 153C – returned file in response thereto – assessment completed u/s 153A on the returned loss – assessment subsequently reopened u/s 148 solely on the basis of statements of a third party – statements were never confronted to assessee and no opportunity of cross-examination provided to assessee in spite of specific requests being made by assessee – reassessment was completed wherein, addition on account of bogus purchase was made – addition not challenged by assessee in order to buy peace of mind and to avoid protracted litigation – AO initiated penalty proceedings u/s 271(1)(c) vide the assessment order itself – at the end of the Assessment order, Ld. AO mentioned “penalty proceedings u/s 271(1)(c) are being initiated separately for concealment of income and furnishing inaccurate particulars of income” – subsequently penalty notice u/s 274 was issued, which was merely a Performa printed form annexed with the assessment order, wherein AO had ticked on “271(1)(c) concealed particulars of yours income or furnished inaccurate particulars of income” – penalty proceedings initiated without specifying the limb of reasons in the penalty notice to impose penalty – penalty was initiated whether for concealment of income or for furnishing inaccurate particulars of income – whether notice invalid? Held: Yes**

**Whether the defect in notice is curable u/s 292B? Held: No- notice has been issued in substantive disregard of law and principles of natural justice.**

**Whether the subsequent penalty order based on the invalid notice is liable to be quashed? Held: Yes”**

**And has taken the same view following the decision in the case of Manjunatha (supra). There apart the decision in the case of Shankar Lal Khandelwal V/s DCIT ITA no.**

*878/JP/2013 order dated 11.03.2016 has also been followed. The facts in the instant case are also the same and hence the ratios of the above referred decisions are fully applicable.*

*8. In the case of DCIT v/s M/s BJD Products in ITA No. 493/LKW/2010 in Pr. 8.14, after following the decision in the case of Manu Engineering, the Hon'ble ITAT held that*

*“ 8.14 .....In the instant case, the action of the Assessing Officer cannot be held justifiable and tenable because there cannot be two offences i.e. to say, that the assessee has concealed particulars of his income and/or has furnished inaccurate particulars of such income.....”*

**9. Very recent decisions on Penalty not valid based on deficient SCN:**

**9.1 Chandmal Kumawat vs. ITO in ITA No. 760/jp/2016 vide order dated 29.12.2016 (DPB-II 5-17)Pr. 15-19**

**9.2 Narayana Heights & Towers vs. ITO, Ward 2-4, Jaipur (2017-LL-0220-58 • In favour of: Assessee • Date: 20/02/2017**

**9.3 M/s Gopi Bai Foundation v/s ACIT (2017) 57 TW 0001 (Jaip. Trib.)**

**9.4 Jai Ambey Associates v/s ITO in ITA No. 801/JP/2016 dated 25.01.2015 (DPB-II 28-42)**

**9.5. Laxmi Ram Rao VS. Income Tax Officer, Ward 3,(3) Banglore (2016-LL-0729-13 • In favour of: Partly in favour of assessee/Partly in favour of revenue • Date: 29/07/2016)**

**9.6 SHRI G.S Suhas VS. Income Tax Officer, Ward 1(2), Banglore (2016-LL-0205-225 • In favour of: Assessee • Date: 05/02/2016)**

**9.7 Jagannath s Shetty VS. Income Tax Office, Ward 1, Manday (2016-LL-0630-173 • In favour of: Assessee • Date: 30/06/2016)**

**9.8 Mahaveer Saraswati VS. Income Tax Office, Ward 2, Hassan (2016-LL-0729-8 • In favour of: Partly in favour of assessee/Partly in favour of revenue • Date: 29/07/2016)**

**9.9 Assistant Commissioner Of Income-Tax, Circle 12(1), Banglore v. Shri Suresh Jain (ITAT-Bangalore • Citation: 2015-LL-1009-78 • In favour of: Assessee • Date: 09/10/2015)**

**9.10 S Chandrashekhhar vs. ACIT (2017) 88 taxmann 459 (Kar HC)**

**9.11 Muninaga Reddy vs. ACIT (2017) 88 taxmann 545 (Kar HC)**

**9.12 Jeetmal Choraria vs. ACIT (2018) 91 taxmann 311 (Kolkata Trib.)**

**9.13 CIT vs. MWP Ltd. (2014) 41 taxmann 496 (Kar HC)**

**10.** *The crux of the decision in Manjunatha (Supra) whereas is that if the SCN is vague, on the basis of such proceedings, no penalty can be imposed. The AO must reach to a conclusion whether the penalty is initiated for both or for one of the offenses which must be specifically stated in the SCN and lastly even the levy of penalty has to be clear as to which particular limb of the offense it is been levied. The position been unclear, penalty was not sustainable as was held in Virgo Marketing (2008)171 Taxmann 156 (Del HC).*

**11.1** *From the entire reading of the subjected assessment order, there appears no satisfaction at all discernable even prima facie and the AO appears to have simply accepted the offer of the income. In the case of Suvaprasanna Bhattacharya (Supra), the Hon'ble ITAT following the decision in case of Madhushree Gupta has in Pr. 6 & 7 has held so*

*“6.----- in the order of assessment, which we have extracted in the earlier part of this order, nowhere spells out or indicates that the AO was of the view that the assessee was guilty of either concealing particulars of income or furnishing inaccurate particulars of income. The offer to tax of income by the assessee has just been accepted.-----*

*7. ----- Therefore even the Hon'ble supreme court's decision [Mak Data 358 ITR 593] suggests that the satisfaction need not be recorded in a particular manner but from a reading of the assessment order as a whole such satisfaction should be clearly discernible. -----we have read the order of assessment as a whole and are satisfied that satisfaction for initiation of penalty proceedings is not discernible from the order of assessment. We therefore concur with the argument of the learned counsel for the assessee that initiation of penalty proceedings was not proper in the present case and on that ground the imposition of penalty u/s.271(1)( c) of the Act is unsustainable.”*

**11.2** *Also refer Ms. Sandhya Gadkari Sharma vs. DCIT (2017) 82 Taxmann 73 (Mum. Trib) wherein it was held that:*

*“Section 271(1)(c) lays down that the penalty proceedings can be initiated on the basis of either of the two charges, i.e., (i) concealment of particulars of income or (ii) furnishing of inaccurate particulars of income. Both the charges are entirely different. If the proceedings are initiated on charge of concealment, then penalty cannot be levied on the charge of furnishing of inaccurate particulars of income and vice versa. Thus, there must be a clear finding about the charge for which penalty is imposed or initiated. It is incumbent upon the Assessing Officer to state whether penalty was being levied for concealment of income or for furnishing of inaccurate particulars of income. In the absence of such findings, the order would be bad in law. Where the Assessing Officer was satisfied during the course of assessment proceedings that the assessee had concealed income from other sources and furnished inaccurate particulars of this income but initiated the proceedings under section 271(1)(c) without making out any particular charge*

*but for both the charges, penalty imposed under section 271(1)(c) was to be deleted.”*

**12. Expl. 5A to section 271(1)(C) – not applicable:**

*12.1. At the outset, it is a trite law that a panel provision has to be construed strictly. Therefore, the provisions of S. 271 (1)(c) have to be construed strictly, and the Explanation 5A which creates a deeming fiction, has to be construed all the more strictly. It is submitted that Expl. 5A cannot be invoked unless the due date of filing ROI (139(4)), has not expired as on the date of the search, or in other words, the time to file ROI after the date of the search is still available. In this case the date of search is **13.10.2010** however, w.r.t assessment year 2009-10 and 2010-11 the due date of filing ROI (139(4)), fall on 31.03.2011 or 31.03.2012 respectively. (Kindly refer the enclosed chart). In these facts, the Expl. 5A cannot be applied at least in A.Y 2009-10 and 2010-11.*

*12.2 However, while upholding the action of the AO of invoking section 271(1)(c ) of the Act Expl. 5A, the ld. CIT(A) at Pg. 10-11 vide Pr. 5.4-5.5 has considered the meaning of the expression "due date" to be the due date as prescribed u/s 139(1) of the Act. However, a plain reading of the said Expl. 5A nowhere suggest so. In fact, it does not even refer to section 139 itself (what to talk of S. 139(1) or section 139(4) of the Act. The Expl. clause (a) simply speaks of the "due date.”*

