IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, JM AND SHRI N. K. PRADHAN, AM

आयकर अपील सं/ I.T.A. Nos. 940 to 943/Mum/2018

(**निर्धारण वर्ष** / Assessment Years: 2010-11 to 2013-14)

Deepak Jatia Marathon Innova, 'A' Wing, 7th Floor, Off. G. K. Marg, Lower Parel, Mumbai-400013.	**बनाम**/ Vs.	DCIT-Central Circle-1(1) Room No.903, 9th Floor, Old CGO Bldg, Annexure, M.K. Road, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ADXPJ8701D		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Anuj Kisnadwala (AR)
Revenue by:	Shri Narendra Singh Jang Pangi (DR)

सुनवाई की तारीख / Date of Hearing: 17/12/2019

घोषणा की तारीख /Date of Pronouncement: 15/01/2020

आदेश / O R D E R

PER AMARJIT SINGH, (JM):

The assessee has filed the above mentioned appeals against the different order passed by the Commissioner of Income Tax (Appeals)-47, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Ys. 2010-11, 2011-12, 2012-13 & 2013-14 in which the penalty levied by the AO has been ordered to be confirmed.

ITA. NO.940/M/2018

2. The assessee has filed the present appeal against the order dated 22.01.2018 passed by the Commissioner of Income Tax (Appeals)-47,

Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y. 2010-11 in which the penalty levied by the AO has been ordered to be confirmed.

3. The assessee has raised the following grounds: -

> ''A. Penalty order u/s 271(1)(C) of the Act is without jurisdiction, bad in law and liable to be quashed.
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> I. The Ld. C11(A) erred in upholding the penalty order passed u/s 271(1)(c) of' the Act without appreciating the fact that there is no specific charge stated either in the assessment order or in the penalty notice for which the penalty proceedings are initiated and thus, the penalty order passed uis.271(i)(e) of the Act is without jurisdiction, bad in law and liable to be quashed.
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> 2. The Ld. CIT(A) failed to appreciate that by not striking off the limb in the penalty notice and thereby not specifying the exact charge for which the penalty proceedings are initiated, the penalty notice is defective and cannot he cured thereafter and hence, the penalty order passed u/s.27 l(i)(c) of the Act on the basis of such defective notice is without jurisdiction. had in law and liable to be quashed.
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> 3. The 14. CIT(A) failed to appreciate that initiation and levy of penalty Ws.27 1(1)(c) of the Act could not be simultaneously carried out under both limbs i.e. concealment of particulars of income as well as furnishing inaccurate particulars of income by treating both as one and the same and hence, the penalty order uls.27 1(1)(c) is had in law and liable to be quashed.
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> 4. Without prejudice to the above, the IA. CIT(A) further failed to appreciate that there is no satisfaction in the assessment order for initiation of penalty proceedings and merely stating that the penalty proceedings are initiated does not overcome the provisions of sec.27 1(1 B) of the Act and hence, the penalty order passed u/s.271(1)(c) of the Act is had in law and liable to be quashed.
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> B. Penalty Levied u/s.271(1) (C) of Rs.43 lacs may be deleted. The Ld. CIT(A) erred in confirming penalty u/s.271(I)(c) of the Act for filing inaccurate particulars of income & thereby concealment of income without appreciating the fact that the

appellant has neither concealed particulars of income nor furnished any inaccurate particulars of income in the return of income filed u/s 153A of the Act and hence, penalty confirmed of Rs.43,00,000/- is without any justification and liable to be deleted.

6. The Ld. CIT(A) failed to appreciate that no cash was paid for booking of flat in building named Orchid Heights and no incriminating evidence was found conclusively proving payment of any on money for booking of flat and it was only to buy peace and avoid protracted litigation that the appellant offered amount of Rs.1,42,20,000/- as additional income in the return of income filed u/s. 153A of the Act and hence, the penalty confirmed amounting to Rs.43,00,000/- u/s.271(I)(c) of the Act is unjustified and liable to be deleted.

7. The Ld. CIT(A) further failed to appreciate that assessment proceedings and penalty proceedings are independent and separate proceedings and the AO was duty bound to prove cash payment made towards booking of flat and not merely rely upon the disclosure made in the return of income, which was to buy peace and avoid protracted litigation and hence. the penalty confirmed uts.271(1)(c) of Rs.43.00,000/- is without any justification and liable to be deleted.

