आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
''B'' BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
AND
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

Sr.No.	ITA No.	Asstt. Year	Name of Appellant	Name of Respondent
1-2.	ITA No.251-252/Ahd/2022	2009-10 & 2011-12	Dharmenbhai Mahendrabhai Sutaria, 16-B, Jadav Chambers, Ashram Road, Ahmedabad. **PAN: AFUPS6552A**	A.C.I.T, Central Circle-(1)(2), Ahmedabad.
3.	ITA No.253/Ahd/2022	2011-12	Dharmenbhai Mahendrabhai Sutaria-HUF, 23-B, Jadav Chambers, Ashram Road, Ahmedabad-380009. **PAN: AAFHD1653K**	A.C.I.T, Central Circle-(1)(2), Ahmedabad.
4.	No.254/Ahd/2022	2011-12	Sanjaybhai Mahendrabhai Sutaria, 16-B, Jadav Chambers, Ashram Road, Ahmedabad-380009. **PAN: AHJPS6566R**	A.C.I.T, Central Circle-(1)(2), Ahmedabad.
5.	No.255/Ahd/2022	2011-12	Sanjaybhai Mahendrabhai Sutaria-HUF, 23-B, Jadav Chambers, Ashram Road, Ahmedabad-380009. **PAN: AAQHS4264N**	A.C.I.T, Central Circle-(1)(2), Ahmedabad.
6.	No.256/Ahd/2022	2014-15	Sanjaybhai Mahendrabhai Sutaria, 16-B, Jadav Chambers, Ashram Road, Ahmedabad-380009. **PAN: AHJPS6566R**	A.C.I.T, Central Circle-(1)(2), Ahmedabad.

7-8.	No.257-258/Ahd/2022	2010-11 & 2011-12	Shreyasi Dharmen Sutaria, 16-B, Jadav Chambers, Ashram Road, Ahmedabad-380009. **PAN: AWOPS188R**	A.C.I.T, Central Circle-(1)(2), Ahmedabad.
9-10.	Nos.259-260/Ahd/2022	2010-11 & 2011-12	Shrena Sanjay Sutaria, 16-B, Jadav Chambers, Ashram Road, Ahmedabad-380009. **PAN: ASQPS7606E**	A.C.I.T, Central Circle-(1)(2), Ahmedabad.

(Applicant)		(Respondent)

Assessee by :	Ms Nupur Shah, A.R
Revenue by :	Shri Ashok Kumar Suthar, Sr.DR

सुनवाई की तारीख/**Date of Hearing : 19/01/2024**
घोषणा की तारीख /**Date of Pronouncement: 10/04/2024**

आदेश/O R D E R

PER BENCH:

The captioned appeals have been filed at the instance of the different Assessee against the separate orders of the Ld. Commissioner of Income-Tax (Appeals), Ahmedabad, arising in the matter of penalty order passed u/s 271(1)(c) of the Income Tax Act 1961 (here-in-after referred to as "the Act") relevant to the Assessment Years as mentioned in the cause title. Since the issues involved in all these appeals are identical, we proceed to dispose of all the appeals by this common order for the sake of convenience and brevity.

First, we take **up ITA No. 251/Ahd/2022, an appeal b**y the assessee, namely Shri Dharmenbhai Mahendrabhi Sutaria for AY 2009-10.

2. **The only** issue raised by the assessee is that the learned CIT(A) erred in confirming the levy of penalty under section 271(1)(c) of the Act for Rs. 22,10,100/- only.

3. The facts in brief are that the assessee is an individual and deriving income from business, partnership firm and other sources. There was a search and seizure action under section 132 of the Act dated 04-12-2014 carried out at the Barter/entry provider Group and the assessee was also part of search authorization. Accordingly, assessment proceedings under section 153A of the Act were initiated in the case of the assessee. However, the assessee did not file return of income in response to the notice issued under section 153A of the Act.

3.1 The assessee during the assessment proceeding was asked to explain the cash deposited in the bank account amounting to Rs. 15.44 Lacs during the year (AY 2009-10) under consideration. In response, the assessee vide letter dated 21-12-2016 submitted that after search proceedings, he examined his bank, capital investment in various firms and accordingly prepared cash book for the period from the AY 2009-10 to 2015-16 and wherever found short fall of cash it offered income. Therefore, the assessee suo-moto offered an additional income of Rs 65 lacs on account of opening cash balance. However, such income was not offered by filing return due to financial constraint. As such, the assessee agreed to an addition of Rs. 65 Lacs on account of unexplained cash. The assessee subsequently i.e. as on 29th December 2016 paid the due taxes on the additional income of Rs. 65 Lacs and came before the AO with the copy of computation of income and manual return but the same was not accepted as assessment order was finalized by the AO on 30th December 2016 in which the AO had made addition of Rs. 65 Lacs. The AO also initiated penalty proceedings under section 271(1)(c) of the Act on account of concealment of income by furnishing inaccurate particular of income. Once the impugned addition of Rs. 65 Lacs was confirmed by the learned CIT(A) vide order dated 23-08-2018, the AO proposed to impose

penalty under section 271(1)(1)(c) of the Act vide show cause notice dated 27-01-2020.

3.2 The assessee in response submitted that the amount of Rs. 65 lacs was offered to tax by him suo-moto during the course of the assessment proceeding. There was neither any material of an incriminating nature found in the search proceedings in connection with impugned voluntary income offered by him nor detected by the AO during the assessment proceedings. The assessment proceeding and penalty proceeding are different. As such, in the assessment an amount/claim can be subject matter of an addition but the same cannot be held to be income concealed or inaccurate particulars furnished leading to concealment of income. The penalty under section 271(1)(c) is quasi criminal proceeding, therefore the revenue before imposing penalty is required to bring material on record suggesting the amount, subject matter addition in quantum proceeding, represents the income which has been concealed.

