

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

श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष
BEFORE: Hon'ble SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 540 & 541/JP/2023
निर्धारण वर्ष / Assessment Year : 2007-08 & 2008-09

Smt. Jamna Devi Sharma Meena Ka Mohalla, Ward No. 2 Goner Jaipur	बनाम Vs.	The ITO Ward 7(2) Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: BXNPD 0140 H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Rohan Sogani, CA
राजस्व की ओर से / Revenue by: Mrs. Monisha Choudhary, Addl. CIT-DR

सुनवाई की तारीख / Date of Hearing : 10/07/2024
उदघोषणा की तारीख / Date of Pronouncement: 20/08/2024

आदेश / ORDER

PER: SANDEEP GOSAIN, JM

Both these appeals have been filed by the assessee against two different of orders of the ld. CIT(A) dated 22-06-2023, National Faceless Appeal Centre, Delhi [hereinafter referred to as (NFAC)] for the assessment years 2007-08 and 2008-09 in the matter of Section 271(1)(c) of the Act raising therein following grounds of appeal.

ITA NO. 540/JP/2023 – A.Y. 2007-08

“1. In the facts and circumstances of the case and in law, Id. CIT(A)/NFAC, has erred in confirming the action of Id. AO in levying penalty of Rs.28,39,991, u/s 271(1)(c) of The Income Tax Act, 1961. The action of Id. CIT (A)/NFAC is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the entire penalty levied by Id. AO and confirmed by Id. CIT (A)/NFAC.

2. In the facts and circumstances of the case and in law the Id. AO has erred in imposing penalty u/s 271(1)(c) without specifically pointing out specifically limb of the section. The action of the Id. AO is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the penalty imposed u/s 271(1)(c).”

ITA NO. 541/JP/2023 – A.Y. 2008-09

“1. In the facts and circumstances of the case and in law, Id. CIT(A)/NFAC, has erred in confirming the action of Id. AO in levying penalty of Rs.1,10,718, u/s 271(1)(c) of The Income Tax Act, 1961. The action of Id. CIT (A)/NFAC is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the entire penalty levied by Id. AO and confirmed by Id. CIT (A)/NFAC.

2. In the facts and circumstances of the case and in law the Id. AO has erred in imposing penalty u/s 271(1)(c) without specifically pointing out specifically limb of the section. The action of the Id. AO is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the penalty imposed u/s 271(1)(c).”

2.1 The Bench noticed in both the appeals that the Id. CIT(A) has dismissed the appeal of the assessee for the assessment year 2007-08 and 2008-09 in the matter of penalty u/s 271(1)(c) of the Act by observing in respective appeals as under:-

ITA NO. 540/JP/2023 – A.Y. 2007-08

“5.15 In the appellate proceedings, the appellant has merely stated that the addition amounting to Rs 57,000/ for cash credits is a meager sum which would otherwise be available with the assessee. The same should be treated as explained atleast for imposition of penalty". The above reply of the appellant has been considered. In the assessment proceedings and the

appellate proceedings, the appellant tried to explain the above cash credits in her bank account by trying to take the benefit of the availability of cash in the hands of other family members by submitting a common cash flow summary, which has been rejected by the A.O., CIT(A) and also by Hon'ble ITAT. In the appellate proceedings against the penalty order, the appellant is now stating that this a small sum which would be normally available with the appellant and thus contradicting its own submission earlier. The important part is that the appellant failed to explain the source of the above cash credit earlier and even in the penalty proceedings also. Considering the discussion in the preceding paras on the leviability of penalty u/s.271(1)(c) and the facts of the case as emanating from the earlier orders on quantum additions and the penalty order and the submission of the appellant, I hold that the penalty levied (on the above addition of Rs.57,000/-) is confirmed on the above issue and the ground of appeal is dismissed.

5.16 As a result, the penalty of Rs.28,39,991/- levied u/s.271(1)(c), on account of both the additions, is confirmed and ground No.1 of appeal is dismissed.

ITA NO. 541/JP/2023 – A.Y. 2008-09

“5.5 The AO initiated penalty proceedings on 24.02.2014. The additions on account of cash deposit in bank account of Rs.5,30,000/- and interest on savings bank account of Rs.9,660/- has been confirmed by CIT(A). The AO issued show cause notice for penalty proceedings on 05/10.2015. Appellant submitted its response before the AO. However, AO not found this response tenable and levied penalty of Rs.1,10,718/- u/s 271(1)(c) of the I.T. Act on 01.03.2017.

5.6 During the appellate proceedings, the appellant has given written submission which has been extracted in the preceding para. The appellant has submitted that the source of cash deposit in appellant's bank account is from the cash available with the members of the family and for the above purpose the appellant had submitted a cash flow statement of family members. The availability of the cash with the family is a bonafide explanation supported by evidence and the same is not proved false by the department and therefore the onus of the appellant u/s.271(1)(c) stands discharged and accordingly the penalty be not imposed. The above explanation of the appellant has already been disregarded in the appellate proceedings before the CIT(A) and Hon'ble ITAT which have confirmed the additions for the reasons given in their respective orders, relevant part of which has been extracted in the preceding para and is also considered relevant for the purpose of adjudicating the penalty proceeding. It is not disputed that cash deposits were made in the bank account of the appellant

during the year and the same have been found to be unexplained. The onus lies on the appellant to explain the source of the cash in which she has failed, The CIT(A) in his order has specifically dealt with the claim of the appellant by observing that

"The appellant has further tried to explain these bank deposits by submitting a common cash flow summary prepared from the entries appearing in her own bank account and also try incorporating the entries appearing in the bank account of assessee with Shri Jagdish and Smt. Narangi Devi, the other group persons. However all these persons have an independent existence and are assessable separately and have carried on separate land transactions etc. because of which the appellant cannot be allowed to take benefit of the availability of the cash in hands of some other person. Therefore, the contention of the appellant that the immediate source of the cash deposits is out of common cash flow chart can not be accepted. Therefore the amount of deposit in cash in the bank account of the assessee remained unexplained and the addition of Rs. 5,30,000/- is hereby upheld The appellant has further tried to explain these bank deposits by submitting a common cash flow summary prepared from the entries appearing in her own bank account and also by incorporating the entries appearing in the bank account of assessee with Shri Jagdish and Smt. Narangi Devi, the other group persons. However all these persons have an independent existence and are assessable separately and have carried on separate land transactions etc. because of which the appellant cannot be allowed to take benefit of the availability of the cash in hands of some other person. Therefore, the contention of the appellant that the immediate source of the cash deposits is out of common cash flow chart can not be accepted. Therefore the amount of deposit in cash in the bank account of the assessee remained unexplained and the addition of Rs. 5,30,000/ is hereby upheld"

The Hon'ble ITAT has also confirmed the order of CIT(A) on the above issue. As regards the contention of the appellant that the penalty u/s.271(1)(c) is not leviable as the explanation given by the appellant has not been proved false by the Department, reference may be made to explanation (1) to section 271(1)(c), which is extracted as under:

"Explanation 1.-Where in respect of any facts material to the computation of the total income of any person under this Act,-

(A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

Therefore, as per limb (B) of Explanation (1) to section 271(1)(c), the penalty is leviable if the appellant is not able to substantiate the explanation offered by him and fails to prove that such explanation is bonafide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him. The assessment order, the order of the CIT(A) and Hon'ble ITAT and the submission of the appellant clearly show that the appellant has failed to substantiate the cash deposits in the bank account and the explanation offered by her using the cash balance and cash flow with other family members is a mere ploy to explain the same without any verifiable basis and cannot be considered as bona-fide or well substantiated.

5.7 With respect to the interest on savings bank account of Rs.9,660/- on which penalty has been levied by the A.O., the appellant has stated that "the interest on savings bank is duly reflected in the bank statement and there cannot be any possibility of concealing the same. Assessee was not liable to file return of income u/s 139 for the reasons of her income being lower than the taxable limit. Therefore, assessee never filed her return of income and there was no occasion for the assessee to offer this interest income for tax. Looked at from this angle, no penalty deserves to be imposed". However, the appellant never filed return of income and even in response to notice u/s.148 the return of income was filed on 05.02.2014 at total income at Rs NIL Considering the above facts, it cannot be considered that the appellant had no occasion to offer this interest income for tax as the appellant could have disclose this interest income in the return filed u/s. 148, even if the return income was below taxable limit.

5.8 Considering the entire facts of the case and after considering the assessment order, the order of the CIT(A) and Hon'ble ITAT against the quantum addition and the penalty order and the submission of the appellant during the appellate proceedings, I have no basis or reason to interfere with the order of the A.O. levying the penalty, which is confirmed. The ground of appeal is dismissed."

3.1 Apropos the grounds of appeal of the assessee in ITA 540/JP/2023 for the assessment year 2007-08 wherein the brief facts of the case are that the assessee is a housewife and belongs to a rural and illiterate background. For the year under consideration, originally no return of income was filed by the assessee. On receipt of notice u/s 148, return of income was filed on 24.04.2018 at total income of Rs.15,820. Following is the summary of the actions of the authorities at various levels in respect of quantum and penalty proceedings.

Particulars	Addition by AO	Confirmed by CIT(A) Order Date 15.04.2018 Appeal No. 544/JPR/14-15	Confirmed by ITAT Order dated 13.04.2018 Appeal No. ITA No. 755/JP/2015	Penalty u/s 271(1)(c) levied by AO and confirmed by CIT(A)
Unexplained Investment	85,42,800	85,42,800	85,42,800	28,39,991
Cash Credits	57,000	57,000	57,000	
Total	85,99,800	85,99,800	85,99,800	

3.2 Now before the Bench, the assessee is in present appeal against the penalty order of CIT(A) in which penalty amounting to Rs 28,39,991 has been confirmed.

3.3 During the course of hearing, the ld. AR of the assessee has filed the following written submission praying therein to quash the penalty u/s 271(1)© of the Act as confirmed by the ld. CIT(A)

“ UNDISPUTED FACTUAL BACKGROUND

Registration of land in the name of other family members - to camouflage the title - to protect the ownership from ongoing disputes - not a transfer and therefore - no capital gain nor can any unexplained investments be taxed.