*On the contrary, S.153A of the Act is a separate code in itself and starts with a non-obstacle clause. Further S.153A(1) of the Act excludes the applicability of section 139 of the Act from the beginning itself. Thereafter, Clause (a) prescribes a time limit which, is left to the discretion of the AO within which, the searched person is required to file his Return of income and all the provisions of the act so far as maybe, shall apply accordingly, as if, such return were a return required to be furnished u/s 139 of act.*

*12.3 Accordingly, the due date even for the purposes of Expl. 5A to section 271(1)(C) should be considered only the due date as prescribed by the AO in the notice issued u/s 153A of the act and none else. In any case, it cannot be a due date as prescribed U/s 139(1) of the act. Looking the issue from this angle, it will be found that in this case, notice/s u/s 153A in all the four subjected years were issued prescribing the due date Being 14.09.2011 whereas, the ROI pursuant to the said notices u/s 153A stood filed on 12 October 2011 itself. (PB- 68, 71, 74, 77) Thus, the ROI, as required by the AO, were filed "within the due date" and therefore Clause (b) to Expl. 5A is not fulfilled. Resultantly, the deeming fiction as created, cannot taken help by the revenue.*

**12.4 Supporting Case laws:**

*12.4.1 The issue is also directly covered by the decision case of **Kshiti R. Maniar vs. ACIT in ITA No.1020/Mum/2011(DPB)** for the A.Y. 2007-08, dated 28.08.2013 and the relevant part of the decision is reproduced as under:*

“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 1st 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.

8. In the facts and circumstances of the case, the Ld. CIT(A) is not justified in confirming the penalty levied by the Assessing Officer. Accordingly, the order of the ld. CIT(A) and that of the A.O. is reversed and the A.O. is directed to cancel the penalty so levied. Thus, all the grounds of the assessee’s appeal are allowed.

9. In the result, the appeal filed by the assessee in ITA No. 682(Asr)/2013 is allowed.”

**12.4.2. Davinder Sapra Prop. vs. ACIT (2014) 40 CCH 0287 (Asr Trib) (DPB)**

**12.4.3 ITO Vs Mr. Gope M. Rochlani [2014] 158 TTJ 120 (Mum. Trib) (DPB).**

**13. No difference between the return and assessed income hence no penalty levied imposable:**

**13.1** There is no dispute on the fact between the parties that the Ld. assessing officer assessed the same very income which was offered by the appellant as additional income surrendered during the course of survey but not only that he rather returned substantially more income than what was surrendered. During the course of search, the appellant surrendered Rs. 25 Lakh for all the subjected years however, while filing the return of income, the appellant offered total Rs.32,66,194/-. The same was assessed by the assessing officer as it is without any variation.

It is submitted that in the cases of penalty of concealment/furnishing inaccurate particular, the very starting point is the last return of income filed by the assessee which has been acted upon by the assessing officer and it is only the difference between the income so returned and the income finally assessed by the AO, which invites imposition of penalty. In a case where however, there is no such difference, there cannot be any question of imposition of penalty.

**13.2 Supporting case laws:**

**13.2.1A** useful reference on this aspect can be made to the decision in the case of **Reliance Petroproducts (P) Ltd. (2010) 322 ITR 158 (SC) (DPB)** wherein, the Supreme Court's held as under: everything would depend upon the IT return filed by the assessee.

**13.2.2** A useful reference on this aspect can be made to the decision in the case of **The case of ACIT vs. Shri A.N. Annamalaisamy, 87 DTR 202 (Chnn. Trib) (DPB)** also support the contention. The relevant part in para 7 is reproduced as under:

“7. We find that the Assessing Officer was carried away by the original return filed by the assessee, wherein originally the income admitted in the course of search was not returned by it. But the fact is that the assessee had filed a revised return before completing the assessment. When that is the case, the first return filed by the assessee is a non est. The only valid return is the revised return filed by the assessee. In that return, the amount admitted by the assessee at the time of search was offered for taxation. The assessee has paid the tax; he has paid the interest. He has not preferred any quantum appeal. He has also explained about the business and stated that the jewellery was acquired over a period of time. When all the pieces are put together, we find that the Commissioner of Income-tax (Appeals) is justified in holding that there is no ground to levy penalty in the present case under sec.271AAA. Accordingly, the order passed by the Commissioner of Income-tax (Appeals) is upheld.”

