

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई  
IN THE INCOME-TAX APPELLATE TRIBUNAL 'C' BENCH, CHENNAI  
श्री वी. दुर्गा राव, न्यायिक सदस्य एवं श्री जी. मंजुनाथा, लेखा सदस्य के समक्ष ।  
Before Shri V. Durga Rao, Judicial Member &  
Shri G. Manjunatha, Accountant Member

आयकर अपील सं./I.T.A. No.2084/Chny/2013  
निर्धारण वर्ष/**Assessment Years: 2006-07**

The Assistant Commissioner of  
Income Tax, Central Circle IV(2),  
46, Nungambakkam High Road,  
Chennai.

M/s. S & P Foundation P. Ltd.,  
Vs. Old No. 27, New No. 38, Madley Road,  
T. Nagar, Chennai 600 017.  
[PAN: AAICS0224K]

(अपीलार्थी /Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by : Shri G. Johnson, Addl. CIT  
प्रत्यर्थी की ओर से/Respondent by : Shri G. Baskar, Advocate &  
Shri I Dinesh, Advocate  
सुनवाई की तारीख/ Date of hearing : 02.12.2021  
घोषणा की तारीख /Date of Pronouncement : 16.12.2021

**आदेश /ORDER**

**PER V. DURGA RAO, JUDICIAL MEMBER:**

This appeal filed by the Revenue is directed against the order of the Id. Commissioner of Income Tax (Appeals) II, Chennai, dated 05.12.2012 relevant to the assessment year 2006-07 in pursuance to the order of the Assessing Officer in levying penalty under section 271(1)(c) of the Income Tax Act, 1961 ["Act" in short].

2. Facts of the case are, in brief, that the assessee company was carrying on construction and real estate business. A search and

seizure operation in the premises of the assessee was conducted on 10.01.2008. During the course of search, certain books of accounts and documents are seized. Subsequently, notice under section 153A of the Act dated 29.09.2008 issued to the assessee, the assessee filed return of income on 12.08.2009 admitting an income of ₹.2,55,13,240/-. Notices under sections 143(2) and 142(1) of the Act were issued and assessment was completed under section 153A r.w.s. 143(3) of the Act on 31.12.2009 determining the total income of the assessee at ₹.2,55,26,240/-. Subsequently, the Assessing Officer has initiated penalty proceedings under section 271(1)(c) of the Act and levied minimum penalty of ₹.85,92,132/- on the entire addition of ₹.2,55,26,240/-. On appeal, the Id. CIT(A) deleted the entire penalty levied by the Assessing Officer by order dated 05.12.2012.

3. The Department carried the matter in appeal before the ITAT by raising the following grounds:

**“GROUNDS OF APPEAL BY THE DEPARTMENT**

1. *On the facts and the circumstances of the case, the Id. CIT(A) erred in deleting the penalty levied u/s. 271(1)(c) of I.T. Act, on the additional income of ₹.1,58,98,570/-.*
2. *On the facts and the circumstances of the case, the Id. CIT(A) failed to appreciate that the explanation 5A to the section u/s*

*271(1)(c) of I.T. Act, clearly attracts in the case of the assessee as the additional income of ₹.1,58,98,570/- was offered in the return of income filed post search and no such income was disclosed in the original return of income filed by the assessee.*

**RELIEF CLAIMED IN APPEAL**

*The order of the learned CIT(A) may be set aside and that of the Assessing Officer be restored.”*

4. On appeal before the ITAT, the ITAT in I.T.A. No. 2084/Chny/2013, by order dated 29.05.2019 restored the entire penalty imposed by the Assessing Officer on total amount of ₹.2,55,13,240/-.

5. On being aggrieved, the assessee carried the matter in appeal before the Hon'ble Jurisdictional High Court.

6. The Hon'ble Jurisdictional High Court, by order dated 15.09.2020 in Tax Case (Appeal) No. 840 of 2017, directed the ITAT to decide the appeal filed by the Revenue afresh. The relevant portion of the order is extracted as under:

*“8. We are of the opinion that the matter deserves to be remanded back to the learned Tribunal as it seems, prima facie, that the learned Tribunal has not only committed some factual errors in respect of filing of return of income by the Assessee but also invoked Explanation 3 and 5A of Section 271(1)(c) of the Act with respect to the alleged non-filing return of income by the Assessee in pursuance of notice issued after the Search which took place in the business place of the Assessee and such a revised Return was filed by the Assessee voluntarily surrendering such income of Rs.1,53,99,000/- and while apparently surrendering all the income on its own by the Assessee ought not to have attracted penalty for concealment under Section 271(1)(c) of the Act, the learned*