The factual matrix, regarding the family dispute concerning the land, is described below: -

- i. Shri Jagdish was adopted by Shri Chandalal in the year 1954. Shri Chandalal was unmarried. Shri Chandalal, thereafter, also adopted Shri Gyarsilal. Copy of jamabandi verifying adoption was submitted during the quantum proceedings. The said fact is not in dispute.
- ii. Shri Chandalal had approximately 60 bighas land in the village Goner. After the death of Shri Chandalal, the issue regarding the ownership of the land owned by late Shri Chandalal was decided by Court in the year 1981. The Court, through a decree, conferred the ownership rights equally in Gyarsilal and Shri Jagdish
- iii. On 03.08.2005, Shri Ladu who is son of Shri Jagdish's real brother Shri Mohrilal filed a suit in the court of Sub Division Officer II claiming certain portion of the land from Shri Jagdish for the reasons that Shri Ladu had no land and it was his right to claim certain portion of the land which was owned by Shri Jagdish on account of his adoption. The suit was dismissed for non-appearance.
- iv. On 21.09.2005, Shri Dinesh, grandson of Shri Gyarsilal filed a suit against Shri Jagdish claiming 1/6th portion of land for the reasons mentioned in the suit.
- v. Thereafter, on 04.09.2006, Smt. Choti Devi, daughter of Shri Gyarsilal filed a suit against Shri Jagdish claiming 1/6th portion of land for the reasons mentioned in the suit.
- vi. Yet another suit was filed by Shri Ashok, grandson of Shri Gyarsilal on 13.02.2007 against Shri Jagdish claiming 1/6th portion of land for the reasons mentioned in the suit.

- vii. Smt Choti Devi, Shri Ashok and Shri Dinesh claimed, in their respective suits, that Shri Jagdish was not at all adopted by Shri Chandalal. All the above 3 suits as on date of hearing of quantum proceedings were pending before the court.
- viii. Shri Jagdish filed a revision petition before the Hon'ble Revenue Board Ajmer requesting a direction that the suits filed by Shri Dinesh, Shri Ashok and Smt. Choti Devi are not maintainable. This petition of Shri Jagdish as on date of hearing of quantum proceedings were pending before the Hon'ble Revenue Board, Ajmer.
- ix. Thus, the land which was the subject matter of assessment in the appeal was disputed and title was under challenge by different claimants.
- x. Shri Jagdish has two sons and 2 daughters. Both the sons are married. Smt. Narangi Devi is wife of Shri Chaju Ram and Smt. Jamna Devi is wife of Shri Kalu Ram.
- xi. In order to safeguard the title in the inherited land, which was in dispute, Shri Jagdish camouflaged the title by getting the land registered in the name of his two daughters- in -laws namely Smt. Narangi Devi and Smt. Jamna Devi without any consideration.
- xii. The family tree is depicted in the written submission

GROUND NO 1: LEVY OF PENALTY U/S 271(1)(C)

A. SUBMISSIONS BEFORE HON'BLE ITAT DURING QUANTUM PROCEEDINGS

1. Elaborate submissions during quantum proceedings were made before Hon'ble Bench. The same may please be considered in correct perspective **[PB 142-158]**

B. FINDING OF HON'BLE ITAT DURING QUANTUM PROCEEDINGS:

1. The main reason for confirming the addition by Hon'ble Bench is the execution of sale deeds for acquisition of land by the assessee. The finding of the Hon'ble Bench is as under **[PB 102-103]**

“Three separate conveyance deeds has been executed in the favor of the assessee (jointly with Smt. Narangi Devi) by Shri Jagdish Narayan Sharma and the same are duly registered with the stamp authorities. Having registered the conveyance deed, where the parties so decide subsequently to cancel or rescind the same, it is again a settled position that they have to again execute a written agreement cancelling or rescinding the earlier sale deed and the said agreement cancelling or rescinding the earlier sale deed has again to be registered with the stamp authorities. Similarly, where the parties so decide subsequently to amend/vary/modify the terms of the sale deed so executed, they have to again execute a written agreement amending/varying/modifying the earlier sale deed and the said agreement has again to be registered with the stamp authorities. In the instant case, there is no agreement which has been executed and registered modifying the initial sale deeds and therefore, the said sale deeds continue to remain valid and stand as on day and reflect the mutual understanding of the parties duly taken on record and recorded in official records by the stamp duty authorities. The subsequent affidavits which are merely signed unilaterally by the assessee and Smt. Narangi Devi, and not even by the transferor, Shri Jagdish Narayan Sharma can in no circumstances take precedence over the registered sale deeds. Further, regarding the circumstances relating to family disputes which have led to execution of the sale deeds, there is no finding recorded by the lower authorities. Even if we believe the existence of such a dispute as so claimed by the assessee, how would that nullify the existence and the contents of the sale deeds which have been executed and registered with the stamp duty authorities. Once a sale deed has been executed which evidence the handing over of the possession of the land and passing of the consideration, the circumstances which has led to execution of the sale deed are of no consequence. It is only in a scenario where pursuant to total or partial partition of HUF or under a gift or a will or a family settlement, certain transfer has happened which the law has envisaged under section 47 as not regarded as transfer for the purposes of computing the capital gains. It is not the case of the assessee that as part of the family settlement, the father-in-law has transferred the land to her along with Smt. Narangi Devi. Further, we find that the assessee after having acquired the subject land has subsequently sold a part of such land to a third party, namely Smt. Prem Devi vide registered sale deed dated 27.07.2007 and capital gains arising therefrom has been brought to tax in the hands of the assessee by the Assessing officer in AY 2008-09.”

C. FINDING OF LD. AO DURING PENALTY PROCEEDINGS:

Since no adequate reply was furnished by the assessee, Id. AO levied the penalty.

D. Written submissions made before Id. CIT-(A) for penalty proceedings are placed at **[PB 217-225]**

E. FINDING OF LD. CIT(A) DURING PENALTY PROCEEDINGS:

Ld. CIT(A) confirmed the penalty levied by Id. AO majorly on account of following reasons:

a. It is well established that whenever there is difference between the returned and assessed income, there is inference of concealment. The onus of the assessee would not be discharged by any fantastic or fanciful explanation. It is not the law that any and every explanation has to be accepted **[Para 5.11 of CIT-(A) order]**

b. The appellant has failed to substantiate the source of investment in the acquisition of immovable property through valid sale deeds and the explanation may be a mere ploy and cannot be considered as bonafide **[Para 5.13 of CIT-(A) order]**

F. SUBMISSIONS:

- i. The conditions of levying penalty u/s 271(1)(c) must exist before the penalty be imposed, independently of the quantum proceedings.
- ii. The first and foremost requirement of Section 69 is establishing of fact that the investment is really and conclusively made with the support of direct and cogent material on record. Neither in quantum proceedings nor even in penalty proceedings, any such evidence is brought on record.
- iii. It is important to note that the assessee was facing serious family disputes, this fact remains undisputed as there is no adverse finding recorded by the lower authorities on the same **[PB 103, Extract of Hon'ble ITAT order]**

“Further, regarding the circumstances relating to family disputes which have led to execution of the sale deeds, there is no finding recorded by the lower authorities”

- iv. Evidences in regard to the family disputes were filed before Hon’ble Bench during the quantum proceedings. The same are also placed at **PB 168-210**.
- v. The assessee during the quantum proceedings submitted the bank statements to substantiate the fact there was no source of income of the assessee. The same are also placed at **PB 214-215**. The bank accounts were first opened only in the year 2005-06. Thus, the assessee had no source of investment to make the alleged investment of Rs 85,42,800 for purchase of land [**PB 137**]
- vi. The assessee relied on the judgement of **Hon’ble Supreme Court** in the case of **PK Noorjahan [1999] 103 taxman 382 (SC)** wherein it was held as under:

“The appeals relate to the assessment years 1968-69 and 1969-70. The assessee is a Muslim lady who was aged about 20 years during the previous year relevant for the assessment year 1968-69. On 15-11-1967 she had purchased 16 cents of land in Ernakulam and the amount spent by her, inclusive of stamp and registration charges, for this purchase was Rs. 34,628. On 27-11-1968, she purchased another 12 cents of land at Ernakulam and the total investment for this purchase was Rs. 25,902, the explanation of the assessee regarding the source of the purchase money for these investments was that the same were financed from out of the savings from the income of the properties which were left by her mother's first husband. The said explanation offered by the assessee was rejected except to the extent of Rs. 2,000 by the ITO who made an addition of Rs. 32,628 as income from other sources in the assessment year 1968-69 and an addition of Rs. 25,902 in the assessment year 1969-70. The said orders were affirmed in appeal by the AAC. The Tribunal, however, held that even though the explanation about the nature and sources of the purchase money was not satisfactory but, in the facts, and circumstances of the case, it was not possible for the assessee to earn the amount invested in the properties and that by the stretch of imagination could the assessee be credited with having earned this income in the course of the assessment year or was even in a position to earn it for a decade or more. The Tribunal took the view that although the explanation of

the assessee was liable to be rejected. Section 69 of the Income-tax Act, 1961 ('the Act') conferred only a discretion on the ITO to deal with the investment as income of the assessee and that it did not make it mandatory on his part to deal with the income as income of the assessee as soon as the latter's explanation happened to be rejected. On that view the Tribunal allowed the appeals of the assessee and cancelled the assessment made by the ITO. Thereafter the Tribunal at the instance of the revenue referred the question abovementioned to the High Court for its opinion. The High Court has agreed with the said view of the Tribunal and has held that in the instant case, it could not be said that the Tribunal was wrong in having differed from the ITO and the AAC in the matter of exercising judicial discretion as to whether even after rejecting the explanation of the assessee the value of the investments were to be treated as the income of the assessee. According to the High Court, the Tribunal had not committed any error in taking into account the complete absence of resources of the assessee and also the fact that having regard to her age and the circumstances in which she was placed she could not be credited with having made any income of her own and in these circumstances, the Tribunal was right in refusing to make an addition of the value of the investments to the income of the assessee. 3. Shri Ranbir Chandra, the learned counsel appearing for the revenue, has urged that the Tribunal as well as the High Court were in error in their interpretation of section 69. The submission is that once the explanation offered by the assessee for the sources of the investments found to be non-acceptable the only course open to the ITO was to treat the value of the investments to be the income of the assessee. The submission is that the word 'may' in section 69 should be read as 'shall'. We are unable to agree. As pointed out by the Tribunal, in the corresponding clause in the Bill which was introduced in the Parliament, the word 'shall' had been used but during the course of consideration of the Bill and on the recommendation of the Select Committee, the said word was substituted by the word 'may'. This clearly indicates that the intention of the Parliament in enacting section 69 was to confer a discretion on the ITO in the matter of treating the source of investment which has not been satisfactorily explained by the assessee as the income of the assessee and the ITO is not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory. The question whether the source of the investment should be treated as income or not under section 69 has to be considered in the light of the facts of each case. In other words, a discretion has been conferred on the ITO under section 69 to treat the source of investment as the income of the assessee if the explanation offered by the assessee is not found satisfactory and the said discretion has to be exercised keeping in view the facts and circumstances of the particular case”

- vii. However, lower authorities have disregarded the said judgement because of the reason that the assessee could not rebut the contents of sale deeds. It is submitted that lower authorities failed to establish the fact that the assessee had **received any funds** for purchase of the said land.
- viii. The assessee in order to discharge its onus of not receiving any consideration for purchase of the land has submitted affidavits and bank statements. The affidavits of the purchasers submitted before Id. CIT-(A) which clearly substantiated the fact that there was no actual transfer of funds but the sale deed was only executed to protect the interests of the family
- ix. It is submitted that contents of affidavits have not been disputed but have rejected for a legal reason. That legal presumption has no relevance for imposition of penalty. Hon'ble ITAT has mentioned that the "*affidavits confirming the fact cannot take precedence over the registered sale deeds*" **[PB 103]**. The fact that the same cannot take precedence can be taken only for the purpose of taxation but not for imposition of the penalty.
- x. Section 69 is a deeming fiction whereby an amount which though not proved to be the income of the assessee is deemed to be so. In the present case, the explanation of the assessee was not accepted in entirety, however, there is no material on record on the basis of which it could be concluded that the same was not bonafide. In other words, the explanation given by the assessee has not been disproved.
- xi. Ld. CIT(A) has not even considered the explanation given by the assessee and merely because the addition was confirmed in the quantum proceedings, confirmed the levy of penalty. It was the duty of lower authorities to prove otherwise by bringing some adverse material against the assessee on record. The same is not in done in the present case.
- xii. It was further stated by Id. CIT(A) at **Page-16 of his order** that "*it is well established that whenever there is difference between the returned and assessee income, there is inference of concealment*"

Hon'ble Supreme Court in the case of Reliance Petroproducts (P.) Ltd [2010] 322 ITR 158 (SC)“.....We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the revenue, that by itself would not, in our opinion, attract the penalty under section 271(1)(c). If we accept the contention of the revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature....”

- xiii. Attention is drawn towards the judgement of **Hon'ble Gujarat High Court** in the case of **Commissioner of Income-tax vs. Baroda Tin Works [1996] 221 ITR 661 (Gujarat)** wherein it was held as under:

“Additions have been made under the provisions of section 68/69A cannot lead to a presumption that such additions were income of the assessee for the purpose of penalty proceedings. The purpose of legal fiction created under sections 68, 69, and 69A was only to bring such unexplained sums within the ambit of charging provision”

- xiv. Therefore, it can be concluded the fiction created under sections 68, 69, 69A, 69B and 69C by itself cannot be extended to penalty proceedings to raise the presumption about concealment of such income. The penalty cannot be imposed on the ground that there was difference in returned and assessed income.
- xv. Before penalty can be imposed the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars.
- xvi. In the present case, following points have to be considered in correct perspective before the imposition of penalty.
- There is no adverse material on record which proves that consideration has been exchanged for the purchase of land.
 - Reason of exchanging consideration for a land which would otherwise come to her through inheritance
 - Reason for executing the sale deed among the family members

- xvii. It is important to note that the sale deed is also between the close relatives and not between the strangers. The deed was only executed because of lack of legal assistance as the assessee belonged to rural background.
- xviii. The case of the assessee is not that the explanation is found to be false but it is a plausible one. Once the explanation given by the assessee is found not to be false, to bring the case under the ambit of the Explanation to Section 271(1)(c) of the Act, it has to be seen that, whether the same is substantiated or not. In the present case, no explanation of the assessee is controverted with an evidence and, thus, no penalty should be levied.

In view of the above even if addition is confirmed in quantum proceedings. There are no evidences to establish the fact of actual payment and, therefore, the penalty imposed is unjustified and illegal and deserves to be quashed.

GROUND NO 2: PENALTY IMPOSED WITHOUT SPECIFYING SPECIFIC LIMB

1. It is inevitable that the authority levying penalty should apply mind and come to a conclusion that whether the penalty is being levied for **concealment of particulars of income OR furnishing inaccurate particulars of income**. In the absence of which no penalty should be levied on the assessee as determination of such limb is *sine qua non* for imposition of penalty under section 271(1)(c).
2. In the notice issued u/s 274, penalty was initiated for concealment of particulars of income **OR** furnishing inaccurate particulars of income [**PB 216**].
3. The lower authorities failed to point out the specific default for which the assessee was being called upon to explain that as to why he may not be saddled with penalty under section 271(1)(c).
4. It is pertinent to note that in the notice u/s 274, Id. AO has not clearly mentioned the limb, on the basis of which, penalty was proposed to be imposed. Id. AO has simply issued a pre-printed notice without striking off the unnecessary portions of the notice (**Concealed particulars of income or furnished inaccurate particulars of Income**). If it was of the view that the

assessee has concealed particulars of income then he should have deleted or not mentioned the other limb for imposition of penalty i.e. furnishing of inaccurate particulars of income. The above act of the Id. AO clearly shows that the entire exercise of initiation of penalty proceedings has been done without application of mind.

5. It is important to note that there is failure in the statutory obligation of conveying and validly putting the assessee to notice that with respect to the addition under consideration penalty was sought to be imposed upon him for which default; and, thus, had divested him from putting forth his defence that as to why no such penalty was called for in his case. The very purpose of affording a reasonable opportunity of being heard to an assessee as per the mandate of section 274(1) would not only be frustrated, but would be rendered as redundant if he is not conveyed in clear terms the specific default for which penalty under the said statutory provision was sought to be imposed.

6. Reliance is placed on the following recent judgements:

i. Hon'ble Bombay High Court in the case of Principal Commissioner of Income-tax vs. Jehangir H. C. Jehangir [2023] 155 taxmann.com 209 (Bombay)

It is clear from the law as laid down that if one of the irrelevant matters is not struck off, it would mean that the Assessing Officer himself was not sure while issuing the show-cause notice whether he had proceeded on the basis that assessee had concealed his income or he had furnished inaccurate particulars. If without being sure as to what was the basis on which he was planning to impose the penalty on assessee, such a notice, would indicate non-application of mind and the notice would be not valid.

ii. Hon'ble ITAT, Raipur Bench in the case of Prashant Manohar Bhagwat vs. ITO [2024] 158 taxmann.com 596 (Raipur - Trib.)

Thus, in the backdrop of the aforesaid observations it is to be held that as the Assessing Officer had clearly failed to discharge his statutory obligation of fairly putting the assessee to notice as regards the defaults for which he was being proceeded against, therefore, the penalty under section 271(1)(c) imposed by him being in clear violation of the mandate of section 274(1) cannot be sustained. Thus, for the aforesaid reasons

the order of the Commissioner (Appeals) who had upheld the same was to be set aside. The penalty imposed by the Assessing Officer under section 271(1)(c) is to be quashed.

iii. Hon'ble Delhi High Court in the case of Principal Commissioner of Income-tax vs. Blackroak Securities (P.) Ltd. [2023] 157 taxmann.com 564 (Delhi)

In case the AO concludes, that a case is made out under section 271(1)(c) of the Act, he needs to indicate, clearly, as to which limb of the said provision is attracted. The reason we say so is, that apart from anything else, the pecuniary burden may vary, depending on the infraction(s) committed by the respondent/assessee.

7. Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565 (Karnataka) after referring to the decision of Hon'ble Supreme Court in the case of T. Ashok Pai (Supra) held as under:-

"...Concealment, furnishing inaccurate particulars of income are different. Thus the Assessing Officer while issuing notice has to come to the conclusion that whether is it a case of concealment of income or is it a case of furnishing of inaccurate particulars. The Apex Court in the case of Ashok Pai reported in 292 ITR 11 at page 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujrat High Court in the case of MANU ENGINEERING reported in 122 ITR 306 and the Delhi High Court in the case of VIRGO MARKETING reported in 171 Taxmn 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. Therefore, when the Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind...."

8. In the case of Jyoti Ltd. [2013] 34 taxmann.com 65 (HC-Guj), the assessing officer in his penalty order noted as under:-

"In view of the above facts, it is clear that the assessee concealed income/furnished inaccurate particulars of income. I, therefore, consider it a fit case for levy of penalty under Section 271(1)(c)"

Hon'ble Gujrat High Court in the above case held that, where the Assessing Officer in order of penalty did not come to a clear finding regarding the penalty being imposed on concealment of income or on furnishing inaccurate particulars of income, the Tribunal was justified in setting aside the impugned penalty order. Hon'ble Gujarat High Court followed the ratio laid down in the case of **New Sorathia Engg. Co. [2006] 282 ITR 642 (Guj-HC)**.

9. The above ratio laid down in the case of **Manjunatha Cotton & Ginning Factory(Supra)** has been followed by various High courts in the below mentioned cases:-

- i. **Shri Samson Perinchery, ITA 1154,953,1097,1226 OF 2014 (Order date – 5.01.2017)(Bombay High Court)**
- ii. **SSA'S Emerald Meadows[2016] 73 taxmann.com 241 (Karnataka High Court)**
- iii. **Mitsu Industries Ltd., ITA No. 216 of 2004, Gujarat High Court**

10. SLP filed by the department against the said ratio was dismissed by the **Hon'ble Supreme Court** in the case of **SSA'S Emerald Meadows [2016] 73 taxmann.com 248 (SC)**. **Hon'ble Apex Court** in the above mentioned case held that **"we do not find any merit in this petition"**. *The special leave petition is, accordingly, dismissed*" (Emphasis Supplied). **Thus the matter has stamp of approval of the Hon'ble Apex Court.**

11. Attention is drawn towards the judgment of the **Hon'ble Jurisdictional High Court** in the case of **Sheveta Construction Co. Pvt. Ltd, ITA NO. 534/2008**, wherein the Hon'ble High Court at Para 9 of the its order held as under:-

*"...Taking into consideration the decision of the Andhra Pradesh High Court which virtually considered the subsequent law and the law which was prevailing on the date the decision was rendered on 27.08.2012. In view of the observations made in the said judgment, we are of the opinion that the contention raised by the appellant is required to be accepted and in the finding of Assessing Officer in the assessment order it is held that the AO, has to give a notice as to **whether he proposes to levy penalty for concealment of income or furnishing inaccurate particulars. He cannot have both the conditions and if it is so he has to say so in the notice and record a finding in the penalty order...**"(Emphasis Supplied)*

12. **Hon'ble ITAT Jaipur Bench**, in the following cases pronounced, followed the ratio laid down by the Hon'ble Jurisdictional High Court in the above-mentioned case and deleted the penalty levied on the assessee under section 271(1)(c)

- i. **Mohd. Sharif Khan vs. DCIT**, in **ITA. No 441/JP/2014**
- ii. **Jai Ambey Associates vs ITO** in **ITA No. 801/JP/2016**

In view of the above, the penalty imposed may please be quashed and the appeal of the assessee Appellant may please be allowed.

3.4 On the other hand, the ld. DR relied upon the orders of the ld. CIT(A) and also relied upon following case laws countering the submissions of the ld AR of the assessee.

1. [2011] 118 Taxman 324 (SC) K.P. Madhusudhanan vs CIT
2. [2017] 84 Taxmann.com 51 (Mumbai Trib) Earthmoving Equipment Services Corporation vs DCIT, 22(2), Mumbai.
3. [2018] 93 Taxman.com 250 (Madras High Court) Sundram Finance Ltd. vs ACIT, Circle VI (4), Chennai)
4. [2024] 158 Taxmann.com 341 (Bombay High Court) Veena Estate (P) Ltd. vs CIT

3.5 The Bench has heard the counsel for both the parties and perused the materials available on record including the written submissions of the parties and the case laws cited (supra). The Ground No. 2 is raised by the assessee as the same is legal in question and goes to the root of the case. In this case, the assessee has challenged the imposing and upholding of the penalty u/s 271(1)© of the Act by

challenging the validity of the notice u/s 271(1)© of the Act. In this case, the ld. AR relied upon the written submission and reiterated the same arguments as raised by him before the revenue authorities and also relied upon the decisions enumerated in his written submissions. The ld. DR relied upon the orders of the Revenue Authorities and also relied upon 04 decisions (supra). At the very outset of the hearing, my attention was drawn to the notice issued by the Department for imposition of penalty u/s 274 read with section 271(1)© of the Act and the same is reproduced below.

‘NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF THE INCOME TAX ACT 1961

Office of the Income Tax Officer
Ward No. 7(2), Jaipur
Dated: 24-02-2014

PAN- BXNPD01401

To,

Smt. Jamna Devi,
W/o Sh. Kalu Ram, Vill Goner,
Tehsil Sanganer, Jaipur

Whereas in the course of proceedings before me for the assessment year 2008-09 it appears to me that you:-

"Have concealed the particulars of your income or furnished inaccurate particulars of such income."

You are hereby required to appear before me at 11:30 A.M. on 10/03/2014 at Income-tax Office, C-95, Baba Sidhnath Bhawan, Lal Kothi, Tonk Road, Jaipur and show cause why an order imposing a penalty on you should not be made under section 271(1)(c) of the Income-Tax 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 is made under section 271.

Sd/-
(Alok Jain)
Income-tax Officer,
Ward-7(2), Jaipur’’

After having gone through the notice issued by the Department, I found that it is inevitable that the Authority levying penalty should apply mind and come to conclusion as to whether penalty is being levied for concealment of particulars of income or furnishing inaccurate particulars of income. The Bench also noticed that the lower authorities failed to point out the specific default for which the assessee was being called upon to explain as to why he may not be saddled with penalty u/s 271(1)© of the Act. In the absence of which no penalty should be levied on the assessee as determination of such limb is sine qua non for imposition of penalty u/s 271(1)© of the Act. From the perusal of the notice, it is apparent that in the notice issued u/s 274 of the Act penalty was initiated for concealment of income or furnishing inaccurate particulars of income which is at page 216 of the paper book of the assessee and the AO failed to point out specific default for imposition of penalty i.e furnishing inaccurate particulars of income. However, the act of the AO by not striking off the necessary limb clearly shows that entire exercise of initiation of proceedings has been done without application of mind. I notice the

facts of the case and found that there is failure in the statutory obligation of conveying and validly putting the assessee to that with respect to the addition under consideration penalty was sought to be imposed upon him for which default and thus in this way the AO had divested him from putting for his defence that as to why no such penalty was called for in her case. In my view the very purpose of affording a reasonable opportunity of being heard to an assessee as per the mandate of Section 274(1) would not only be frustrated but would be rendered as redundant if she is not conveyed in clear terms the specific default for which penalty under the said provision was sought to be imposed. In this regard, I rely on following decisions referred by the ld. AR of the assessee.

1. Hon'ble Bombay High Court in the case of Principal Commissioner of Income-tax vs. Jehangir H. C. Jehangir [2023] 155 taxmann.com 209 (Bombay)

2. Hon'ble ITAT, Raipur Bench in the case of Prashant Manohar Bhagwat vs. ITO [2024] 158 taxmann.com 596 (Raipur - Trib.)

3. Hon'ble Delhi High Court in the case of Principal Commissioner of Income-tax vs. Blackroak Securities (P.) Ltd. [2023] 157 taxmann.com 564 (Delhi)

4. Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565 (Karnataka) after referring to the decision of Hon'ble Supreme Court in the case of T. Ashok Pai

5. In the case of Jyoti Ltd. [2013] 34 taxmann.com 65 (HC-Guj), the assessing officer in his penalty order noted as under:-

"In view of the above facts, it is clear that the assessee concealed income/furnished inaccurate particulars of income. I, therefore, consider it a fit case for levy of penalty under Section 271(1)(c)"

Hon'ble Gujrat High Court in the above case held that, where the Assessing Officer in order of penalty did not come to a clear finding regarding the penalty being imposed on concealment of income or on furnishing inaccurate particulars of income, the

Tribunal was justified in setting aside the impugned penalty order. Hon'ble Gujarat High Court followed the ratio laid down in the case of New Sorathia Engg. Co. [2006] 282 ITR 642 (Guj-HC).

6. The above ratio laid down in the case of Manjunatha Cotton & Ginning Factory(*Supra*) has been followed by various High courts in the below mentioned cases:-

- (I) Shri Samson Perinchery, ITA 1154,953,1097,1226 OF 2014 (Order date – 5.01.2017)(Bombay High Court)
- (II) SSA'S Emerald Meadows[2016] 73 taxmann.com 241 (Karnataka High Court)
- (III) Mitsu Industries Ltd., ITA No. 216 of 2004, Gujarat High Court

7. SLP filed by the department against the said ratio was dismissed by the Hon'ble Supreme Court in the case of SSA'S Emerald Meadows [2016] 73 taxmann.com 248 (SC). Hon'ble Apex Court in the above mentioned case held that "we do not find any merit in this petition". *The special leave petition is, accordingly, dismissed*" (Emphasis Supplied). Thus the matter has stamp of approval of the Hon'ble Apex Court.

8. Hon'ble Jurisdictional High Court in the case of Sheveta Construction Co. Pvt. Ltd, ITA NO. 534/2008,

9. Hon'ble ITAT Jaipur Bench, in the following cases pronounced, followed the ratio laid down by the Hon'ble Jurisdictional High Court in the above-mentioned case and deleted the penalty levied on the assessee under section 271(1)(c)

- i. Mohd. Sharif Khan vs. DCIT, in ITA. No 441/JP/2014
- ii. Jai Ambey Associates vs ITO in ITA No. 801/JP/2016''

Now after going through all the cases referred by me (*supra*), it is settled law that if one of the irrelevant limb in the notice for imposition of penalty is not struck off then it would mean that the AO was not sure while issuing the show cause notice as to whether he had proceeded on the basis that the assessee had concealed

her income or she had furnished the inaccurate particulars of income. Therefore, if without being sure as to what the basis on which he is planning to impose penalty on assessee, such a notice would indicate non-application of mind and notice would not be valid. Although the Id DR has relied upon the decisions rendered by the Coordinate Bench of ITAT and Hon'ble High Courts (supra) but the facts from those cases *pari materia* are altogether different and thus the same are not applicable to the facts of the present case. However, the Hon'ble Karnataka High Court decision in the case of Manjunatha Cotto & Ginning Factory (supra) has categorically held that notice without striking off the relevant clause will lead to an inference as to non-application of mind and this judgement was valid in the cases of Shri Samson Perinchery and SSA's Emerald Meadows (supra) and even the SLP filed by the Department against the said ratio was dismissed by the Hon'ble Supreme Court in the case of SSA'S Emerald Meadows [2016] 73 Taxmann.com 248n (SC) wherein the Hon'ble Supreme Court clearly mentioned that they find no merits in the petition filed by the Department. Accordingly, Special Leave Petition filed by the Department was dismissed. Thus, in this was the Hon'ble Supreme Court has also approved the view taken by the Hon'ble Karnataka High Court in the case of SSA'S Emerald Meadows (supra). Even otherwise the Jurisdictional High Court of Rajasthan in the case of Sheveta Construction Co. Pvt Ltd. (ITA No. 534/2008) has categorically mentioned at para 9 of its order that *AO has to give a*

notice as to whether he proposes to levy penalty for concealment of income or furnishing inaccurate particulars but s he cannot have both the conditions and if it is so he has to say so in the notice and record a finding in the penalty order.

Therefore, considering the totality of the facts of the case as discussed above, I am of the view that notice issued u/s 274 r.w.s.271 of the Act by the AO as to imposition of penalty is defective and thus no penalty could have been levied on the basis of this defective notice. Hence, in this view of the matter, the order of the Id. CIT(A) is unsustainable and the Ground No. 2 of the assessee is allowed.

4.1 As regards the Ground No. 1 of the assessee as to confirming the penalty of Rs.28,39,991/- u/s 271(1)© of the Act by the Id.CIT(A), it may be noted that since the Ground No. 2 raised above by the assessee has been allowed, therefore, it is not required to adjudicate upon the Ground No. 1 of the assessee.

5.1 As regards the appeal of the assessee in ITA No. 541/JP/2023, it is noted that similar grounds have been raised by the assessee in its ground of appeal (supra). Since the Bench has decided the appeal of the assessee in ITA No. 540/JP/2024 for the assessment year 2007-08 in favour of the assessee, hence the decision taken by the Bench for the assessment year 2008-08 will apply mutatis mutandis in the assessment year 2009-10 in the case of the assessee.

6.0 In the result, both the appeals of the assessee are allowed with no orders as to costs.

Order pronounced in the open court on 20/08/2024.

Sd/-
(संदीप गोसाईं)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 20 /08/2024

***Mishra**

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

1. The Appellant- Smt. Jamna Devi Sharma, Jaipur
2. प्रत्यर्था / The Respondent- The ITO, Ward 7(2), Jaipur
3. आयकर आयुक्त / The Id CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्ड फाईल / Guard File (ITA No. 540 & 541/JP/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar