IN THE INCOME TAX APPELLATE TRIBUNAL,
'A' BENCH, KOLKATA

Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Girish Agrawal, Accountant Member

I.T.A. Nos. 301 & 305/KOL/2022
Assessment Years: 2007-2008 & 2011-2012

Beni Prasad Lahoti,.....Appellant
12, Hardutt Rai Chamaria Road,
Howrah-711101
[PAN: AAUPL9647E]

-Vs.-

Deputy Commissioner of Income Tax,.....Respondent
Central Circle-2(2), Kolkata,
Aayakar Bhawan (Poorva),
110, Shanti Palli, Kolkata-700107

Appearances by:
Shri Rajeeva Kumar, Advocate, appeared on behalf of the assessee
Shri Vijay Kumar, Addl. CIT, Sr. D.R., appeared on behalf of the Revenue

Date of concluding the hearing : October 20, 2022
Date of pronouncing the order : 12/12/2022

O R D E R

Per Girish Agrawal, Accountant Member:-

The present two appeals by the assessee arise out of the respective orders of ld. Commissioner of Income Tax(Appeals)-20,Kolkata for assessment years2007-2008 and 2011-12 vide order dated 23.12.2021 against the penalty

order passed under section 271(1)(c) of the Income-tax Act (hereinafter referred to as the 'Act') dated 30.03.2015 passed by DCIT, Central Circle-2(2), Kolkata.

2. Registry has pointed out that both the appeals are time-barred by 95 days, but it is to be observed that the impugned order was passed on 23.12.2021 for both the assessment years after the COVID period started and the appeals have been filed before the Tribunal in September, 2022. The period of limitation is being excluded by the Hon'ble Supreme Court in its order, passed time to time in *suo motu* Writ Petition No. 3 of 2020. The directions have been issued by the Hon'ble Court and have been extended from time to time and if the COVID period is being excluded keeping in view the Hon'ble Supreme Court's order, then there is no substantial delay in filing the appeals on the part of the assessee. Therefore, we condone the delay and proceed to decide the appeals on merit.

3. In both the appeals, the assessee has challenged the imposition of penalty of Rs.33,609/- in A.Y. 2007-08 and Rs.1,35,315/- in A.Y. 2011-12. Since common grounds are involved in both the years, we take up the matter for A.Y. 2007-08 to discuss the facts and merits of the case, which will apply *mutatis mutandis* for appeal relating to A.Y. 2011-12 also.

4. Brief facts of the case are that assessee filed his original return of income on 31.10.2007 reporting total

income of Rs.92,066/-. A search and seizure operation under section 132 of the Act was conducted on 18.02.2013, which included the residence of the assessee also. Subsequently, notice under section 153A of the Act was issued on 08.05.2014, which was served upon the assessee, asking for filing the return of total income. In response to notice under section 153A of the Act, assessee filed his return of income on 31.10.2014 reporting a total income of Rs.1,41,420/-, which included an additional income of Rs.50,000/- towards brokerage and commission.

4.1. It is pertinent to note that in a joint disclosure petition dated 16.04.2013, assessee along with one Shri Hari Prasad Rathi had jointly disclosed Rs.11,00,00,000/- for assessment year 2007-08 to assessment year 2013-14 on account of brokerage and commission income and commodity trading profit. Out of jointly disclosed amount of Rs.11,00,00,000/-, assessee had disclosed Rs.9,00,00,000/- and Shri Hari Prasad Rathi disclosed the balance of Rs.2,00,00,000/- as undisclosed income, for which year-wise break-up was given and is tabulated in para-4 of the assessment order passed under section 153A read with section 143(3) of the Act dated 31.03.2015.

5. In the impugned penalty order passed under section 271(1)(c) read with section 274 of the Act dated 30.09.2015, ld. Assessing Officer imposed the penalty by invoking provisions of Explanation 5A to Section 271(1)(c) of the Act by noting that the assessee had not filed his return of

income disclosing the brokerage and commission income of Rs.50,000/- before the search and seizure operation. It was because of a search operation that the assessee was forced to disclose his concealed income. Had the search and seizure operation not been conducted in his case, assessee would have never disclosed the concealed income as additional income and filed return of income accordingly. Hence, it is clear that assessee did not disclose this income voluntarily. Therefore, it cannot be claimed that the assessee has followed the Rule of Law. Aggrieved, the assessee went in appeal before the ld. CIT(Appeals), who confirmed the penalty so imposed.

6. Aggrieved, the assessee is in appeal before the Tribunal.

7. Before us, the sole issue required to be adjudicated upon is whether the additional income disclosed in the return filed in response to notice under section 153A of the Act was a voluntary disclosure of income with a view to buy peace and, therefore, the alleged voluntary disclosure of income does not fall within the mischief of deemed concealment provided in Explanation 5 of Section 271(1)(c) of the Act.

7.1. The case of the assessee is that since his income has been accepted by the AO, as it is, without making any addition or without referring any seized material exhibiting the unearth of money, bullion, diamonds or any other asset, would suggest that the alleged undisclosed income would not fall within the ambit of concealed income provided in Explanation-5A appended with section 271(1)(c) of

the Act. On the other hand, the case of the department is, that had the additional income been disclosed voluntarily in response to the notice under section 153A, then, why such income was not disclosed in the original return filed by the assessees prior to the search ? The disclosure of additional income is result of search as made out in the joint disclosure petition dated 16.04.2013. Therefore, the alleged additional income assessed in the hands of the assessee is deemed to be a concealed income for the purpose of visiting him with penalty under section 271(1)(c) r.w.s Explanation-5A of the Act.

8. Explanation 5A to Section 271(1)(c) is reproduced 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".*

9. From the perusal of above provision, it is observed 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 utilsing 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 Section 271 of the Act be deemed to have been concealed particulars of income or furnished inaccurate particulars.

9.1. In a given situation, no money or bullion or jewellery or income might have been found from the assessee for the assessment years which are covered within the provisions of section 153A, 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 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. 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 he

has disclosed this amount only when some incriminating material was found. To our mind this assumption ought to be supported with reference of that specific incriminating material. Let us see the finding in the assessment order. In paras 4.1 to 4.3 of the said assessment order, the ld. AO has noted as under:-

> *"4.1.As per the disclosure petition dated 16.04.2013, the assessee disclosed Rs.50,000/- as income from 'Brokerage & Commission' for the F,Y, 2006-07 relevant to the A.Y. 2007-08.*
>
> *4.2 It is seen from the return that the assessee has disclosed the amount in the return of income under the head of 'income from other sources' thereby increasing the income by Rs.50,000/-.*
>
> *4.3. As the undisclosed income stated above has already been included in the gross total income of the assessee, no further addition has been made in this regard".*

10. Relevant extracts pertaining to the issue under consideration, vis-a-vis Explanation 5A of Section 271(1)(c) are already reproduced above. From the above observations of ld. Assessing Officer in the assessment order and the material placed on record, we note that the entire case of Revenue for imposing the penalty is based on the disclosure petition filed by the assessee jointly with Shri Hari Prasad Rathi dated 16.04.2013 after the conduct of search on 18.02.2013.

11. The evidentiary value of such statement has been explained in various authoritative pronouncements. Let us first take note of section 132(4) of the Act.

> *"The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income- tax Act, 1922 (11 of 1922), or under this Act.*
>
> *Explanation.- For the removal of doubts, it is hereby declared that the examination of any person under this sub- section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Indian Income- tax Act, 1922 (11 of 1922), or under this Act."*

12. A bare perusal of section would reveal that it empowers the authorized officer to examine, during the course of search or seizure, any person on oath. The disclosure made during the statement recorded under this section will be admitted in the evidence and can be used against the assessee in the proceeding.

13. No doubt, disclosure or admission made under section 132(4) of the Act during the course of search proceedings is admissible evidence, but not conclusive one. This presumption of admissibility of evidence is a rebuttable one, and if an assessee is able to demonstrate with the help of some material that such admission was either mistaken, untrue or based on misconception of facts, then, solely on the basis of such admission, no addition is required to be made. It is true that admission being declaration against an interest are good evidence, but they are not conclusive, and a party is always at liberty

to withdraw the admission by demonstrating that they are either mistaken or untrue. In law, the retracted confession even may form the legal basis of admission, if the AO is satisfied that it was true and was voluntarily made. But then basing the addition on a retracted declaration solely would not be safe. It is not a strict rule of law, but only a matter of prudence. As a general rule, it is unsafe to rely upon a retracted confession without corroborative evidence. Due to this grey situation, CBDT issued Circular No.286/2/2003 prohibiting the departmental officials from taking confession in the search. The board is of the view that often the officials used to obtain confessions from the assessee and stop further recovery of the material. Such confessions have been retracted and then the addition could not withstand the scrutiny of the higher appellate authority, because no material was found, supporting such addition.

14. Thus, keeping the provisions of section 132(4) in juktaposition with provisions of Explanation 5A to Section 271(1)(c), the inference of ownership of any money, bullion, jewellery or other valuable articles, to our mind, ought not be based merely on the joint disclosure petition dated 16.04.2013. When the assessee has taken specific plea that no money, bullion or jewellery or income based on any entries in any books of account or other documents for these two assessment years was found during the course of search, ld. Assessing Officer ought to have immediately referred the documents, entries or any asset found, which is relevant to these assessment years in the penalty proceedings. He should have rejected the explanation of the assessee by demonstrating it as incorrect. Rather, the authorities have proceeded on the assumption that had there been no money, bullion, jewellery or income based on entries was not found,

the assessee would not have made voluntary disclosure of the income in his returns. To our mind, inference of availability of money, bullion or assets or income embedded in the entries cannot be drawn merely from the disclosure petition referred above. These should have been found in physical form and pertaining to these specific years in the course of conduct of such and seizure operation, only then deeming fiction of concealment as stated in Explanation 5A of Section 271(1)(c) would get triggered. Thus, revenue authorities have not referred any documentary evidence demonstrating the fact that voluntary incomes offered by the assessee in these two years were actually unearthed during the course of search and are based on any entry in any books of account or other documents so unearthed which are specific to such additions whereon impugned penalty is imposed. Therefore, to our mind, penalty so imposed by applying Explanation 5A to Section 271(1)(c) deserves to be deleted. Accordingly, appeal of the assessee is allowed and the penalty so imposed is deleted. These findings apply *mutatis mutandis* to the other assessment year i.e. A.Y. 2011-12 and the same is also allowed.

15. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open Court on 12th December, 2022.

Sd/-	Sd/-
(Rajpal Yadav)	**(Girish Agrawal)**
Vice-President(KZ)	**Accountant Member**

Kolkata, the day of 12/12/2022

Copies to : *(1)* ***Beni Prasad Lahoti,***
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(2) Deputy Commissioner of Income Tax,
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(3) Commissioner of Income Tax (Appeals)-20, Kolkata;
(4) Commissioner of Income Tax, Kolkata- ;
(5) The Departmental Representative
(6) Guard File

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By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.