*Tribunal has not only restored the penalty by the impugned order but also restored the penalty on the issue for which no ground was raised in the Grounds of Appeal filed by the Revenue before it. The Explanations which give rise to presumption of concealment are rebuttable presumptions and therefore without discussing those facts about such rebuttal or otherwise, the Penalty could not be reimposed by the Tribunal particularly when it was reversing the order of the learned Commissioner of Income Tax (Appeals) in this regard, who found the explanation of the Assessee satisfactory and had deleted the penalty in question.*

9. *Therefore, without commenting any further on the order passed by the learned Tribunal, we are of the opinion that the learned Tribunal ought to decide the Appeal again after giving opportunity to both the parties afresh on the grounds of Appeal raised by the Revenue. Therefore, without answering the questions of law raised before us, we set aside the order passed by the learned Tribunal on 6th June 2017 for the Assessment Year 2006-2007 in respect of penalty under Section 271(1)(c) of the Act and we request the learned Tribunal to decide the Appeal again in accordance with law after giving opportunity to both the parties, discussing the relevant facts.”*

7. As per the judgement of the Hon'ble Jurisdictional High Court in T.C.(A) No. 840 of 2017, the appeal of the Revenue was posted for hearing and taken up for adjudication the grounds raised by the Department, which were extracted as under:

**“GROUNDS OF APPEAL BY THE DEPARTMENT**

1. *On the facts and the circumstances of the case, the ld. CIT(A) erred in deleting the penalty levied u/s. 271(1)(c) of I.T. Act, on the additional income of ₹.1,58,98,570/-.*
2. *On the facts and the circumstances of the case, the ld. CIT(A) failed to appreciate that the explanation 5A to the section u/s 271(1)(c) of I.T. Act, clearly attracts in the case of the assessee as the additional income of ₹.1,58,98,570/- was offered in the return of income filed post search and no such income was disclosed in the original return of income filed by the assessee.*

**RELIEF CLAIMED IN APPEAL**

*The order of the learned CIT(A) may be set aside and that of the Assessing Officer be restored.”*

8. With regard to the deletion of penalty levied under section 271(1)(c) of the Act on the addition income of ₹.1,53,98,570/- [wrongly mentioned as ₹.1,58,98,570/-], the Id. DR Shri G. Johnson, Additional CIT has submitted that the return filed by the assessee by disclosing an amount of ₹.1,53,98,570/- after the search under section 132 of the Act was conducted on 10.01.2008, no explanation was offered by the assessee for non-disclosure of the above amount. It was, therefore, submitted that it is a clear concealment of income as per Explanation 5A to section 271(1)(c) of the Act brought by Finance (No. 2) Act, 2009 with retrospective effect from 01.06.2007.

9. It was further submitted that the revised return of income filed by the assessee on 12.08.2009 and the amendment substituted to Explanation 5A to section 271(1)(c) of the Act was already exist as law as on the date of revised return filed and disclosure made by the assessee and thus, the amended Explanation 5A to section 271(1)(c) of the Act squarely applies to the assessee's case.

10. He also submitted that the revised return filed by the assessee by disclosing additional income is not voluntary for the reason that the assessee has not given any explanation for an amount of ₹.1,53,98,570/- debited to land development cost by giving credit to advance from allottees. Under compelling circumstances, the assessee has no option but to disclose the income by filing revised return of income since search and seizure operation under section 132 of the Act was conducted and thus, he has submitted that the penalty levied by the Assessing Officer on the undisclosed income of ₹.1,53,98,570/- may be confirmed.

11. On the other hand, the Id. Counsel for the assessee has submitted that the assessee filed its original return of income on 28.11.2006 and the Assessing Officer has wrongly considered that the assessee only filed the return of income on 12.08.2009, subsequent to the search, is not correct and he has referred to paper book page No. 1, wherein, the original return filed by the assessee dated 28.11.2006 was filed.