8. The appellant craves leave to add, amend. alter or delete all or any of the aforesaid grounds of appeal."

4. The brief facts of the case are that the assessment of the assessee was completed on 31.03.2015 u/s 143(3) r.w.s. 153A of the I.T. Act, 1961 determining total income to the tune of Rs.2,40,30,130/-. A search and seizure action was taken in the case of ASI Group and its associated concerns on 13.08.2013 u/s 132(1) of the I. T. Act, 1961. The main company of this group was Associated Stone Industries (Kota) Ltd. (ASI) which was engaged in the mining and trading of Kota Stone. Simultaneously, search action was carried out in the case of assessee being Chairman and Managing Director of ASI residing at Orbit Arya, 14th Floor & 15th Floor

(Duplex), Nepeansea Road, Mumbai-6 wherein the assessee Shri Deepak Jatia and his family resides. Besides the above said residence premise, the search action was also carried out at the following premises in this group:-

(i) Office: Marathon Innova 'A' Wing 7th Floor, Off: G. K. Marg, Lower Parel, Mumbai-400013.

(ii) Office: ASI House, KudayalaIndl. Area. Ramganjmandi 326519.

(iii) 419-B, Kalbadevi Road, Joshiwadi 2nd Floor, Mumbai-400002.

The case of the assessee was covered u/s 153A of the I. T. Act, 1961. Notice u/s 153A of the Act was issued. In response to the notice, the assessee filed the return of income declaring total income to the tune of Rs.2,40,30,150/- which includes additional income offered of Rs.1,42,20,000/- towards unaccounted investment in purchase of flat. The assessee had filed the return of income u/s 139(1) of the I. T. Act, 1961 on 30.07.2010 declaring income to the tune of Rs.97,91,024/-. The said return was processed u/s 143(1) of the Act and thereafter, scrutiny assessment order was passed u/s 143(3) of the Act dated 10.09.2012 assessing the income at Rs.98,10,130/-. Thereafter, notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee and the assessment of the assessee was completed u/s 153A of the Act determining total income to the tune of Rs. 2,40,30,150/- which includes additional income offered of Rs.1,42,20,000/-. The penalty proceeding was initiated by issuance of notice. The AO levied

the penalty to the tune of Rs.43,00,000/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who confirmed the penalty, therefore, the assessee has filed the present appeal before us.

ISSUE NOs. 1 to 4

5. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. All the issues are in connection with the confirmation of the penalty levied by the AO. At the very outset, the Ld. Representative of the assessee has argued that the penalty notice nowhere speaks about specific limb to levy the penalty because the particular charge was not tick off in the notice, therefore, in the said circumstances, the penalty is not liable to be sustainable in the eyes of law, hence the order of the CIT(A) confirming the penalty order of the AO is wrong against law and facts and is liable to be set aside. In support of these contentions the Ld. Representative of the assessee has placed reliance upon the law settled in ITA. No.1154/M/2014 in the case of **CIT-11 Vs. Samson Perinchery and the order of the ITAT, Mumbai Bench in ITA. No.2555/M/2012 vide order dated 28.04.2017 titled as Meherjee Cassinath Holdings P. Ltd. Vs. ACIT, Circle-4(2).** However, on the other hand, the Ld. Representative of the Department has refuted the said contentions. The copy of notice dated 31.03.2015 is on the file in which the Assessing Officer nowhere specify any limb to levy the penalty because none of the charge was tick off in the notice. It is not in dispute that the penalty u/s 271(c) of the Act is leviable on

account of the concealment of particular of income and on account of furnishing the inaccurate particulars of income. Both have different connotations. In this regard, the Hon'ble Supreme Court has appreciated the distinction between both the limb in the case **Dilip N. Shroff 161 taxman 218 (SC).** As per the record, the assessment order speaks about levying the penalty on account of furnishing the inaccurate particulars of income but the notice nowhere specify any limb to levy the penalty. The notice is not justifiable in view of the law settled by the Bombay High Court in the case of **CIT-11 Vs. Samson Perinchery.** At the time of argument, the Ld. Representative of the assessee has also placed reliance upon the finding of the Hon'ble ITAT in ITA. No. 2555/M/2012 titled as **Meherjee Cassinath Holdings P. Ltd. Vs. ACIT, Circle-4(2).** The relevant para is hereby reproduced below: -

> *"8. We have carefully considered the rival submissions. Sec. 271(1)(c) of the Act empowers the Assessing Officer to impose penalty to the extent specified if, in the course of any proceedings under the Act, he is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. In other words, what Sec. 271(1)(c) of the Act postulates is that the penalty can be levied on the existence of any of the two situations, namely, for concealing the particulars of income or for furnishing inaccurate particulars of income. Therefore, it is obvious from the phraseology of Sec. 271(1)(c) of the Act that the imposition of penalty is invited only when the conditions prescribed u/s 271(1)(c) of the Act exist. It is also a well accepted proposition that 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' referred to in Sec. 271(1)(c) of the Act denote different connotations. In fact, this distinction has been appreciated even at the level of Hon'ble Supreme Court not only in the case of Dilip N. Shroff (supra) but also in the case of T.Ashok Pai, 292 ITR 11*

(SC). Therefore, if the two expressions, namely 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' have different connotations, it is imperative for the assessee to be made aware as to which of the two is being put against him for the purpose of levy of penalty u/s 271(1)(c) of the Act, so that the assessee can defend accordingly. It is in this background that one has to appreciate the preliminary plea of assessee, which is based on the manner in which the notice u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 has been issued to the assessee-company. A copy of the said notice has been placed on record and the learned representative canvassed that the same has been issued by the Assessing Officer in a standard proforma, without striking out the irrelevant clause. In other words, the notice refers to both the limbs of Sec. 271(1)(c) of the Act, namely concealment of the particulars of income as well as furnishing of inaccurate particulars of income. Quite clearly, non-striking-off of the irrelevant limb in the said notice does not convey to the assessee as to which of the two charges it has to respond. The aforesaid infirmity in the notice has been sought to be demonstrated as a reflection of non-application of mind by the Assessing Officer, and in support, reference has been made to the following specific discussion in the order of Hon'ble Supreme Court in the case of Dilip N. Shroff (supra):-

"83. It is of some significance that in the standard proforma used by the Assessing Officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.

84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. (See Malabar Industrial Co. Ltd. v. CIT [2000] 2 SCC 718]"

9. Factually speaking, the aforesaid plea of assessee is borne out of record and having regard to the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff

(supra), the notice in the instant case does suffer from the vice of non-application of mind by the Assessing Officer. In fact, a similar proposition was also enunciated by the Hon'ble Karnataka High Court in the case of M/s. SSA's Emerald Meadows (supra) and against such a judgment, the Special Leave Petition filed by the Revenue has since been dismissed by the Hon'ble Supreme Court vide order dated 5.8.2016, a copy of which is also placed on record.

10. In fact, at the time of hearing, the ld. CIT-DR has not disputed the factual matrix, but sought to point out that there is due application of mind by the Assessing Officer which can be demonstrated from the discussion in the assessment order, wherein after discussing the reasons for the disallowance, he has recorded a satisfaction that penalty proceedings are initiated u/s 271(1)(c) of the Act for furnishing of inaccurate particulars of income. In our considered opinion, the attempt of the ld. CIT-DR to demonstrate application of mind by the Assessing Officer is no defence inasmuch as the Hon'ble Supreme Court has approved the factum of non-striking off of the irrelevant clause in the notice as reflective of non-application of mind by the Assessing Officer. Since the factual matrix in the present case conforms to the proposition laid down by the Hon'ble Supreme Court, we proceed to reject the arguments advanced by the ld. CIT-DR based on the observations of the Assessing Officer in the assessment order. Further, it is also noticeable that such proposition has been considered by the Hon'ble Bombay High Court also in the case of Shri Samson Perinchery, ITA Nos. 1154, 953, 1097 & 1126 of 2014 dated 5.1.2017 (supra) and the decision of the Tribunal holding levy of penalty in such circumstances being bad, has been approved.

11. Apart from the aforesaid, the ld. CIT-DR made an argument based on the decision of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Others, 216 ITR 660 (Bom.) to canvass support for his plea that non-striking off of the irrelevant portion of notice would not invalidate the imposition of penalty u/s 271(1)(c) of the Act. We have carefully considered the said argument set-up by the ld. CIT-DR and find that a similar issue had come up before our coordinate Bench in the case of Dr. Sarita Milind Davare (supra). Our coordinate Bench, after considering the judgment of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Ors., (supra) as also the judgments of the

Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) and Dharmendra Textile Processors, 306 ITR 277 (SC) deduced as under :-

"12. A combined reading of the decision rendered by Hon'ble Bombay High Court in the case of Smt. B Kaushalya and Others (supra) and the decision rendered by Hon'ble Supreme Court in the case of Dilip N Shroff (supra) would make it clear that there should be application of mind on the part of the AO at the time of issuing notice. In the case of Lakhdir Lalji (supra), the AO issued notice u/s 274 for concealment of particulars of income but levied penalty for furnishing inaccurate particulars of income. The Hon'ble Gujarat High Court quashed the penalty since the basis for the penalty proceedings disappeared when it was held that there was no suppression of income. The Hon'ble Kerala High Court has struck down the penalty imposed in the case of N.N.Subramania Iyer Vs. Union of India (supra), when there is no indication in the notice for what contravention the petitioner was called upon to show cause why a penalty should not be imposed. In the instant case, the AO did not specify the charge for which penalty proceedings were initiated and further he has issued a notice meant for calling the assessee to furnish the return of income. Hence, in the instant case, the assessing officer did not specify the charge for which the penalty proceedings were initiated and also issued an incorrect notice. Both the acts of the AO, in our view, clearly show that the AO did not apply his mind when he issued notice to the assessee and he was not sure as to what purpose the notice was issued. The Hon'ble Bombay High Court has discussed about non-application of mind in the case of Kaushalya (supra) and observed as under:-

"...The notice clearly demonstrated non-application of mind on the part of the Inspecting Assistant Commissioner. The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charge he had to face. In this back ground, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified."

In the instant case also, we are of the view that the AO has issued a notice, that too incorrect one, in a routine manner. Further the notice did not specify the charge for which the penalty notice was

issued. Hence, in our view, the AO has failed to apply his mind at the time of issuing penalty notice to the assessee."

12. The aforesaid discussion clearly brings out as to the reasons why the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) is to prevail. Following the decision of our coordinate Bench in the case of Dr. Sarita Milind Davare (supra), we hereby reject the aforesaid argument of the ld. CIT-DR.

13. Apart from the aforesaid discussion, we may also refer to the one more seminal feature of this case which would demonstrate the importance of non-striking off of irrelevant clause in the notice by the Assessing Officer. As noted earlier, in the assessment order dated 10.12.2010 the Assessing Officer records that the penalty proceedings u/s 271(1)(c) of the Act are to be initiated for furnishing of inaccurate particulars of income. However, in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act of even date, both the limbs of Sec. 271(1)(c) of the Act are reproduced in the proforma notice and the irrelevant clause has not been struck-off. Quite clearly, the observation of the Assessing Officer in the assessment order and non-striking off of the irrelevant clause in the notice clearly brings out the diffidence on the part of Assessing Officer and there is no clear and crystallised charge being conveyed to the assessee u/s 271(1)(c), which has to be met by him. As noted by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the quasi-criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice, and in the present case, considering the observations of the Assessing Officer in the assessment order alongside his action of non-striking off of the irrelevant clause in the notice shows that the charge being made against the assessee qua Sec. 271(1)(c) of the Act is not firm and, therefore, the proceedings suffer from non-compliance with principles of natural justice inasmuch as the Assessing Officer is himself unsure and assessee is not made aware as to which of the two limbs of Sec. 271(1)(c) of the Act he has to respond.

14. Therefore, in view of the aforesaid discussion, in our view, the notice issued by the Assessing Officer u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 is untenable as it suffers from the vice of non-application of mind having regard to the ratio of the judgment of the Hon'ble Supreme Court in the case of Dilip N.

> *Shroff (supra) as well as the judgment of the Hon'ble Bombay High Court in the case of Shri Samson Perinchery (supra). Thus, on this count itself the penalty imposed u/s 271(1)(c) of the Act is liable to be deleted. We hold so. Since the penalty has been deleted on the preliminary point, the other arguments raised by the appellant are not being dealt with."*

6. In view of the above facts and circumstances, it is quite clear that the penalty is not leviable in accordance with law. Since the penalty is not sustainable on the issue of defective notice, therefore, we are not inclined to decide the matter of controversy on merits. In view of the said circumstances, we are of the view that the finding of the CIT(A) is wrong against law and facts and is not liable to be sustainable in the eyes of law, therefore, we set aside the finding of the CIT(A) on this issue and delete the penalty.

