

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

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA Nos. 208 & 209/JP/2023
निर्धारण वर्ष / Assessment Years : 2015-16 & 2016-17

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| DCIT, Central Circle, Ajmer | बनाम Vs. | Yashwant Kumar Sharma F-108, Industrial Area, Makhupura Parbatpura, Ajmer |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ASWPS 3791 E | | |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

निर्धारिती की ओर से / Assessee by : Sh. C. M. Agarwal (CA)
राजस्व की ओर से / Revenue by : Sh. James Kurian (CIT) &
Sh. A. S. Nehara (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 18/05/2023
उदघोषणा की तारीख / Date of Pronouncement: 10/07/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

There are the two appeals filed by the revenue which are arising out of the order of the Commissioner of Income Tax (Appeals), Udaipur-2 [hereinafter referred to as Ld. CIT(A)] for the assessment years 2015-16 & 2016-17 dated 23.01.2023 which in turn arises from the order passed by the DCIT/ACIT, Central Circle, Ajmer as per provision of Section 271(1)(c) of the Income tax Act, 1961 (in short 'the Act') dated 18.03.2022.

2. Since the issues involved in both the appeals of the revenue for all both the year and relates to the same assessee involving identical facts, issues and even the grounds of the revenue being similar these two appeals were heard together with the agreement of both the parties and are being disposed off by this consolidated order.

3. At the outset, the Id. DR has submitted that the matter in ITA no. 208/JP/2023 for A.Y 2015-16 may be taken as a lead case for discussions as the issues involved in the lead case are common and inextricably interlinked or in fact interwoven and the facts and circumstances of other year are identical except the difference in the amount in other assessment year. The Id. AR did not raise any specific objection against taking that case as a lead case. Therefore, for the purpose of the present discussions, the case of ITA No. 208/JP/2023 is taken as a lead case.

3.1 Based on the above arguments we have also seen that for both the appeals grounds are similar, facts are similar and arguments were similar and therefore, were heard together these two appeals and are disposed by taking lead case facts, grounds, and arguments from the folder in ITA No. 208/JP/2023 and our findings will equally applicable in the case in ITA no. 209/JP/2023.

4. Before moving towards the facts of the case we would like to mention that the revenue has assailed the appeal in ITA No. 208/JP/2023 on the following grounds;

“1. Ground 1. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in deleting penalty for Rs. 1,35,55,000/- u/s 271(1)(c) of the I.T. Act, for the assessment year 2015-16.

2. Ground 2. The Ld. CIT(A) erred in law in deleting the penalty order passed by the Id. AO upon the premise that notice u/s 274 r.w.s 271(1)(c) does not unambiguously state whether the Appellant has concealed its income or furnished inaccurate particular thereof, particularly when the outcome of wrongful act of concealment or of furnishing of incurrent particulars of income, is evasion of tax.

3. Ground 3. The learned CIT appeals has erred in law as his decision is premature, when he has deleted the penalty levied under section 271(1)(c) of the Income Tax Act, 1961 holding that the assessing officer has not specified whether penalty is to be levied under section 271(1)(c) for concealment of income or for furnishing of inaccurate particulars of income, particularly when the matter has not attained finality as the SLP that has been dismissed by Honourable Supreme Court is merely a dismissal and not a speaking order, and as such, does not lay down the law of the land.

4. Ground 4. Whether the Id. CIT(A) erred in law in deleting the penalty imposed under section 271(1)(c) of the Income Tax Act, 1961 amounting to Rs. 1,35,55,000/-, without considering that the undisclosed income was detected solely in consequence of the search action taken by the department and the disclosure of additional income was not voluntary, as per Explanation 5A to section 271(1)(c) of the Act?

5. Ground 5 The appellant craves leave to add, amend or withdraw any of the grounds of appeal during the course of appeal proceedings.”

5. The fact as culled out from the records is that the assessee has filed its original return of income u/s on 18.03.2016 declaring taxable income of Rs. 12,96,980/-. Later on a search & seizure action u/s 132(1) of the Income Tax Act, 1961 was carried out at the residential and business

premises of assessee group and his family members i.e. Bhagwati Group, Ajmer on 13.02.2020. During search and seizure proceedings, certain incriminating documents/loose papers, Books of accounts etc. were found from the premises of one of group assessee. Consequent to search in response to notice u/s 153A of the Act, the assessee filed his return of income on 15.09.2021 declaring total income of Rs. 4,11,10,250/-. The returned total income includes a sum of Rs. 3,98,13,270/- undisclosed income admitted during search. Finally the return of income declared u/s. 153A of Act was accepted by the assessing officer. But as the difference of Rs. 3,98,13,270/- between return of income originally filed on 18.03.2016 and on 15.09.2021 in response to notice u/s. 153A is mainly undisclosed income/profit under the head business or profession. Therefore, the concealing particulars of income / furnishing inaccurate particulars of income, penalty proceeding u/s. 271(1)(c) of the Act initiated separately. Based on these facts the assessment was completed u/s. 143(3) r.w.s 153A/153B of the Act.

5.1 On culmination of the assessment proceeding as he has initiated the proceeding u/s. 271(1)(c) of the Act he has in his penalty order noted that as the undisclosed income of Rs. 3,98,13,270/- was not declared in the ITR

originally filed under section 139(1). Though the assessee had declared the same in the ITR filed under section 153A, but that does not give immunity to the assessee from the levy a penalty under section 271(1)(c) of the act as the detection of undisclosed income was taken place in consequence to the search action and that too was on the basis of material seized. If the search action would not have been initiated, the undisclosed income could not be unearthed. Therefore, the means rea is proved from all the facts and circumstances discussed above, which make the assessee liable for imposition of penalty under section 271(1)(c) of the act. Explanation 5A to the section 271(1)(c) of the act is clearly applicable. In view of the stated fact that the assessing officer was of the view that the assessee has concealed the particulars of income within the meaning and purview of section 271(1)(c) of the act. Therefore, the assessing officer levied the penalty of Rs. 1,35,55,000/- vide order dated 18.03.2022.

6. Feeling dissatisfied from the order of the assessing officer levying the penalty assessee filed an appeal before the Id. CIT(A). A propose to the grounds so raised by the assessee the relevant finding of the Id. CIT(A) is reiterated here in below:

"6. I have considered the facts of the case, gone through the relevant assessment orders, penalty orders and submission of the appellant and the various case laws.

6.1 The AO has levied penalty u/s 271(1)(c) the I.T. Act 1961 in the case of appellant on the following reasons

1. The assessee declared additional income in the return of income filed u/s 153A since search/action of the Act was conducted in this case.
2. Had the search not been conducted such additional income would not have been detected.
3. The disclosure of additional income is not voluntary.
4. In this case explanation 5A to the section 271(1)(c) are applicable.

6.2 In the Assessment order the AO has mentioned about the undisclosed income as under:-

"6. The assessee had filed original return of income on 18.03.2016 declaring their in total income of Rs. 12,96,980/- Total income of Rs. 4,11,10,250/- was offered in the return of income filed on 15.09.2021 in compliance to notice u/s 153A of the Income-tax Act. The Difference of Rs. 3,98,13,270/- between Return of Income, originally filed on 18.03.2016 and on 15.09.2021 in response to notice u/s 153A, is mainly undisclosed income/profit under the Head of Business or profession.

Therefore, for concealing particulars of income/furnishing inaccurate particulars of Income, Penalty Proceedings u/s 271(1)(c) of the Income- tax Act, 1961, are being initiated separately.

