* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 07.12.2016
Pronounced on: 09.02.2017

\+ **ITA 463/2016 & CM No. 26604/2016**

PR. COMMISSIONER OF INCOME TAX-19 ..... Appellant

Versus

SHRI NEERAJ JINDAL ..... Respondent

\+ **ITA 464/2016 & CM No. 26605/2016**

PR. COMMISSIONER OF INCOME TAX-19 ..... Appellant

Versus

SHRI NEERAJ JINDAL ..... Respondent

\+ **ITA 465/2016**

PR. COMMISSIONER OF INCOME TAX-19 ..... Appellant

Versus

SHRI ANKUR AGGARWAL ..... Respondent

\+ **ITA 466/2016 & CM No. 26606/2016**

PR. COMMISSIONER OF INCOME TAX-19 ..... Appellant

Versus

SHRI ANKUR AGGARWAL ..... Respondent

Through: Mr. Rahul Chaudhary, Senior Standing Counsel for Appellants.
Mr. Satyen Sethi and Mr. Arta Trana Panda, Advocates for Respondents.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. These four appeals by the revenue, under Section 260-A of the Income Tax Act, ("the Act") are directed against four separate orders of the Income Tax Appellate Tribunal (Delhi Bench) ("**ITAT**") for AY 2005-06 and 2006-07. The following common question of law was framed for decision by this court:

> "*Did the ITAT correctly interpret Section 271(1)(c) of the Income Tax Act,* 1961 *read together with Explanation* 5 *in proceeding to delete the penalty imposed by the Assessing Officer in the first instance?*"

2. Since the four appeals arise out of a common set of facts and raise similar questions of law, the brief facts in ITA- 463/2016 are discussed. The assessee belonged to the M/s. J.M. Estate Developers Pvt. Ltd. group. For the relevant assessment year 2005-06, it reported its income through a return under Section 139(1) of the Act, declaring an income of ₹1,72,799/- on 30.12.2005. A search and seizure operation under Section 132(4) of the Act was carried out on 11.01.2007 in the premises of the assessee's group companies and directors of the company. A disclosure of ₹16 crores was made by the group under Section 132(4) of the Act on behalf of different directors and relatives of the directors. During the search, cash amounting to ₹5,26,530/- and jewellery worth ₹l7,85,785/- were found from the premises and lockers of the assessee. Out of these assets, cash amounting to ₹4,06,930/- was seized, whereas no jewellery was seized. Notice under Section 153A of the Act was issued on 26.02.2008, in response to which the assessee filed his return of Income on 23.10.2008 declaring an income of ₹23,38,731/-, thus showing additional income of ₹21,65,932/-. The AO

completed the assessment under Section 153A read with Section 143(3) of the Act on 31.12.2008 after accepting the declared income by observing that, *"After examination of the details filed and discussion with AR of the assessee the income of the assessee is accepted and assessed at Rs.23,38, 731/-."* In addition, he also initiated penalty proceedings under Section 271(1)(c) of the Act by observing:

> "*From the seized records it is noticed that the assessee group had offered a sum of Rs.16 Crores as unaccounted income. However, as the disclosure is consequence of the search, I am of the view that the assessee has concealed the income. Thus, penalty proceedings u/s 271 (l)(c) is being initiated separately*."

Thereafter, the AO passed the penalty order under Section 271(1)(c) of the Act, by imposing penalty amounting to ₹1,34,640/- being 100% of the amount of tax sought to be evaded on the concealed income of ₹4 Lakhs.

3. The assessees preferred revisions under Section 264 of the Act dated 06.08.2009 before the Commissioner of Income Tax ("CIT") (Central-II), New Delhi against the order passed by the A.O. The CIT (Central-II) in its order dated 10.03.2011 held that since penalty order had been set aside and the proceedings had been restored back to the A.O. under Section 263 of the Act, the proceedings under Section 264 had become infructuous and were accordingly, dismissed.

4. With respect to the proceedings under Section 263 referred to by the CIT (Central-II) above, the CIT observed that the A.O. had imposed penalty on the concealed income of only ₹4,00,000/-, whereas in the return of income filed by the assessee in response to notice under Section 153A, the assessee had declared additional income of ₹21,65,932/-. Therefore, the CIT

(Central-II) passed the revisional order on 10.03.2011 by holding that the order passed by the A.O. was erroneous and prejudicial to the interests of the revenue because the A.O. had, whilst making the penalty order, erroneously taken the figure of concealed income at ₹4,00,000/- as against the additional income of ₹21,65,932/- declared by the asseessee. Therefore, the CIT (Central-II) set aside the penalty order and proceedings were restored back to the A.O. with the direction to dispose the matter in accordance with the provisions of the Act and judicial pronouncements on the issue, after affording proper opportunity to the assessee. Pursuant to this development, the AO made an order under Section 271(1)(c) of the Act on 29.09.2011 imposing penalty of ₹7,29,100/- being 100% of the amount of tax sought to be evaded on the concealed income of ₹21,65,932/-. Aggrieved, the assessee appealed; the CIT (A) deleted the penalty. The revenue appealed to the ITAT, which on 19.08.2015, confirmed the order of the CIT (A).

Proceedings and Arguments before the CIT(A) and ITAT

5. The assessee had contended that the penalty order was untenable because there was no difference between the income returned pursuant to notice under Section 153A and the income assessed. The assessee declared the entire undisclosed income in the return filed in response to the notice under Section 153A, which was accepted in the assessment order of the AO. Furthermore said the assessee, no incriminating materials were found during the course of the search carried out at the premises of M/S JM Estates Developers Pvt. Ltd. Therefore, the additional income offered in the revised return would have to be considered as *bona fide*. The assessee argued that in the statement recorded during the course of search, voluntary surrender of ₹16 crores was made so as to cover various group cases, including that of the

assessee. Such surrender was to buy peace of mind, to co-operate with the revenue and to avoid protracted litigation with it. The revenue argued that penalty had to be levied because the return of income was not a voluntarily disclosure, but was under Section 153A. It was further contended that incriminating documents were found during the course of the search and seizure operations, and disclosure made by the appellant u/s 132(4) of the Act was as a consequence of the search operations. But for the search at the premises of M/s J M Estate Developers Pvt. Ltd. group, including the appellant, the appellant would not have disclosed the additional income nor would he have offered the same for taxation. The CIT (A) relied on the decision of the learned ITAT (Delhi) in the case of ***Sh. Prem Arora v. DCIT, Central Circle-25, New Delhi, 2012-TIOI-262-ITAT-DEL,*** to hold that the concept of voluntary return of income may be important in penalty proceedings initiated in the course of normal assessment proceedings made u/s 143(3) or section 147, but not under Section 153A. The CIT (A) held that for the purpose of imposition of penalty, the original return of income filed u/s 139 cannot be considered. Penalty u/s 271(1)(c) is imposable when there is variation in assessed and returned income and not otherwise. If there is no variation, there will be no concealment. When there is no concealment, the question of levy of penalty would not arise.

6. Aggrieved by the CIT (A) order, the Revenue filed appeal before the Income Tax Appellate Tribunal contending that the CIT (A) erred in ignoring the fact that Explanation-5 to Section 271(1)(c) was applicable to the facts of this case and hence the levy of penalty was justified. The Revenue also submitted that if pursuant to a search operation, penalty is not levied for unearthing of additional income detected during a search, it would

be an open incentive for all to conceal their income till such time as it was detected by the department.

7. In its decision, the ITAT also relied upon the decision in ***Sh. Prem Arora (supra)*** and held that Explanation-5 would be applicable in cases where during any search initiated before 1.6.2007 any money, bullion, jewellery or other valuable article is found in the possession or under the control of the assessee. In such cases, even if the assesee declares income from such assets after the date of the search, he shall be deemed to have concealed his income. However, in the present case, the search was conducted on 11.01.2007 and cash of ₹5,26,530/- was found from the assessee's possession; so the cash was admittedly not seized during the relevant assessment years which were in question before the ITAT. The ITAT rejected the Revenue's contentions. It concluded that while the assessee had surrendered undisclosed income, the cash was seized during search in A.Y. 2007-2008, and not in the relevant assessment years under consideration. Therefore, the ITAT concluded that Explanation 5 to Section 271(1) of the Act could not be invoked in assessment years 2005-06 & 2006-07, which were the relevant assessment years, on the presumption that the assessee might have been in possession of the seized cash throughout the period covered by search assessments.

8. The present batch of appeals concerns the interpretation and application of Section 271(1)(c) of the Act and Explanation 5 thereto. Two broad issues arise for consideration in this regard:

(i) Whether under Section 271(1)(c) as it stood prior to the insertion of Explanation 5, levy of penalty is automatic if return filed

by the assessee under Section 153A of the Act discloses higher income than in the return filed under Section 139(1)?

(ii) What would be the position of law after insertion of Explanation 5 and whether it is attracted in the facts of this case?

We will answer each question in turn.

Issue I

9. Counsel for the revenue submitted that in the original return, the assessee had not declared the income which came to be detected by the Department during the course of survey. It is only after the search that the assessee filed the revised returns, which itself would go to show that amount offered during the search is concealed income. There is no finding by the Tribunal that there was cessation of liability of these amounts during the relevant financial year. Hence, the Revenue contends that the levy of penalty is required to be sustained. For imposition of penalty mens rea is not a requirement. Once the conditions mentioned in section 271(1)(c) are held to have been established, the imposition of penalty is automatic and no discretion is left in the authorities.

10. It is moreover contended that the levy of penalty cannot be denied for the reason that the assessee cannot be given benefit of Explanation 5 to Section 271(1)(c) of the Act as clause (ii) of Explanation 5 to Section 271(1)(c) exempts only that part of the income from the penal provision, which is covered by statement under Section 132(4), where the assets have been acquired by the assessee out of his income which is not disclosed in the return of income to be furnished before the expiry of the time prescribed in section 139(1) and the assessee specifies in the statement in the manner in which such income has been derived. The penalty was levied because the

assessee had not indicated in the return the income which was sought to be brought to taxation as a result of the search. The disclosure in the return after the search did not in any way, diminish its responsibility to do so.

11. Counsel for the assessee argues that the findings of the ITAT are sound and do not call for interference. It is urged that the appellant disclosed the amounts seized in respect of which specifics as to the years they were attributable to, were furnished. Since there was no variation between the statement made during the search proceeding and the sums disclosed during the returns (as all the amounts shown in the return under Section 153A coincided or tallied with the amount found) the revenue's invocation of Section 271(1)(c) of the Act by relying on Explanation 5, was unfounded.

12. The first question involves interpretation of Section 271(1)(c) of the Act. For convenience, the relevant provision of the Act is reproduced below:

> **"Section 271**
>
> *(1) If the Assessing Officer or the Principal Commissioner or Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person –*
>
> *xxxxx*
>
> *(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,*
>
> *he may direct that such person shall pay by way of penalty-*
>
> *xxxxx*
>
> (iii) *in the cases referred to in clause (c) or clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of*

particulars of his income or fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits."

13. At the outset, it must be noted that pursuant to the search and seizure operation conducted under Section 132(4) of the Act, the assessee was given notice under Section 153A to file fresh return of his income. Thereafter, the assessee filed revised returns and the return filed by the assessee under Section 153A was accepted as such by the A.O. However, the A.O. was of the opinion that inasmuch that the income disclosed by the assessee under Section 153A was higher than the income in the original return filed under Section 139(1) and since in his view, such disclosure of income was a consequence of the search conducted on the assessee, there was concealment of income which attracted Section 271(1)(c) of the Act. Therefore, the question that needs to be answered is whether penalty is to be levied automatically whenever the assessee declares a higher income in his return filed under Section 153A in comparison to the original return filed under Section 139(1).

14. The Supreme Court held, in ***Shri T. Ashok Pai v. Commissioner of Income Tax, Bangalore*** **(2007) 7 SCC 162**, that penalty under Section 271(1)(c) is not to be mandatorily imposed. In other words, the levy of penalty under this provision is not automatic. This view has been reiterated in ***Union of India v. Rajasthan Spinning and Weaving Mills,*** **(2009) 13 SCC 448** to say that for there to be a levy of penalty under Section 271(1)(c), the conditions laid out therein have to be specifically fulfilled. Section 271(1)(c) of the Act, being in the nature of a penal provision, requires a strict construction. While considering the interpretation of this

provision, this Court in ***Commissioner of Income Tax v. SAS Pharmaceuticals (2011) 335 ITR 259 (Del),*** stated that:

> "*It is to be kept in mind that Section 271(1)(c) of the Act is a penal provision and such a provision has to be strictly construed. Unless the case falls within the four-corners of the said provision, penalty cannot be imposed. Subsection (1) of Section 271 stipulates certain contingencies on the happening whereof the AO or the Commissioner (Appeals) may direct payment of penalty by the Assessee*."

Thus, what is required to be judged is whether there has been a "concealment" of income in the return filed by the assessee.

15. Earlier decisions indicated a conflict of opinion as to whether Section 271(1)(c) required the revenue to specifically prove *mens rea* on the part of the assessee to conceal his income. In order to remove the element of *mens rea*, the Finance Act, 1964 deleted the word "deliberately" that preceded the words "concealed the particulars of his income" in Section 271(1)(c). Nonetheless, even post the amendment, the Apex Court in ***K.C. Builders v. Assistant Commissioner of Income Tax,*** **265 ITR 562 (SC)** held that:

> "*The word 'concealment' inherently carried with it the element of mens rea. Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if takes out the case from the purview of non-disclosure, cannot by itself take out the case from the purview of furnishing inaccurate particulars. Mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In order that a penalty under Section 271(1)(c) may be imposed, it has to be proved that the assessee has consciously*

made the concealment or furnished inaccurate particulars of his income."

16. Thus, despite the fact that there is no requirement of proving *mens rea* specifically, it is clear that the word "conceal" inherently carries with it the requirement of establishing that there was a conscious act or omission on the part of the assessee to hide his true income. This was also the conclusion of the Supreme Court in the case of ***Dilip N. Shroff Karta of N.D. Shroff v. Joint Commissioner of Income Tax, Special Range Mumbai and Anr.*, (2007) 291 ITR 519 (SC)**. In a later decision in ***Union of India v. Dharmendra Textile Processors*, (2008) 13 SCC 369**, the Supreme Court overruled its decision in ***Dilip N. Shroff (supra)***. Thereafter, in ***Commissioner of Income Tax v. Reliance Petroproducts Pvt. Ltd.***, **(2010) 11 SCC 762** the Court clarified that ***Dilip N. Shroff (supra)*** stood overruled only to the extent that it imposed the requirement of *mens rea* in Section 271(1)(c); however, no fault was found with the meaning of "conceal" laid down in ***Dilip N. Shroff's*** case. Thus, as the law stands, the word "conceal" in Section 271(1)(c), would require the A.O. to prove that specifically there was some conduct on part of the assessee which would show that the assessee consciously intended to hide his income.

17. In this case, the A.O. in his order noted that the disclosure of higher income in the return filed by the assessee was a consequence of the search conducted and hence, such disclosure cannot be said to be "voluntary". Hence, in the A.O.'s opinion, the assessee had "concealed" his income. However, the mere fact that the assessee has filed revised returns disclosing higher income than in the original return, in the absence of any other

incriminating evidence, does not show that the assessee has "concealed" his income for the relevant assessment years. On this point, several High Courts have also opined that the mere increase in the amount of income shown in the revised return is not sufficient to justify a levy of penalty.

18. The Punjab & Haryana High Court in ***Commissioner of Income Tax v. Suraj Bhan*, (2007) 294 ITR 481 (P & H),** held that when an assessee files a revised return showing higher income, penalty cannot be imposed merely on account of such higher income filed in the revised return. Similarly, the Karnataka High Court in the case of ***Bhadra Advancing Pvt Limited v. Assistant Commissioner of Income Tax*, (2008) 219 CTR 447**, held that merely because the assessee has filed a revised return and withdrawn some claim of depreciation penalty is not leviable. The additions in assessment proceedings will not automatically lead to inference of levying penalty. The Calcutta High Court in the case of ***Commissioner of Income Tax v. Suresh Chand Bansal*, (2010) 329 ITR 330 (Cal)** held that where there was an offer of additional income in the revised return filed by the assessee and such offer is in consequence of a search action, then if the assessment order accepts the offer of the assessee, levy of penalty on such offer is not justified without detailed discussion of the documents and their explanation which compelled the offer of additional income. The Madras High Court in the case of ***S.M.J. Housing v. Commissioner of Income Tax*, (2013) 357 ITR 698** held that where after a search was conducted, the assessee filed the return of his income and the Department had accepted such return, then levy of penalty under Section 271(1)(c) was not justified. From the above cases it would be clear that when an assessee has filed revised returns after search has been conducted, and such revised return has been

accepted by the A.O., then merely by virtue of the fact that such return showed a higher income, penalty under Section 271(1)(c) cannot be automatically imposed.

19. The whole matter can be examined from a different perspective as well. Section 153A provides the procedure for completion of assessment where a search is initiated under Section 132 or books of account, or other documents or any assets are requisitioned under Section 132A after 31.05.2003. In such cases, the Assessing Officer shall issue notice to such person requiring him to furnish, within such period as may be specified in the notice, return of income in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search was conducted under Section 132 or requisition was made under Section 132A. The Assessing Officer shall assess or reassess the total income of each of these six assessment years. Assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under Section 132 or requisition under Section 132A, as the case may be, shall abate. [Ref to Memorandum accompanying the Finance Bill, 2003] Section 153A opens with a *non-obstante* clause relating to normal assessment procedure covered by Sections 139, 147, 148, 149, 151 and 153 in respect of searches made after May 31, 2003. The sections, so excluded, relate to returns, assessment and reassessment provisions. However, the provisions that are saved are those under Section 153B and 153C, so that these three Sections 153A, 153B and 153C are intended to be a complete code for post-search assessments. Considering that the non-obstante clause under Section 153A excludes the application of, *inter alia*, Section 139, it is clear that the

revised return filed under Section 153A takes the place of the original return under Section 139, for the purposes of all other provisions of the Act. This is further buttressed by Section 153A (1)(a) which reads:

> "*Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall-*
>
> *a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall,* ***so far as may be, apply accordingly as if such return were a return required to be furnished under section 139****.*

20. Therefore, the position that emerges from the above-mentioned provision is that once the assessee files a revised return under Section 153A, for all other provisions of the Act, the revised return will be treated as the original return filed under Section 139. On similar lines, the Gujarat High Court in the case of ***Kirit Dahyabhai Patel v. Assistant Commissioner of Income Tax,*** **(2015) 280 CTR (Guj) 216**, held that: "*In view of specific provision of s. 153A of the I.T. Act. the return of income filed in response to notice under s. 153A of the I.T. Act is to be considered as return filed under s. 139 of the Act, as the AO has made assessment on the said return and therefore, the return is to be considered for the purpose of penalty under s.*

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 s. 153A, if any."

21. Thus, it is clear that when the A.O. has accepted the revised return filed by the assessee under Section 153A, no occasion arises to refer to the previous return filed under Section 139 of the Act. For all purposes, including for the purpose of levying penalty under Section 271(1)(c) of the Act, the return that has to be looked at is the one filed under Section 153A. In fact, the second proviso to Section 153A(1) provides that "*assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate.*" What is clear from this is that Section 153A is in the nature of a second chance given to the assessee, which incidentally gives him an opportunity to make good omission, if any, in the original return. Once the A.O. accepts the revised return filed under Section 153A, the original return under Section 139 abates and becomes *non-est.* Now, it is trite to say that the "concealment" has to be seen with reference to the return that it is filed by the assessee. Thus, for the purpose of levying penalty under Section 271(1)(c), what has to be seen is whether there is any concealment in the return filed by the assessee under Section 153A, and not *vis-a vis* the original return under Section 139.

Issue II

22. The second question concerns the interpretation and application of Explanation-5 to Section 271(1)(c) and whether it is attracted in the facts of this case. For convenience, Explanation-5 is reproduced below:

"*Explanation 5: Where in the course of a search initiated under section 132 before the 1st day of June, 2007, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income, –*

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein ; or

(b) for any previous year which is to end on or after the date of the search,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income unless, -

(1) such income is, or the transactions resulting in such income are recorded, -

(i) in a case falling under clause (a), before the date of the search ; and (ii) in a case falling under clause (b), on or before such date, in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the said date ; or

(2) he, in the course of the search, makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in

> *his return of income to be furnished before the expiry of time specified in sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.*

23. Explanation-5 to Section 271(1) was inserted by the Taxation Laws (Amendment) Act, 1984, with effect from 1 October, 1984. The Explanation is applicable to cases where in the course of a search under Section 132 of the Act, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing. In such cases, if the assessee claims that these assets have been acquired by him by utilizing (wholly or in part) his income for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date, or where such return has been furnished before the said date, such income has not been declared in the return, or such previous year is to end on or after the date of the search, the assessee shall, for the purposes of imposition of penalty under Section 271(1)(c) of the Act, be deemed to have concealed the particulars of his income. This Explanation has been inserted to address situations where consequent to a search, assets and valuables are discovered to be in the possession of the assessee, and thereafter the assessee files return of income after the date of search. In such cases, even if the assessee includes the amounts utilized by him in acquiring the assets found in his possession during the search operations as his income in the return filed after the search, the assessee would be *deemed* to have concealed his income. Thus, Parliament has created a deeming fiction by virtue of which in such cases, even if the assessee includes such income (which represents the value of the assets found in his possession during the search) in his return

filed after the search, it will be deemed that such return disclosing higher income was filed only because the assets were found in his possession during the search. Put differently, if not for the search, the Legislature deems that the assessee would not have disclosed such income in the return filed subsequently. Explanation-5 also contains two exceptions, where the assessee would not be deemed to have concealed his income and would gain immunity from levy of penalty- *first*, if such income is or the transactions resulting in such income are recorded in the books of account maintained by the assessee for any source of income or such income was otherwise disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of the search; *second*, in the course of the search, the assessee makes a statement under Section 132(4) that the assets found in his possession have been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of the time specified in Section 139(1), and also specifies in the statement the manner in which such income has been derived and pays the tax together with interest, if any, in respect of such income.

24. The purpose of inserting Explanation-5 in the statute books was explained by the Supreme Court in ***K.P. Madhusudan v. Commissioner of Income Tax, (2001 251 ITR 99***, wherein the Court held-

> "*Learned Counsel for the assessee then drew our attention to the judgement of this Court in Sir Shadilal Sugar and General Mills Ltd. v. CIT* (1987) 168 ITR 705. *He submitted that the assessee had agreed to the additions to his income referred to hereinabove to buy peace and it did not follow therefrom that the amount that was agreed to he added was concealed income. That it did not follow that the amount agreed to be added was*

> *concealed income is undoubtedly what was laid down by this Court in the case of Sir Shadilal Sugar and General Mills Ltd.* (1987) 168 ITR 705 *and that therefore, the Revenue was required to prove the mens rea of a quasi-criminal offence. But it was because of the view taken in this and other judgments that the Explanation to Section 271 was added.*"

25. This shows that Explanation-5 was specifically inserted to deal with the situation where higher income was disclosed in the return filed consequent to a search operation, and the assessee claimed that such addition of income did not imply that there was concealment. In other words, but for the insertion of Explanation-5, it would be open to the assessee to contend that additions made to his income in the return filed after the search operation, were only to buy peace and did not tantamount to concealment. This also flows from the language of Explanation-5 itself, wherein the words used by the Legislature are "*be deemed to have concealed the particulars of his income*", which shows that there is a deeming fiction by virtue of which such additional income is considered as concealment. If such additions in the income in the return filed consequent to a search, were to automatically evidence concealment under Section 271(1)(c), there would be no need for Parliament to enact a deeming fiction in the form of Explanation-5; such a reading would render Explanation-5 otiose and without any purpose. This is also consonant with the view arrived at in the earlier part of this decision, i.e. mere increase of income in the return filed pursuant to Section 153A would not be sufficient to show concealment under Section 271(1)(c).

26. Now for the Revenue to invoke Explanation-5, it would have to prove that its requirements are clearly fulfilled in the present case. In order for Explanation-5 to apply, it is necessary that there must be certain assets (such

as money, bullion etc.) found in the possession of the assessee during the search, and that the assessee must *claim that such assets have been acquired by him by utilising (wholly or in part) his income*. Moreover, such income must be in relation to a particular *previous year* that has either ended before the date of the search or is to end on or after the date of the search and *such* income is declared subsequently in the return of income filed after the search. Therefore, it is only when assets are found during the search which the assessee claims have been acquired by him by utilizing (wholly or in part) his income for any particular previous year, and then declares such income (which he utilized in acquiring the assets found) in a subsequent return filed after the date of search, would it be deemed that the assesee has concealed his income. In other words, the assets seized during the search must relate to the income of the particular assessment year whose return is filed after the date of the search. Such a conclusion is only logical, considering that assessment under the Act is with respect to a particular assessment year and the penalty imposed under Section 271(1)(c) would also be for concealing income in that particular assessment year, which concealment was revealed by the discovery of certain assets in the assessee's possession during the search conducted under Section 132. Here, it would be beneficial to reproduce the dictum of the Rajasthan High Court in ***Commissioner of Income Tax v. Kanhaiyalal,* (2008) 299 ITR 19 (Raj)**, where it held that-

> "*We may consider the things from yet another aspect, viz., that under the set up of IT Act, in whatever eventuality the assessment may have to be made, i.e. whether a regular assessment, or assessment consequent upon escapement of income, or assessment of a block period, but in either case, the*

assessment has to be, with respect to the particular assessment year, relating to the concerned previous year, and the income derived, or found by the Department to have been derived, or earned, by the assessee, during particular previous year, has to be assessed during the relevant assessment year only, and assessment of such income cannot be shifted to any other past or future years, so much so that there may be cases, where the right of the Department to assessment may have been lost on account of passage of limitation also."

Thus, it is clear that the Revenue has to establish that the assets seized during the search conducted on the assessee, related to the income of the assessee for the relevant assessment years i.e. AY 2005-06 and AY 2006-07.

27. On this question, the decision of the ITAT in ***Sh. Prem Arora (supra)*** must be noted. In that case, the ITAT held:

"*From above discussion it is clear that the provisions of Explanation 5 are applicable in the cases where during the course of search initiated on or before 1.6.2007 any money, bullion, jewellery or other valuable article or thing is found in the possession or under control of the assessee. In the case of the assessee the search was conducted on 22.11.2006 and cash of Rs. 1,11,45,350/- was found from the possession of the assessee. The assessee had undisclosed commission income as well as purchases and sales as seen from the statement of affairs made by the assessee based on seized material. The assessee had drawn cash flow statement for the entire period of six years in order to determine undisclosed income based on seized material for each of six assessment years. Explanation 5 to section 271(1) of the Act cannot be invoked in assessment year 2004-05 merely on presumption that the assessee might have been in possession of cash throughout the period covered by search assessments. The income offered to tax u/s 153A for assessment year 2004-05 is based on entries recorded in the seized material. Unlike provisions of Explanation 5A, the provisions of Explanation 5 cannot be invoked in assessment*

year 2004-05 in respect of entries recorded in seized material. Thus invoking of Explanation 5 in assessment year 2004-05 is based on presumptions, surmises and conjectures. It is settled law that suspicion howsoever strong, it cannot take place of actual evidence and hence the contention of the Revenue that assessee was in possession of cash throughout the period of six assessment years has to be rejected. In view of above discussion we are of the considered opinion that even the amended provisions of Explanation 5 cannot be applied in assessment year 2004-05. Consequently penalty u/s 271(c) cannot be imposed by invoking Explanation 5 of the Act in assessment year 2004-05 in respect of cash found in previous year relevant to assessment year 2007-08."

28. Basing its reasoning on this decision, the ITAT in the present case held that in the case of the assessee, the search was conducted on 11.01.2007 and cash of ₹5,26,530/- was recovered from the possession of the assessee; and so the cash was admittedly, not seized during the relevant assessment years in consideration before the Tribunal. In other words, while the assessee had surrendered undisclosed income, the cash was seized during search in A.Y 2007-2008, and not in the relevant assessment years. However, in the relevant assessment year under consideration in the instant case, the assessee made an addition of ₹21,65,932/- in the return filed pursuant to notice under section 153A. The ITAT held that Explanation 5 to section 271(1) of the Act could not be invoked in assessment years 2005-06 & 2006-07, which are under consideration in this case, merely on the presumption that the assessee might have been in possession of the seized cash throughout the period covered by the search assessments. The learned ITAT also held-

"*The income offered to tax u/s 153A for assessment years 2005-06 and 2006-07 cannot be said to be based on assets seized, because from the assessment order, it is clear that search was*

on 11.01.2007 (i.e AY 2007-08), the cash seized during search was only to the tune of Rs.5,26,530/- and it is not emerging from the records that the assessee has claimed during search that the cash seized (on 11.0 1.2007), belonged to him and that was owned by him in the relevant assessment years i.e. AYs 2005-06 and 2006-07. Unless there is a clear finding in this respect, Explanation 5 of Section 271 (1)(c) cannot be of any help to the department. As rightly pointed out by the Coordinate Bench in Prem Arora (supra), the provisions of Explanation 5 cannot be invoked in assessment years 2005-06 and 2006-07 in respect of entries recorded in seized material. Thus invoking of Explanation 5 in assessment year 2005-06 & 2006-07 is based on assumptions and presumptions. It is settled law that suspicion howsoever strong, cannot take the place of evidence and hence the contention of the Revenue that assessee was in possession of cash throughout the period of assessment years under consideration has to be rejected."

It is difficult to see any infirmity in the decision of the learned ITAT in the present case. Levy of penalty under Section 271(1)(c) cannot be on the basis of surmises and conjectures. Thus, Explanation-5 cannot assist the claim of the revenue in the present case for the relevant assessment years under consideration before this Court for the simple reason that for the relevant assessment years, 2005-06 & 2006-07, no material was recovered during the search. Rather, the assessee added ₹ 21,65,932/- in the return filed pursuant to notice under section 153A. That amount was not relatable to any sum recovered or article seized. Therefore, the question of adding or not adding amounts after the search and falling within the mischief of Explanation 5 to Section 271 (1) (c) cannot arise in the facts and circumstances of this case.

29. Based on the above discussion, this Court is of the opinion that Explanation-5 cannot be relied upon by the Revenue in the relevant assessment years under consideration before this Court, and in the absence of recourse to Explanation-5, there is no incriminating evidence to show that the assessee has concealed the particulars of his income, within the meaning of Section 271(1)(c) of the Act. In conclusion, this Court is of the view that there is no illegality in the order of the learned ITAT in the present case. In all four appeals, the question of law involved is thus answered in favour of the assessee. The revenue's appeals are therefore dismissed.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

FEBRUARY 09, 2017