12. He further submitted that the amendment brought by Finance (No.2) Act, 2009 under Explanation 5A to section 271(1)(c) of the Act

has no application to the assessee for the reason that the assessee has already filed the return of income on 28.11.2006 much before conducting the search operation on 10.01.2008. He further submitted that as per the original Explanation 5A to section 271(1)(c) of the Act [before amendment to the Finance (No.2) Act, 2009], if the assessee already filed return of income, the presumption of deemed concealment has no application and it only applies to the assessees who are not filed the return. Subsequently, the Explanation 5A to section 271(1)(c) amended by Finance (No.2) Act, 2009 with retrospective effect from 01.06.2007 to bring both the assessees i.e., the assessees who filed the return of income before the search and who filed the return of income after the search deemed concealment applies. Therefore, the Id. Counsel for the assessee has submitted that since the assessee has already filed original return of income on 28.11.2006 before the search conducted on 10.01.2008, subsequent amendment has no application. Further, he relied on the decision of ITAT Ahmedabad "B" Bench in the case of Atlanta Electricals (P.) Ltd. v. ACIT [(2019) 111 taxmann.com 351(Ahmedabad – Trib.).

13. He further submitted that the assessee has filed the revised return of income after search by disclosing additional income of

₹.1,53,98,570/- voluntarily. Therefore, it is submitted that the disclosure made by the assessee cannot be said that it is a concealment of income. Thus, the Id. Counsel for the assessee prayed that the penalty levied by the Assessing Officer, which was deleted by the Id. CIT(A) may be upheld.

14. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below including paper books filed by the assessee. In this case, the assessee has filed its original return of income on 28.11.2006 by declaring total income of ₹.1,01,14,668/-. Subsequently, a search and seizure action under section 132 of the Act was conducted in the case of the assessee on 10.01.2008. In response to the notice under section 153A of the Act, the assessee filed its return of income on 12.08.2009 admitting an income of ₹.2,55,13,240/- including additional income of ₹.1,53,98,570/- by withdrawing development charges. The assessment was completed under section 153A r.w.s. 143(3) of the Act on 31.12.2009 determining the total income of the assessee at ₹.2,55,26,240/- and subsequently initiated penalty proceedings under section 271(1)(c) of the Act by issuing notice under section 274 r.w.s.

271(1)(c) of the Act dated 31.12.2009. In response to the notice issued by the Assessing Officer, the assessee has submitted its reply on 20.05.2010, which is reproduced as under:

*“Dear Sir,*

*Sub: Penalty u/s 271(1)(c) of the ITA Act for the AY 2006-07 – reg.  
PAN – AAICS0224K*

*In response to the above, we are submit that you have not specified distinct item in respect of which the proceedings u/s 271(1)(c) have been initiated. In the absence of the same, we are unable to decipher, why the said proceedings has been initiated, even though it is mentioned in the Assessment Order that penalty proceedings u/s 271(1)(c) of the IT Act, has been initiated. Probably it was a mistake, which happened in a routine manner.*

*Nevertheless, the only addition made in this Asst. Year is Rs.13,000/-, which is a disallowance u/s 40(a)(ia), on a technical ground. This does not call for description of concealment and penalty proceedings u/s 271(1)(c). In this regard we rely on the Supreme Court order dt. 17.03.2010 in the case of CIT, Ahmedabad Vs. Reliance Petroproducts Pvt. Ltd.*

*We pray that, as our case does not attract levy of penalty, the proceedings may be dropped.”*

15. During the course of penalty proceedings, by considering the explanation of the assessee, the Assessing Officer was of the opinion that the additional income of ₹.1,53,98,570/- admitted against the notice under section 153A of the Act was only after search conducted by the Department, otherwise, the assessee would not have disclosed the above income and thus, the disclosure made by the assessee

amounts to clear concealment of income thereby levied penalty under section 271(1)(c) of the Act on the entire income of ₹.2,55,26,240/- and levied minimum penalty of ₹.85,92,132/-. On appeal, the Id. CIT(A) deleted the entire penalty levied by the Assessing Officer. The relevant portion of the CIT(A)'s order is extracted as under:

*“6. I have carefully considered the facts of the case and the submission made by the ld. AR. I have also gone through the decisions relied on by the ld. AR. I have also gone through the returns of income filed on 30.11.2006 and 12.8.2009. It has wrongly been stated in the penalty order that the appellant had not filed any return of income u/s.139 of the Act. The assessee had e-filed his return for AY 2006-07 on 28.11.2006 declaring income of Rs.1,01,46,668/-. Subsequently, in response to the notice u/s.153A dated 29.9.2008, it filed return on 12.8.2009 admitting income of Rs.2,55,13,240/- inclusive of additional income of Rs.1,53,98,570/- by withdrawing claim of land development charges. In the assessment order, the same was accepted with a further addition of Rs.13,000/- only u/s.40(a)(ia). Thus, the total income determined was Rs.2,55,26,240/-. The AO has levied penalty on the entire assessed income. The main contention of the AO is that but for search operation u/s.132, the assessee would not have disclosed the income filed in response to notice u/s.153A. While doing so, he has ignored the return filed by assessee before the date of search on 28.11.2006 declaring income of Rs.1,01,46,668/-. No penalty could be levied on such voluntary income admitted by the assessee u/s.139(1) prior to the date of search. Hence, the issue for adjudication is the additional income of Rs.1,53,98,570/- towards withdrawal of land development charges and Rs.13,000/-being disallowance u/s.40(a)(ia).*

*6.1. As regards the penalty on additional amount of Rs.1,53,98,570/-, being withdrawal of land development charges, the AO has stated that but for search, the assessee would not have disclosed any income filed in response to notice u/s.153A. He has, however, not given any definite finding as to how it constitutes concealed income. While considering an appeal against an order made u/s.271(1)(c), what is required to be examined is the record which the AO imposing penalty had before him and if that record can sustain that there has been concealment or furnishing inaccurate particulars of income, that would be sufficient to sustain the penalty. At this juncture, it would be appropriate to note that the Explanation contained section in u/s.271(1)(c) is self contained in that it treats every difference between the reported and assessed income as concealed income, but at the same time, provides the*

*criteria where penalty would be warranted. Penalty is leviable for concealment where an assessee fails to offer any explanation for a difference or offers an explanation, which is found to be false. In the instant case, the amount has been voluntarily offered by the appellant in the return of income u/s.153A by withdrawing the land development expenses debited to the profit and loss account. The appellant has been able to offer an explanation which is satisfactory. Further, as submitted by the ld. AR, taxes have also been paid on the admitted income. The decision of the Hon'ble Supreme Court in the case of CIT v. Suresh Chandra Mittal 259 ITR 9 (SC) is relevant in such a situation. The Hon'ble Supreme Court held that penalty is not leviable if the assessee files revised return offering additional income. In that case, the assessee had originally filed returns showing meagre income. When, after search action u/s.132, a notice u/s.148 was served on him, he filed revised returns showing higher income. Subsequently, assessment order was passed and the return submitted was regularized u/s.148. In penalty proceedings u/s.271(1)(c), the assessee claimed that he offered additional income to buy peace of mind and avoid litigation. A.O. did not accept the contention and levied penalty which was confirmed by CIT(A). But the ITAT held that the department has not discharged its burden of proving concealment and had simply rested its conclusion on the act of voluntary surrender done by assessee on good faith, and that penalty order could not be levied on such income. On a reference, the Hon'ble High Court held that no penalty could be levied for concealment. The Department preferred appeals to the Hon'ble Supreme Court. The Hon'ble Supreme Court dismissed the appeals holding that no interference with the order of the High Court was called for (251 ITR 9). There is no reason as to why the ratio of the above decision will not be applicable to the facts of the present case. Here also, a search action u/s.132 was carried out at the premises of the assessee. The appellant had filed original return of income on 28.11.2006 declaring income of Rs.1,01,46,668/-. Subsequent to search u/s.132, it filed return of income in response to the notice u/s.153A wherein it has offered additional income of Rs.1,53,98,570/- by withdrawing the claim of land development expenses. The AO has also accepted the above income in the assessment order. There is no definite finding regarding concealment of income of furnishing of inaccurate particulars of such income. The appellant did not file any appeal because addition of Rs.13,000/- only was made u/s.40(a)(ia) to the returned income. Moreover, it is well settled that assessment and penalty proceedings are separate. In view of these facts and respectfully following the above decision, I am of the considered opinion that penalty cannot be levied on the additional income offered by the assessee.*

*6.2. As rewards disallowance u/s.40(a)(ia), it may be stated that penalty was not initiated on this addition of Rs.13,000/- in the assessment order. However, penalty has been levied because the entire assessed income was subjected to penalty u/s.271(1)(c). The Hon'ble ITAT(SB), Vishakhapatnam in the case of Marilyn Shipping & Transport v. Addl. CIT, (2012) 20*

*taxmann.com 244 has held that provisions of sec.40(a)(ia) are applicable only to amounts of expenditure payable as on 31st March of the previous year and not to actual amounts paid during the previous year without deduction of TDS. When the addition itself is not sustainable, there is no question of levy of penalty on such addition. The Hon'ble Supreme Court in CIT v. Reliance Petroproducts Pvt. Ltd., 322 ITR 158 has also held that disallowance of expenses per se will not amount to furnishing inaccurate particulars of income. Hence, the penalty is not leviable on this addition. In the result, the ground is allowed."*

16. The only issue for consideration as raised by the Revenue in appeal before us is whether the penalty levied by the Assessing Officer in respect of the additional income of ₹.1,53,98,570/- declared by the assessee subsequent to the search attracts the provisions of section 271(1)(c) of the Act or not.

17. In this case, the Assessing Officer has initiated penalty proceedings on the ground that the additional income disclosed by the assessee was only because of the search conducted by the Department. In the penalty order, the Assessing Officer has noted that in the final accounts for the financial year 2005-06, an amount of ₹.1,53,98,570/- had been debited to "Land Development Cost" by giving corresponding credit to "Advances from allottees. From the above, the Assessing Officer came to a conclusion that it is clear concealment of income and levied penalty under section 271(1)(c) of the Act. On appeal, the Id. CIT(A) deleted the penalty for reason that

the penalty under section 271(1)(c) of the Act is leviable only, if an assessee fails to offer an explanation for the difference amount or give an explanation which is found to be false. In the present case, the Id. CIT(A) observed that the amount is voluntarily offered by the assessee in response to notice under section 153A of the Act by withdrawing the land development expenses debited to profit and loss account and the explanation offered by the assessee is satisfactory and the assessee paid taxes on the admitted income. By following the judgement of the Hon'ble Supreme Court in the case of CIT v. Suresh Chandra Mittal (supra), the Id.CIT(A) has deleted the penalty levied by the Assessing Officer. In this case, when the Assessing Officer has issued notice to the assessee to explain the concealment of income, the assessee has not given any explanation except stating that notice issued under section 271(1)(c) is vague because, the Assessing Officer had not specified whether the penalty is on account of concealment of income or furnishing inaccurate particulars of income. It was further replied that the addition is only of ₹.13,000/- disallowed under section 40(a)(ia) of the Act, which is on technical ground and as per the judgement of the Hon'ble Supreme Court order dated 17.03.2010 in the case of CIT v. Reliance Petroproducts Pvt. Ltd. (supra), on technical ground no

penalty is leviable. This is the explanation given by the assessee before the Assessing Officer during the course of penalty proceedings. The case of the Revenue is that the assessee has originally filed the return of income on 28.11.2006 declaring income of ₹.1,01,14,668/- and subsequently, after search, an amount of ₹.1,53,98,570/- was offered for taxation for which the assessee has not offered any explanation before the Assessing Officer during the course of penalty proceedings. Thus, the Assessing Officer was not in a position to examine the additional income declared by the assessee and therefore, the Assessing Officer came to a conclusion that the additional income declared by the assessee is a concealed income. Once the assessee has not offered any explanation before the Assessing Officer during the course of penalty proceedings, in our opinion, it is a deemed concealment and the Id. CIT(A) wrongly presumed that the assessee has offered explanation, which was not found by the assessing Officer false and the amount offered by the assessee is voluntary. In the CIT(A)'s order, nowhere he has stated what was the explanation offered by the assessee and why the additional income of ₹.1,53,98,570/- was not reflected in the original return of income and also, subsequent to the search, how the

additional income declared by the assessee is a voluntary declaration. Without discussing anything, simply the Id. CIT(A) came to a conclusion that the assessee has explained the additional income declared and additional income declared by the assessee is voluntary and the Hon'ble Supreme Court decision in the case of CIT v. Suresh Chandra Mittal (supra) applies. In our opinion, the Id. CIT(A), without examining the Explanation 5A to section 271(1)(c) of the Act prior to amendment and subsequent to the amendment, which is a correct statute to be applied and to adjudicate in respect of the penalty levied by the Assessing Officer, decided the issue. In our opinion, the Id. CIT(A) was not correct in deleting the penalty.

18. To decide this ground of appeal raised by the Department, it is necessary to examine the provisions of Explanation 5A to section 271(1)(c) of the Act prior to amendment and after the amendment. The relevant portion of the provision of original and amendment to Explanation 5A to section 271(1)(c) of the Act are extracted as under:

*“Explanation 5A – Where in the course of search initiated under section 132 on or after the 1<sup>st</sup> day of June, 2007, the assessee is found to be the owner of –*

- (i) any money, bullion, jewellery or other valuable article or thing (hereinafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired*

*by him by utilizing (wholly or in part) his income for any previous year; or*

- (ii) *any income based on any entry in any books of account or other documents or 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 the search and the due date for filing the return of income for such year has expired and 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 the 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”.*

19. Subsequent to the amendment substituted by Finance (No. 2) Act, 2009, w.r.e.f. 01.06.2007 to Explanation 5A to section 271(1)(c) of the Act is extracted as under:

*Explanation 5A – Where, in the course of a search initiated under section 132 on or after the 1<sup>st</sup> day of June, 2007, the assessee is found to be the owner of –*

- (i) *any money, bullion, jewellery or other valuable article or thing (hereinafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income for any previous year; or*
- (ii) *any income based on any entry in any books of account or other documents or 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 the 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 such-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.]*

20. From the above, it is very clear that the pre-amended Explanation was limited to non-filer assesseees, whereas, this anomaly was corrected in substituted Explanation. To elaborate, while the original Explanation introduced by Finance Act, 2007, w.e.f. 01.06.2007 held that the persons found guilty of concealment of income where return was not filed. The substituted Finance Act to Explanation 5A to section 271(1)(c) with retrospective effect from 01.06.2007 by Finance (No.2) Act, 2009 attempted to cover both who files the return of income and also not filed the return of income for the purpose of imposing penalty on undisclosed income found.

21. In the present case, though the assessee filed original return of income on 28.11.2006, subsequent to the search, the assessee filed return of income on 12.08.2009. By the time the return filed by the assessee by disclosing undisclosed income of the assessee,

Explanation 5A to section 271(1)(c) of the Act substituted by Finance (No. 2) Act, 2009 w.r.e.f. 01.06.2007 is already exist in the statute. As per the Explanation 5A to section 271(1)(c) of the Act substituted by the Finance Act, the amount disclosed by the assessee is clearly deemed concealment of income. Though the Assessing Officer has levied penalty for the entire income, in our opinion, the Assessing Officer has rightly imposed penalty on the undisclosed income to the extent of ₹.1,53,98,570/-.

22. In so far as the arguments of the Id. Counsel for the assessee that the amount offered by the assessee is voluntary and therefore, the penalty cannot be levied is concerned, we find that the assessee has not given any explanation before the Assessing Officer during the course of penalty proceedings. That apart, when the search was conducted and books of accounts seized and when it was pointed out to the assessee that from the books of accounts that the amount of land development expenses debited to the profit and loss account, the assessee without giving any explanation why this expenses are debited, the same is offered for taxation as undisclosed income. Under the above facts and circumstances, we are of the opinion that the

disclosure made by the assessee subsequent to search is not voluntary disclosure. Therefore, the argument of the Id. Counsel for the assessee is rejected.

23. So far as the case law relied by the Id. Counsel for the assessee in the case of Atlanta Electricals (P.) Ltd. v. ACIT (supra) is concerned, in that case, the assessee has filed return of income under section 139 of the Act prior to search as well as return filed under section 153C of the Act prior to the substitution of Explanation came into force and governed by pre-amended Explanation 5A to section 271(1)(c) of the Act and therefore, the Ahmedabad Benches of the ITAT has held that penalty under section 271(1)(c) of the Act has no application. Whereas, in the present case, the facts are entirely different, which we have discussed hereinabove and the case law relied upon by the Id. Counsel for the assessee has no application.

24. The case law relied on by the Id. CIT(A) in the case of CIT v. Suresh Chandra Mittal (supra) has no application to the facts of the present case.

25. In view of the above, we are of the opinion that the Explanation 5A inserted by Finance (No. 2) Act, 2009 clearly applies to the facts of

the present case and therefore, the additional income disclosed by the assessee subsequent to the search is a deemed concealment of income. In view of the above, we reverse the order of the Id. CIT(A) and upheld the penalty levied by the Assessing Officer to the extent of ₹.1,53,98,570/- declared by the assessee by filing revised return of income dated 12.08.2009 subsequent to the search.

25. In the result, the appeal filed by the Revenue is allowed.

Order pronounced on the 16<sup>th</sup> December, 2021 at Chennai.

Sd/-  
(G. MANJUNATHA)  
ACCOUNTANT MEMBER

Sd/-  
(V. DURGA RAO)  
JUDICIAL MEMBER

Chennai, Dated, the 16.12.2021

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant, 2. प्रत्यर्थी/Respondent, 3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5. विभागीय प्रतिनिधि/DR & 6. गार्ड फाईल/GF.