

IN THE INCOME TAX APPELLATE TRIBUNAL, "A" BENCH, KOLKATA

Before : **Shri N.V. Vasudevan, Judicial Member, and
Shri M. Balaganesh, Accountant Member**

ITA Nos. 1425 & 1426/Kol/2010 A.Ys 2004-05 & '05-06

D.C.I.T, CC-1, Kolkata Vs. Shri Sheo Kumar Kajaria
(Appellant) PAN: AFCPK 7875A
(Respondent)

ITA Nos. 378 to 382/Kol/2011 A.Ys. '02-03 to '06-07

A.C.I.T, CC-XII, Kolkata Vs. M/s. Gopal Das Kothari (HUF)
(Appellant) PAN: AACHG 8411M
(Respondent)

ITA Nos. 1172 to 1174/Kol/2011 A.Ys. '04-05 to '06-07

A.C.I.T, CC-XII, Kolkata Vs. Shri Sajjan Kumar Patwari (HUF)
(Appellant) PAN: AAFHS 3391K
(Respondent)

For the Appellant/Department: Shri S.Dutta, JCIT, ld.Sr.DR

For the Respondent/Assessee : S/Shri A.K Tibrewal,
Shri A.K Tulsiyan, FCAs
Amit Agarwal, Advocate, ld.ARs

Date of Hearing: 08-12 -2015

Date of Pronouncement: 16 -12-2015

ORDER

SHRI M.BALAGANESH, AM :

These appeals arise out of different orders passed by the Learned CIT(A), Central-III/II, Kolkata in Appeal Nos. 180 to 184/CC-I/CIT(A)/C-III/08-09 dated 26.05.2010 for the Asst Years 2004-05 & 2005-06 in respect of Shri. Sheo Kumar

Kajaria ; Appeal Nos. 37/CC-XII/CIT(A)C-II/10-11, 38/CC-XII/CIT(A)C-II/10-11, 39/CC-XII/CIT(A)C-II/10-11, 40/CC-XII/CIT(A)C-II/10-11 & 36/CC-XII/CIT(A)C-II/10-11 dated 14-12-2010 for the Asst Years 2002-03 to 2006-07 in respect of M/s Gopal Das Kothari(HUF) and Appeal Nos. 41,40 & 39/CC-1/CIT(A)/C/10-11 dated 23.06.2011 for the Asst Years 2004-05 , 2005-06 & 2006-07 in respect of Shri. Sanjan Kr. Patwari, against the order of Penalty passed by the Learned AO u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

2. The only issue involved in all these appeals is that whether the assessee is entitled for immunity from levy of penalty on account of Explanation 5 to Section 271(1)(c) of the Act in respect of income offered after the search but in the return filed u/s 153A / 153C of the Act. Since identical issue is involved in all the appeals, they are taken up together and disposed off by this common order for the sake of convenience.

3. The revenue had raised the following grounds before us for all the assessment years under appeal as mentioned hereinabove:-

3.1. **Shri Sheo Kumar Kajaria – Asst Year 2004-05**

1. *On the facts and circumstances of the case, the Ld. CIT(A) has erred in law as well as in facts by deleting the penalty levied u/s 271(1)(c) on the ground that the assessee's case is immunized from penalty on account of Explanation -5 to Section 271(1) when the assessee's case does not come under the purview of the exceptions provided therein.*
2. *On the facts and circumstances of the cae the Ld. CIT(A) , Central-III, Kolkata has erred in law as well as facts in allowing assessee's rectification application moved u/s 154 of the I.T. Act, 1961 by rectifying his predecessor's order dated 27.08.2009 without any reasonable ground, because there is no mistake apparent from record in that order.*
3. *The appellant craves leave to add/or amend any grounds of appeal.*

The same grounds are raised for the Asst Year 2005-06 by the revenue except with change in figure of Penalty levied.

3.2. Shri Gopal Das Kothari (HUF) - Asst Year 2002-03

- 1. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in cancelling penalty of Rs. 11,66,860/- imposed u/s 271(1)(c) of the Act, by holding that the assessee's case was covered by the immunity from penalty provided under exception (2) to Explanation – 5 of Section 271(1)(c) of the Act, without appreciating that the said immunity is available only for the years for which due date of return u/s 139(1) of the Act has not expired on the date of search, which was not satisfied in this case.*
- 2. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the provisions of Sec. 271(1)(c), Explanation 5(2) will apply to the A.Y. 2002-03, the due date of return for which had expired long before the date of search i.e 25.4.2007, which is contrary to the provisions of the Act.*
- 3. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in not following the Third Member decision of Hon'ble ITAT, Ahmedabad, Bench "B", in the case of ACIT, CC-I(3) vs Kirti Dahyabhai Patel, reported in 121 ITD 159, wherein it was held that the assessee was not entitled to the immunity from penalty for the years for which the due date of filing of return had expired prior to the date of search.*
- 4. That the Department craves leave to add, modify or alter any of the ground (s) of appeal and / or adduce additional evidence at the time of hearing of the case.*

The same grounds are raised for the Asst Years 2003-04 to 2006-07 by the revenue except with change in figure of Penalty levied.

3.3. Shri Sajjan Kumar Patwari (HUF) - Asst Year 2004-05

- 1. That in the facts and circumstances of the case and in law the Ld. CIT(A) has erred in cancelling the penalty of Rs. 1,56,852/- for A.Y. 2004-05, Rs. 9,93,633/- for A.Y. 2005-06 and Rs. 24,23,673/- for A.Y. 2006-07 imposed up u/s 271(1)(c) of the I.T. Act by holding that the assessee was eligible*

for immunity under Explanation -5 to sec 271(1)(c) of the Act, without appreciating that the date of filing of return for all these years had expired prior to the date of search and the assessee was not eligible for immunity available under clause (2) of Explanation (5) of sec. 271(1)(c) of the Act.

2. *That in the facts and circumstances of the case and in law the Ld. CIT(A) has erred in not following the decision of Ld. ITAT in the case of ACIT, CC-I(3) vs Kirit Dayabhai Patel reported in 121 ITD 159(AHD) (TM) , wherein it was held that the assessee was not entitled to immunity from penalty where additional income was declared in return filed in response to notice u/s 153A of the Act which did not fall under category of return mentioned in Explanation 5(2) to sec. 271(1)(c).*
3. *That the appeal for the A.Y 2004-05 is being filed inspite of tax effect being less than Rs. 3 lakh for the reason that the CIT(A) has passed a consolidated order and his decision is being contested in other years, hence appeal is required to be filed in this year as well, as per Board's instructions.*
4. *That the Department craves leave to add, modify or alter any of the ground (s) of appeal and / or adduce additional evidence at the time of hearing of the case.*

The same grounds are raised for the Asst Years 2005-06 & 2006-07 by the revenue except with change in figure of Penalty levied.

4. Facts in the case of Shri Sheo Kumar Kajaria

The brief facts of this issue is that a search and seizure operation was conducted on 23.8.2006 u/s 132 of the Act in the Builder group of cases. The assessee is one of the individuals belonging to this group. In the course of search, the assessee was found to be in possession of undisclosed income and accordingly the assessee gave disclosure statement u/s 132(4) of the Act offering substantial income as below:-

<u>Assessment Year</u>	<u>Disclosure amount</u>
2004-05	77,39,135
2005-06	1,23,02,449

4.1. The details of income declared in the return filed u/s 139(1) of the Act for each assessment year , income offered in disclosure statement u/s 132(4) of the Act for each assessment year pursuant to the search , income declared in the return filed u/s 153A of the Act for each assessment year , additional income offered during the course of assessment proceedings and assessed income thereon are tabulated as below:-

Particulars	ASSESSMENT YEARS	
	2004-05	2005-06
Income admitted u/s 139(1)	7,17,758	8,14,514
Disclosure made u/s. 132(4)	77,39,135	1,23,02,449
Income disclosed u/s. 153A	77,39,135	1,23,02,449
Additional income offered during asst proceedings	0	0
Income assessed u/s. 153A	84,57,672	1,31,16,963

4.2. The Learned AO levied penalty in respect of income returned and assessed u/s 153A of the Act on the ground that but for the search, the assessee would not have come forward for disclosure of the undisclosed income. On first appeal, the Learned CITA in his order u/s 250 of the Act dated 27.8.2009 upheld the levy of penalty as according to Learned CITA, the assessee had not paid the taxes due thereon in respect of income offered u/s 153A of the Act and accordingly that the assessee had not cumulatively satisfied the conditions stipulated in Clause 2 of Explanation 5 to section

271(1)(c) of the Act. Hence he held that assessee is not entitled for immunity from levy of penalty. Later the assessee moved a rectification application before the Learned CITA in respect of mistake committed by the Learned CITA with regard to the finding that assessee had not paid the taxes on the income disclosed u/s 153A of the Act. The Learned CITA pursuant to verification of the fact of payment of taxes by the assessee, sought to rectify his earlier order and passed an order u/s 154 read with section 250 of the Act on 26.5.2010 stating that the assessee is indeed entitled for immunity from levy of penalty and allowed the appeals of the assessee for the Asst Years 2004-05 and 2005-06. Aggrieved, the revenue is in appeal before us and had raised the similar ground for the assessment years 2004-05 & 2005-06 as stated hereinabove.

5. Facts in the case of Gopal Das Kothari (HUF)

The brief facts of this issue is that a search and seizure operation was conducted on 25.4.2007 u/s 132 of the Act in the Kothari group of cases. The Kothari group is principally controlled and managed by the following persons who are the coparceners of the assessee HUF of which Shri Dau Dayal Kothari is the Karta pursuant to the death of Shri Gopal Das Kothari:-

1. Shri Dau Dayal Kothari
2. Shri Bithal Das Kothari
3. Shri Krishna Kumar Kothari
4. Shri Kamal Kumar Kothari
5. Shri Kishore Kumar Kothari
6. Shri Man Mohan Kothari
7. Shri Hari Mohan Kothari and,
8. Shri Keshav Kumar Kothari

In the course of search, the assessee was found to be in possession of undisclosed income and accordingly the assessee gave disclosure statement u/s 132(4) of the Act offering substantial income as below:-

<u>Assessment Year</u>	<u>Disclosure amount</u>
2002-03	38,30,222
2003-04	33,35,678
2004-05	84,54,040
2005-06	80,25,307
2006-07	1,33,48,039

5.1. The details of income declared in the return filed u/s 139(1) of the Act for each assessment year , income offered in disclosure statement u/s 132(4) of the Act for each assessment year pursuant to the search , income declared in the return filed u/s 153C of the Act for each assessment year , additional income offered during the course of assessment proceedings and assessed income thereon are tabulated as below:-

Particulars	ASSESSMENT YEARS				
	2002-03	2003-04	2004-05	2005-06	2006-07
Income admitted u/s 139(1)	69778	64322	45960	74693	251961
Disclosure made u/s. 132(4)	3830222	3335678	8454040	8025307	13348039
Income disclosed u/s. 153C	3900000	3400000	8500000	8100000	13600000
Additional income offered during asst proceedings	0	0	143985	0	0
Income assessed u/s. 153C	3900000	3400000	8643985	8100000	13600000

5.2. In the course of assessment proceedings, the assessee disclosed further income of Rs. 1,43,985/- for the Asst Year 2004-05. The Learned AO levied penalty in respect of income returned , additional income offered during assessment proceedings and income assessed u/s 153C of the Act on the ground that but for the search, the assessee

would not have come forward for disclosure of the undisclosed income. On first appeal, the Learned CITA deleted the penalty for the assessment years 2002-03 to 2006-07 stating that the assessee had satisfied all the conditions stipulated in clause 2 to Explanation 5 to section 271(1)(c) of the Act and accordingly is entitled for immunity from levy of penalty as the assessee had, made disclosure statement u/s 132(4) of the Act and had disclosed the same in the return filed in response to notice u/s 153C of the Act , had specified the manner in which such undisclosed income has been earned and paid taxes due thereon. Aggrieved, the revenue has raised the similar grounds for the assessment years 2002-03 to 2006-07 as mentioned hereinabove.

6. Facts in the case of Sajjan Kumar Patwari (HUF)

The brief facts of this issue is that a search and seizure operation was conducted on 3.5.2007 u/s 132 of the Act in the Rashmi group of cases. The assessee is one of the HUFs belonging to this group. In the course of search, the assessee was found to be in possession of undisclosed income and accordingly the assessee gave disclosure statement u/s 132(4) of the Act offering substantial income as below:-

<u>Assessment Year</u>	<u>Disclosure amount</u>
2004-05	5,00,000
2005-06	29,50,171
2006-07	71,91,278

6.1. The details of income declared in the return filed u/s 139(1) of the Act for each assessment year , income offered in disclosure statement u/s 132(4) of the Act for each assessment year pursuant to the search , income declared in the return filed u/s 153C of the Act for each assessment year , additional income offered during the course of assessment proceedings and assessed income thereon are tabulated as below:-

Particulars	ASSESSMENT YEARS		
	2004-05	2005-06	2006-07
Income admitted u/s 139(1)	143500	139950	267060
Disclosure made u/s 132(4)	500000	2950171	7191278
Income disclosed u/s 153C	643500	3091120	7458340
Additional income offered during asst proceedings	0	0	513
Income assessed u/s 153C	643500	3091120	7458853

6.2. In the course of assessment proceedings, the assessee disclosed further income of Rs. 513/- for the Asst Year 2006-07. The Learned AO levied penalty in respect of income returned , additional income offered during assessment proceedings and income assessed u/s 153C of the Act on the ground that but for the search, the assessee would not have come forward for disclosure of the undisclosed income. On first appeal, the Learned CITA deleted the penalty for the assessment years 2004-05 to 2006-07 stating that the assessee had satisfied all the conditions stipulated in clause 2 to Explanation 5 to section 271(1)(c) of the Act and accordingly is entitled for immunity from levy of penalty as the assessee had, made disclosure statement u/s 132(4) of the Act and had disclosed the same in the return filed in response to notice u/s 153C of the Act , had specified the manner in which such undisclosed income has been earned and paid taxes due thereon. Aggrieved, the revenue has raised the similar grounds for the assessment years 2004-05 to 2006-07 as mentioned hereinabove.

7. The Learned DR argued that but for the search, the assessee would not have come forward to disclose these undisclosed incomes and hence assessee has concealed the particulars of income and argued that penalty is leviable in terms of Explanation 5 to Section 271(1)(c) of the Act. He further argued that, even assuming without conceding, immunity is available for the assessee in terms of Clause 2 of Explanation 5 to Section 271(1)(c) of the Act, it is available only for the year of search and for the

previous year for which the due date of filing the return had not expired and hence the immunity, in any case, is not available for the earlier years other than these two years.

7.1. In response to this, the Learned AR vehemently supported the order of the Learned CIT(A) and argued that the assessee had cumulatively satisfied all the conditions stipulated in Clause 2 of Explanation 5 to section 271(1)(c) of the Act and hence is accordingly eligible for immunity from levy of penalty thereon. In support of his arguments, he relied on various case laws that were filed in the paper book by him. He also argued that the provisions of Clause 2 of Explanation 5 to section 271(1)(c) is applicable for all the assessment years prior to the year of search. He also argued that even the additional disclosure of income made by the abovementioned assesses for certain assessment years were made voluntarily before any detection by the department. He further argued that nothing in the section 271(1)(c) order of the Learned AO suggests that the additional income was detected by the department. With regard to arguments of Learned DR that but for the search this undisclosed income could not have been unearthed, the Learned AR argued that this issue is squarely covered in favour of the assessee by the decision of the *Hon'ble Calcutta High Court in CIT vs Amardeep Singh Dhanjal in ITA No. 39 of 2010 dated 11.1.2013*. He further argued that the expression 'to be furnished before the expiry of time specified in subsection (1) of section 139' used in Clause 2 of Explanation 5 to section 271(1)(c) of the Act might create some difficulty for claiming immunity and he argued that this very question has been answered in favour of the assessee by the *Jurisdictional Calcutta High Court in the case of CIT vs Brijendra Gupta in ITA No. 330 of 2009 dated 8.6.2015* and took us to the relevant operative portion of the said judgement. He further argued that the impugned issue is also entirely covered by the coordinate bench decision of this tribunal in the case of Narendra J Thacker vs DCIT for Asst Years 2001-02 to 2005-06 vide order dated 4.12.2015, wherein all the case laws on the impugned subject have been elaborately discussed.

8. We have heard the rival submissions and perused the materials available on record. We find that the impugned issue for all the assessment years in respect of all the assesses herein are squarely covered by the recent decision of the coordinate bench of this tribunal in the case of **Narendra J Thacker vs DCIT for the Asst Years 2001-02 to 2005-06 vide order dated 4.12.2015.** The said tribunal relied on the following decisions on the impugned issue :-

- a) *Decision of Hon'ble Calcutta High Court in the case of CIT vs Amardeep Singh Dhanjal in ITA No. 39 of 2010 dated 11.1.2013.*
- b) *Decision of Hon'ble Calcutta High Court in the case of CIT vs Brijendra Gupta in ITA No. 330 of 2009 dated 8.6.2015.*
- c) *Decision of Kolkata Tribunal in the case of DCIT vs Shayam Sunder Beriwal in ITA Nos. 1061, 1062 & 1063 / Kol / 2008 dated 31.10.2008*
- d) *Decision of Delhi Tribunal in the case of Prem Arora vs DCIT reported in (2012) 24 taxmann.com 260 (Delhi)*
- e) *Decision of Kolkata Tribunal in the case of DCWT vs Vivek Kr. Kathotia in WTA Nos. 02 to 08 / Kol / 2013 dated 15.5.2015*
- f) *Third Member decision of Delhi Tribunal in the case of Addl CIT vs Prem Chand Garg reported in (2009) 31 SOT 97 (Delhi) (TM) dated 11.5.2009*
- g) *Decision of Hon'ble Calcutta High Court in the case of CIT vs Ramesh Chand Goyal in G.A. No. 2347 of 2010 in ITAT No. 181 of 2010 dated 11.8.2010*
- h) *Decision of Hon'ble Madras High Court in the case of CIT vs S.D.V.Chandru reported in (2004) 266 ITR 175 (Mad)*
- i) *Decision of Hon'ble Calcutta High Court in the case of CIT vs Shri Samit Roy in ITA No. 354 of 2009 dated 3.9.2015.*
- j) *Decision of Hon'ble Calcutta High Court in the case of CIT vs Tapan Kumar Ghosh in ITA No. 6 of 2010 dated 3.9.2015.*

- k) *Decision of Hon'ble Gujarat High Court in the case of Kirit Dahyabhai Patel vs ACIT in Tax Appeal No. 1181 of 2010 with Tax Appeal No. 1182 to 1185 of 2010 dated 3.12.2014. (this decision reversed the third member decision of Ahmedabad Tribunal relied upon by Learned DR)*
- l) *Decision of Hon'ble Gujarat High Court in the case of CIT vs Mahendra C Shah reported in (2008) 299 ITR 305 (Guj).*

The operative portion of the aforesaid judgements are not reproduced herein for the sake of brevity but the same has been considered elaborately in the judgement rendered by this tribunal as stated supra. By placing reliance on the aforesaid decisions, this tribunal in the case of Narendra J Thacker (supra) had held :-

- the assessee has cumulatively satisfied all the conditions stipulated in Clause 2 of Explanation 5 to Section 271(1)(c) of the Act and hence entitled for immunity from levy of penalty for all the assessment years under appeal;

- the assessee had made voluntary disclosure of Rs. 2,50,000/- and Rs. 4,72,603/- for the Asst Years 2001-02 & 2002-03 during the course of search assessment proceedings after filing the return u/s 153A of the Act but before any detection by the department and the same is considered only as a revision of the disclosure made u/s 132(4) followed by filing of returns u/s 153A of the Act;

- the expression 'to be furnished' mentioned in Clause 2 of Explanation 5 to Section 271(1)(c) has to be construed as 'required to be furnished u/s 153A of the Act'

Respectfully following the aforesaid tribunal decision in the case of Narendra J Thacker dated 4.12.2015 , we hold accordingly for these appeals also. Accordingly, the grounds raised by the revenue for all the assessment years are dismissed.

9. To sum up, appeals of the revenue in the case of Sheo Kumar Kajaria in ITA Nos. 1425 & 1426 / Kol / 2010 are dismissed, in the case of M/s.Gopal Das Kothari in ITA Nos. 378 to 382 / Kol / 2011 are dismissed and Sanjan Kumar Patwari (HUF) in ITA Nos. 1172 to 1174 / Kol / 2011 are dismissed.

ORDER PRNOUNED IN THE OPEN COURT ON 16 /12/2015

Sd/-
(N.V. Vasudevan, Judicial Member)

Sd/-
(M. Balaganesh, Accountant Member)

Date 16/12/2015

Copy of the order forwarded to:-

- 1.. The Appellant/Department: The DCIT/ACIT, CC-I 18 Rabindra Sarani, Kol-1.
- 2 The Respondent/Assessee-Shri Sheo Kumar Kajaria 4 Ashoka Road, Kol-27
Shri Sajjan Kumar Patwari (HUF) Vill Raghunathpur P.O Jhargram, Paschim Medinipur-721507/M/s. Gopal Das Kothari (HUF) 'Mohta House, 2nd Fl., 29 Strand Road, Kol-1 .
- 3 /The CIT, 4.The CIT(A)
5. DR, Kolkata Bench
6. Guard file.

True Copy,
**PRADIP/SPS

By order,

Asstt Registrar