**13.2.3** In **Pr. CIT vs. Neeraj Jindal 2017) 393 ITR 0001 (Delhi)**, it was held that:

“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. 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. In fact, the second proviso to Section 153A(1) provides that “assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate.” What is clear from this is that Section 153A is in the nature of a second chance given to the assessee, which incidentally gives him an opportunity to make good omission, if any, in the original return. Once the A.O. accepts the revised return filed under Section 153A, the original return under Section 139 abates and becomes non-est. Now, it is trite to say that the “concealment” has to be seen with reference to the return that it is filed by the assessee. Thus, for the purpose of levying penalty under Section 271(1)(c), what has to be seen is whether there is any concealment in the return filed by the assessee under Section 153A, and not vis-a vis the original return under Section 139”*

**13.2.4 Prem Arora vs. DCIT (2012) 78 DTR 91 (Delhi) (Tribunal) (DPB)** wherein , it was held as under:

*“Section 271(1)(c), read with section 153A, of the Income-tax Act, 1961 - Penalty - For concealment of income - Assessment year 2004-05 - Whether for purpose of imposition of penalty under section 271(1)(c) resulting as a result of search assessments made under section 153A, original return of income filed under section 139 cannot be considered - Held, yes - Whether concealment of income has to be seen with reference to additional income brought to tax over and above income returned by assessee in response to notice issued under section 153A and, therefore, once returned income under section 153A is accepted by Assessing Officer, it can neither be a case of concealment of income nor furnishing of inaccurate particulars of such income - Held, yes - Search was conducted on 22-11-2006 and cash was found from possession of assessee - Assessee had drawn cash flow statement for entire period of six years in order to determine undisclosed income based on seized material for each of six assessment years - Whether penalty under section 271(1)(c) cannot be imposed by invoking Explanation 5 in assessment year 2004-05 in respect of cash found in previous year relevant to assessment year 2007-08, merely on presumption that assessee might have been in possession of cash throughout period covered by search assessments - Held, yes [In favour of assessee]*

*Words and Phrases : Word 'pending' occurring in the second proviso to section 153A and words 'all other provisions of this Act shall apply to the assessment made under this section' as occurring in Explanation (i) to section 153A of the Income-tax Act, 1961”*

**13.3 Continuing with the same analogy, Also, kindly refer:**

***The Hon'ble Chennai Bench A of ITAT in the case of ACIT vs. V N Devadoss (2013) 32 Taxmann 133*** has allowed a deduction claimed by the assessee u/s 80-IB, which was denied by the AO on the plea that the return of income was not filed within the due date u/s 139(1) of the act in contravention of sec 80AC. The Hon'ble ITAT however, finding that the assessee did file a return of income within the time permitted in the notice u/s 153A wherein, this deduction was claimed, the assessee was held entitled to the deduction in as much as the return of the income filed u/s 153A is the return of income as contemplated for the purpose of sec 80-IB r/w sec 80AC. In that case it was held as under:

*“Deduction claimed under section 80-IB(10) in return filed under section 153A cannot be denied on ground that claim was not made earlier in return filed under section 139(1)- Where assessee filed return of income in response to notice issued under section 153A, interest under section 234A was liable to be charged from date of expiry of notice period given in notice under section 153A to date of completing assessment under section 143(3)”*

Also kindly refer ***Mehthan Ispat Ltd vs. DCIT (2015) 55 Taxmann 444 (Kolkata Trib.)***

*Hence the impugned penalty deserves a complete deletion.”*

2.7 On the other hand, the ld. DR strongly relied on the orders of the authorities below.

2.8 We have carefully considered the rival contentions of both the parties and perused the material available on the record along with the various decisions cited by the parties. In this case, the . Assessing Officer initiated penalty proceedings for concealment of particulars of income and for furnishing inaccurate particulars of income vide assessment orders each dated 19.03.2013 for A.Y. 2009-10 and 2010-11 respectively whereas in the assessment orders each dated 19.03.2013 for A.Y. 2007-08 and 2008-09, he simply mentioned that *the penalty proceedings u/s*

*271(1)(c) are separately initiated on this issue.* But the notices issued u/s 274 read with Section 271(1)(c) of the Act were issued in all the years on 19.03.2013 stating as under:-

“x x x x *it appears to me that you have concealed the particulars of your income and/or furnished inaccurate particulars of income.*”

The facts are not denied that the assessee disclosed additional income in all the years in the return of income filed in response to notices issued u/s 153A of the Act. The ld. CIT(A) considered the case and held that Explanation 5A to Section 271(1)(c) is applicable in this case because the search was carried out after 1st of June 2007 i.e on dated 13.10.2010. However, simply because the assessee has agreed and offered the additional income during the course of the search and disclosed the same in the returns u/s 153A, does not obviate the necessity and is rather a precondition for the AO to make sure that the show cause notice u/s 274 r.w 271(1)(c), specifically state the grounds mentioned in S. 271(1)(c) i.e whether it is for concealment of income or furnishing of inaccurate particulars of income. Merely sending a printed performa without striking off the particular limb or specifying the particular ground or default would not satisfy the requirement of law. The assessee must know specifically the ground which he has to meet otherwise, no penalty can be imposed on the assessee. However, in this case, copies of the notices dated 19.03.2013 issued u/s 274 in all the 4 years, have been

placed at Pg 66-66C of the assessee's common paper book. The relevant portion of the such notices is reproduced hereunder

“x x x x it appears to me that you have concealed the particulars of your income **and/or** furnished inaccurate particulars of income.”

Thus, the AO has not specified which limb of the provision, the assessee was asked to reply. This does not meet with the requirement of law. The Hon'ble Karnataka High Court in the case of CIT vs. M/s Manjunatha Cotton & Ginning Factory & Ors.(2013) 359 ITR 565 (Karn) held that sending printed form where all the grounds mentioned in section 271 would not satisfy the requirement of law. The assessee should know the ground which he has to meet specifically, otherwise, the principle of natural justice is offended on the basis of such proceedings, no penalty could be could be imposed to the assessee. In that case it was held that

“NOTICE UNDER SEC. 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 Expl.-1 or in Expl.-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 where 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.”*

The said decision since been followed in several decisions of the Hon’ble High Courts and Co-ordinate Benches of ITAT. It was followed in CIT v/s Shri Samson Perinchery in ITA No. 953, 1097, 1154 & 1226/2014 (Mum. Trib.) on dated 05.01.2017 observing as under:-

*‘ The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 to be bad in law as it did not specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of CIT v/s Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565.*

The same has also been affirmed by the Apex Court in the case of CIT & Anr. v/s. M/s SSA’s Emerald Meadows in CC No. 11485/2016 on dated 05.08.2016 The Hon’ble Karnataka High Court has taken the same view in the cases of S Chandrashekhar vs. ACIT (2017) 88 taxmann 459 (Kar HC), Muninaga Reddy vs. ACIT (2017) 88 taxmann 545 (Kar HC) and CIT vs. MWP Ltd. (2014) 41 taxmann 496 (Kar HC). The Hon’ble Delhi High Court has also taken a similar view in the case of Virgo Marketing (2008)171 Taxmann 156 (Del HC). During the course of

hearing, the ld. AR cited several decisions which, included a number of decisions of the Co-ordinate bench of ITAT Jaipur also, as mentioned above. Accordingly, in view of the above facts and circumstances of the case as well as the decisions cited (supra) we hold that the notices issued u/s 274 r.w.s. 271(1)(c) of the Act dated 19.03.2013 are not valid and the same are quashed. Consequential levy of penalty in all the years are also deleted. Since we have deleted the penalty on legal Ground No. 4, therefore, the other legal ground being academic is not adjudicated upon.

4.0. In the result, the appeals of the assessee are allowed.

Order pronounced in the open Court on 21 -06-2018.

Sd/-  
( विजय पाल राव )  
(Vijay Pal Rao)  
न्यायिक सदस्य /Judicial Member

Sd/-  
(भागचन्द)  
(Bhagchand)  
लेखा सदस्य /Accountant Member

जयपुर /Jaipur

दिनांक /Dated:- 21/06/ 2018

\*Mishra

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

1. अपीलार्थी /The Appellant- Shri Ramesh Chand Bansal, Beawar
2. प्रत्यर्थी / The Respondent- The DCIT, Central Circle, Ajmer
3. आयकर आयुक्त(अपील) / CIT(A).
4. आयकर आयुक्त / CIT,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर /DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No.398 /JP/2015)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar