IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH SMC NEW DELHI

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER

ITA No.5747/Del/2014
Assessment Years 2006-07

Alok Bhandari, **1/2873, Ram Nagar Extn.** **Loni Road, Shadara,** **New Delhi.** **PAN: AGMPB 5584A**	Vs.	**ACIT, Central Circle-II,** **Faridabad.**
(Appellant)		(Respondent)

ITA No.5749/Del/2014
Assessment Years 2006-07

Rajendra Bhandari, **1/2873, Ram Nagar Extn.** **Loni Road, Shadara,** **New Delhi.** **PAN: AGMPB 5581F**	Vs.	**ACIT, Central Circle-II,** **Faridabad.**
(Appellant)		(Respondent)

Assessee(s) by :	Shri R.S. Ahuja, C.A..
Revenue by :	Ms. Bedobani, Sr.D.R.

सुनवाई की तारीख/**Date of Hearing** : **19/04/2017**
घोषणा की तारीख /**Date of Pronouncement:** **21/04/2017**

ORDER

These two appeals of two assessees, Mr. Alok Bhandari and Mr. Rajendra Bhandari arise from two different orders of learned CIT(A)-Central Gurgaon, vide orders each dated 9.7.2014 each for the assessment years 2006-07. The assessee in the case of Mr. Alok Bhandari has raised the following grounds of appeal.

"(A) That on the facts & circumstances of the case the learned ITO & the CIT(A) erred in :

1) *Imposing penalty u/s 271(1)(c) amounting to Rs.2,69,000/-.*
2) *Levying penalty inspite of the fact that law applicable for imposing the penalty u/ 271(1)(c) is the law in force at the time of filing of original return. The original return was filed on 03.03.2009 while the finance Act (No.2) of 2009 came in effect from 01.04.2009 passed in Lok Sabha on 27th July 2009 and in Rajya Sabha 29th July 2009 and assented on 19th August 2009 with retrospective effect 01.06.2007.*

3) Ignoring the fact that explanation 5A of Section 271(1) was inserted by the Finance Act 2009, w.e.f. 01.06.2007 which is after the assessment year in question."

2. The grounds in the case of Rajendra Bhandari are identical except the quantum of penalty. Since, the issue in both the appeals is identical, therefore, both the appeals are being taken by these consolidated order. First of all, I am taking up the appeal in the case of Alok Bhandari in ITA No.5747/Del/2014 for the assessment year 2006-07 as under.

3. The brief facts of the case are that search and seizure operation was conducted at the premises of the Bestech group on 07.02.2008. Assessee was also covered. Survey operations u/s.133A(1) of the Act were also conducted simultaneously in the premises of some of the members of the group. Assessment u/s.153A(1)(b) was completed on 17/07/2009 at a total income of Rs.12,50,791/- which happened to be the income returned u/s.153A. Penalty proceedings were initiated, culminating into levy of penalty of Rs. 2,69,000/- @ the minimum rate of 100%.

4. The assessee argued mainly on the legal grounds that penalty u/s.271(1)(c) cannot be levied which is illegal and bad in law. The said issue was raised before the learned CIT(A) as well which pleadings of the assessee were rejected by the learned CIT(A).

5. I have heard the rival contentions and perused the facts of the case that once a return is filed pursuant to notice under section 153A, the same is treated as return filed under section 139 of the Act [refer clause (a) of section 153A91)]. Further, concealment/furnishing of inaccurate particulars of income/undisclosed income, has to be necessarily seen vis-a-vis return filed by the appellant, once, income itself is declared which is accepted as such under section 139 r.w.s. 153A of the Act, then, the question of there

being concealment/furnishing of inaccurate particulars of income/undisclosed income, does not arise at all. In the present case, the entire undisclosed income has been offered for tax by the appellant in the return of income, which was subject matter of assessment before the Assessing Officer. The return filed by the appellant has been accepted as such by the learned Assessing Officer, without any variation. Therefore, in the absence of any undisclosed income being found in the assessment vis-a-vis the return filed, the issue of imposition of penalty does not arise. Thus the Assessing Officer is erred in imposing the penalty on the assessee. It is well established principle that law prevailing on the date of filing of return is applicable for impostioin of penalty. In the present case for the assessment year 2007-08, though the first two conditions i.e. (a) and (b) of explanation 5A to Section 271(1), are satisfied since the relevant previous year had ended prior to the date of search on 7th February, 2008 and the due date expired prior to the date of search. However, the third condition, i.e., the appellant has not filed return of income for the said previous year, is not satisfied inasmuch as for the previous year relevant to the assessment year 2007-08, the appellant company has filed return of income under section 139(1) of the Act on 31.07.2007. In view of the aforesaid, deeming fiction enacted in the aforesaid Explanation 5A as on the statute on 03.03.2009, i.e., the date of filing in return of income under section 153A of the Act, is not at all applicable to the facts of the appellant-company. Thus the Assessing Officer erred in imposing the penalty on the assessee.

5.1. The facts of the case in the present appeal in fact are that search and seizure operation under section 132 of the Act was carried out in the case of the appellant and its group concerns on 7th February, 2008. During the course of search statement of Sh. Dharmendra Bhandari, was recorded under

section 132(4) of the Act wherein undisclosed income of Rs.8,00,000/- was surrendered. Accordingly, based on the aforesaid disclosure made during the course of search and seizure operation, the appellant, in the return filed on 03.03.2009 pursuant to notice issued under section 153A of the Act declared income of Rs.12,50,791/- including aforesaid additional income of Rs. 8,00,000/-. In the assessment completed by assessing officer vide order dated 17th July, 2009 passed under section 153C/153A of the Act, returned income filed by the assessee has been accepted as such. The learned assessing officer has levied penalty on the appellant u/s. 271(1)(c) of Income Tax Act, vide its order dated 19.03.2010.

5.2. There cannot be any dispute to the fact that once a return is filed pursuant to notice under section 153A, the same is treated as return filed under section 139 of the Act [refer clause (a) of section 153A(l)]. Further, concealment/ furnishing of inaccurate particulars of income/undisclosed income, has to be necessarily seen vis-a-vis return filed by the appellant Once, income it is declared which is accepted as such under section 139 r.w.s. 153A of Act, then, the question of there being concealment/ furnishing of inaccurate particulars of income/undisclosed income, does not arise at all. In the present case, the entire undisclosed income has been offered for tax by the appellant-company in the return income, which was subject matter of assessment before assessing officer. The return filed by the appellant has been accepted as such by your assessing officer, without any variation. Therefore, in the absence of any undisclosed income being found in the assessment vis-a-vis the return filed, the issue of imposition of penalty does not, arise.

5.3 The reliance is placed on the following decision in this regard.

1) *It has been held in the decision of the Delhi Bench of the Tribunal in the case of Prem Arora vs. DCIT in (2012) 78 DTR (Del)(Trib)91 wherein the Tribunal held that where returned income filed u/s.153A is accepted by the assessing officer, there will be no concealment of income and consequently penalty*

u/s.271(1)(c) cannot be imposed.

ii) In CIT vs. SAS Pharmaceuticals (2011) 3351TR 259, Hon'ble Delhi High Court held -"It necessarily follows that concealment of particulars of income or furnishing of inaccurate particulars of income by the assessee has to be in the IT return filed by it. The assessee can furnish the particulars of income in his return and everything would depend upon the IT return filed by the assessee. The assessee can furnish the particulars of income in his return and everything would depend upon the IT return filed by assessee. This view gets supported by explanations 4 as well as 5 and 5A of Section 271. Obviously no penalty can be imposed unless the conditions stipulated in the said provisions are duly and unambiguously satisfied. Since the assessee was exposed during survey, may be, it would have not disclosed the income but for the said survey. However, there cannot be any penalty only on surmises. conjectures and possibilities. Section 271(1)(c) has to be construed strictly. Unless it is found that there is actually a concealment or non-disclosure of particulars of income. penalty cannot be imposed. There is no such concealment or non-disclosure as the assessee had made a complete disclosure in the IT return and offered the surrendered amount fur the purposes of tax".

iii) In CIT v. T.M. Abdul Hazeez & CO. [2007J 293 ITR 384 (Mad.) in response to the notice under section 148, the appellant filed the return of income 18.03.2004, admitting a total income of Rs. 2,71,960 which included additional income offered amounting to Rs. 1,82,000 being the loan credits in the names of ten persons. The AO imposed the penalty on the appellant on the ground that the appellant had disclosed additional income for the assessment years in question and also failed to prove the genuineness loan credits. The Tribunal deleted the penalty holding that the penalty was leviable only on the basis of the assessment proceedings. The Madras High court affirmed the order of the Tribunal.

iv) In CIT vs Shyamlal M. Soni : 276 ITR 156, the issue before the High Court was: "Whether on the facts and circumstances of the case and in the law the Tribunal was justified in holding that no penalty under section 271(1)(c) of the Act could be levied for assessment years 1985-86, 1986-87 and 1987-88 even though the revised returns were filed offering the additional income after search and in response to notice under section 148 of the Act issued by the Department?"

The Court answered the above question in the affirmative. The Court held that no penalty uls 271(1)(c) of the Act could be levied where the revised return had been accepted and assessed at the hands of the appellant although the revised returns had been filed after a search under section 132 of the Act and after a notice had been under section 148 of the Act.

v) Rajiv Garg 175 Taxman 184 (P&H) in the return filed in pursuance to notice under section 148 of the Act the appellant revised its claim one instead of offering for tax the amount of capital gain, he offered the entire sale proceeds as income. Such additional income offered was assessed to tax Therefore, the finally assessed income was the same as income declared by

the appellant in the return filed in response to the notice issued under section 148 of the Act.

The Court, while affirming the order of the Tribunal deleting penalty, observed that undeniably the notice under section 148 of the Act was issued on 21-3-2003 and the appellant filed its return on 30-4-2003. The CIT(A) has recorded a finding that the enquiries conducted by the DDIT (Inv.), Gurgaon regarding the nature of transaction, sale and purchase of shares carried out through the broker Shri S.S. Mehta enabled the Assessing Officer to hold the capital gain as bogus. The information from investigation wing that sale was bogus was not communicated to appellant when notice under s.148 was issued. The return filed 'under section 148 was not filed after 'detection'. The return of income so filed was voluntary and had offered the additional income to buy peace of mind and to avoid litigation.
In the aforesaid facts the Court held that during the course of assessment; the aforesaid explanation given by the appellant was neither rejected nor it was held to be mala fide. Further, the assessing authority had failed to take any objection that the declaration of income made by the appellant in his revised return and in his explanation were not bona fide. Therefore, in view of the aforesaid finding, the Court held that the Tribunal was justified in upholding the order of the Commissioner of Income-tax (Appeals), whereby the penalty imposed under section 271(1)(c) of the Act by the Assessing Officer was ordered to be deleted."

5.4 Furthermore, levy of penalty has to be as per law applicable on the date of filing of the return and admittedly on 03.03.2009 when the return of income for assessment year 2006- 07 was filed by the appellant, the un-amended provisions of Explanation 5A to section 271(1)(c) of the Act were on the statute. The question whether there was concealment of income and/or furnishing inaccurate particulars thereof by the appellant in the return of income filed on the said date has to be seen vis-a-vis, law as applicable on that date. In that view of the matter, the amended provision of Explanation 5A made applicable w.r.e.f from 1.6.2007 cannot be pressed into service. In view of the aforesaid, the pre-substituted provisions of Explanation 5A to Section 271 would, therefore, apply in the present case of the appellant-company for the year under consideration, even though the said Explanation stands substituted retrospectively by the subsequent

Finance Act.

5.5 Even otherwise, it is further submitted that presumption raised by the Explanations to section 271(1) are rebuttable and does not, ispo facto, result in automatic imposition of penalty. In the present case, the fact that the entire 'undisclosed income' was declared by the appellant in the statement recorded during search and the same was also disclosed in the return filed pursuant to notice issued under section 153A, clearly goes to show the bona fides of the appellant, not warranting imposition of penalty under section 271 (1)(c) of the Act.

6. In the aforesaid circumstances, penalty levied u/s.271(1)(c) is directed to be quashed. Thus, all the grounds of the assessee are allowed.

7. In the result, the appeal of the assessee is allowed.

8. Now, we take up the appeal of Mr. Rajendra Bhandari in ITA No.5749/Del/2014, where the issue is identical except the quantum of the penalty and by following my order in the case of Mr. Alok Bhandari hereinabove, the order of the penalty confirmed by the learned CIT(A) is directed to be reversed and all the grounds of the assessee are allowed. Thus I am reversing the order of learned CIT(A) in both the appeals.

9. To sum up, both the appeals of the assessees are allowed.

Order pronounced in the open court on this day 21st April, 2017

Sd/-
(B.P. JAIN)
ACCOUNTANT MEMBER
Dated: 21/04/2017