7. In view of the above, total income of the assessee is computed as under:-

| | |
|------------------------|-------------------|
| Return Income u/s 153A | Rs. 4,11,10,250/- |
| Total Assessed Income | Rs. 4,11,10,250/- |

6.3 The penalty notice u/s/274 read with section 271 of the I. T. Act 1961 issued in the case of appellant on 30.09.2021 is reproduced as under:-

OFFICE OF THE
ASSTT. COMMISSIONER OF INCOME-TAX
CENTRAL CIRCLE, AJMER

PENALTY NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF THE I.T. ACT, 1961

PAN NO. ASWPS3791E Date: 30.09.2021


To

Yashwant Sharma
F-108, Industrial Area, Makhapura, Purbatpura, Ajmer


Whereas in the course of IT proceeding before me for the A.Y2015-16, it appear to me that you have -

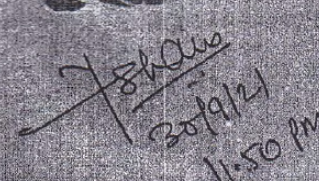
| READ WITH SECTION | |
|-------------------|---|
| 271(1)(c) | Concealed particular of income or furnished inaccurate particulars of income. |

You are hereby requested to appear before me on 18.10.2021 at 11:45A.M./P.M. and show cause why the orders imposing aforesaid penalty/penalties on you should not be made of the I.T. Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative you may show cause in writing on or before the said date which will be considered before any such order are made.


(Manmohan Kandpal)
Asstt. Commissioner of Income-tax
Central Circle, Ajmer

1. This communication issues manually without a DIN on account of reason/reasons given in para 3(ii) of the CBDT Circular no. 19/2019 dated 14.08.2019 and with the approval of the Director General of Income Tax, Rajasthan Jaipur's Vice Number 1362 dated 29.09.2021.





In this notice the AO has not specified whether the penalty is initiated for concealment of income or for furnishing inaccurate particulars of income.

6.4 The appellant has argued that in the assessment order the AO has not made any reference to any undisclosed income having been detected during the course of search or having been admitted by the appellant during the course of search in the statement recorded u/s 132(4). Disclosure of additional income in the return of income filed in response to the notice u/s 153A of the I. T. Act 1961 was voluntary. No addition made by the AO in the returned income declared in the returned

income filed u/s 153A of the Income Tax Act. No specific satisfaction as to concealment of income or furnishing inaccurate particulars of income is there in the show cause notice. Evidently, the AO was not sure of any concealment of income by the assessee or filing of inaccurate particulars of income by the assessee till the passing of assessment order. Before levying penalty u/s 271(1)(c) of the I.T. Act it is mandatory that the assessee is made aware of the specific charge against him for which the assessee is to be proceeded with by issuing a specific show cause notice. On the merits also the AO has accepted the returned income without finding any error in the returned income filed of the appellant. The AO has not mentioned as to how the disclosure of additional income in the return of income file by the appellant not voluntary.

6.5 The arguments raised by the appellant with respect to initiation of penalty u/s 271(1)(c) in the assessment order are found to be true as the assessing officer has not specified. Whether the penalty is initiated for concealment of income/pr. for furnishing inaccurate particulars of income. In the penalty notice also the Ro/has not speed the charge as to whether the penalty is initiated for concealment particulars of income or for furnishing inaccurate particulars of income. The appellant has relied upon the decision of Hon'ble Supreme Court in the case of CIT and ANR. V/s M/s SSA'S Emerald Meadows special Leave Appeal (C) /2016 (CC No. 11485/2016). In this case SLP filed by the revenue was dismissed. The decision which was subject matter of appeal was rendered by Hon'ble High court of Karnataka, Bengaluru in ITA No. 380 of 2015. In this decision it was held that notice issued by the AO under section 274 r.w.s. 271(1)(c) of the Income-tax Act to be bad in law as it did not specify which limb of section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e. whether for concealment of particulars of income or furnishing of inaccurate particulars of income. Following the decision of Apex Court, the notice issued by the AO is found to be bad in law and therefore, penalty levied by the AO is directed to be deleted. This ground of appeal is allowed accordingly.