4. However, the AO held that the amount in question was offered by the assessee in connection with unexplained cash deposited in the bank account of Rs. 15.55 Lacs and cash investment in partnership firms for Rs. 55.17 lacs. Hence, the claim of the assessee that the income was offered voluntary, or suo-motto is not acceptable. Further, the assessee in the cash book introduced impugned amount as opening unexplained cash credit on account of deposits in the bank and capital investment in firms. Hence, the assessee at the time of filing of original return u/s 139 of the Act was aware of such unexplained deposits but still not offered the same in the return. The income was offered after a question regarding deposit in bank and investment in firm was raised during the proceedings under section 153A of the Act. Had the search not been conducted and proceeding under section 153A of the Act would not have been initiated, then the assessee should have concealed the impugned income. The AO also referred the provisions of explanation 5A to section 271(1) of the Act where fiction of deemed concealment of income is provided for disclosure of income first time after the search

proceedings. The AO to also referred the judgment of Hon'ble Gujarat High court in case of Snita Transport (P) Ltd vs. DCIT reported in 42 taxmann.com 54 where penalty under section 271(1)(c) of the Act was levied on the income offered by revised return after the same was accepted by the assessee in the survey proceedings.

4.1 Accordingly, the AO held that the assessee has concealed the particular of additional income of Rs. 65 lacs offered during the proceedings under section 153A of the Act and levied the penalty of Rs. 22,09,350/- being 100% of the amount of tax sought to be evaded.

5. On appeal by the assessee, the learned CIT(A) also confirmed the levy of penalty by the AO by observing as under:

> *7.8.1 In this case, the appellant had filed his original return of income u/s 139(4) of the Act on 27.04.2010 declaring total income of Rs.70,71,749/- Subsequently, a search action in the case of Accommodation Entry Providers Group of Ahmedabad was carriedout on 04.12.2014. During the course of search action at the residence of Shri Anill Hiralal Shah, some documents in the form of excel sheet was seized, in which some transactions were related to the appellant. A Warrant of authorization u/s. 132 of the Act was also issued in the case of appellant. Accordingly, notice u/s. 153A of the Act was issued on 22.07.2015. Therefore, the appellant had declaring additional income of Rs.65,00,000/-. It is clearly established that if search action was not conducted by the Department and notice u/s. 153A of the Act was not issued by the Department, the appellant would not have disclosed any additional income. Thus, it can be concluded that the appellant had disclosed additional income, consequent upon the enquiry/notice u/s. 153A/seized documents related to appellant. Therefore, it is clearly seen that the facts of the case of appellant is similar to the facts in the case of Bharatkumar G. Rajani. Thus, the decision of the Hon'ble Gujarat High Court in the case of Bharatkumar G. Rajani v. DCIT [2013] 40 Taxmann.com 344 (Gujarat) is also clearly applicable in the case of appellant.*
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> *7.9 Reliance is also placed on the following decisions for penalty in the instant case:-*
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> *(i) The Hon'ble Jurisdictional High Court of Gujarat in the case of Commissioner of Income-tax v. Vidyagauri Natverlal [1999] 238 ITR 91 (GUJ.) [06- 11-1998] had passed the judgement in favour of Revenue. The head note of the judgement is as under:-*
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>> *"Whether particulars furnished by assessee are true and correct or whether particulars furnished are inaccurate and whether particulars furnished are in accurate or incorrect to his knowledge, all are questions which require an inquiry into facts and consideration of material on record before arriving at any conclusion whether penalty is to be imposed or not, depending on finding reached as a result of that inquiry Held, yes Whether examination of source of cash credit commences only on disclosure of receipt from one or other party in books of assessee and if on enquiry, explanation and information in regard to source of cash credit furnished by assessee is not found satisfactory, same is deemed to be income of that year*

so much as to question of assessment of income for previous year in which disclosure about cash credit finds place Held, yes Whether where assessee had disclosed cash credits in Part III of return filed by him, but could not explained its source, it could not be concluded that assessee was not guilty of concealing particulars of his income or for furnishing inaccurate particulars - Held, yes."

(iv) The Hon'ble High Court of Madras in the case of Chemmancherry Estates Co. vs. Income-tax Officer, Ward-VIII(2) [2019] 111 taxmann.com 66 (Madras) [09- 08-2019] has held as under :-

III. Section 271(1)(c) of the Income-tax Act, 1961 Penalty For concealment of income (Capital gains) - Assessment years 2001-02 and 2002-03 - Whether where land sold by assessee was held to be non-agricultural land, and, thus, was not exempt from tax and assessee was consciously aware of real position and knowingly furnished inaccurate particulars of income in return that land sold was an agricultural land, there was willful concealment and, thus, penalty was to be levied under section 271(1)(c)-Held, yes [Paras 27 and 28] [In favour of revenue]"

(v) The Hon'ble High Court of Kerala in the case of Commissioner of Income- tax vs. N. Jayaprakash [2018] 99 taxmann.com 443 (Kerala) [06-10-2017] had passed the judgement in favour of Revenue. The head note of the judgement is as under:-

"Assessment year 1992-93 If concealment or furnishing of inaccurate particulars of income is an act committed by assessee at time of filing return, liability of assessee or culpability of assessee is his conduct at time when he filed return and mere fact that concealment of income was invented by Assessing Officer from details that are furnished by assessee does not absolve assessee from levy of penalty under section 271(1)(c) [In favour of revenue]."

7.10 In view of the above discussions and factual matrix of the case, the penalty u/s.271(1)(c) of the Act levied by the AO amounting to Rs 22,10,000/- is confirmed. Thus, ground of appeal no. 1 to 6 are dismissed.

6. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

7. The learned AR before us submitted that the revenue has not unearthed any document of incriminating nature as a result of search relating to the suo-moto income offered by the assessee in the return filed in response to the notice issued under section 153A of the Act. As such, the documents found during search was pertaining to the financial year 2010-11 corresponding to assessment year 2011-12 containing the financial transactions belonging to M/s Sarthav Infrastructure Pvt. Ltd. As such, the incriminating document was used for making the additions in the hands of M/s Sarthav Infrastructure Pvt. Ltd. As such, there was no addition made by the revenue based on the seized documents.

Furthermore, the year in dispute is the unabated assessment year wherein the addition can be made only on the basis of incriminating documents. But in the present case, the assessee has suo moto offered the income without referring to any document of an incriminating nature. Thus, it was prayed by the ld. AR that the penalty is not leviable in the given fact and circumstances.

8. On the other hand, the learned DR before us contended that had there not been any search, the income offered by the assessee would have gone tax free. As per the ld. DR, the income was offered by the assessee only as a result of search and therefore, it cannot be said that income was offered by the assessee suo-moto. The ld. DR vehemently supported the order of the authorities below.

9. We have heard the rival contentions of both the parties and perused the materials available on record. Before we deal with the issue on hand whether the penalty is leviable under section 271(1)(c) of the Act or under explanation 5A to section to section 271(1) of the Act in the given fact and circumstances. It is important to note that the assessee belongs to a group known as barter/entry provider group which was subject to search under the provisions of section 132 of the Act dated 4 December 2014. In consequence to search, an excel sheet was found from the premises of Shree Anil Hiralal Shah and Sanket Jitendra Shah Vohra containing the cash transactions for the period beginning from April 2010 to August 2010. Such transactions fall during the financial year 2010-11 corresponding to the assessment year 2011-12. It is mandatory for the AO to initiate proceedings under section 153A of the Act in the case of search on the assessee for the six assessment years immediately preceding the year in which such was conducted. For the impugned 6 assessment years, the assessee is required to file return of income under section 153A of the Act and the AO has to frame assessment under section 153A read with section 143(3) of the Act.

9.1 However, it is settled position by the Hon'ble Delhi High Court and Gujarat High Court in the case of CIT vs. Kabul Chawla [2016] 380 ITR 573 (Delhi) and

CIT vs. Saumya Construction (P.) Ltd [2016] 387 ITR 529 (Guj.) that in case of unabated/completed assessment, the additional income can only be assessed or subject to addition based on the documents of incriminating nature found during the course of search at the premises of the assessee. In other words, the unabated assessment years can be disturbed in the search proceedings where any document of incriminating nature is found from the premise of the assessee. The view taken by the Hon'ble Delhi and Gujarat High Cout *(Supra)* has been recently confirmed by the Hon'ble Supreme Court in case of PCIT vs. Abhisar Buildwell (P.) Ltd reported in [2023] 149 taxmann.com 399 (SC). The relevant extract of the finding of the Hon'ble Supreme Court is extracted as under:

> ***12.*** *If the submission on behalf of the Revenue that in case of search even where no incriminating material is found during the course of search, even in case of unabated/completed assessment, the AO can assess or reassess the income/total income taking into consideration the other material is accepted, in that case, there will be two assessment orders, which shall not be permissible under the law. At the cost of repetition, it is observed that the assessment under section 153A of the Act is linked with the search and requisition under sections 132 and 132A of the Act. The object of Section 153A is to bring under tax the undisclosed income which is found during the course of search or pursuant to search or requisition. Therefore, only in a case where the undisclosed income is found on the basis of incriminating material, the AO would assume the jurisdiction to assess or reassess the total income for the entire six years block assessment period even in case of completed/unabated assessment. As per the second proviso to Section 153A, only pending assessment/reassessment shall stand abated and the AO would assume the jurisdiction with respect to such abated assessments. It does not provide that all completed/unabated assessments shall abate. If the submission on behalf of the Revenue is accepted, in that case, second proviso to section 153A and sub-section (2) of Section 153A would be redundant and/or rewriting the said provisions, which is not permissible under the law.*
> ***13.*** *For the reasons stated hereinabove, we are in complete agreement with the view taken by the Delhi High Court in the case of Kabul Chawla (supra) and the Gujarat High Court in the case of Saumya Construction (supra) and the decisions of the other High Courts taking the view that no addition can be made in respect of the completed assessments in absence of any incriminating material.*

9.2 In the case in hand, undeniably no document of incriminating nature was found from the premises of the assessee as a result of search pertaining to the year in dispute. As such an excel sheet was found from the premises of Shree Anil Hiralal Shah and Sanket Jitendra Shah Vora containing the financial transactions for the financial year 2010-11 corresponding to assessment year 2011-12. There is also no dispute to the fact that the year and consideration is unabated assessment year as the regular assessment under section 143(3) of the Act was already

completed vide order 21-11-2011 way before search under section 132 of the Act. Accordingly, if we apply the principles of the Hon'ble Supreme Court laid down in the case of PCIT vs Abhisar Buildwell (P.) Ltd *(supra)*, we are of the view that no quantum addition is sustainable in the hands of the assessee in the absence of incriminating document. However, the assessee during the assessment proceedings under section 153A of the Act was asked to explain the source of the cash deposit in the bank and the amount of capital contribution in the partnership firm. The assessee in response to such questionnaire has offered the income of ₹ 65 lakhs so as to justify the source of deposits in the bank for ₹ 15.55 lakhs and the amount of capital contribution in the partnership firm of ₹ 55.17 lakhs and paid due taxes on the same. Based on the submission of the assessee, the addition was made by the AO in the assessment order passed under section 153A r.w.s. 143(3) of the Act. The relevant submission of the assessee in this regard can be verified from the order of the authorities below.

9.3 Now, the controversy arises whether the income offered by the assessee or detected by the AO during the assessment proceedings but without unearthing any document of incriminating nature, can be subject to the penalty proceedings under section 271(1)(C) of the Act in the given facts and circumstances. To our understanding, the income offered to tax by the assessee which was not subject to the addition in the search proceedings being the special proceedings under section of 153A of the Act in view of the judgement of Hon'ble Supreme Court as discussed above, the same cannot be subject to penalty as it was not based on any incriminating document. It is for the reason that the quantum addition in itself is susceptible and accordingly the penalty provisions should not be attracted to the assessee. In simple words, we are of the view that the penalty levied by the AO and confirmed by the learned CIT(A) is not sustainable based on the understanding that the quantum addition made in the given case was without any document of incriminating nature and therefore the same was not liable to be added in view of the judgement of Hon'ble Supreme Court as discussed above. Levying penalty on the quantum addition in the assessment which itself is in doubt,

is not justified. In holding so, we also draw support and guidance from the order of this tribunal in case of M/s Atlanta Electricals Pvt Ltd. in ITA No. 551 & 552/AHD/2012 dated 26-09-2019 where it was held as under:

> *9.2 We however also advert to another plea raised on behalf of the assessee while assailing imposition of penalty. A plea has been inter alia raised on behalf of the assessee towards non-fulfillment of pre- requisites before invocation of provisions of Section 153C of the Act. It is the case of the assessee that in the absence of jurisdiction under s.153C of the Act, the quantum proceedings under s.153C of the Act itself is non est and consequently, penalty under s.271(1)(c) of the Act could not have been imposed. On appraisal, we find force in the aforesaid plea too. The erstwhile provision of Section 153C of the Act prior to its amendment by Finance Act, 2015 w.e.f. 01.06.2015 provided that the AO was required to be satisfied that both undisclosed assets as well as s documents seized etc. must 'belong to' a person other than the person in whose hands search was conducted and proceedings under s.153A of the Act was initiated. The expression 'belong to' was explained by the Hon'ble Delhi High Court in the case of Pepsico India Holdings Private Limited vs. ACIT [2015] 370 ITR 295 (Delhi). It was observed by the Hon'ble Delhi High Court that Section 153C of the Act cannot be invoked unless the AO of the searched person is satisfied for cogent reasons that seized documents do not 'belong to' the searched person. The distinction between expression 'belongs to' and 'relates to' or 'refers to' must be borne in mind by AO. It was observed by the Hon'ble Court that AO should not confuse the expression 'belongs to' with expression 'relates to' or 'refers to'. The Hon'ble Court went on to explain the purport of the expression by giving illustration of a registered sale deed which essentially implied something more than a casual connection. In the wake of the aforesaid judgment, merely because a document/loose paper was found in the possession of a searched person showing reference to certain entries relatable to a third person, the said documents/loose paper by itself would not tantamount to be belonging to the third person. Similar view has been expressed in the case of Renu Constructions Pvt. Ltd. (Delhi) 399 ITR 262 (Del.) and Kamleshbhai Dharamshibhai Patel 263 CTR 362 (Guj). The co-ordinate bench Tribunal in Shailesh S Patel vs. ITO (2018) 97 taxmann.com 570 (Ahmedabad Trib.) has also reiterated the aforesaid pre-requisite for formation of 'satisfaction' for the purposes of Section 153C of the Act. No averment is found from the case records that the documents seized towards excess stock did belong to and was the property of the company and not of the Director from whose custody it was found. Therefore, in such non-descript and innocuous situation, where the quantum assessment itself is susceptible, the consequence in form of penalty would not, in our view justified.*

9.4 Coming to the case of Snita Transport (P) Ltd vs. DCIT reported in 42 taxmann.com 54 as relied by the AO, we note that the fact of the case on hand and the case relied upon by the AO are distinguishable. As such, in the case of Snita Transport Pvt Ltd, the assessee accepted the additional income before the survey team after incriminating material found during the survey and accordingly offered the same by revising original return of income, but revised return was not accepted as same was non est. On the other hand, no such income was admitted during the search or detected based on any material by the search team in the case of present assessee.

9.5 We also note that under similar facts and circumstances, the Hon'ble Courts in various cases have also deleted the penalty levied by the AO. In the case of C**IT v. Suresh Chandra Mittal 119 Taxman 433 (SC),** the Tribunal cancelled penalty levied under section 271(1)(c) on ground that Department had not discharged its burden of proving concealment and had simply rested its conclusion on assessee's act of voluntary surrender in good faith. The High Court, on reference, upheld Tribunal's findings. The Hon'ble Supreme Court held that no interference was called for in the findings of the High Court.

9.5.1 In the case of **Sir Shadi Lal Sugar & General Mills Ltd. V. CIT 33 Taxman 460A (SC), w**hile completing assessment of assessee-company for assessment year 1958-59, ITO effected additions towards false debits towards cane purchases, excess debit towards cane shortages and erroneous debit of certain salary payments, and, assessee did not contest these additions on merits. In penalty proceedings, however, assessee agreed to these additions pursuant to which IAC held assessee guilty of concealment of all three items and levied penalty. The Tribunal, however, considered entire evidence and concluded that qua excess debit of shortages and erroneous debit of salary payment, mere fact that assessee agreed to impugned additions did not ipso facto indicate any criminality aimed at concealment of income.

9.5.2 In the case of **CIT v. Bhavinkumar M. Dagli 79 taxmann.com 392 (Gujarat),** the Gujarat High Court held that where during assessment proceedings, assessee filed revised return declaring additional income and prior to that department had no material to show that there was some additional income than income disclosed in original return, there was no justification for imposition of penalty on ground that assessee had furnished inaccurate particulars of income.

9.5.3 In the case of **Commissioner of Income-tax v. C.A. Taktawala 177 Taxman 47 (Gujarat),** the Gujarat High Court held that where Assessing Officer did not have sufficient material to establish existence of concealed income and, in

fact, additions to assessee's income had been made only on basis of declaration made by assessee subject to minor variations, factum of mere filing of revised returns by assessee on a number of occasions could show that returns were not voluntary.

9.5.4 In the case of **PCIT v. Swapna Enterprise 91 taxmann.com 12 (Gujarat),** the Gujarat High Court held that where Assessing Officer levied penalty under section 271AAA for default of not substantiating manner in which undisclosed income was earned, in view of fact that assessee developer had made statement that undisclosed income was earned by way of 'on money' received in its housing project and, moreover, assessee had paid due tax on said income, impugned penalty was unjustified.

9.5.5 In the case of **PCIT v. Neeraj Jindal 79 taxmann.com 96 (Delhi),** the Delhi High Court held that When an assessee has filed revised return after search has been conducted, and such revised return has been accepted by Assessing Officer, then merely by virtue of fact that such return showed a higher income, penalty under section 271(1)(c) cannot be automatically imposed.

9.5.6 In the case of **S.M.J. Housing v. CIT 38 taxmann.com 203 (Madras),** the Madras High Court held that where in search no incriminating material was found which would suggest unexplained income or there was no recovery of cash or amount from assessee, levy of penalty u/s 271(1)(c) of the Act would be set aside.

9.5.7 In the case of **CIT v. SAS Pharmaceuticals 11 taxmann.com 207 (Delhi),** the Delhi High Court held that for imposing penalty under section 271(1)(c), concealment of particulars of income or furnishing of inaccurate particular of income by assessee has to be in income-tax return filed by it. Further, where income surrendered by assessee during survey had been shown by it in its

regular income-tax return filed within prescribed time, penalty could be imposed upon it under section 271(1)(c) of the Act.

9.5.8 In the case of **Jai Palace v. CIT 51 taxmann.com 462 (Allahabad),** the High Court held that where assessee voluntarily surrendered a sum pertaining to cash credit in revised return to purchase peace and to avoid litigation, penalty was to be deleted.

9.5.9 n the case of **CIT v. M.P. Narayanan 244 ITR 528 (Mad.),** the High Court held that in penalty proceeding it is duty of ITO to establish by evidence that there was concealment of income and amount added represented assessee's income. Further, the mere fact that assessee agreed to inclusion of cash credits and other amounts in total income on account of inability to prove source or to avoid protracted litigation would not justify Department in levying penalty.

9.5.10 In the case of **CIT v. Smt. Mukta Sridhar 16 taxmann.com 388 (Karnataka),** the High Court held that where gifts, which were found to be not genuine during search, were recorded in regular books of account which were disclosed in returns filed and as a matter of fact, after surrendering income, assessee had offered said income to tax along with interest, no penalty could be imposed upon assessee under section 271(1)(c) of the Act.

9.5.11 In the case of **Gebilal Kanhaialal (HUF) v. ACIT 143 TAXMAN 42 (RAJ.),** a search was carried out at residential and business premises of assessee. During course of search, assessee surrendered certain income under section 132(4) of the Act. The Assessing Officer taxed surrendered income and also imposed penalty under section 271(1)(c) of the Act. The High Court held that since tax along with interest had been paid on disclosed income, Tribunal had committed error in restoring penalty order of Assessing Officer.

9.6 Accordingly, we set aside the finding of the learned CIT(A) and direct the AO to delete the penalty levied by him. Hence the ground of appeal of the assessee is hereby allowed.

9.7 In the result, the appeal of the assessee is hereby allowed.

Coming to ITA No. 252/Ahd/2022, an appeal by the assessee Dharmenbhai Mahendrabhi Sutaria for A.Y. 2011-12.

10. **The only** issue raised by the assessee is that the learned CIT(A) erred in confirming the levy of penalty under section 271(1)(c) of the Act for Rs. 9,73,550/- only.

11. The facts in brief are that during the search at the assessee group an excel sheet marked as "CCCCCC.xls" was found from the computer of Shri Anil Hiralal Shah containing information about unaccounted cash receipts in the different projects of M/s Sarthav Infrastructure Pvt Ltd. and layering of such receipt in the bank accounts of different concerns/ individual of the group during the period April 2010 to August 2010. From the impugned sheet, an amount of Rs. 10 lakhs also matched the cash deposited in the bank account of the assessee. As such, in the bank account of assessee, the cash aggregating to Rs. 40.95 Lakhs were deposited during the year i.e. from April 2010 to March 2011. The assessee on account of such cash deposit offered an additional income of Rs. 31.5 lakh in the return filed under section 153A of the Act.

12. The AO on the additional income offered by the assessee in the return filed under section 153A of the Act levied penalty under section 271(1)(c) r.w. explanation to section 5A to section 271(1) of the Act on charge of concealment of income. The AO found that the assessee in the cash book introduced cash to justify the deposits in the bank account which was not offered as income in the original return filed under section 139 of the Act. The assessee only after search

when incrimination material in relation to unexplained cash deposit was found from shri Anil Hiralal Shah offered such income. Had the search not been conducted and excel sheet from shri Anil Hiralal Shah would not have been found, the assessee would have concealed income of Rs. 31.5 lakh. The AO further held that the case of the assessee also falls under the ambit of explanation 5A to section 271(1) of the Act. Accordingly, the AO levied penalty of Rs. 9,73,350/- being 100% of the amount of tax sought to be evaded.

13. On appeal by the assessee, the learned CIT(A) also confirmed the penalty levied by the AO.

14. Being aggrieved by the order of the learned CIT(A) the assessee is in appeal before us.

15. The learned AR before us submitted that the revenue has not unearthed any document of incriminating nature as a result of search relating to the suo-moto income offered by the assessee in the return filed in response to the notice issued under section 153A of the Act. As such, the documents found during search was pertaining to the financial year 2010-11 corresponding to assessment year 2011-12 containing the financial transactions belonging to M/s Sarthav Infrastructure Pvt. Ltd. As such, the incriminating document was used for making the additions in the hands of M/s Sarthav Infrastructure Pvt. Ltd. As such, there was no addition made by the revenue based on the seized documents. Furthermore, the year in dispute is the unabated assessment year wherein the addition can be made only on the basis of incriminating documents. But in the present case, the assessee has suo moto offered the income without referring to any document of incriminating nature. Thus, it was prayed by the ld. AR that the penalty is not leviable in the given fact and circumstances.

16. On the other hand, the learned DR before us contended that had there not been any search, the income offered by the assessee would have gone tax free.

As per the ld. DR, the income was offered by the assessee only as a result of search and therefore, it cannot be said that income was offered by the assessee suo-moto. The ld. DR vehemently supported the order of the authorities below.

17. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we note that the fact of year under consideration 2011-12 are identical to the AY 2009-10 except the additional income in the year under consideration was offered in the return filed under section 153A of the Act whereas in the AY 2009-10 additional income was offered during the assessment proceedings. The year under consideration is also an unabated /completed assessment year and no material of incriminating nature was found from the premises of the assessee which could have been made basis for making assessment. The provisions of explanation 5A to section 271(1) of the Act also cannot be applied in the case on hand as additional income offered in the return filed under section 153A was not based on any money, bullion, jewellery or other valuable article found during the course of search or the assessee in the course of search was found to be the owner of any income based on entry in books of account or other documents. Therefore, in our considered opinion finding given by us in **ITA No. 251/Ahd/2022 for the AY 2009-10** shall also be applicable in the year under consideration i.e. A.Y. 2011-12. The assessee's appeal for AY 2009-10 has been decided by us vide paragraph No. **9** of this order in favour of the assessee.

17.1 Be that as may be, it is trite law that penalty proceeding is independent from assessment proceeding. To levy penalty under section 271(1)(c) of the Act it is necessary to bring on record that the assessee has earned income which has been concealed or inaccurate particulars furnished leading to concealment of income. In the case of the present assessee, the cash was deposited in the bank account of the assessee. The cash deposited in the bank of the assessee per se cannot be said to be an income liable to tax as gross basis. Though, the present assessee suo-moto offered additional income of Rs. 31.5 lakh against cash

deposits of Rs. 40.95 Lakh and contended that he was not maintaining books of account but after search proceeding, he has drawn cash and bank books for AYs 2009-10 to 2015-16 and wherever cash deficit arises which he not able to recall the sources, he offered income for the same to buy piece of mind. There is no material brought on record by the AO which could establish the cash deposited in the bank of the assessee is the income of the assessee from undisclosed sources. It is also pertinent to note that as per the AO's own analysis of the seized excel sheet being CCCCC.xls, the unaccounted cash related to the different projects of M/s Sarthav Infrastructure Pvt ltd. (SIPL) which has been layered into the bank account of different individuals and concern of the group including the present assessee. Thus, as per AO's own admission cash in dispute is the income of the SIPL which was merely deposited in the bank of the assessee and the other individuals or concern of the group for layering purpose. Therefore, considering the analysis of the AO, ideally the assessee is only one of the conduits used for layering the unaccounted income of SIPL, but the assessee still offered income to buy piece of mind. Therefore, in such facts and circumstances, the assessee should not be penalized under section 271(1)(c) of the Act without having corroborative material that cash deposit represents undisclosed income of the assessee which he concealed.

17.2 Further, the additional income was offered in the return filed under section 153A of the Act which was accepted in the assessment proceedings without variation. Once an income is offered in return and the same has been accepted without variation and the provision of explanation 5A has not been applied on the same then it should not be said that the impugned income was concealed by the assessee. In holding so draw support and guidance from the judgment of Hon'ble Gujarat High Court in case of Kirit Dahyabhai Patel vs. ACIT reported in 80 taxmann.com 162 where it was held as under:

> ***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.*

17.3 In view of the above detailed discussion and considering the facts in totality we hereby set aside the finding of the learned CIT(A) and direct the AO to delete the levy of penalty. Hence, the ground of appeal raised by the assessee for the year under consideration i.e. 2011-12 is hereby also allowed.

17.4 In the result appeal of the assessee is hereby allowed.

Coming to ITA No. 253/Ahd/2022, an appeal by the assessee Dharmenbhai Mahendrabhi Sutaria (HUF) for A.Y. 2011-12.

18. The only issue raised by the assessee is that the learned CIT(A) erred in confirming the levy of penalty for Rs. 7,94,000/- under section 271(1)(c) of the Act.

19. The necessary facts are that the assessee (HUF) is engaged in the business through its proprietary concern namely M/s Sidham Management Services and a partner in M/s Dharmen Marbles and Stone. In the original return filed for the year under consideration on 15-04-2012, the assessee has declared income of Rs. 2,56,116/- only. Subsequently, the search proceedings under section 132 of the Act dated 04-12-2014 were carried out on group concern of the assessee. In consequence of the search at the group concern, the notice under section 153C of the Act was issued to the assessee. The assessee in response to this notice under section 153C of the Act filed a return dated 26-11-2016 declaring an income at Rs. 30,56,116/- only. Thus, the assessee offered additional income of Rs. 29 Lakhs in the return filed under section 153C of the Act. The additional income of Rs. 29 Lakh was offered against the cash deposits of Rs. 29 lakhs in the bank account of the assessee during the year under consideration. The assessment under section

143(3) read with section 153C of the Act was finalized on 30-12-2016 accepting the returned income of the assessee. However, the AO levied penalty under section 271(1)(c) of the Act on account of additional income offered for Rs. 29 lakhs. The AO held that the assessee deposited unexplained cash in the bank account but did not offer the same as income while filing original return under section 139 of the Act. Once the search was carried out at the group concern and incriminating material found in relation to the cash deposited in the bank accounts, then only the assessee offered additional income. Hence, the assessee concealed its income and is liable to penalty under section 271(1)(c) of the Act. Accordingly, the AO levied penalty of Rs. 7,94,000/- only.

20. On appeal by the assessee, the learned CIT(A) confirmed the levy of penalty under section 271(1)(C) of the Act.

21. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

22. The learned AR before us submitted that the revenue has not unearthed any document of incriminating nature as a result of search relating to the suo-moto income offered by the assessee in the return filed in response to the notice issued under section 153A of the Act. As such, the documents found during search was pertaining to the financial year 2010-11 corresponding to assessment year 2011-12 containing the financial transactions belonging to M/s Sarthav Infrastructure Pvt. Ltd. As such, the incriminating document was used for making the additions in the hands of M/s Sarthav Infrastructure Pvt. Ltd. As such, there was no addition made by the revenue based on the seized documents. Furthermore, the year in dispute is the unabated assessment year wherein the addition can be made only on the basis of incriminating documents. But in the present case, the assessee has suo moto offered the income without referring to any document of an incriminating nature. Thus, it was prayed by the ld. AR that the penalty is not leviable in the given fact and circumstances.

23. On the other hand, the learned DR before us contended that had there not been any search, the income offered by the assessee would have gone tax free. As per the ld. DR, the income was offered by the assessee only as a result of search and therefore, it cannot be said that income was offered by the assessee suo-moto. The ld. DR vehemently supported the order of the authorities below.

24. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we note that the facts of case of assessee (HUF) are identical to facts involved in the case Shri Dharmenbhai Mahendrabhai Sutaria in ITA No. 252/Ahd/2022 for the A.Y. 2011-12 except the assessee (HUF) is covered under section 153C of the Act whereas Shri Dharmenbhai Mahendrabhai Sutaria was covered under section 153A of the Act. Therefore, the provisions of explanation 5A to section 271(1) of the Act cannot be applied in the case on hand as assessee was not searched person. Therefore, in our considered opinion, the finding given by us in case of Shri Dharmenbhai Mahendrabhai Sutaria in **ITA No. 252/Ahd/2022 for the A.Y. 2011-12** shall also be applicable in the case of present assessee (HUF) for AY 2011-12. The above- mentioned appeal of Shri Dharmenbhai Mahendrabhai Sutaria has been decided by us vide paragraph No. **17** of this order in favour of the assessee. Hence, following the same, the ground of appeal raised by the assessee (HUF) is hereby also allowed.

24.1 In the result, the appeal of the assessee is hereby allowed.

Coming to ITA No. 254/Ahd/2022, an appeal by the assessee Shri Sanjay Mahendrabhi Sutaria for AY 2011-12.

25. At the outset, we note that the issue raised by the present assessee in the captioned appeal for the AY 2011-12 is identical to the issue raised by the assessee namely Shri Dharmenbhai M Sutaria for the assessment year 2011-12 in

ITA No. 252/AHD/2022. Therefore, the findings given in the **ITA bearing No. 251/AHD/2022** shall also be applicable for the issue raised by the present assessee in the year under consideration i.e. A.Y. 2011-12. The appeal of Shri Dharmenbhai M Sutaria for the A.Y. 2011-12 has been decided by us vide paragraph **No. 17** of this order in favour of the assessee. The learned DR and the AR also agreed that whatever the findings for the issue raised by Shri Dharmendra M Sutaria assessment for the year 2011-12 shall also be applied for the issue raised by the current assessee for the assessment years 2011-12. Hence, the ground of appeal filed by the assessee is hereby allowed.

25.1 In the result, the appeal of the assessee is hereby allowed.

Coming to ITA No. 255/Ahd/2022, an appeal by the assessee M/s Sanjay Mahendrabhi Sutaria (HUF) for AY 2011-12.

26. At the outset, we note that the issue raised by the present assessee in the captioned appeal for the AY 2011-11 is identical to the issue raised by the assessee namely Dharmenbhai M Sutaria -HUF for the assessment year 2011-12 in ITA No. 253/AHD/2022. Therefore, the findings given in the **ITA bearing No. 253/AHD/2022** shall also be applicable for the issue raised by the present assessee in the year under consideration i.e. A.Y. 2011-12. The appeal of Dharmenbhai M Sutaria-HUF for the A.Y. 2011-12 has been decided by us vide paragraph No. **24** of this order in favour of the assessee. The learned DR and the AR also agreed that whatever the findings for the issue raised by Dharmendra M Sutaria-HUF assessment for the year 2011-12 shall also be applied for issue raised by the current assessee for the assessment years 2011-12. Hence, the ground of appeal filed by the assessee is hereby allowed.

26.1 In the result, the appeal of the assessee is hereby allowed.

<u>Coming to ITA No. 256/Ahd/2022 by the assessee Sanjay Mahendrabhi Sutaria for A.Y. 2014-15.</u>

27. The only issue raised by the assessee is that the learned CIT(A) erred in confirming the levy of penalty under section 271(1)(c) for Rs. 7,72,500/- on the additional income offered in the return filed under section 153A of the Act.

28. The necessary facts are that the assessee was subject to the search proceedings dated 4th December 2014 and therefore, the proceedings u/s 153A of the Act were initiated vide notice dated 22nd July 2015. However, the assessee after the search filed belated return u/s 139(4) of the Act dated 09-03-2016 at Rs. 5,33,560/- only. Subsequently, the assessee filed return u/s 153A of the Act as on 7th December 2016 wherein declared additional income of Rs. 25 lakhs against the cash deposited in the bank account and contributed to the partnership firm. The AO against the additional income offered initiated penalty proceedings under section 271(1)(c) of the Act. Finally, the AO levied a penalty of Rs. 7,72,700/- being 100% of the amount of tax sought to be evaded on charges of concealment of income. As such, the AO held that the assessee offered additional income against the unexplained cash only after the search proceedings. Had there not been any search, the assessee would have concealed the income. The learned CIT(A) also confirmed the penalty levied by the AO under the provisions of section 271(1)(c) of the Act.

29. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

30. The learned AR for us contended that in the absence of any seized documents found from the premises of the assessee, the income offered represents the suo-moto disclosure and therefore the same cannot be subject matter of penalty.

31. On the other hand, the learned DR vehemently supported the order of the authorities below.

32. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the assessee has made disclosure of an income of ₹ 25 lakhs to justify the deposit of cash in the bank and capital contribution in the partnership firm amounting to ₹ 3 lacs and 25 lakhs respectively. The AO has imposed a penalty under section 271(1)© of the Act on the income disclosed by the assessee. Admittedly the penalty was imposed in the proceedings of the assessment made under section 143(3) read with section 153A of the Act. There were found seized documents during the search operation which was containing the transaction of cash deposit in the bank. As such, there was no document found of an incriminating nature relating to the capital contribution in the partnership firm amounting to ₹ 25 lakhs only. Thus, in the absence of any information with the Revenue, we can hold that the disclosure made by the assessee was suo-moto and without referring to any incriminating document. Accordingly, we are of the view that such disclosure made by the assessee cannot be made subject to the penalty under the explanation 5A of the provisions of section 271(1)© of the Act. Hence, we set aside the finding of the learned CIT-A and direct the AO to the penalty imposed by him. Hence, ground of appeal of the assessee is hereby allowed.

Coming to ITA No. 257/Ahd/2022, an appal by the assessee, Saryashi D Sutaria for A.Y. 2010-11.

33. The only issue raised by the assessee is that the learned CIT(A) erred in confirming the levy of penalty under section 271(1)(c) of the Act for Rs. 12,42,000/- only.

34. The facts in brief are that the assessee in original return, under section 139(1) of the Act, filed dated 3rd November 2011 declared taxable income of Rs.

48,07,940/- which was accepted in the assessment order passed under section 143(3) of the Act. Subsequently, a notice under section 148 of the Act dated 29-03-2017 was issued for reopening assessment. The assessee in this return filed in response to the notice issued under section 148 of the Act declared an additional income of Rs. 35,14,940/- only. As such, the additional income offered by the assessee includes an amount Rs. 2 lakhs offered under the head in from other sources against cash deposit and remaining amount offered under the head short-term capital gain. The AO initiated penalty proceedings under section 271(1)(c) of the Act against the additional income offered by the assessee in the return filed u/s 148 of the Act and finally levied penalty of Rs. 12,42,609/- being 100% of the amount tax sought to be evaded.

34.1 On appeal, the learned CIT(A) also confirmed the penalty levied by the AO under the provisions of section 271(1)(c) of the Act.

34.2 Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

34.3 The learned AR before us contended that the assessee has made disclosure in the income tax return which was supposed to be offered as short-term capital gain. This is the mistake committed by the assessee and therefore the assessee rectified the same by offering the income under the head as short-term capital gain which has resulted in an increase in the income. However, the assessee never intended to furnish the inaccurate particulars of income by claiming the short-term capital gain as long-term. It was a bona fides mistake committed inadvertently while filing the return of income and therefore the same cannot be subject matter of the penalty.

34.4 On the other hand, the learned DR submitted that the additional income was offered by the assessee on account of the search otherwise the same would have gone tax free without charging the tax. Accordingly, the learned DR

contended that the assessee has furnished inaccurate particulars of income. The learned DR vehemently supported the order of the authorities below.

34.5 We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the assessee himself has disclosed the income under the head capital gain which evidences that the assessee never intended to furnish the inaccurate particulars of income. Merely offering the income under the wrong head cannot be a basis of levying the penalty under the provisions of section 271(1)(c) of the Act for furnishing inaccurate particulars of income. Thus, we are of the view that there was in-advertent mistake committed by the assessee which cannot be termed as inaccurate particulars of income. As such, at the most, such disclosure made by the assessee can be called as wrong claim which cannot be equated with the furnishing of inaccurate particulars of income. Accordingly, we are of the view that the assessee cannot be made subject to the penalty in the given facts and circumstances under the provisions of section 271(1)© of the Act. Hence, the ground of appeal of the assessee is hereby allowed.

34.6 In the result, the appeal of the assessee is hereby allowed.

Coming to ITA No. 258/Ahd/2022, an appeal by the assessee Saryashi D Sutaria for A.Y. 2011-12.

35. At the outset, we note that the issue raised by the present assessee in the captioned appeal for the AY 2011-12 is identical to the issue raised by the assessee namely **Dharmenbhai M Sutaria -HUF** for the assessment year 2011-12 in ITA No. 253/AHD/2022. Therefore, the findings given in the **ITA bearing No. 253/AHD/2022** shall also be applicable for the issue raised by the present assessee in the year under consideration i.e. AY 2011-12. The appeal of Dharmenbhai M Sutaria-HUF for the A.Y. 2011-12 has been decided by us vide paragraph No. **24** of this order in favour of the assessee. The learned DR and the

AR also agreed that whatever be the findings for the issue raised by Dharmendra M Sutaria-HUF for the year 2011-12 shall also be applied for the issue raised by the current assessee for the assessment year 2011-12. Hence, the ground of appeal filed by the assessee is hereby allowed.

35.1 In the result, the appeal of the assessee is hereby allowed.

Coming to ITA No. 259/Ahd/2022, an appeal by the assessee Sharena Sanjay Sutaria for AY 2010-11.

36. At the outset, we note that the issue raised by the present assessee in the captioned appeal for the AY 2010-11 is identical to the issue raised by the assessee namely **Shareyasi D Sutaria** for the assessment year 2010-11 in ITA No. 257/AHD/2022. Therefore, the findings given in **ITA No. 257/AHD/2022** shall also be applicable for the issue raised by the present assessee in the year under consideration i.e. A.Y. 2010-11. The appeal of Shareyasi D Dutaria for the A.Y. 2010-11 has been decided by us vide paragraph No. **34.5** of this order in favour of the assessee. The learned DR and the AR also agreed that whatever will be the findings for the issue raised by **Shareyasi D Sutaria** for the assessment year 2010-11 shall also be applied for the issue raised by the current assessee for the assessment year 2010-11. Hence, the ground of appeal filed by the assessee is hereby allowed.

36.1 In the result appeal of the assessee is hereby allowed.

Coming to ITA No. 260/Ahd/2022 by the assessee Sharena Sanjay Sutaria for A.Y. 2011-12.

37. At the outset, we note that the issue raised by the present assessee in the captioned appeal for the AY 2011-12 is identical to the issue raised by the assessee namely Dharmenbhai M Sutaria -HUF for the assessment year 2011-12 in

ITA No. 253/AHD/2022. Therefore, the findings given in I**TA No. 253/AHD/2022** shall also be applicable for the issue raised by the present assessee in the year under consideration i.e. A.Y. 2011-12. The appeal of **Dharmenbhai M Sutaria-HUF** for the A.Y. 2011-12 has been decided by us vide paragraph No. **24** of this order in favour of the assessee. The learned DR and the AR also agreed that whatever will be the findings for the issue raised by Dharmendra M Sutaria-HUF for the assessment year 2011-12 shall also be applied for the issue raised by the current assessee for the assessment year 2011-12. Hence, the ground of appeal filed by the assessee is hereby allowed.

37.1 In the result, the appeal of the assessee is hereby allowed.

38. In the combined results, all the appeals filed by the different assessee are hereby allowed.

Order pronounced in the Court on 10/04/2024 at Ahmedabad.

Sd/-	Sd/-
(SIDDHARTHA NAUTIYAL)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 10/04/2024
Manish