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

श्री विजय पॉल राव, 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. No. 922/JP/2018
निर्धारण वर्ष/Assessment Years : 2009-10

Smt. Shipra Jain B-522, Malviya Nagar, Jaipur	बनाम Vs.	ACIT Central Circle-1 Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AEHPJ1594F		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA. No. 920/JP/2018
निर्धारण वर्ष/Assessment Years : 2009-10

Sh. Sapan Jain B-522, Malviya Nagar, Jaipur	बनाम Vs.	ACIT Central Circle-1 Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACEPJ3164G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA. No. 921/JP/2018
निर्धारण वर्ष/Assessment Years : 2010-11

Sh. Sapan Jain B-522, Malviya Nagar, Jaipur	बनाम Vs.	ACIT Central Circle-1 Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACEPJ3164G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA. No. 923/JP/2018
निर्धारण वर्ष/Assessment Years : 2010-11

Smt. Shipra Jain B-522, Malviya Nagar, Jaipur	बनाम Vs.	ACIT Central Circle-1 Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AEHPJ1594F		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri P. C. Parwal (CA)
राजस्व की ओर से/ Revenue by: Shri J. C. Kulhari (JCIT)

सुनवाई की तारीख/ Date of Hearing : 03/10/2018
उदघोषणा की तारीख/Date of Pronouncement : 31/10/2018

आदेश/ ORDER

PER BENCH:

These are appeals filed by the respective assessees against the order of ld. CIT(A)-4, Jaipur for Assessment Year 2009-10 and Assessment year 2010-11 challenging the levy of penalty under section 271(1)(c) of the Act. All these appeals were heard together and are being disposed off by this consolidated order.

2. The grounds of appeal taken are as under:-

ITA. No. 922/JP/2018 for AY 2009-10

"(1) Under the facts and circumstances of the case, order passed u/s 271(1)(c) is illegal and bad in law.

(2) The ld. CIT(A) has erred on facts and in law in confirming the levy of penalty of Rs. 45,555/- on addition of Rs. 1,34,025/- made on account of alleged estimated unexplained investment in construction of house."

ITA. No. 920/JP/2018 for AY 2009-10

"1. Under the facts and circumstances of the case, order passed u/s 271(1)(c) is illegal and bad in law.

2. The ld. CIT(A) has erred on facts and in law in confirming the levy of penalty on addition of Rs. 1,34,025/- made on account of alleged estimated unexplained investment in construction of house."

ITA. No. 921/JP/2018 for AY 2010-11

"1. Under the facts and circumstances of the case, order passed u/s 271(1)(c) is illegal and bad in law.

2. The Ld. CIT(A) has erred on facts and in law in confirming the levy of penalty on addition of Rs. 4,43,000/- (correct amount is Rs. 5,57,000/-) made on account of alleged estimated unexplained investment in construction of house."

ITA. No. 923/JP/2018 for AY 2010-11

"1. Under the facts and circumstances of the case, order passed u/s 271(1)(c) is illegal and bad in law.

2. The ld. CIT(A) has erred on facts and in law in confirming the levy of penalty of Rs. 3,09,000/- on addition of Rs. 10 lacs made on account of alleged estimated unexplained investment in construction of house. He has further erred in confirming the above penalty ignoring the fact that after the order of Hon'ble ITAT, addition is restricted to Rs. 5,57,000/- only."

ITA. No. 922 & 920/JP/2018

2. Briefly stated, the facts of the case are that a search and seizure operation was carried out u/s 132 of the Income Tax Act, 1961 on

08.06.2011 at the business and residential premises of the assessees. Both the assessees, being husband & wife, jointly purchased a plot for consideration of Rs.32,65,200/- during FY 2005-06 and constructed a house on it during 2007 to 2009. In the statement recorded u/s 132(4), Sh. Sapan Jain stated that he has spent Rs. 65-70 lakhs in construction of house which was started in the year 2007 and was completed in 2009. He also stated that he has further made investment of Rs.20 lacs on fittings, furnishing, furniture, etc. after the construction in FY 2009-10. However, in the return filed u/s 153A, both the assessees declared total cost of construction at Rs.53,21,778/-, i.e. Rs.26,60,889/- each by Sh. Sapan Jain and Smt. Shipra Jain.

2.1 The AO referred the matter to DVO who determined the cost of construction at Rs.1,05,40,097/- and thereby determined difference at Rs.52,18,319/-. Accordingly, AO added the difference amount in the hands of both the assesses equally during FY 2006-07 to 2008-09, resulting into addition of Rs.9,38,800/- in the year under consideration. On this addition, AO initiated penalty proceedings u/s 271(1)(c) of the IT Act.

2.2 On appeal, assessees pointed out various defects in the DVO's report. The Ld. CIT(A) after considering the defects restricted the addition to Rs. 2,68,051/-. Accordingly, addition of Rs.1,34,025/- (2,68,051/2) was confirmed by Ld. CIT(A) in the hands of both the assessees and the matter has attained finality as far as quantum proceedings are concerned.

2.3. In penalty proceedings, assessees filed its reply vide letter dt. 20.03.2017 which was not found acceptable and the AO levied penalty

of Rs.45,555/- on addition of Rs.1,34,025/- by holding that assessee is liable for penalty under explanation 5A of 271(1)(c) of the Act.

2.4 The Ld. CIT(A) confirmed the penalty by holding that AO has based his addition on the basis of DVO report which is very specific and remain significantly unrebutted at the CIT(A) stage. The estimation of DVO is in consonance with the statement recorded by the department u/s 132(4) of the Act. Further, the ld CIT(A) has held that the AO has initiated the penalty exactly specifying the limb under which he sought to impose the penalty. Now, both the assessees are in appeal against the said findings of the ld CIT(A).

3. During the course of hearing, the ld. AR submitted that at the outset, it is submitted that AO in the body of the order has mentioned that assessee is liable for penalty u/s 271(1)(c) of the IT Act. At the end of the order, penalty proceedings are initiated for concealment of income. In the notice issued u/s 274 read with sec. 271(1)(c) dated 21.03.2014, penalty proceedings u/s 271(1)(c) was initiated for concealment of income or furnishing of inaccurate particulars of income. Again in the notice dt. 20.02.2017, penalty proceedings was initiated for concealment of income/ furnishing of inaccurate particulars of income. Further in the penalty order, the AO without specifying any particular limb under which penalty is leviable imposed the penalty u/s 271(1)(c). Thus, in the absence of any specific charge against the assessee in the penalty notice and in the penalty order, consequent penalty imposed by AO is illegal and bad in law. Reliance in this connection was placed on the various decisions including CIT Vs. SSA'S Emerald Meadows (2016) 242 Taxman 180 (SC), CIT vs. M/s Manjunatha Cotton & Ginning Factory &Ors.359 ITR 565 (Kar).

3.1 On merits, it was submitted that the entire addition made by the AO and reduced by the CIT(A) is on the basis of cost of construction estimated as per DVO's report. In search, no evidence of investment over and above that declared by the assessee was found. The AO referred to surrender of Rs. 20 lakhs but the same is in relation to furnishing items for which addition has been made in AY 2010-11 and it has no relevance with the cost of construction. Hence, on such addition which is on account of estimation of cost of construction by DVO, no penalty is leviable. For this purpose, reliance was placed on the following cases:-

- Dilip N. Shroff Vs. JCIT & Anr. (2007) 291 ITR 519 (SC)

The Hon'ble Supreme Court held that only because the opinion of registered valuer is not accepted or some other expert gives another opinion, is not by itself sufficient for arriving at a conclusion that the assessee had furnished inaccurate particulars attracting penalty u/s 271(1)(c). Primary burden of proof of furnishing inaccurate particulars of income is on the Revenue and it is only on discharge of primary burden that secondary burden of proof would shift on the assessee. Accordingly, penalty was deleted on addition made on the basis of valuation report.

- CIT Vs. K.R. Chinni Krishna Chetty (2000) 246 ITR 121 (Mad.) (HC)

The Hon'ble Madras High Court held that penalty under sec. 271(1)(c) could not be levied on assessee whose income had been assessed at a higher figure solely on the basis of the valuer's report which showed the cost of construction at a figure higher than the one reported by the assessee.

- CIT Vs. Apsara Talkies (1985) 155 ITR 303 (Mad.) (HC)

Mere estimate of cost by departmental valuer could not constitute material to concealment, more so, there was no evidence of understatement of construction expenses by assessee, therefore, levy of penalty was not valid.

- ACIT Vs. Prakash Industries Ltd. (2016) 46 CCH 145 (Del.) (Trib.)

The ITAT held that valuation made by DVO was estimate that could be basis for making addition to income of assessee for purpose of assessment but same alone could not be basis to construe concealment for purpose of imposing penalty u/s 271(1)(c).

In view of above, penalty imposed by AO and confirmed by Ld. CIT(A) be deleted.

4. We have heard the rival contentions and perused the material available on record. The AO has invoked the deeming provisions of Explanation 5A to Section 271(1)(c) of the Act to levy penalty in the instant case. Section 271(1)(c) of the Act, being in the nature of penal provisions require a strict interpretation and it is to be seen that the instant case falls within the four corners of the said provisions and conditions laid down therein are specifically fulfilled. Therefore, it would be relevant to examine the conditions specified in Explanation 5A which reads as under:

"Explanation 5A- Where, in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of:
(i) any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income for any previous year; or
(ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year,

which has ended before the date of search, and

(a) where the return of income for such previous year has been furnished before the said date but such income has not been declared therein; or

(b) the due date for filing the return of income for such previous year has expired but the assessee has not filed the return, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished in accurate particulars of such income."

4.1 In the instant case, in the course of search which has been carried out u/s 132 on 08.06.2011, Sh. Sapan Jain along with his wife Smt. Shipra Jain was found to be the joint owner of a residential house at Plot No. 6 Usha Colony, Malviya Nagar, Jaipur. In the statement recorded u/s 132(4), Sh. Sapan Jain stated that he has spent Rs. 65-70 lakhs in construction of the house which was started in the year 2007 and completed in the year 2009. In the return of income filed pursuant to notice u/s 153A, the assessee did not disclose the full cost of

construction/investment so stated in his statement recorded u/s 132(4) and thereafter, the AO referred the matter to the DVO who determined the cost of construction at Rs. 1,05,40,097/- as against Rs. 52,18,319/- determined by the assessee and thereafter, the differential amount was brought to tax in the hands of the assessee equally along with his wife. Therefore, as far as invocation of Explanation 5A to section 271(1)(c) of the Act is concerned, no fault can be found with the AO. A search has been initiated u/s 132 on or after the 1st Day of June, 2007 and the assessee has been found to be joint owner of residential house at Plot No. 6 Usha Colony, Malviya Nagar, Jaipur and a part of the investment/cost of construction of such house has been stated by the assessee to have been made out of his income for the previous year 2008-09 which has ended before the date of search which was conducted on 8.6.2011. And it is also clear that in the original return of income filed u/s 139(1) which has been furnished on 29.09.2009, such income has not been disclosed therein. Given that both the conditions so specified has been satisfied in the instant case, the provisions of Explanation 5A are clearly applicable. Further, no specific arguments have been taken by the ld. AR to dispute the applicability of Explanation 5A. In light of these undisputed facts, we donot see any infirmity in invocation of the provisions of Explanation 5A to section 271(1)(c) of the Act. However, the contentions of the AR on merits need to be considered which we have discussed in subsequent paragraphs.

4.2 Now coming to the first contention so raised by the ld. AR that in the absence of any specific charge against the assessee in the penalty notice and subsequently in the penalty order, consequent penalty imposed by AO is illegal and bad in law. We find that Explanation 5A to section 271(1)(c) is a deeming provision and subject to fulfilling the

requisite conditions, it deems the assessee to have concealed the particulars of his income or furnished inaccurate particulars of such income similar to what has been provided in clause (c) to section 271(1) of the Act. In search cases as well, the legislature has thus envisaged applicability of one or both of these charges. It is settled position now as held by catena of judicial pronouncements that the notice initiating the penalty proceedings should specify the charge against the assessee and even where the charge is uncertain at the time of initiation of penalty proceedings, subsequently during the penalty proceedings, the AO 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'.

4.3 In this regard, useful reference can be drawn to the decision of the **Coordinate Bench in case of HPCL Mittal Energy vs Add. CIT** reported in 96 Taxman.com 3 where the matter was referred to the Third Member to decide on the issue as to "Whether, in case where the satisfaction of the AO while initiating penalty proceedings u/s. 271(l)(c) of the Income-tax Act, 1961 is with regard to alleged concealment of income by the assessee, whereas the imposition of the penalty is for 'concealment/furnishing inaccurate particulars of income', the levy of penalty is not sustainable?".

After analyzing catena of judicial pronouncements including the decisions which have been cited by the ld AR, the Coordinate Bench speaking through the Third Member has held as under:

> *"9. On an analysis of the factual matrix narrated above, it is manifested that the AO recorded satisfaction qua the three items*

of disallowance/additions leading to penalty, as 'concealment of income' in all the assessment orders; initiated penalty in all the four cases by treating them as covered under the expression 'concealment of particulars of income'; and then finally passed penalty orders on the assessees finding them guilty of 'concealment of particulars of income/furnishing inaccurate particulars of such income'. As against that, the actual position is that all the three items of disallowance/additions fall only under the category of 'furnishing of inaccurate particulars of income'. Now the question arises if the penalty is sustainable in such circumstances?

10. *At this juncture, it is pertinent to note that penalty proceedings are distinct from the assessment proceedings. Merely because an addition has been made or confirmed in the assessment, does not, per se, lead to imposition of penalty u/s. 271(l)(c). Penalty proceedings are separately initiated on conclusion of the assessment, in which the assessee is given an opportunity to explain his position qua the imposition of penalty on the additions/disallowances made in the assessment. The AO considers the explanation of the assessee and then decides if the penalty is imposable or not. Further, the opinion of the AO as to concealment of particulars of income or furnishing of inaccurate particulars of such income has to be seen with reference to the day on which he initiates/imposes penalty. Later events, like confirmation or deletion of additions/disallowances in quantum appeals, are irrelevant in this context.*

11. *It transpires from the above discussion that, insofar as the issue before me is concerned, there are broadly two different stages having bearing on the imposition of penalty, namely, assessment and penalty. At the assessment stage, the AO has to record a satisfaction in the assessment order as to whether the additions/disallowances, on which penalty is likely to be imposed, represent concealment of particulars of income or furnishing of inaccurate particulars of income. There can be two sub-stages in penalty proceedings requiring the AO to record such satisfaction, viz., at the time of initiating the penalty proceedings and at the time of passing the penalty order. I will deal with such two stages in the present context.*

(a) Recording of satisfaction at the assessment stage.

12. *It has been noticed hereinabove that the first stage of imposition of penalty is recording of satisfaction by the AO in the assessment order as to whether the assessee concealed the particulars of income or furnished inaccurate particulars of income. There was a lot of litigation on this point. The assessees were contending before the appellate courts that the AO had not recorded proper satisfaction in the assessment order and hence the penalty should be deleted. On the other hand, the Department was contending that the satisfaction was properly recorded. Considering the magnitude of litigation on the point, the Finance Act, 2008, inserted sub-section (1B) to section 271, w.r.e.f. 1.4.1989, which runs as under: —*

'Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or

reassessment and the said order contains a direction for initiation of penalty proceedings under clause (c) of sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c).'

13. *The effect of this insertion is that when an amount is added or disallowed in an assessment and the order contains a direction for initiation of penalty proceedings u/s. 271(l)(c), it shall be deemed to constitute satisfaction of the AO for initiation of the penalty proceedings. Crux of the new provision is that a mere direction in the assessment order to initiate penalty proceedings under clause (c) is sufficient to conclude that the AO recorded proper satisfaction as to whether the additions/disallowances are 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income' or both. It is incorrect to argue that even after the insertion of sub-section (1B), the AO still needs to specifically record as to whether each item of addition/disallowance is a case of concealment of particulars of income or furnishing of inaccurate particulars of income. Deeming 'satisfaction' under clause (c) in terms of sub-section (1B) means deeming 'proper satisfaction' and 'proper satisfaction' means getting satisfied as to whether it is a case of concealment of particulars of income or furnishing of inaccurate particulars of such income. It cannot be conceived that a direction to initiate penalty proceedings in the assessment order is only 'satisfaction' and not 'proper satisfaction'. This contention, if taken to a logical conclusion, would mean that after such a direction in the assessment order constituting his satisfaction, the AO should*

once again specifically record satisfaction with reference to each addition or disallowance as to whether it is a case of concealment or furnishing of inaccurate particulars. It is obviously an absurd proposition and goes against the unambiguous language of the provision. Thus, it is overt that after insertion of sub-section (1B) to section 271, invariably, the AO should be deemed to have recorded proper satisfaction with reference to each addition/disallowance as to concealment or furnishing of inaccurate particulars, once a direction is contained in the assessment order to initiate penalty u/s. 271(l)(c) of the Act. Requiring the recording of separate satisfaction, once again, by the AO would militate against the deeming provision contained in sub-section (1B). Admittedly, in all the four appeals under consideration, the AO directed to initiate penalty u/s. 271(l)(c) of the Act in the assessment orders. Thus, the Revenue can be safely considered to have successfully passed out the first stage.

(b) Recording of satisfaction at the penalty stage

14. *It has been noted above that penalty proceedings are separate from assessment proceedings, which get kicked with the issue of notice u/s. 274 and culminate in the penalty order u/s. 271(l)(c) of the Act. Many a times, penalty initiated in the assessment order on one or more counts by means of notice u/s. 274, is not eventually imposed by the AO on getting satisfied with the explanation tendered by the assessee in the penalty proceedings. In any case, confronting the assessee with the charge against him is sine qua non for any valid penalty proceedings. It is only when the assessee is made aware of such*

a charge against him that he can present his side. Thus prescribing the charge in the penalty notice and penalty order is must. Absence of a charge in the penalty notice or not finding the assessee guilty of a clear offence in the penalty order, vitiates the penalty order.

15. *The moot question is that what should be the nature of specification of a charge by the AO at the stage of initiation of penalty proceedings and at the time of passing the penalty order. Is the AO required to specify in the penalty notice/order as to whether it is a case of 'concealment of particulars of income'; or 'furnishing of inaccurate particulars of income'; or both of them, which can be expressed by using the word 'and' between the two expressions. When the AO is satisfied that it is a clear-cut case of concealment of particulars of income, he must specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. The AO cannot initiate penalty on the charge of 'concealment of particulars of income', but ultimately find the assessee guilty in the penalty order of 'furnishing inaccurate particulars of income'. In the same manner, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of 'furnishing of inaccurate particulars of income', he must again specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. After initiating penalty on the charge of 'furnishing of inaccurate particulars of income', he cannot impose penalty by finding the assessee guilty of 'concealment of particulars of income'. Again, he cannot be*

uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of imposition of penalty u/s. 271(l)(c) of the Act on two or more additions/disallowances, one or more falling under the expression 'concealment of particulars of income' and the other under the 'furnishing of inaccurate particulars of income', he must specify it so by using the word 'and' between the two expressions in the notice at the time of initiation of penalty proceedings. If he remains convinced in the penalty proceedings that the penalty was rightly initiated on such counts and imposes penalty accordingly, he must specifically find the assessee guilty of 'concealment of particulars of income' and also 'furnishing of inaccurate particulars of income' in the penalty order. If the charge is not levied in the above manner in all the three clear-cut situations discussed above in the penalty notice and also in the penalty order, the penalty order becomes unsustainable in law.

16. *The Hon'ble Karnataka High Court in CIT v. Manjunatha Cotton and Ginning Factory [2013] 359 ITR 565/218 Taxman 423/35 taxmann.com 250 has held that a 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 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(l)(c) do not exist as such he is not liable to pay penalty. The Hon'ble High Court went on to hold that: 'Clause (c) deals with two specific offences, that is to say,*

concealing particulars of income or furnishing inaccurate particulars of income.... 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….. 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'.

17. *In Manu Engg. Works (supra) penalty was imposed by noting: 'that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income'. Striking down the penalty, the Hon'ble High Court held that: 'it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down.'*

18. *In Padma Ram Bharali (supra), the Hon'ble High Court did not sustain penalty levied u/s. 271(l)(c) when: 'the initiation of the penalty proceeding was for concealment of the particulars of income. But the Tribunal finally held that the assessee would be deemed to have concealed the particulars of income or to have furnished inaccurate particulars of such income.'*

19. *Thus it is evident that when the AO is satisfied at the stage of initiation of penalty proceedings of a clear-cut charge against*

the assessee in any of the three situations discussed above (say, concealment of particulars of income), but imposes penalty by holding the assessee as guilty of the other charge (say, furnishing of inaccurate particulars of income) or an uncertain charge (concealment of particulars of income/furnishing of inaccurate particulars of income), the penalty cannot be sustained.

20. *Another crucial factor to be kept in mind is that the satisfaction of the AO as to a clear-cut charge leveled by him in the penalty notice or the penalty order must concur with the actual default. If the clear-cut charge in the penalty notice or the penalty order is that of 'concealment of particulars of income', but it turns out to be a case of 'furnishing of inaccurate particulars of such income' or vice-versa, then also the penalty order cannot legally stand.*

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.

22. *In Manu Engineering Works (supra), the Hon'ble Gujarat High Court noticed that the charge at the stage of initiation of penalty proceedings as well in the penalty order was uncertain and the expression used at both the stages was concealment of particulars of income and/or furnishing of inaccurate particulars of such income. It struck down the penalty by holding that the assessee must have been found to be guilty of a certain charge in the penalty order. It, however, did not find anything amiss with the initiation of penalty on such uncertain charge, which is vivid from the following observations : —*

'We find from the order of the IAC, in the penalty proceedings, that is, the final conclusion as expressed in para. 4 of the order: "I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had finished inaccurate particulars of such income". Now, the language of "and/or" may be proper in issuing a notice as to penalty order or framing of

charge in a criminal case or a quasi-criminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee.'

***23.** It is thus evident that uncertain charge at the stage of initiation of penalty proceedings can be made good with a clear-cut charge in the penalty order. In any case, existence of a clear-cut charge in penalty order is a must so as to validate any penalty order."*

4.4 In the instant case, the Assessing officer has recorded his satisfaction in respect of the five items of disallowance/additions including undisclosed investment on construction of house amounting to Rs 938,800 leading to penalty, as 'concealment of income' in the assessment order passed under section 143(3) r/w 153A, thereafter initiated penalty by issuance of notice u/s 274 r/w 271 dated 21.30.2014 in respect of all the five items of disallowance/additions by treating them as covered under the expression "concealment particulars of income or furnished inaccurate particulars of income" and then finally passed the impunged penalty order u/s 271(1)(c) in respect of undisclosed investment on construction of house amounting to Rs 134,025 (to the extent sustained by the ld CIT(A) out of Rs 938,800) and levied penalty u/s 271(1)(c) amounting to Rs 45,555 by stating as under:

"6. In view of above stated facts and legal position, the assessee under consideration is, clearly liable for penalty u/s 271(1)(c) of the Act is imposed upon him as per following computation:-

Total undisclosed/concealed income liable to penalty u/s 271(1)(c)	*Rs. 1,34,025*
Penalty imposable (100% of tax sought to evaded) *Penalty imposable (300% of tax sought to evaded)*	*Rs. 45,555/-* *Rs. 1,36,665/-*
Penalty levied (100% of the tax sought to evaded	*Rs. 45,555/-*

In view of the above, a penalty of Rs. 45,555/- is hereby levied u/s 271(1)(c) of the Income-tax Act, 1961. Issued demand notice."

4.5 It is thus a case where the AO has recorded the satisfaction in the assessment order stating that the assessee has concealed his particulars of income whereby the assessee has not disclosed his investment in construction of the house to the extent of expenditure incurred during the previous year relevant to impunged assessment year. Therefore, the notice initiating the penalty proceedings is uncertain where he uses the expression "concealment particulars of income or furnished inaccurate particulars of income". However, during the penalty proceedings, he has given a decisive finding as reflected in the penalty order that the assessee is guilty of 'concealment of particulars of income' by not disclosing the investment in the construction of his house. As held by the Coordinate Bench (supra), the uncertain charge at the time of initiation of penalty has been made good and substituted with a conclusive default at the time of passing the penalty order and that in such a case, no fault can be found in the penalty order." In such a case, we donot see any infirmity in the penalty order so passed by the Assessing officer and the contentions so raised by the ld AR in this regard are not accepted.

4.6 Further, coming to the contentions of the ld AR on merits that where the entire addition made by the AO and reduced by the CIT(A) is on the

basis of cost of construction estimated as per DVO's report and in search proceedings, no evidence of investment over and above that declared by the assessee was found, the penalty should not be levied. In this regard, as we have noted above, the AO has invoked the provisions of Explanation 5A and the presumption therein is that the assessee has concealed particulars of his income or furnished inaccurate particular of income. As held in case of Manjunatha Cotton & Grinning Factory (supra) that the presumption found in Explanation 1 is a rebuttable presumption, to our mind, the presumption under section 5A is also a rebuttable presumption and the bonafide of the explanation so submitted by the assessee needs to be examined before a final view is taken on the levy of penalty. In the instant case, the Assessing officer in his assessment order states that the cost of construction estimated by the assessee's valuation officer (AVO) is not correct and acceptable, and the cost of construction estimated by the DVO being made by a Govt. technical person and such valuation is more scientific which is based on correct plinth area rates was found acceptable and addition of Rs 52,18,319 in various years including the year under consideration (Rs 938,800) was made by the him. The ld CIT(A) on review of the said DVO report and the objections/explanations so filed by the assessee held that the assessee has been able to explain the difference in the valuation between the two valuations to the extent of Rs 49,50,171 (out of Rs 52,18,319) and the balance addition of Rs 2,68,051 was sustained equally among the two assessees. The said addition forms the basis of impunged penalty orders drawing solely and heavily on the findings of the assessment order and there is no further finding so recorded by the AO during the course of penalty proceedings. We thus find that the explanation of the assessee has been accepted to a large extent by the ld CIT(A) where he deletes the addition of Rs 49,50,171 out of Rs

52,18,319 and the bonafide of such explanations are thus established. In respect of remaining additions of Rs 268,051 which is so sustained, it is again solely based on estimation by the DVO which is found more scientific as against the valuation which the assessee has got done through its own valuer. To our mind, such minor differences in estimation and consequent valuation are but natural and so long as fundamental methodology so adopted by the valuation officer are not disputed, such minor differences in valuation cannot form the basis for levy of penalty as held by various Courts including the **Hon'ble Supreme Court in case of Dilip N. Shroff** (supra) wherein it was held that only because the opinion of registered valuer is not accepted or some other expert gives another opinion, is not by itself sufficient for arriving at a conclusion that the assessee had furnished inaccurate particulars attracting penalty u/s 271(1)(c). In light of the same, the penalty so levied u/s 271(1)(c) of the Act is hereby directed to be deleted in hands of Sh. Sapan Jain. Under identical facts and circumstances of the case, the penalty has been levied in case of Smt. Shipra Jain and our present findings apply equally in her case as well. In the result, both the appeals are allowed.

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5. Briefly stated, the facts of the case are that a search and seizure survey operation was carried out u/s 132 of the Income Tax Act, 1961 on 08.06.2011 at the business and residential premises of the assessees. Both the assessees, being husband & wife, jointly purchased a plot for consideration of Rs.32,65,200/- during FY 2005-06 and constructed a house on it during 2007 to 2009. In the statement recorded u/s 132(4), Sh. Sapan Jain stated that he has spent Rs. 65-70 lakhs in construction of house which was started in the year 2007 and was completed in 2009. He also stated that he has further made

investment of Rs.20 lacs on fittings, furnishing, furniture, etc. after the construction in FY 2009-10 out of undisclosed income which he offered for tax. However, in the return filed u/s 153A, no such disclosure was made by either of the two assessees.

5.1 The AO on the basis of statement of Sh. Sapan Jain determined the undisclosed expenditure on these items at Rs.20 lacs and thereby made addition of Rs.10 lacs in hands of both the assessees. On this addition, the AO also initiated penalty proceedings u/s 271(1)(c) of the IT Act.

5.2 Against the addition, the assessee filed an appeal before the Ld. CIT(A) who confirmed the addition. The Tribunal vide its order dt. 15.05.2017 restricted the addition to Rs.11,14,000/-, thereby confirmed the addition of Rs.5,57,000/- in each hand.

5.3 In penalty proceedings, the AO rejected the assessee's submission/explanation and levied penalty on addition of Rs.10 lacs (sustained by the ld CIT(A)) and referring to Explanation 5A held that the assessee case is clearly covered and liable for penalty under section 271(1)(c) of the Act.

5.4 On appeal against the said levy of penalty, the Ld. CIT(A) held that explanation 5A to section 271(1)(c) of the Act. In case of Smt. Shipra Jain, he confirmed the levy of penalty on addition of Rs.10 lacs however without giving effect to the order of the Tribunal in quantum proceedings. In case of Sh. Sapan Jain, he confirmed the levy of penalty on the addition which was sustained by the Tribunal but took the amount at Rs. 4,43,000/- instead of Rs.5,57,000/-.

6. During the course of hearing, the ld. AR submitted that the AO in the body of the order has mentioned that assessee is liable for penalty u/s 271(1)(c) of the IT Act. At the end of the order, penalty proceedings are initiated for concealment of income. In the notice issued u/s 274 read with sec. 271(1)(c) dated 21.3.2014, penalty proceedings u/s 271(1)(c) was initiated for concealment of income or furnishing of inaccurate particulars of income. Again in the notice dt. 20.02.2017, penalty proceedings was initiated for concealment of income/furnishing of inaccurate particulars of income. Further in the penalty order, AO without specifying any particular limb under which penalty is leviable imposed the penalty u/s 271(1)(c). Thus, in the absence of any specific charge against the assessee in the penalty notice and in the penalty order, consequent penalty imposed by AO is illegal and bad in law. Reliance in this connection was placed on the various decisions including CIT Vs. SSA'S Emerald Meadows (2016) 242 Taxman 180 (SC), CIT vs. M/s Manjunatha Cotton & Ginning Factory &Ors. 359 ITR 565 (Kar).

6.1 On merits, it was submitted that after the order of Tribunal, addition of Rs.20 lacs made by AO on account of alleged estimated unexplained investment in construction of house was restricted to Rs.11,14,000/-, i.e. Rs.5,57,000/- in each hand. However, Ld. CIT(A) in case of Shipra Jain confirmed the penalty on addition of Rs.10 lacs. Hence, penalty levied on addition of Rs.4,43,000/- (10,00,000-5,57,000) is uncalled for and be deleted.

6.2 So far as penalty levied with reference to the addition of Rs.5,57,000/- is concerned, it was submitted that AO solely on the basis of the statement of Sh. Sapan Jain and considering the fact that in search, air conditioners, LCD, paintings, double bed and other furniture

were found for which assessee admitted investment of Rs.20 lakhs, made the addition of Rs.10 lakhs in each hand which is confirmed by the Ld. CIT(A). However, the Tribunal restricted the addition to Rs.5,57,000/- (11,14,000/2) by adopting the estimated value of the items found in search which is listed at Pg 9 of the assessment order. It is a fact on record that in search no evidence was found that assessees have made investment in these items. The addition is made only on the basis of the statement of Sh. Sapan Jain and not on the basis of any incriminating material found in search. Hence, addition of Rs.10 lakhs was only on estimation which is reduced to Rs.5.57 lakhs only on estimation. On such estimated addition, no penalty is leviable as held in case of Shiv Lal Tak Vs. CIT 251 ITR 353 (Raj) and CIT Vs. Krishi Tyre Retreating and Rubber Ind. [2014] 44 taxmann.com 9 (Raj).

7. We have heard the rival contentions and perused the material available on record. Undisputedly, the facts and circumstances of the case are identical to the facts and circumstances in AY 2009-10 except for the fact that there is an admission by the assessee u/s 132(4) during the course of search that he has made investment to the tune of Rs 20 lacs on furniture, fittings and electrical household items and which has formed the basis of addition in the quantum proceedings. However, the Coordinate Bench on appeal has sustained such addition to the tune of Rs 11,40,000 only. Therefore, the very basis for levy of penalty stand modified to Rs 11,40,000 and to the extent of Rs 557,000 in hands of both the assessees. We find that said addition of Rs 557,000 is again based on estimation as there are no specific details in terms of bills/vouchers etc. which were found during the course of search except the inventory of such items found installed in the residential premises which was prepared at the time of search. The

same could be a basis for making the addition in the quantum proceedings but not for levying penalty. Therefore, our findings and directions contained in ITA no. 922 & 920 shall apply equally in the present set of appeals. In the result, the penalty so levied u/s 271(1)(c) is hereby deleted and appeals are allowed.

Order pronounced in the open Court on 31/10/2018.

Sd/-	Sd/-
(विजय पॉल राव)	(विक्रम सिंह यादव)
(Vijay Pal Rao)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 31/10/2018
*Ganesh Kr.
आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- Smt. Shipra Jain, Jaipur & Smt. Sapna Jain, Jaipur
2. प्रत्यर्थी/ The Respondent- ACIT, 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. 922, 920, 921 & 923/JP/2018}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar