

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

श्री विजय पाल 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. 1442/JP/2018
निर्धारण वर्ष / Assessment Year : 2013-14

Deputy Commissioner of Income Tax, Central Circle, Kota.	बनाम Vs.	Shri Ajay Agarwal, Plot No. 6 & 7, Multimetals Campus, C-Block, Heavy Industrial Area, Kota, Rajasthan.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AFOPA 1833 L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by : Shri Varinder Mehta(CIT-DR)
निर्धारिती की ओर से / Assessee by : Shri Vijay Goyal (CA) &
Shri Gulshan Agarwal (CA)

सुनवाई की तारीख / Date of Hearing: 28/02/2019
उदघोषणा की तारीख / Date of Pronouncement : 22/03/2019

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.:

This appeal by the revenue is directed against the order dated 01/10/2018 of Id. CIT(A)-2, Udaipur arising from the penalty order passed U/s 271(1)(c) of the Income Tax Act, 1961 (in short the Act) for the A.Y. 2013-14. The revenue has raised following grounds of appeal:

- "1. Whether on the facts and circumstances of the case and in law, the CIT(A) was right in cancelling the penalty of Rs. 42,45,088/- levied by the A.O. under explanation 5A to Section 271(1)(c) of the Income Tax Act.*
- 2. Whether on the facts and circumstances of the case and in law, the CIT(A) was right in cancelling the penalty by placing reliance on the decision of the Jaipur Bench of the Hon'ble ITAT in ITA No.*

296/JP/2014 in Ajay traders Vs DCIT Central Circle, Alwar and in ignoring the later decision dated 24/05/2017 in ITA No. 141/JP/2016 in Shri Shri Radha Govind Lashkari Jaipur Vs ACIT, Central Circle-2, Jaipur.”

2. The assessee is individual and belongs to M/s Kota Dall Mill Group. The assessee filed his return of income U/s 139(1) of the Act on 27/09/2013 declaring total income of Rs. 32,08,730/- alongwith agricultural income of Rs. 19,36,854/-. The assessee has also filed long term capital gain on sale of shares amounting to Rs. 1,39,91,821/- and claimed exempt it U/s 10(38) of the Act. Apart from the dividend income on equity shares, which was also claimed exempted. Thereafter a search and seizure action U/s 132 of the Act was carried out in the case of M/s Kota Dall Mill Group to whom the assessee belongs on 02/07/2015. During the course of search and seizure proceedings, certain documents marked as Annexure AS-1 were found containing the details of long term capital gain earned by the assessee and his family members during the various years. In the statement recorded U/s 132(4) of the Act, the assessee declared and surrendered the said long term capital gain on sale of shares as undisclosed income and offered the same for taxation. In the return of income filed in response to notice U/s 153A of the Act, the assessee declared the total income of Rs.1,72,70,510/- and agricultural income of Rs. 19,36,854/- including the surrendered income of Rs. 1,40,61,780/- as admitted in the statement U/s 132(4) of the Act.

The assessment was completed U/s 143(3) read with Section 153A of the Act on 28/12/2017 on the total income of Rs.1,72,70,510/- which includes the income admitted by the assessee and surrendered to tax as undisclosed income during the search and seizure action. Subsequently, the Assessing Officer initiated the penalty proceedings U/s 271(1)(c) of the Act in respect of the income surrendered by the assessee of Rs. Rs. 1,40,61,780/- and levied the penalty of Rs. 43,45,088/- vide order dated 18/5/2018.

3. The assessee challenged the order of the Assessing Officer levying the penalty U/s 271(1)(c) of the Act before the Id. CIT(A) and contended that the income surrendered by the assessee in the course of search and seizure action was already disclosed in the return of income filed U/s 139(1) of the Act, though the same was claimed as exempt U/s 10(38) of the Act, therefore, it is not a case of concealment of particulars of income or furnishing inaccurate particulars of income. The assessee has also contended that Explanation 5A to Section 271(1)(c) of the Act is not applicable in the case of the assessee when the long term capital gain was already declared in the original return of income filed U/s 139(1) of the Act and was also duly recorded in the books of account, therefore, the same cannot be treated as concealed income of the assessee. The Id. CIT(A) has deleted the penalty levied U/s 271(1)(c) of the Act of the ground that the additional income surrendered by the assessee was

treated as concealed income only on the basis of statements recorded during the search dehors the seized material, finding in the assessment, therefore, the statement of the assessee is not sufficient to establish that it was a concealment of particulars of income or furnishing inaccurate particulars of income. Aggrieved by the impugned order of the Id. CIT(A), the revenue has filed the present appeal.

4. Before us, the Id CIT-DR has submitted that though the assessee has shown long term capital gain from sale of shares and claimed the same exempt from tax U/s 10(38) of the Act, however, during the course of search and seizure action, it was discovered that the said claim was bogus and consequently the assessee declared the said income and surrendered to tax. Therefore, the wrong facts declared by the assessee in the return of income filed U/s 139(1) of the Act would not amount to declare the income in the original return. The Id CIT-DR has thus submitted that apart from the long term capital gain, which was surrendered as undisclosed income, the assessee has also surrendered the amount of Rs. 9,000/- as undisclosed commission paid on the transactions of taking the bogus entry of capital gain. He has further contended that the surrender is based on the incriminating material found and seized during the search and therefore, the Id. CIT(A) has committed an error by holding that the Assessing Officer has treated the income as concealment only on the basis of the statement dehors any

seized material. The assessee in his statement recorded U/s 132(4) of the Act has clearly admitted the bogus claim of long term capital gain and therefore, disclosed the undisclosed income. Hence, Explanation 5A of Section 271(1)(c) of the Act is applicable in the case of the assessee which makes it clear that if the Assessing Officer is satisfied that any person has concealed the particulars of income or furnishing inaccurate particulars of income or where in respect of any facts material to the computation of total income of the assessee fails to offer an explanation or the explanation is found by the Assessing Officer to be not bonafide, then the case of the assessee comes within the purview of Section 271(1)(c) of the Act. The Id CIT-DR has contended that once the assessee himself has admitted the undisclosed income then the case of the assessee is covered under the provisions of Section 271(1)(c) read with Explanation 5A of the Act. He has relied upon the order of the Assessing Officer.

5. On the other hand, the Id AR of the assessee has submitted that the revenue has not disputed the fact that the assessee has declared long term capital gain in the return of income filed U/s 139(1) of the Act on 27.09.2013, though it was claimed as exempt income U/s 10(38) of the Act. The Id AR has further submitted that the transaction of purchase and sale of shares were duly recorded in the books of account of the assessee and the Assessing Officer has not disturbed the transaction of

purchase of shares and shown in the balance sheet as on 31/3/2012. The purchase consideration as well as sale considerations have been paid and received through banking channel and are independently verifiable from the bank statement. Further the assessee produced all the supporting documentary evidence of purchase and sale of these shares through stock exchange. The Id AR has pointed out that the transaction of purchase and sale of shares of the listed companies were made through the stock exchange and through the registered brokers. The shares were duly reflected in the DEMAT account of the assessee and the sale of these shares were also from the DEMAT account of the assessee. Therefore, when the transaction of purchase and sale are through the Stock Exchange and the payment of the purchased consideration as well as receipt of sale consideration is through banking channel and duly recorded in the books of account then the transactions recorded in the separate slip will not change the nature of transaction from disclosed to undisclosed. The assessee submitted documents or record pertaining to purchase and sale of equity shares of listed companies through recognized Stock Exchange which includes contract note with STT paid bills, depository statement, registered stock brokers ledger account and bank statements evidencing receipt of sale consideration through proper banking channel. All these documents duly substantiated the genuineness of the long term capital gain earned during the year under

consideration, the documents produced by the assessee were not doubted or controverted by the Assessing Officer in the course of assessment proceedings. During the course of search and seizure operation, no incriminating material, evidence or documents whatsoever was found, calculation of long term capital gain cannot be said to be incriminating material when all these documents are duly recorded in the books of account. The Id AR has further submitted that the penalty proceedings are separate from assessment proceedings and finding in the assessment proceedings does not lead to the conclusion that the assessee has concealed the income. The penalty U/s 271(1)(c) of the Act is not automatic. No positive material has been brought on record by the Assessing Officer to show that the income is based on any entries recorded in the seized material. The mere fact that the assessee has declared higher income in the return of income filed U/s 153A of the Act than in the original return of income, in absence of any incriminating material, it cannot be construed that the assessee has concealed his income. Once the transactions are duly recorded in the books of account and also supported by the relevant documentary evidence to prove the genuineness of the purchase and sale of shares then merely declaring higher income would not ipso facto amount to concealment of income or furnishing of inaccurate particulars of income attracting the penalty proceedings U/s 271(1)(c) of the Act. In the penalty proceedings, the

Assessing Officer has without appreciating the documentary evidence and without controverting the documentary evidence has treated the surrendered income as concealment of income or furnishing inaccurate particulars of income. The Id AR has relied upon the following decisions:

- (i) Tidewater Marine International Inc V DCIT Spl. Range Dehradun 96 ITD 406 (Delhi).
- (ii) Deep Chand Kothari V. CIT (1988) 171 ITR 381 (Raj)
- (iii) Commissioner of Income Tax v. Harjeev Aggarwal (2016) 290 CTR 263
- (iv) Principal Commissioner of Income Tax, Delhi Vs. Best Infrastructure (India) Pvt. Ltd [2017] 397 ITR 82

The Id. AR has submitted that the Hon'ble High Court has held that statements recorded U/s 132(4) of the Act do not by themselves constitute incriminating material. The Id AR has referred to the various documents produced before the Assessing Officer and submitted that once the assessee produced all documentary evidence to establish that the transaction of purchase and sale of shares are genuine then the case of the assessee does not fall in the purview of Section 271(1)(c) read with Explanation 5A of the Act. He has also relied upon the decision of this Tribunal in the case of Ajay Traders V. Deputy Commissioner of Income Tax, Central Circle, Alwar (2017) 81 taxmann.com 463 (Jaipur-Trib) and submitted that mere surrender of additional income U/s 132(4) of the Act without any incriminating material found during the search will not attract the mischief of Explanation 5A to Section 271(1)(c) of the Act.

The Id AR has also referred series of decisions including the decision of Hon'ble Supreme Court in the case of CIT V. Reliance Petro Products Pvt. Ltd (2010) 322 ITR 158 (SC) and submitted that even if the claim of exemption U/s 10(38) of the Act is found to be not allowable, the same would not amount to concealment of income or furnishing inaccurate particulars of income.

6. We have considered the rival submissions as well as relevant material on record. The question arises whether a surrender and disclosure made by the assessee U/s 132(4) of the Act in absence of any incriminating material found during the search and seizure action would lead to the conclusion that the assessee has concealed the particulars of income or furnishing inaccurate particulars of income. In the case of the assessee, there is no dispute that the assessee filed return of income U/s 139(1) of the Act on 27/09/2013 and declared the long term capital gain of Rs. 1,39,91,821/- and claimed exempted U/s 10(38) of the Act. It is also not in dispute that the transactions of purchase and sale of equity shares of listed companies were duly recorded in the books of account and capital gain arising from the sale of shares were reflected in the books of account regularly maintained by the assessee. The assessee has also shown the shares in question in the balance sheet as on 31/3/2012 and the Assessing Officer has not doubted or disturbed the holding of the shares by the assessee and shown in the balance sheet at the end of the

preceding financial year. Once the transactions are duly recorded in the books of account and also disclosed in the original return of income filed U/s 139(1) of the Act then the documents found during the search containing the details of the long term capital gain already recorded in the books of account would not amount to incriminating material disclosing any undisclosed income. Even the said details as recorded in the seized material AS-1 itself does not reveal the nature of transaction being genuine or bogus. These are only the computation of long term capital gain from sale of shares. Therefore, the documents which were found and seized during the course of search and seizure action containing details of long term capital gain would not be regarded as incriminating material disclosing any income not recorded in the books of account. Apart from the fact that these transactions were duly recorded in the books of account and also disclosed in the return of income filed U/s 139(1) of the Act, the assessee has also produced relevant documents, the details of which are as under:

(A) IN RELATION TO SHARES PURCHASE:
➤ Summary of shares purchased during the FY 2010-11(Page No. 80 of paper book)
➤ Copies of purchase bills in respect of share purchased (Page No. 81 of paper book)
➤ Copy of ledger account from the books of share broker reflecting the details of purchase transactions (Page No. 82 of paper book)
➤ Copy of bank statement showing the payment made against purchases of shares (Page No. 83 of paper book)

➤ Acknowledgement of ITR filed on 01.02.2016 u/s 139(1) of IT Act, 1961 along with computation sheet of total Income of the A.Y. 2011-12. (Page No. 84-87 of paper book)
➤ Acknowledgement of ITR filed on 11.11.2011 u/s 153A of Income Tax Act, 1961 along with computation sheet of total Income of the A.Y. 2011-12. (Page No. 88-90 of paper book)
➤ Copy of Balance sheet & Capital Account of AY 2011-12. (Page No. 91 of paper book)
➤ Copy of Assessment Order dated 28.12.2017 u/s 143(3) r.w.s. 153A passed by Deputy Commissioner of Income Tax, Central Circle Kota (Raj.) for the Assessment Year 2011-12. (Page No. 92-94 of paper book)
(B) IN RELATION TO SHARES SALES:
➤ Summary of shares sale during the year under consideration (Page No. 95 of paper book)
➤ Copy of sales bills/contract notes of shares (Page No. 96-101 of paper book)
➤ Copy of ledger Account of assessee in books of accounts of share brokers through whom the shares were sold (Page No. 102-103 of paper book)
➤ Copy of bank statement showing the entry of payment received against sales of shares (Page No. 104-106 of paper book)
(C) DEMAT ACCOUNT STATEMENT OF FOLLOWING BROKERS
➤ Suresh Rathi Securities Private Limited
➤ Religare Securities Private Limited (Page No. 107-108 of paper book)

Thus, the purchase bill for purchase of shares alongwith ledger account in the books of the share broker clearly reveals the date of purchase and also the payment of purchase consideration through banking channel as revealed in the bank account statement of the assessee. All these documents are independently verifiable. The revenue has not disputed the filing of original return of income by the assessee for these years as well as for the A.Y. 2011-12. Further the Assessing officer while passing the assessment U/s 153A of the Act for the A.Y. 2011-12 has not disturbed the holding of shares shown in the balance sheet as on

31/3/2012. These transactions were also carried out through the capital account of the assessee which was also part of the record of the A.Y. 2011-12 but the Assessing Officer has accepted all these details without any adverse finding or comments while passing the assessment order U/s 153A of the Act for the A.Y. 2011-12. The assessee also produced sale bills/contract notes regarding sale of shares, copy of ledger account of the assessee in the books of share brokers in respect of sale transactions, bank statement showing the receipt of sale consideration and DEMAT accounts having the entries of credit of the shares at the time of purchase and debit of the shares from the DEMAT account at the time of sale. Further the equity shares of the companies listed in the Stock Exchange were purchased and sold by the assessee through Stock Exchange. Therefore, the transaction of purchase and sales are not off market but at the floor of the Stock Exchange which can be duly verified from independent source without any influence of the assessee. Hence, the documents produced by the assessee are the evidence which cannot be manipulated and also can be verified from the independent sources. Once the assessee has produced all these documents to establish the genuineness of purchase and sale of transactions of shares through Stock Exchange than the mere disclosure and surrender of income would not lead to the conclusion that the assessee has concealed the particulars of income or furnished inaccurate particulars of income. If the

transactions are accepted as genuine and are already declared in the return of income filed U/s 139 as well as duly recorded in the books of account then long term capital gain arising from the sale of listed shares is exempted U/s 10(38) of the Act. The withdrawal of claim of exemption by the assessee in the statement U/s 132(4) of the Act, ignoring the supporting evidence of genuineness of the claim, would not ipso facto amount to concealment of income or furnishing inaccurate particulars of income. Explanation 5A to Section 271(1)(c) of the Act has set out the conditions for income declared in the return of income furnished after the date of search is deemed to have been concealed the particulars of income or furnished inaccurate particulars of income. For ready reference, we reproduce Explanation 5A to Section 271(1)(c) of the Act as under:

Section 271(1)(c) [*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 date¹⁷ for filing the return of income for such previous year has expired but the assessee has not filed the return,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a

penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.]

Therefore, clause (a) and (b) clearly set out the conditions and situation under which the income declared in the return filed subsequent to the search can be deemed as concealment of particulars of income or furnishing inaccurate particulars of income. In the case in hand when the assessee already furnished return of income before the date of search and also declared long term capital gain then none of the conditions as prescribed under clause (a) & (b) are satisfied so as to bring the case of the assessee in the mischief of Explanation 5A to Section 271(1)(c) of the Act. In the case of Commissioner of Income Tax v. Harjeev Aggarwal (supra), the Hon'ble Delhi High Court while considering the definition of undisclosed income as per Section 158B(b) read with Section 158BB has held in para 20 to 23 as under:

“20. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the Assessee during search operation.

21. A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any

other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded.

22. In *CIT v. Shri Ramdas Motor Transport* [1999] 238 ITR 177/102 Taxman 300, a Division Bench of Andhra Pradesh High Court, reading the provision of Section 132(4) of the Act in the context of discovering undisclosed income, explained that in cases where no unaccounted documents or incriminating material is found, the powers under Section 132(4) of the Act cannot be invoked. The relevant passage from the aforesaid judgment is quoted below:—

"A plain reading of sub-section (4) shows that the authorised officer during the course of raid is empowered to examine any person if he is found to be in possession or control of any undisclosed books of account, documents, money or other valuable articles or things, elicit information from such person with regard to such account books or money which are in his possession and can record a statement to that effect. Under this provision, such statements can be used in evidence in any subsequent proceeding initiated against such per son under the Act. Thus, the question of examining any person by the authorised officer arises only when he found such person to be in possession of any undisclosed money or books of account. But, in this case, it is admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion nor any other valuable articles or things, nor any unaccounted documents nor any such incriminating material either from the premises of

the company or from the residential houses of the managing director and other directors. In such a case, when the managing director or any other persons were found to be not in possession of any incriminating material, the question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under section 132(4) of the Act, does not arise. Therefore, the statement of the managing director of the assessee, recorded patently under section 132(4) of the Act, does not have any evidentiary value. This provision embedded in sub-section (4) is obviously based on the well established rule of evidence that mere confessional statement without there being any documentary proof shall not be used in evidence against the person who made such statement. The finding of the Tribunal was based on the above well settled principle."

23. It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section 132(4) of the Act which expressly provides that the scope of examination under Section 132(4) of the Act is not limited only to the books of accounts or other assets or material found during the search. However, in the context of Section 158BB(1) of the Act which expressly restricts the computation of undisclosed income to the evidence found during search, the statement recorded under Section 132(4) of the Act can form a basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search and cannot be the sole basis for making a block assessment.

In the subsequent decision in the case of Principal Commissioner of Income Tax, Delhi Vs. Best Infrastructure (India) Pvt. Ltd. (*supra*), the Hon'ble Delhi High Court has again held in para 38 as under:

"38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in *Harjeev Aggarwal (supra)*. Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in *Smt. Dayawanti Gupta (supra)* where the admission by the Assessee themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessee were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission."

Therefore, the statement recorded U/s 132(4) dehors any incriminating material would not by themselves constitute incriminating material. In the case of *Ajay Traders V. Deputy Commissioner of Income Tax, Central Circle, Alwar* (supra), the Coordinate bench of this Tribunal while considering the applicability of Explanation 5A to Section 271(1)(c) of the Act without any incriminating material found during the search has held in para 4.1 to 4.3 as under:

“4.1 The Id. A/R for the assessee submitted that there was a search under section 132 of the IT Act on the assessee firm along with other group entities, HUFs, Individuals etc. on 17.09.2008. In order to buy peach and to cooperate with the department, total amount of Rs. 3 crores for the entire group was offered as additional income u/s 132(4) of the IT Act. The assessee has disclosed additional income under the head 'Income from other sources'. Return for A.Y. 2007-08 was filed by declaring an income of Rs. 82,88,590/- on 30.04.2010 which was accepted by the AO and no further addition was made by him. It is fact that assessee has enhanced the income by Rs. 15 lacs to the income declared in the original return of income. The AO invoked provisions of Explanation-5A to section 271(1)(c). During the course of search, no incriminating documents were found which is evident from the assessment order that no addition had been made by the AO. He accepted the returned income. The Id. CIT (A) also confirmed the penalty by mis-placing the Hon'ble Supreme Court decision in the case of *MAK Data (P.) Ltd. v. CIT* [2013] 358 ITR 593/38 taxmann.com 448. The surrender of income in the revised return was voluntary and suo moto. Additional income disclosed under section 153A in the return does not lead to the conclusion that the assessee firm was having undisclosed income or had concealed the particulars of income. The surrender was made on the basis of statement recorded u/s 132(4) of the IT Act. He further argued that under similar facts and circumstances which came before the Hon'ble Delhi High Court in the case of *CIT v. Raj Pal Bhatia* [2011] 333 ITR 315/10 taxmann.com 191/202 Taxman 140 (Mag.) wherein the Hon'ble Court held that statement could not be construed as material found during the course of search operations for the purpose of Chapter XIV-B. The case law applied by the Id. CIT (A) has mis-placed the fact that in that case certain documents pertaining to share applications were

found during the course of survey, whereas in assessee's case no incriminating documents were found. Therefore, case law relied upon by the Id. CIT (A) is not applicable. He further argued that ITAT Mumbai in the case of *Financial Technologies (I) Ltd. v. Asstt. CIT* [2015] 61 taxmann.com 406 held that Explanation-5A has been used by the legislature where any money, bullion, jewellery or other valuable article or thing found during the course of search which has not been disclosed by the assessee and additions were made on account of unaccounted money, bullion etc. In this case as such revenue has not brought on record any material to prove that unaccounted money, jewellery or incriminating documents were found. He further has drawn our attention to ITAT Jaipur Bench decision in the case of *Radhey Shyam Mittal*, ITA No. 1013, 1014 & 1015/JP/2013 deleting penalty imposed by the Assessing Officer by invoking Explanation 5A to section 271(1)(c), wherein the Tribunal held that penalty under Explanation 5A to sec. 271(1)(c) has to be made where any incriminating documents are found during the course of search. In the case of assessee, no incriminating documents were found, therefore, the coordinate Bench had deleted the addition. The Id. A/R of the assessee requested to delete the penalty confirmed by Id. CIT (A).

- 4.2** At the outset, the Id. D/R vehemently supported the order of Id. CIT (A).
- 4.3** We have heard rival contentions and perused the material on record. It is undisputed fact that during the course of search, no incriminating documents were found and seized. The assessee surrendered the additional income under section 132(4) at Rs. 15 lacs and requested not to impose penalty u/s 271(1)(c) of the IT Act. The Id. AO imposed the penalty by invoking the Explanation 5A to section 271(1)(c) of the Act, which has been confirmed by Id. CIT (A) by considering the judgment of Hon'ble Supreme Court in the case of *MAK Data (P.) Ltd. (supra)*. But for imposing the penalty under Explanation 5A on the basis of statement recorded during the course of search, it is necessary to be found incriminating documents and is to be considered at the time of assessment framed under section 153A of the Act. The issue has been considered by various High Courts as well as by ITAT as relied upon by the assessee, which are squarely applicable to the case of the assessee. As no incriminating documents were found during the course of search, therefore, Explanation 5A to section 271(1)(c) is not applicable. Accordingly, we delete the penalty confirmed by Id. CIT (A).”

Thus, the Tribunal has held that the penalty U/s 271(1)(c) read with Explanation 5A of the Act can be levied only when some incriminating

material is found during the course of search. Even otherwise the penalty proceedings are separate and independent from the assessment order and particularly in case where the Assessing Officer has not made any addition but the assessee itself has surrendered an additional income then the explanation of the assessee against the levy of penalty has to be considered in the proceedings U/s 271(1)(c) of the Act. It is settled proposition of law though the assessment order is a relevant material for the purpose of levy of penalty U/s 271(1)(c) of the Act, however, it cannot be a sole basis of levy of penalty and the Assessing Officer has to consider all the relevant material facts as well as explanation furnished by the assessee. Therefore, in the case of the assessee, the income was assessed only because the assessee surrendered the same but it would not have otherwise sustained the test of the legal requirement of the assessment of the income without any incriminating material. There are binding precedents on the issue that in the proceedings U/s 153A of the Act, the Assessing Officer cannot reassess the income in absence of any incriminating material found and seized during the course of search or post search enquiry. In the case in hand, we find that the entire basis of the additional income assessed to tax in the proceedings U/s 153A of the Act is the statement of the assessee U/s 132(4) of the Act and subsequent surrender of the said income to tax without any incriminating material found or seized. Since the income and transaction relating to the

income are already part of the books of account not only for the year under consideration but also for the preceding years and therefore, except surrender made by the assessee, the addition if any made by the Assessing officer of this income based on the statement would not have survived or sustained. The Hon'ble Jurisdictional High Court in the case of Jai Steel (India) Vs ACIT (2013) 259 CTR (Raj) 281 has laid down the proposition that the addition made in absence of incriminating material in the proceedings U/s 153A where the assessment was not pending on the date of search is not sustainable. A similar view has been taken by the Hon'ble Delhi High Court in the case of CIT Vs Kabul Chawla 380 ITR 573 (Del) as well as in the case of Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia [2017] 395 ITR 526 and held that unless there is an incriminating material for the addition sought to be made pursuant to the search and seizure operation, the addition cannot be made in respect of the assessment year which was not pending as on the date of search. Therefore, once the assessee has raised all these contentions and explained during the penalty proceedings that the transactions of purchase and sale of shares and consequential long term capital gain are genuine based on the documentary evidence and further all these were part of the books of account and disclosed in the return of income filed U/s 139 consequently the addition itself would not have survived had the assessee not

surrendered the income then this explanation of the assessee would certainly lead to the conclusion that the penalty is not leviable U/s 271(1)(c) of the Act. The Id. CIT(A) after considering all the relevant material as well as the case laws on the point has held in para 4 to 4.5 as under:

4. I have considered the facts of the case, gone through the relevant assessment orders, penalty orders and the paper-book & submission of the appellant and the various case laws.

4.1 It is found that the appellant has advanced arguments from multiple perspectives, starting from technicalities of imposing the penalty by treating the additional income as concealment of income, penalty only on the basis of statements recorded in search, additional income surrendered dehors the seized material, finding in assessment alone not sufficient to establishing of the mensrea etc. From examination of documents and submission the following facts emerges by which the penalty u/s 271(1)(c) cannot be held as validly imposable in the instant case: -

i) During the course of search the appellant admitted the long term capital gain shown in his ITR as his undisclosed income but such undisclosed income is not based on any documents found as a result of search or evidences. During the course of search & seizure operations, no incriminating material, evidence or documents whatsoever were found.

ii) Such long term capital gain was already declared in the ITR filed under Section-139(1) of the Act though the same shown as exempted u/s 10(38) of the Act.

iii) During the course of assessment proceedings the appellant submitted documents from acquisition to sales of

documents to prove the genuineness of capital gain earned by him. The transaction was carried out in recognized stock exchange and was through proper banking channel. The documentary evidence were remained uncontroverted by the AO during the assessment proceedings as well as penalty proceedings.

iv) During the course of assessment proceedings as well as penalty proceedings the appellant repeatedly submitted that the long term capital gain earned by him is genuine one and duly verifiable. The admission of the same was only to metal peace. However no inquiry was made at the end of the AO to controvert the submission of the applicant or no document was adduced in this regard.

v) The penalty was imposed solely for the reason that the appellant has filed returns u/s 153A of the Act disclosing higher income than in the original return, and only on the basis of income offered by applicant in his statement.

vi) For imposing the penalty the AO held that the appellant has suppressed his income by way of not disclosing his correct income in his regular return however no evidence in this regard was adduced/relied in the assessment order as well as penalty order.

4.3 Thus in the assessment proceedings as well as penalty proceedings the applicant repeatedly submitted the capital gain earned was as genuine but no heed was given thereon and without carrying any independent inquiry the penalty was imposed solely relying on the statement of applicant. For the purpose of levying penalty u/s 271(1)(c) of the Act, the concealment of income has to be independently established by the other evidences and not on the basis of the statement of the appellant alone. For proving any additional income declared in the return filed u/s 153A of the Act as concealed income, there must be

deliberate act of the Assessee duly corroborated with the evidences. However, it seems the appellants submissions of factual matrix and decisions of Hon'ble Jaipur ITAT reproduced above are good enough to decide the matter.

4.3 *It is undisputed fact that the income surrendered during the search u/s 132(4) was duly included/ offered for tax while filing return of income u/s 153A and due taxes thereon was paid. The income surrendered and included/ offered for tax while filing return of income was accepted as such by the AO.*

4.4 *In above factual situation, the penalty u/s 271(1)(c) cannot be levied as the matter is covered one. Apart from the consideration given on the several case laws cited by the applicant it is worth to place the reliance on the decision Hon'ble ITAT, Jaipur Bench, Jaipur in the case of Ajay traders Vs DCIT, Central Circle Alwar (ITA No. 296/- JP/2014 pronounced on 06.05.2016 as follows: -*

“4.3. We have heard rival contentions and perused the material on record. It is undisputed fact that during the course of search, no incriminating documents were found and seized. The assessee surrendered the additional income under section 132(4) at Rs. 15 lacs and requested not to impose penalty u/s 271(1)(c) of the IT Act. The ld. AO imposed the penalty by invoking the Explanation 5A to section 271(1)(c) of the Act, which has been confirmed by ld. CIT (A) by considering the judgment of Hon'ble Supreme Court in the case of MAK Data Pvt. Ltd. (supra). But for imposing the penalty under Explanation 5A on the basis of statement recorded during the course of search, it is necessary to be found incriminating documents and is to be considered at the time of assessment framed under section 153A of the Act. The issue has been considered by various High Courts as well as by ITAT as relied upon by the assessee, which are squarely applicable to the case of the assessee. As no incriminating documents were found during the course of search, therefore, Explanation 5A to section

271(1)(c) is not applicable. Accordingly, we delete the penalty confirmed by ld. CIT (A).”

It is undisputed fact that, the no incriminating documents were found during the course of search to prove the concealment of income and the penalty was imposed merely on the basis of income surrendered by the appellant in his statement and shown in the ITR filed u/s 153A of the Act. The income so surrender by the appellant was reported in the return filed u/s 153A which has been accepted without further addition. No incriminating documents are not used to alter the income reported by the appellant or prove the income so surrender by the applicant as real undisclosed income. Therefore, issue is squarely covered with the above citation.

4.5 *In view of the above discussions and considering the overall facts and attending circumstances of the appellant’s case and with regards to the various juridical pronouncements discussed herein above, I found that it is undisputed fact in this case that the impugned income subjected to the assessment is only income which is surrendered by the appellant during the search and also disclosed in return of income filed under section 153A. There is no corroborative evidence/material/document in support of income so surrendered and offered for taxation and the same is only on the basis of the statement of the assessee recorded during search. The declared income is also finally assessed as such. Following, the decisions discussed in para 4.4 the penalty levied on this account under section 271(1)(c) of the Income Tax Act is not sustainable and accordingly the same stands as cancelled. Accordingly, this ground of appeal 1 to 6 is allowed.*

In view of the facts and circumstances of the case and a detailed discussion in the foregoing paras of this order, we do not find any error or illegality in the impugned order of the ld. CIT(A) in deleting the penalty U/s 271(1)(c) of the Act.

7. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 22nd March, 2019.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 22nd March, 2019

*Ranjan

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

1. अपीलार्थी / The Appellant- The D.C.I.T., Central Circle, Kota.
2. प्रत्यर्थी / The Respondent- Shri Ajay Agarwal, Kota.
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. 1442/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar