

**आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ "ए" अहमदाबाद।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"A" BENCH, AHMEDABAD**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER**  
**AND SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

**ITA No. 1971/Ahd/2017**  
**Assessment Year : 2010-11**

Mukesh Ramchandra Patel, 1397, Patel-Vas, Mithakhali Gam, Ellisbridge, Ahmedabad-380015 PAN : AGGPP 5391 R	Vs	Deputy Commissioner of Income-tax, Circle 1(2), Ahmedabad
<b>अपीलार्थी/ (Appellant)</b>		<b>प्रत्यर्थी/ (Respondent)</b>
Assessee by :		Shri S N Soparkar, AR
Revenue by :		Shri Deelip Kumar, Sr DR

सुनवाई की तारीख/Date of Hearing : 08/01/2020  
घोषणा की तारीख /Date of Pronouncement: 09/01/2020

**आदेश/O R D E R**

**PER RAJPAL YADAV, JUDICIAL MEMBER :-**

The assessee is in appeal before the Tribunal against the order of the learned CIT(A)-4, Ahmedabad dated 16<sup>th</sup> June 2017 passed for Assessment Year 2010-11. The assessee has taken three grounds of appeal, but his grievances revolve around a single issue namely learned CIT(A) has erred in confirming penalty of Rs.23,47,735/- imposed by the Assessing Officer under Section 271(1)(c) of the Income-tax Act, 1961.

2. The brief facts of the case are that a search & seizure operation under Section 132 of the Income-tax Act was carried out at the residential premises of the assessee on 27.04.2011. During the course of search, certain incriminating loose-papers were found and seized vide Annexure-B1 to B3. A statement of the assessee under Section 132(4) of the Income-tax Act was recorded on 28.04.2011. He was confronted with the loose-papers and, in

reply to question no.10, it was disclosed by the assessee that a land was sold for a consideration of Rs. 9,34,56,997/-; out of that, Rs.5,23,27,500/- was received through cheque and balance amount of Rs.4,11,29,497/- was received in cash. The assessee has 1/3<sup>rd</sup> share in the land and cash component falling to his share at Rs.1,13,96,770/- was admitted as his undisclosed income. In response to notice under Section 153A of the Act, assessee has filed his return and included the amount of Rs.1,13,96,770/- declared in the statement under Section 132(4) of the Income-tax Act. The return was accepted as it is and penalty proceedings were initiated by the learned Assessing Officer. The learned Assessing Officer has imposed penalty under Section 271(1)(c) of the Act vide order dated 25<sup>th</sup> September 2014 amounting to Rs.23,47,735/-. The learned Assessing Officer, while concluding as to how the penalty is imposable upon the assessee, considered the *Explanation 5A* appended to Section 271(1)(c) of the Act as well as the facts unearthed during the course of search. The observations of the learned Assessing Officer are worth to be noted which read as under:-

*“3. In view of the noncompliance from the side of the assessee the matter needs to be decided on merits keeping in view the details and material available with this office. A careful consideration need to be made to verify whether the provisions of section 271(1)(c) and explanation 5A in particular as substituted by Finance (No.2) Act 2009 w.r.e.f. 01/06/2007 are attracted or not. For the sake of clarity the said explanation is reproduced here in below:*

*[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 (I) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.]*

*In the light of the above Explanation, the facts of this case are examined herein below in order to verify whether this case falls in the mischief of the said Explanation or not:*

- i) Search u/s.132 was initiated on 27/04/2011 i.e. after the 1st day of June 2007.*
- ii) The assessee was found to be the owner of undisclosed income which was based entries in the documents found in the course of search.*
- iii) The assessee had claimed that the same represented his income of Rs.1,13,96,773/- for the previous year relevant to A.Y. 2010-11.*
- iv) The relevant previous year has ended on 31/03/2010 i.e. before the date of search (27/04/2011).*
- v) The due date for filing the return of income for A.Y. 2010-11 has expired at the time of search.*
- vi) The income of Rs. 1,13,96,773/- was not declared by the assessee in his original return filed u/s,139 but the same has been declared by the assessee for the first time in his return filed on 30/03/2012 u/s. 153 A of the Act.*
- vii) The disclosure was not voluntary declaration but was made in consequence of the search initiated u/s 132 and was based on certain incrementing documents found at the time of search.*

*In the light of above narrated facts it is clear that as per the provisions of section 271(1)(c) explained vide Explanation 5A, as amended w.e.f. 01-06-2007 by Finance Act 2009 the assessee has deemed to have concealed the*

*particulars of his income to the extent of Rs. 1,13,96,770/- in respect of unaccounted income in capital gain on sale of land."*

3. Appeal to the learned CIT(A) did not bring any relief to the assessee.
4. Before us, learned Counsel for the assessee raised two fold submissions. In his first fold of contentions, he submitted that *Explanation 5A* could be attracted if any money, bullion, jewellery or asset representing the admitted undisclosed income was found during the course of search. Only on the basis of a statement under Section 132(4) admitting certain amount as undisclosed income and further inclusion of such amount in return filed by the assessee would not authorize the Revenue Authorities to visit the assessee with penalty proceedings with the help of *Explanation 5A*. For buttressing his proposition, he made reference to the order of ITAT passed by this very combination of Bench (JM + AM) in ITA No. 2662/Ahd/2017. He took us through paragraph nos. 5-8 of the order of the Tribunal and submitted that no evidence exhibiting the recovery of money, bullion, jewellery or asset was found representing the undisclosed income admitted by the assessee in his return during the course of search.
5. In his second fold of submissions, he contended that the assessee has appended a note with the return of income that the land which was sold by the assessee giving rise to alleged capital gain was an agricultural land and it was not a capital asset within the meaning of Section 2(14) of the Income-tax Act. Had it been so, then, before visiting the assessee with the penalty, learned Revenue Authorities ought to have decided the issue whether any capital gain tax was leviable in the hands of the assessee on these transactions as a specific plea was raised by the assessee before the First Appellate Authority and, for buttressing this proposition, he took us to the

statement of facts filed before the learned CIT(A). He drew our attention towards the following pleadings mentioned in the submission:-

*"As stated herein above as the assessee was desirous of purchasing agricultural lands for carrying out agricultural activities he had already entered into agreement for purchase of other agricultural lands out of such proceeds of sale. However, during the course of statement as the assessee not aware of the intricacies of the income Tax Act had committed and offered such receipts as income and further had further assured to pay necessary taxes there on subject to the department assurance that he shall not be liable to penalty and prosecution if the said is offered through his statement the assessee had offered the same to tax. The said offer was thus made subject to the understanding that no penalty / prosecution proceedings would be initiated and therefore in order to buy peace and to avoid any further litigations this return is filed showing therein the above referred income as per the statement. In view of the said understanding the assessee filed his return of income & offered said income under the head capital gains. That the Ld. A.O has assessed the said income and thus as there is no variation to returned income."*

He pointed out that this issue has not been adjudicated by both the authorities.

6. The learned Departmental Representative, on the other hand, relied upon the orders of the Revenue Authorities. With regard to first fold of contentions of learned Counsel for the assessee, he pointed out that, during the course of search, loose-papers inventorised as Annexure B1 to B3 were found. The assessee has admitted the transactions i.e. sale of land. He has admitted receipt of cash over and above the consideration stated in the sale deed. Thus, there was direct evidence found during the course of search exhibiting the discovery of unexplained assets in the shape of sale consideration representing alleged undisclosed income. With regard to second fold of contentions of learned Counsel for the assessee, he was unable to controvert the contentions of the learned Counsel for the assessee.

7. We have duly considered the rival contentions and gone through the record carefully. In the case of Late Pragnesh Navinbhai Patel (ITA No. 2662/Ahd/2017), relied upon by the learned Counsel for the assessee, we have considered an identical aspect wherein scope of *Explanation 5A* has been explained by the Tribunal. We deem it appropriate to take note of our findings in that order - particularly observations brought to our notice by the learned Counsel for the assessee in paragraph nos. 6 and 7; and, the findings read as under:-

*“5. With the assistance of the ld. representatives, we have gone through the record carefully. Explanation 5A and section 271AAA of the Act has a direct bearing on the controversy. Therefore, it is pertinent to take note of this clause, 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 inaccurate particulars of such income.*

*271AAA. (1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of June, 2007 but before the 1st day of July, 2012, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.*

*(2) Nothing contained in sub-section (1) shall apply if the assessee, –*

*(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;*

*(ii) substantiates the manner in which the undisclosed income was derived; and*

*(iii) pays the tax, together with interest, if any, in respect of the undisclosed income.*

*(3) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).*

*(4) The provisions of sections 274 and 275 shall, so far as may be, apply in relation to the penalty referred to in this section.*

*Explanation. – For the purposes of this section, –*

*(a) "undisclosed income" means –*

*(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has –*

*(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or*

*(B) otherwise not been disclosed to the 87[Principal Chief Commissioner or] Chief Commissioner or 87[Principal Commissioner or] Commissioner before the date of search; or*

*(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted;*

*(b) "specified previous year" means the previous year –*

*(i) which has ended before the date of search, but the date of filing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or*

*(ii) in which search was conducted"*

6. A perusal of both these sections together would indicate that the immunity akin to Explanation 5 is available to the assessee under Explanation-5A also, if he fulfills the conditions narrated in section 271AAA. The Explanation appended to Section 271AAA provides the definition of undisclosed income and specified previous year. A perusal of the expression "specified previous year" would indicate that the year of search and immediately earlier year, if due date of filing of the return has not expired and income-tax return for such year has not been filed. Since the assessment years involved before us are the Asstt.Years 2007- 2008 to 2012-13, the due date for filing of the returns was expired before the search action. Thus, these years do not fall within the ambit of "specified years". Since the period of these assessment years do not fall within the expression "specified year" provided in Section 271AAA, therefore, we do not deem it necessary to construe and explain the meaning of Explanation 5A within the scope of Section 271AAA.

7. At the cost of repetition, we would like to observe that as per Explanation 5A, if in the course of search initiated under section 132 on or after the 1st June, 2007, the assessee is found to be owner of any money, bullion, jewellery or other valuable article or things and the assessee claims such assets have been acquired by him by utilising the whole or partly of his income from any previous year or any income based on any entry in any books of account or other documents or transactions found during the course of search, and the assessee claims that such entry in the books of account or

*other documents or transactions represents his income from any previous year, which has ended before the date of search, then, notwithstanding such income is declared by him in any return of income furnished on or after the date of search, he shall for the purpose of imposition of penalty under clause (c) of sub-section (1) of this Section be deemed to have been concealed particulars of income or furnished inaccurate particulars. The moot question for attracting this explanation is that in the course of search money, bullion, jewellery or income based on any entry in the books of accounts or other documents ought to have been found. In a given situation, no money or bullion or jewellery or income might have found from the assessee for the assessment years which were not part of "specified previous year" contemplated in section 271AAA or immunity available to the assessee under sub-clause (a) and (b) of Explanation 5A, then also, if in response to the notice under section 153A, the assessee disclosed some additional income voluntarily, would he be deemed to have concealed the income for visiting him with penalty under section 271(1)(c) of the Act? The ld. Revenue authorities had drawn inference that since the assessee has not disclosed additional income in the original returns, meaning thereby, it is to be assumed that they have disclosed this amount only when some incriminating material was found. To our mind this assumption ought to be supported with reference of that incriminating material.*

8. *We have perused the assessment order. The AO has not made reference to any material found during the course of search which can suggest that additional incomes declared by the assessee are representing any money, bullion, jewellery or impounded any diary. In other words, it cannot be construed that some assets were found during the course of search representing that income which has been declared by the appellants. Somewhat similar and identical issue has been considered by the Hon'ble Delhi High Court in the case of Pr.CIT Vs. Neeraj Jindal, 393 ITR 1."*

8. In the light of above, let us examine the facts of the present case. In the present case, assessee admitted that, along with his co-owners, a land was sold. The evidence exhibiting the sale of land was found. The evidence exhibiting receipt of cash over and above the sale consideration stated in the sale deed was found. When these materials were confronted to the assessee in the statement recorded under Section 132(4) of the Act, then he has admitted the undisclosed income received as sale consideration in cash and not disclosed in the regular return as well as accounted for in the books of accounts. Thus,

there was ample evidence found during the course of search exhibiting the fact that income was not disclosed by the assessee in his regular books of accounts as well as in the return. The case of the assessee falls within the mischief of *Explanation 5A*. It is incorrect at the end of the assessee to say that no asset, money, jewellery or bullion representing the alleged undisclosed income was found during the course of search. Therefore, with regard to first fold of contentions, we do not find any merits in the contentions of the learned Counsel for the assessee. It is rejected.

9. As far as second fold of contentions is concerned, it is pertinent to observe that even if the assessee has filed the return of income and declared certain income, but the penalty proceeding is an independent proceeding. If on account of any legal or factual ground, assessee is able to absolve himself from levy of penalty, then all such rights are available in the penalty proceedings. The contention of the assessee is that agricultural land sold by him along with co-owners was not a capital asset and no capital gain tax was imposable upon the assessee. It is a different matter that he has paid the capital gain tax but that admission cannot be accepted even for visiting the assessee with penalty. In the penalty proceedings, he wants to take an independent stand that since no capital gain tax is leviable; therefore, no penalty is imposable. This is an independent plea. It ought to have been examined and ought to have been adjudicated. This plea has been specifically raised in the note appended to the return as well as in the submissions before the learned CIT(A) (extracted supra). Considering the above, we deem it appropriate to set aside this aspect to the file of the learned Assessing Officer. The leaned Assessing Officer shall call for record of the alleged agricultural land and find out whether it was an agricultural land not falling within the ambit of expression "capital asset" provided in Section 2(14) of the Income-tax Act. In case it is found that it was not a capital asset, then the assessee will not be visited with penalty; however, this should not be construed as a direction. Our observations will not impair

or injure the case of the Assessing Officer or cause any prejudice to the defense or explanations of the assessee. The Assessing Officer will be at liberty to decide the issue in accordance with law.

10. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the Court on 9<sup>th</sup> January 2020 at Ahmedabad.

Sd/-

Sd/-

**(WASEEM AHMED)**  
**ACCOUNTANT MEMBER**  
Ahmedabad, Dated 09/01/2020

**(RAJPAL YADAV)**  
**JUDICIAL MEMBER**

*W*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण , राजकोट/DR, ITAT, Ahmedabad,
6. गार्ड फाईल /Guard file.

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