ISSUE Nos. 5 to 7

7. Under these issues the assessee has challenged the penalty on the basis of this fact that when the assessee has filed the return of income u/s 153A of the Act in which there is no filing of inaccurate particulars of income and concealment of income, hence, the penalty is not liable to be sustainable in view of the decision of the Hon'ble ITAT 'G' Bench New Delhi in the case of **Rishabh Buildwell P. Ltd. Vs. DCIT & Sanjeev Jain Vs. DCIT in ITA. No.6880 & 6881/Del/2018 dated 03.07.2019.** However, on the other hand, the Ld. Representative of the Department has refuted the said contention. Before going further, we deem it necessary to advert the finding of the Hon'ble ITAT in the case of **Rishabh Buildwell P. Ltd.** as under: -

''8. Primarily, we find that the Assessing Officer has not brought anything on record to assess any income over and above the returned income filed by the assessee. The AO in the assessment order could not bring into fore as to how the seized material has been analyzed and to prove as to how the concealment or furnishing of inaccurate particulars of income has arisen. The entire part of the assessment order with regard to the penalty is reproduced below to verify whether or not the Revenue has brought out any concealed income or made a case for levy of the penalty u/s 271(1)(c) of the Act as under:

"4.1 During the assessment proceeding assessee were required to explain the document as page no. 68, 76, 78, 80, 87, 96, 116, 117 and 118 of LP2(A-2) SEIZED FROM PREMISE OF 195-Ram Vihar Delhi. Which is related to cash payment to cash received. The assessee has submitted that 'the following amount was received in cash from resident of society towards maintenance and summary of the cash movement and cash payment made by Sh. Sanjeev Jain between different companies are on behalf of the companies by Sh. Sanjeev Jain, to summaries it is submitted that the net result of the above documents off Rs.1,05,83,000/- already declared in the return of income in A.Y. 2014-15'. The reply of the assessee is considered and Rs.1,05,83,000/- will be added in the hands of Sh. Sanjeev Jain in A.Y. 2014-15. Penalty proceeding u/s 271AAB of the I.T. Act also initiated separately. Addition: Rs.1,05,83,000/- (A.Y.2014-15)

4.2 During the assessment proceeding assessee were required to explain the document as page no. 33-51 of LP-3(A-3) seized from premise of 195- Ram Vihar Delhi. The assessee is required to explain the above documents and a show cause given to assessee that why may not be treated as unexplained and added in your income? The assessee has submitted that 'These documents are related to Angel Mall and not recorded in the books of accounts; as per memory of the Sanjeev Jain, it is cash received and cash paid on the behalf of companies, but due to avoid litigation, we have surrendered Rs.80,00,000/- in A.Y. 2009-10, Rs.72,95,000/- in A.Y. 2010-11 and Rs.4,03,05,000/- in A.Y. 2011-12'. The reply of the assessee is considered and Rs.80,00,000/- in A,Y. 2009-10, Rs.72,95,000/- in A.Y. 2010-11 and Rs.4,03,05,000/- in A.Y. 2011-12 will be added in the hands of Sh. Sanjeev Jain in A.Y. 2014-15. Penalty proceeding u/s 271(1)(c) of the I.T. Act also initiated separately for furnishing inaccurate of particulars of income and concealment of income.

Addition: Rs.80,00,000/- in A.Y. 2009-10,

Addition: Rs.72,95,000/- in A.Y. 2010-11

Addition: Rs.4,03,05,000/- in A.Y. 2011-12"

9. From the reading of the above assessment order we find that though the assessing officer has mentioned the word "Addition" it does not represent any adding up of the income but narration of the income returned by the assessee in response to notice u/s 153A of the Act. Now, in the absence of any addition made by the assessing officer whether any penalty u/s 271(1)(c) of the Act is leviable or not is examined with reference to the facts of the case and the established judgments.

10. The penalty u/s 271(1)(c) of the Act is leviable in case of financing of inaccurate particulars of income or concealment of income. The Revenues has to show whether the assessee indeed has concealed income or furnished inaccurate particulars of income. There has to be a finding with regard to the addition made in the assessment order. Whereas in instant case, there was no addition made by the AO. There is no deeming fiction for the levy of penalty the provisions applicable whether it is an assessment u/s 153A of the Act or assessment u/s 143(3) of the Act or u/s 148 of the Act the provision essentially remain the same. In the instant case, the assessee has filed return of income declaring additional income which was accepted by the AO. Hence, they cannot be treated as the assessee has concealed income as concealment as to be dealt by the Revenue by way of unearthing sum of the income which has been kept away from the eye of the Revenue. Furnishing of inaccurate of particulars refers to filing of material which is not in conformity with the facts or truths. They deal in with correct detail about income so that a part of the income could be covered up by the assessee. None of these two conditions are applicable to the instant case. The AO proceeded to treat the assessee's additional income so offered as concealment and furnishing of inaccurate particulars of income. The provisions of the explanation 5A to Section 271(1)(c) of the Act and 271AAB of the Act have to be interpreted strictly. Unless, there is an actual concealment or non-discloser of the particular of the income the penalty cannot be imposed. Further, when the revised income is accepted and the income is assessed as per the revised income there is no scope of penalty. In the case of Kirit Dahyabhai Patel Vs ACIT (2017) 80 Taxmann.com 162 (Guj.), the Hon'ble High Court held that in view of specific provision of Section 153A, the return of income filed in response to notice u/s 153A is to be considered as return filed u/s 139, as the AO has made assessment on the said return and, therefore, the return has to be considered for the purpose of penalty u/s 271(1)(c) of the Act and the penalty is to be levied on the income assessed over and above the income returned u/s 153A, if any, admittedly, in this matter both the returned income and the assessed income are same. Whereas the Revenue was of the opinion that in as much that the income disclosed by

the assessee under Section 153A was higher than the income in the original return filed under Section 139(1) and since in his view, such disclosure of income was a consequence of the search conducted on the assessee, there was concealment of income which attracted Section 271(1)(c) of the Act.

11. The Supreme Court held, in Shri T. Ashok Pai v. Commissioner of Income Tax, Bangalore (2007) 7 SCC 162, that penalty under Section 271(1)(c) is not to be mandatorily imposed. In other words, the levy of penalty under this provision is not automatic. This view has been reiterated in Union of India v. Rajasthan Spinning and Weaving Mills, (2009) 13 SCC 448 to say that for there to be a levy of penalty under Section 271(1)(c), the conditions laid out therein have to be specifically fulfilled. Section 271(1)(c) of the Act, being in the nature of a penal provision, requires a strict construction.

12. In this case, the A.O. in his order noted that the disclosure of higher income in the return filed by the assessee was a consequence of the search conducted and hence, such disclosure cannot be said to be "voluntary". Hence, in the A.O.'s opinion, the assessee had "concealed" his income. However, the mere fact that the assessee has filed revised returns disclosing higher income than in the original return, in the absence of any other incriminating evidence, does not show that the assessee has "concealed"his income for the relevant assessment years. On this point, several High Courts have also opined that the mere increase in the amount of income shown in the revised return is not sufficient to justify a levy of penalty.

13. The Punjab & Haryana High Court in Commissioner of Income Tax v. Suraj Bhan, (2007) 294 ITR 481 (P & H), held that when an assessee files a revised return showing higher income, penalty cannot be imposed merely on account of such higher income filed in the revised return. Similarly, the Karnataka High Court in the case of Bhadra Advancing Pvt. Limited v. Assistant Commissioner of Income Tax, (2008) 219 CTR 447, held that merely because the assessee has filed a revised return and withdrawn some claim of depreciation penalty is not leviable. The additions in assessment proceedings will not automatically lead to inference of levying penalty. The Calcutta High Court in the case of Commissioner of Income Tax v. Suresh Chand Bansal, (2010) 329 ITR 330 (Cal) held that where there was an offer of additional income in the revised return filed by the assessee and such offer is in consequence of a search action, then if the assessment order accepts the offer of the assessee, levy of penalty on such offer is not justified without detailed discussion of the documents and their explanation which compelled the offer of additional income. The Madras High Court in the case of S.M.J.

Housing v. Commissioner of Income Tax, (2013) 357 ITR 698 held that where after a search was conducted, the assessee filed the return of his ITA Nos. 6880 income and the Department had accepted such return, then levy of penalty under Section 271(1)(c) was not justified. From the above cases it would be clear that when an assessee has filed revised returns after search has been conducted, and such revised return has been accepted by the A.O., then merely by virtue of the fact that such return showed a higher income, penalty under Section 271(1)(c) cannot be automatically imposed.

14. Considering that the non-obstante clause under Section 153A excludes the application of, inter alia, Section 139, it is clear that the revised return filed under Section 153A takes the place of the original return under Section 139, for the purposes of all other provisions of the Act. This is further buttressed by Section 153A (1)(a) which reads:

"Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shalla) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section139.

15. Therefore, the position that emerges from the above-mentioned provision is that once the assessee files a revised return under Section 153A, for all other provisions of the Act, the revised return will be treated as the original return filed under Section 139. Reliance is placed on the judgements of in the case of Kirit Dahyabhai Patel v. Assistant Commissioner of Income Tax, 280 CTR 216 and PR. Commissioner of Income Tax Vs Shri Neeraj Jindal (Delhi High Court) in Appeal Number : ITA 463/2016 & CM No. 26604/2016.

16. Explanation-5 was specifically inserted to deal with the situation where higher income was disclosed in the return filed consequent to a search operation, and the assessee claimed that such addition of income did not imply that there was concealment. In other words, but for the insertion of Explanation-5, it would be open to the assessee to contend that additions made to his income in the return filed after the search operation, were only to buy peace and did not tantamount to

concealment. This also flows from the language of Explanation-5 itself, wherein the words used by the Legislature are "be deemed to have concealed the particulars of his income", which shows that there is a deeming fiction by virtue of which such additional income is considered as concealment. If such additions in the income in the return filed consequent to a search, were to automatically evidence concealment under Section 271(1)(c), there would be no need for Parliament to enact a deeming fiction in the form of Explanation-5; such a reading would render Explanation-5 otiose and without any purpose. This is also consonant with the view arrived at in the earlier part of this decision, i.e. mere increase of income in the return filed pursuant to Section 153A would not be sufficient to show concealment under Section 271(1)(c).

17. For the Revenue to invoke Explanation-5, it would have to prove that its requirements are clearly fulfilled in the present case. In order for Explanation-5 to apply, it is necessary that there must be certain assets (such as money, bullion etc.) found in the possession of the assessee during the search, and that the assessee must claim that such assets have been acquired by him by utilizing his income. Moreover, such income must be in relation to a particular previous year that has either ended before the date of the search or is to end on or after the date of the search and such income is declared subsequently in the return of income filed after the search. Therefore, it is only when assets are found during the search which the assessee claims have been acquired by him by utilizing his income for any particular previous year, and then declares such income in a subsequent return filed after the date of search, would it be deemed that the assesee has concealed his income. In other words, the assets seized during the search must relate to the income of the particular assessment year whose return is filed after the date of the search. Such a conclusion is only logical, considering that assessment under the Act is with respect to a particular assessment year and the penalty imposed under Section 271(1)(c) would also be for concealing income in that particular assessment year, which concealment was revealed by the discovery of certain assets in the assessee's possession during the search conducted under Section 132. {Refer PR. Commissioner of Income Tax Vs Shri Neeraj Jindal (Delhi High Court)}

18. From the perusal of the seized material, we also find that the Revenue has not concretized any concealment by the assessment years in question based on the seized material. The assessment did not emanate in the seized material but a reinforcement of the income declared by the assessee.

> *19. Keeping in view the facts that there is no difference between returned income and the assessed income, keeping in view the fact that the Revenue has not brought any material for levy of penalty, Keeping in view the judgments which were enunciated that the return filed in response to notice 153A of the Act needs to be treated as returned filed u/s 139 of the Act for the purpose of assessment, we hereby delete the penalty levy u/s 271(1)(c) of the Act."*

8. There are similar facts in the case of **Sanjeev Jain Vs. DCIT in ITA. No.6880 & 6881/Del/2018 dated 03.07.2019,** therefore, there is no need to repeat the finding of the same. In view of the above mentioned decision, the return u/s 153A of the Act required to be treated as returned filed u/s 139 of the Act for the purpose of assessment, therefore, no penalty is liable to be sustainable in the eyes of law. There is no concealment of income and furnishing the inaccurate particulars of income in the return of income. Taking into account all the facts and circumstances, we are of the view that the finding of the CIT(A) is not justifiable, therefore, we set aside the same and delete the penalty.

ITA. Nos. 941 to 943/M/2018

9. All the appeals are on similar ground containing similar facts of the case, therefore, the finding given above while deciding the appeal bearing ITA. No.940/M/2018 is quite applicable to the facts of all cases as mutatis mutandis. Accordingly, we delete the penalty in these appeals also and allowed the appeals of the assessee.

10. In the result, the appeals filed by the **assessee are hereby ordered to be allowed.**

Order pronounced in the open court on 15/01/2020

Sd/-	Sd/-
(N. K. PRADHAN)	**(AMARJIT SINGH)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 15/01/2020
Vijay Pal Singh/Sr. PS
आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**