7. The last Ground of Appeal is that the appellant craves leave to add, alter, amend or withdraw any of the grounds of appeal during the course of appellate proceedings.

7.1 The appellant has not added or altered, amend or withdraw any of the above mentioned grounds of appeal. Accordingly, such mention by the appellant in its ground is treated as general in nature, no needing any specific adjudication and is accordingly treated as disposed off.

8. In the result the appeal is treated as allowed.”

7. As the revenue dissatisfied with the order of the Id. CIT(A), has challenged the order of the Id. CIT(A) on the grounds as reiterated here in above paras. A propose to the grounds so raised the Id. DR is heard who has relied on the findings of assessing officer and submitted that the assessee has disclosed income of Rs. 12,96,980/- in the original return of income and pursuant to the search assessee has disclosed a sum of Rs. 3,98,13,270/- as additional income in the return filed u/s. 153A of the Act and the same is supported by the statement recorded u/s. 132(4) of the Act. Thus, though the assessment was completed accepting the income as per the return filed in response to notice u/s. 153A of the Act and as the assessee avoided this income is liable for the penalty as per provision of section 271(1)(c) of the Act as the assessee has not disclosed huge income but has disclosed only on account of the search action initiated by the revenue. The Id. CIT(A) has deleted the penalty merely on the ground that the Id. AO has not specified the limb penalty levied should not have been deleted. In support of the arguments the Id. DR also relied upon on the following decisions:

| S. No. | Description of the case | Page No. |
|--------|--|----------|
| 1 | [1994] 75 Taxman 549 (Bombay) High Court of Bombay Commissioner of Income-tax v. Smt. Kaushalya* | 1-6 |
| 2 | [1984] 16 Taxman 224 (Pat.) High Court of Patna Commissioner of Income-tax v. Mithila Motors (P.) Ltd. | 7-10 |
| 3 | [2017] 84 taxmann.com 51 (Mumbai-Trib.) in the ITAT Mumbai Bench 'E' Earthmoving Equipment Service Corporation v. Deputy Commissioner of Income-tax, 22(2), Mumbai | 11-15 |

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|---|---|-------|
| 4 | Dhanraj Mills Pvt. Ltd. vs. ACIT ITA Nos. 3830 & 3833/Mum/2009 Assessment Years: 1987-88 & 1998-99 | 16-32 |
|---|---|-------|

8. On the other hand, the Id. AR of the assessee relied upon the detailed written submission made before the Id. CIT(A), as the same was reproduced in the order of the Id. CIT(A) the same was not reiterated for the sake brevity. He also submitted that all the aspects as argued by the Id. DR already been considered by the Id. CIT(A) and the Id. CIT(A) has in his detailed order decided that the assessee is not liable for the penalty amount as the conditions prescribed in the explanation 5A are not satisfied. The Id. AR of the assessee has relied upon the following decisions in support of the arguments advanced before us:

- Shantilal Jain DBIT No. 26/2018
- Shri Krishan Lal Madhok (Del) ITA No. 6422/Del/2018 06.09.2021
- Kriti Dahyabhai Patel (2015) 280 CTR (Guj) 2016

9. We have heard the rival contentions and perused the material placed on record and gone through the judicial precedence cited before us to drive home to the contentions raised by the rival parties. The bench noted that the disclosure made by the assessee in the statement recorded u/s. 132(4) of the Act will be useful to decide the case on hand the same is reproduced here in below for the sake of convenience:

प्रश्न 6. आप को Annex-A5 exhibit No.2 जो कि आपकी कम्पनी में भगवती में भगवती मशीन प्रा. लि. से संबंधित है को आयकर अधिनियम की धारा 132 के तहत Seized किया गया है। कृपया इन लूज दस्तावेजों को Pagewise

में दर्ज विवरण के बारे में बताएं ? इन सभी page wise papers/ documents का आपके कम्पनी के कर्मचारी श्री आत्माराम शर्मा, purchase magnager का बयान हो चुका है। उनका बयान आपको दिखा दिया गया रहा हूं। exhibit no.2 में कुल पेज 66 है। कृपया इसके बारे में अपना पक्ष प्रस्तुत करें ?

उत्तर हां मैने पूरे exhibit no.2 के पेज न. 1 से 66 तक देख लिया है। इसमें मुख्यतः जो cash Advance , मशीनरी बेचने में हमें प्राप्त होते है, उसकी हिसाब लिखा जाता है। इसमें, इसके सामने जो भी Case payment दिया है उसका भी हिसाब लिखा हे इन सभी हिसाबों का समरी पेज न. 45 से 59 तक लिखा गया है। अतः मै पूरे Seized documents जो कि मेरे ऑफिस परिसर में मिले है उसके Basis पर मेरे अनुसार मेरी कम्पनी को Net Undisclosed Income लगभग रूप्ये 6.10 करोड़ (रूपये छः करोड़ दस लाख) होती है। मै इस Undisclosed Income पर जो भी वर्श वार्डज टैक्स बनेगा उसे मै समय पर जमा कर दुंगा। मेरे कर्मचारी श्री आत्माराम शर्मा purchase magnager के बयान पेज न. 1 से 10 तक को (प्रश्न सं. 1 से 13 तक) पढ़ लिया है तथा उनके बयान से मै पूर्णतः सहमत हूं।

It is evident that the income disclosed by the assessee is voluntary based on the loose paper. It is also not disputed that against this income the revenue could corroborate the disclosure amount with any money, bullion, jewellery or other valuable article or thing (referred to as assets). The bench also noted that in the assessment order consequent to the search passed by the assessing officer the explanation of 5 of section 271(1)(c) of the Act is not invoked or discussed so as to establish the levy of the penalty and the order has been passed accepting the returned income of the assessee. In the assessment order the assessing officer has simply accepted the additional income which is not claimed to have been supported by any undisclosed money, bullion, jewellery or other valuable article or thing. In the light of the these fact we are of the view that the explanation 5 of section 271(1)(c) of the Act is not applicable based on the

facts so placed before us and we are of the view that there is a clear absence of the requirement as prescribed in the law for levy of penalty u/s. 271(1)(c) of the Act for search assessment. The bench also noted that there is clear absence of the satisfaction in the assessment order that whether the assessee has furnished any inaccurate particulars of income or concealed the particulars of income. Even the Id. AO while issuing the notice u/s. 274 r.w.s. 271 of the Act has not specified the limb for which he intend to levy the penalty. The judgement relied upon by the Id. AO in the case of Dr A Mohd Abdul Khadir is of the A. Y. 1972-73 to 1976-77 and the explanation 5A is applicable to the search carried out after June 2007. Thus, the finding that the revised return could not be treated as voluntarily has no leg to stand considering the specific explanation provided in the Act. The other decision as relied upon by the AO in his penalty order in the case of CIT Vs. Rakesh Suri 331 ITR 458 is not related to the addition pursuant to search. Thus, the decision relied upon by the Id. AR and DR are different on its facts and are clearly distinguishable with the facts of this case and the same are not applicable to the facts of the case on hand. While rendering the decision in this case the Id. CIT(A) has considered all the aspects of the case and given the decision after considering all the aspects of the case. The bench also noted that from the statement recorded that

the assessee has surrendered the additional income voluntarily as it transpired from the extract of the statement of the assessee as reproduced here in above. Considering the aspect of these case and respectfully following the decision in the case of Kirit Dahyabhai Patel Vs. ACIT 80 taxmann.com 162 (Gujarat) where in the Gujarat High court held that

8. We have heard learned advocates for the parties and perused the material on record. Before dealing with the contentions, it would be relevant to reproduce Explanation 5 to Section 271 (1) (c) of the Income Tax Act, which reads as under:-

"Explanation 5. Wherein in the course of a [search initiated under section 132 before the 1st day of June, 2007], the assessee is found to be the owner of 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-

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| (a) | for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, wherein such return has been furnished before the said date, such income has not been declared therein; or |
| (b) | for any previous year which is to end on or after the date of the search, 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, unless, - |
| (1) | Such income is, or the transactions resulting in such income are recorded,- |
| | (i) in a case falling under clause (a), before date of the search; and |
| | (ii) in a case falling under clause (b), on or before such date; in the books of account, if any, maintained by him for any source of income of such income is otherwise disclosed to the [principal Chief Commissioner or Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner] before the said date; or |
| (2) | he in the course of the search, makes a statement |

| | |
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| | under sub-section (4) of section 132 that any money, bullion, jewelery or other valuable article of thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in sub section (1) of Section 139 and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income." |
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9. The High Court of Madras in the case of *S.D.V. Chandru (supra)* held that in a case where the assessee had not disclosed his income in the returns filed for the previous year which have ended prior to the date of the search and, in the statement given under Section 132(4) the assessee admitted the receipt of undisclosed income for those years and also specified the manner in which such income had been derived and thereafter pays the tax on that undisclosed income with interest, then such undisclosed income would get immunised from the levy of penalty.

10. Looking to the facts and circumstances of the case, it would be relevant to refer the decision relied upon by learned senior advocate for the appellant in the case of *Gebilal Kanbhaialal (HUF) (supra)*, wherein the Apex Court in paragraph No. 6 has observed as under:-

"6. Explanation 5 is a deeming provision. It provides that where, in the course of search under Section 132, the assessee is found to be the owner of unaccounted assets and the assessee claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous Year which has ended before the date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income for the purpose of imposition of penalty under Section 271(1) (C). The only exceptions to such a deeming provision or to such a presumption of concealment are given in sub-clauses (1) and (2) of Explanation 5. In this case, we are concerned with interpretation of clause (2) of Explanation 5, which has quoted above. Three conditions have got to be satisfied by the assessee for claiming immunity from payment of penalty under clause (2) of Explanation 5 to Section 271(1)(C). The first condition was that the assessee must make a statement under Section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in Section 139(1). Such statement was made by the Karta during the search which concluded on August 1, 1987. It is not in dispute that condition No.1 was fulfilled. The second condition for availing of the immunity from penalty under Section 271(1)(C) was

that the assessee should specify, in his statement under Section 132(4), the manner in which income stood derived. Admittedly, the second condition, in the present case also stood satisfied. According to the department, the assessee was not entitled to immunity under Clause (2) as he did not satisfy the condition for availing the benefit of waiver of penalty under Section 271(1)(c) as the assessee failed to file his return of income on 31st July, 1987 and pay tax thereon particularly when the assessee concealed on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. However, no time limit for payment of such tax stood prescribed under clause (2). The only requirement stipulated in the third condition was for the assessee to "pay tax together with interest". In the present case, the third condition also stood fulfilled. The assessee has paid tax with interest upto the date of payment. The only condition which was required to be fulfilled for getting the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income upto the date of payment. Clause (2) did not prescribe the time limit within which the assessee should pay tax on income disclosed in the statement under Section 132(4)."

11. Even, the High Court of Chattisgarh in the case of *Abdul Rashid (supra)* has held that in order to get the benefit of immunity under clause(2) of explanation-5 to Section 271(1)(c) of the Income Tax Act, it is not necessary to file the return before the due date provided that the assessee had made a statement, during the search and explained the manner in which the surrendered amount was derived, and paid tax as well as interest on the surrendered amount.

12. At this stage, it is required to be noted that the Apex Court in the case of *CIT v. Vegetable Products Ltd. (supra)*, has held that if the Court finds that the language of a taxing provision is ambiguous or capable of more meaning than one, then the Court has to adopt the interpretation which favours the assessee, more particularly so where the provision relates to the imposition of a penalty.

13. Considering the facts and circumstances of the case and also considering the decisions relied upon by learned senior advocate for the appellant, we are of the considered opinion that the view taken by the Tribunal is erroneous. The CIT (A) rightly held that it is not relevant whether any return of income was filed by the assessee prior to the date of search and whether any income was undisclosed in that return of income. In view of specific provision of Section 153A of the I.T. Act, the return of income filed in response to notice under Section 153(a) of the I.T. Act is to be considered as return filed under Section 139 of the Act, as the Assessing Officer has made assessment on the said return and therefore, the return is to be considered for the purpose of penalty under Section 271(1)(c) of the I.T. Act and the penalty is to be levied on the income assessed over and above the income returned under Section 153A, if any.

14. Further, in the present case, it appears from the record that the assessee had satisfied all the conditions which are required for claiming immunity from payment of penalty under Section 271(1) of the Act. The provision does not specify any time

limit during which the aforesaid amount i.e. the amount of penalty with interest has to be paid. Admittedly when the assessee herein have paid the entire amount with interest, the Assessing Officer ought to have granted them immunity available under Section 271(1)(C) of the Income Tax Act.

15. The decision relied upon by learned advocate for the respondent will not apply to the facts of the present case.

16. In view of the aforesaid facts of the case and also the principle laid down in the decisions relied upon by the learned senior counsel for the appellant more particularly the principle laid down in the case of *Gebilal Kanhailal (supra)* and *Abdul Rashid (supra)*, we are of the considered opinion that the penalty under Section 271(1)(C) of the Income Tax Act cannot be levied on the income shown in the return filed under Section 153 of the I.T. Act.

17. Considering the facts and circumstances of the case and also considering the decision of the Madras High Court in the case of *S.D.V. Chandu (supra)*, we are of the opinion that the appellant is entitled to the benefit of the provisions of Explanation 5(2) to Section 271(1)(c) of the Income Tax Act.

18. For the foregoing reasons, the present appeals stand allowed. The order of the Tribunal is quashed and set aside. Consequently, the order of the CIT (A) is restored. The question of law involved in this appeals is answered in favour of the assessee and against the revenue.

Considering the ratio of the decision and after careful perusal of the facts of the case and the decision of the Id. CIT(A) at length wherein he has considered all the aspect of the case and has also considered the above cited decision. The Id. CIT(A) also noted that there is clear absence of the satisfaction as to which limb of the penalty exist in this case by the Id. AO in the assessment order and in issuance of notice u/s. 271(1)(c) of the Act to levy the penalty. Based on the binding decision as cited and considering the facts and detailed finding recorded in the order of the Id. CIT(A) we see no infirmity in the order of the Id. CIT(A). Based on these observations the appeal filed by the revenue stands dismissed.

10. The fact of the case and issue in ITA Nos. 209/JP/2023 relates A. Y. 2016-17 of the same assessee is similar to the case in ITA No. 208/JP/2023 for A. Y. 2015-16. As we have heard both the parties and persuaded the materials available on record, bench noted that the issues raised by the assessee in this appeal No. 209/JP/2023 is equally similar on set of facts and grounds with that of ITA No. 208/JPR/2023 therefore, it is not imperative to repeat the facts and various grounds raised by both the parties. Hence, the bench feels that the decision taken by us in ITA Nos. 208/JPR/2023 for the Assessment Year 2015-16 shall apply mutatis mutandis in the case of Yashwant Kumar Sharma in ITA No. 209/JP/2023 for the Assessment Year 2016-17.

In the result, both the appeal of the revenue stands dismissed.

Order pronounced in the open court on 10/07/2023.

Sd/-

(संदीप गोसाई)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

Sd/-

(राठौड कमलेश जयंतभाई)
(Rathod Kamlesh Jayantbhai)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 10/07/2023

*Ganesh Kumar, PS

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

1. The Appellant- DCIT, Central Circle, Ajmer
2. प्रत्यर्थी / The Respondent- Yashwant Kumar Sharma, Ajmer
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA Nos. 208 & 209/JP/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar