आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES 'B' JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 1498/JP/2018
निर्धारण वर्ष/Assessment Year : 2014-15

Deputy Commissioner of Income tax, Central Circle-1, Jaipur	बनाम Vs.	Sh. Kamal Sethia 801, Western Height, S-21, Shyam Nagar, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AFEPS7265Q		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA. No. 1499/JP/2018
निर्धारण वर्ष/Assessment Year : 2014-15

Deputy Commissioner of Income tax, Central Circle-1, Jaipur	बनाम Vs.	Sh. Vivek Sethia 801, Western Height, S-21, Shyam Nagar, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ASPPS7131R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

राजस्व की ओर से/ Revenue by : Shri B. K. Gupta (CIT)
निर्धारिती की ओर से/ Assessee by : Shri Anil Goyal (CA)

सुनवाई की तारीख/ Date of Hearing : 20/05/2019
उदघोषणा की तारीख/Date of Pronouncement : 07/06/2019

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

These are two appeals filed by the Revenue against the order of ld. CIT(A)-4, Jaipur dated 01.10.2018 for AY 2014-15 wherein the ld. CIT(A) has deleted the levy of penalty u/s 271(1)(c) of the Act. Since the common issues are involved, both these appeals were heard together and are being disposed off by this consolidated order.

ITA No. 1498/JP/2018

2. With the consent of both the parties, the case of Sh. Kamal Sethia is taken as the lead case for the purposes of present discussion wherein the Revenue has taken the following sole ground of appeal as under:-

"whether on the facts and in the circumstances of the case and in law ld. CIT(A) is justified in deleting the penalty u/s 271(1)(c) of Rs. 1,23,40,919/- imposed by the AO."

3. Briefly stated, the facts of the case are that a search & seizure action u/s 132(1) of the Act was carried out on 17.12.2014 at the various premises of Vardhaman Group and the assessee, being one of the members of this group was also covered by search operations. The assessee is a director in two companies, namely M/s Richwell Enterprises Pvt. Ltd., and M/s Yashraj Commercial Complex Pvt. Ltd. and also a partner in the firms, M/s Vardhaman Builders and Developers (28.00% share), M/s Sethia Real Estate (33.33% share) and M/s Manglam Vardhman Developers LLP (25.00% share).

4. The assessee originally filed his return of income u/s 139(1) on 24.07.2014 declaring income from house property, remuneration and interest from these firms and interest from bank during this year totaling to Rs. 23,74,227/-. Thereafter, the assessee filed his revised return of income u/s 139(5) on 19.03.2015 declaring total income of Rs. 3,85,78,660/- which includes undisclosed income of Rs. 3,63,07,500/- which has been accepted by the assessee in his statement u/s 132(4) recorded during the course of search. In response to notice u/s 153A of the Act issued to the assessee on 11.02.2015, the assessee again furnished his return of income on

27.03.2015 declaring total income of Rs. 3,85,78,660/- which is at the same figure as per the revised return filed earlier on 19.03.2015. The Assessment u/s 143(3) read with section 153A was completed on 24.11.2016 at assessed income of Rs. 3,85,78,660/-. The penalty proceedings u/s 271(1)(c) of the Act were separately initiated for concealment of income/furnishing inaccurate particulars of income vide issue of show cause notice dated 24.11.2016.

5. During the course of penalty proceedings, a fresh show cause notice dated 04.05.2017 was again issued and in response, the assessee filed his written submission. In its submission, the assessee submitted that given that he has filed his revised return of income, the concealment of income, if any has to be seen with reference to the revised return of income/return filed in response to notice u/s 153A as the original return has been replaced by the revised return. It was submitted that there was no concealment of income as the income declared in revised return, and also in return filed in response to notice u/s 153A and the income finally assessed by the AO are the same. The submission so filed was not found acceptable to the Assessing Officer. As per the Assessing Officer, the case of assessee is covered under explanation 5A to section 271(1)(c) of the Act. As per the Assessing Officer, the assessee filed his original return of income on 24.07.2014 before the date of search on 17.12.2014. The assessee filed his revised return of income on 19.03.2015 after the date of search and included undisclosed income of Rs. 3,63,07,550/- in the said return. It has been clearly stated in explanation 5A to section 271(1)(c) where the undisclosed income was not included in the return of income filed for the relevant previous year before the date of search then, notwithstanding that such income

is declared by him in any return of income furnished on or after the date of 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 with the amount of concealed income being Rs. 3,63,07,550/-. Further, the Assessing Officer relied on the Hon'ble Supreme Court decision in case of Prasanna Dugar vs. CIT [2016] 70 taxmann.com 175 (SC), Hon'ble Punjab and Haryana decision in case of Commissioner of Income-tax (Central), Ludhiana vs. Bansal Abushan Bhandar [2014] 42 taxmann.com 9 (Punjab & Haryana) and Chennai Tribunal in case of ACIT, Central Circle 11(5) vs. Smt. J. Mythili. Finally, the AO has given his conclusive finding at para 7 of his penalty order wherein it has been stated that in view of the above cited and facts and legal position, the assessee is liable for penalty u/s 271(1)(c) of the Act on account of concealment of income and accordingly, the penalty of Rs. 1,23,40,919/- was levied u/s 271(1)(c) of the Act.

6. Being aggr eved, the assessee carried the matter in appeal before the ld. CIT(A). As per ld. CIT(A), the prerequisite for invoking of explanation 5A to section 271(1)(c) is that the assessee should be found to be owner of any money, bullion etc. found or entry in books of accounts or other documents found from the ownership of the assessee during the course of search which represents his undisclosed income for any previous year which has ended before the date of search and where the return of income for such previous year has been furnished before the date of search but such income has not been declared therein. Therefore, the perquisite for invoking explanation 5A is that the assessee should be found to be owner of

such income as narrated therein. Then coming to the contention of the assessee that since additional income is declared in the return filed u/s 153A and there being no difference between returned income and assessed income and therefore, no penalty is leviable, the ld. CIT(A) stated that when the additional income is declared after search and after detecting undisclosed income in form of money, bullion etc found or entry in books of accounts or documents are found and thereafter the assessee discloses, as per explanation 5A to 271 (1)(c), then such income declared in return which was not originally declared be deemed to be income in respect of which particulars are concealed. Therefore, contention so raised was held not tenable as also the case laws are not applicable as the same relates to period prior to insertion of explanation 5A.

7. The ld. CIT(A) thereafter held that the AO before applying explanation 5A did not examine whether income has been shown in the return of income is based on any money, bullion, jewellery, or any entry in the books have been found by way of incriminating material found during the course of search and a perusal of the assessment order and the penalty order reveals that the AO has merely accepted the additional income offered by the appellant and no finding has been given by the AO as to how the appellant has earned additional income qua the seized material found during the course of search. In support, reliance was placed on the Co-ordinate Bench in case of Radhe Shyam Mittal wherein it was held that penalty u/s 271(1)(c) r.w. Explanation 5A cannot be levied if addition is not based on any incriminating material found during the course of search on the basis of any money, bullion, jewellery, or any entry in the books. Further, reliance was placed on the Co-ordinate Bench decision in case of Ajay Traders. It

was further held by the ld CIT(A) that voluntary action of appellant in declaring additional income once in the revised return and again in response to notice u/s 153A de hors the evidence found as a result of search cannot be branded as concealment of income so as to levy penalty and it would have been a different result had the income offered is pursuant to evidences found as a result of search.

8. It was further held by the ld. CIT(A) that the AO has simply observed in the assessment order "Notice u/s 271(1)(c) is being issued". There is no finding as to whether it is for concealment of particulars of income or furnishing inaccurate particulars of income and the same cannot be considered as proper satisfaction so as to levy penalty u/s 271(1)(c). In support, the reliance was placed on the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565 and Rajasthan High Court in case of Sheveta Construction Co. Pvt Ltd., in ITA No. 534/2008 and various Co-ordinate Bench decisions.

9. It was further held by the ld. CIT(A) that the levy penalty is not automatic and since the provisions of explanation 5A have been invoked by the AO, the said deeming provisions are to be strictly construed. For invoking explanation 5A for deeming even when income being declared in the return furnished after search to be deemed to be concealment of particulars of income or furnishing inaccurate particulars, the earlier part of said explanation should also be applicable. The earlier part provides that in the course of search the assessee should be found to be owner of any money, bullion or jewellery etc. or any income based on any entry in books of accounts or other documents found during search. So long as this pre condition

is not found to be satisfied, straightway applying explanation 5A by deeming certain income being declared in the return (filed after search admitting additional income) to be concealed income is not envisaged in law. The onus to prove that condition exists for levy of penalty is upon the Revenue. Since on facts, the said explanation 5A is not held to be applicable and since there are no other provision to hold that additional income offered is concealed income or deemed to be concealed income, the levy of penalty is not tenable in the instant case.

10. It was further held by the ld. CIT(A) that as per clause (b) of explanation 5A, the term used is "due date" and not "due date as specified u/s 139(1)" and therefore, even if assessee files return of income after date of search but within extended due date u/s 139(4) by including the unaccounted income admitted during search of his return of income, deeming fiction of explanation 5A shall not be attracted. In support reliance was placed on the Co-ordinate Bench decision in case of ITO vs. Mr. Gope M. Rochlani in [2014] 40 taxmann.com 46 followed in Rakesh Nain Trivedi (2015) 152 ITD 0869 (Amritsar) and thereafter at para 8.7, the ld. CIT(A) has given his conclusive findings which are reproduced as under:-

"8.7 Thus I am of the view that the penalty imposed by the AO is not sustainable for the 3 reasons discussed above. In short the reasons are:-

1. *That expln. 5A to section 271(1)(C) is not applicable as the assessment order is silent on disclosure being relatable to seized assets or incriminating transactions.*

2. *That the order passed u/s 143(3) rws u/s 153A does not specify under which limb the penalty is initiated. Nor does notice u/s 274 do so.*
3. *That the appellant has field revised return within time available u/s 139 hence expln 5A to section 271(1)(c) is not applicable."*

11. In the above factual matrix, we now refer to the contentions advanced by both the parties. Firstly, we refer to the contentions advanced by the ld CIT DR. During the course of hearing, the ld. CIT DR submitted that first of all, ground challenging the legality of order u/s 271(1)(c) of Act was admitted by the ld. CIT(A) by way of an additional ground without giving an opportunity to the Assessing Officer. It was submitted that the assessee has not challenged before AO about non-mentioning of the specific limb for levy of penalty in the show cause notice issued u/s 271(1)(c). Further, the assessee has not raised any specific grounds of appeal while filing the appeal in Form No. 35 and thereafter has taken additional ground of appeal during the appellate proceedings. The ld. CIT(A) has decided the issue without giving any opportunity of being heard to the AO which is nothing but violation of principle of natural justice. It was submitted that on this ground alone, the matter may please be set aside to the file of ld. CIT(A) with the direction to adjudicate the issue after giving a proper opportunity of being heard to the AO.

12. Further, the ld. CIT DR referred to the Third Member decision in case of HPCL Mittal Energy Ltd. vs. Addl. CIT [2018] 97 taxmann.com 3 (Amritsar-Trib) wherein at para 21, it was held as under:-

*"**21.** Apart from the above three situations in which the AO has clear-cut satisfaction, there can be another fourth situation as well. It may be when it is definitely a case of under-reporting of income by the assessee for which an addition/disallowance has been made, but the AO is not sure at the stage of initiation of penalty proceedings of the precise charge as to 'concealment of particulars of income' or "furnishing of inaccurate particulars of income'. In such circumstances, he may use slash between the two expressions at the time of initiation of penalty proceedings. However, during the penalty proceedings, he must get decisive, which should be reflected in the penalty order, as to whether the assessee is guilty of 'concealment of particulars of income' or 'furnishing of inaccurate particulars of such income'. Uncertain charge at the time of initiation of penalty, must necessarily be substituted with a conclusive default at the time of passing the penalty order. If the penalty is initiated with doubt and also concluded with a doubt as to the concealment of particulars of income or furnishing of inaccurate particulars of such income etc., the penalty order is vitiated. If on the other hand, if the penalty is initiated with an uncertain charge of 'concealment of particulars of income/furnishing of inaccurate particulars of income' etc., but the assessee is ultimately found to be guilty of a specific charge of either 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income', then no fault can be found in the penalty order."*

13. It was submitted that the said Third Member decision has been followed by the Jaipur Benches in case of Rajendra Kumar Gupta vs. DCIT in ITA No. 359/JP/2017 vide order dated 18.01.2019 and in case

of Mahesh Kumar Jain & others in ITA No. 630/JP/2017 dated 27.11.2017 and other cases, though related to penalty u/s 271AAB. Further reliance was placed on the Third Member decision in case of Grass Field Farms & Resorts (P.) Ltd. vs. DCIT [2016] 70 taxmann.com 176. Regarding the decision of Hon'ble Rajasthan High Court in case of Sheveta Construction Co. Pvt vs. ITO, as relied upon by the ld. CIT(A), it was submitted that in case of Dinesh Kumar Vijay vs. ITO in ITA No. 58/JP/2016, the Jaipur Tribunal has distinguished the said decision and has held as under:-

"14 In case of Sheveta Construction (supra), the substantial question of law for consideration before the Hon'ble Rajasthan High Court was whether penalty for a leged concealment of income or furnishing inaccurate particulars of income be levied when legality of assessment proceedings itself is subjudice before the Hon'ble High Court and the question to that effect has already been admitted in quantum appeal. In the present case, the assessee has not moved any appeal against the assessment order even before the ld.CIT(A) and therefore, there is no question of assessment proceedings being subjudice before the Hon'ble High Court. Accordingly, the decision of the Hon ble High Court in case of Sheveta Construction doesn't support the case of assessee.

15. It is therefore a case where the satisfaction has been recorded for both the limbs of section 271(1)(c) and finally, the penalty has been levied for violation of both the limbs of section 271(1)(c) of the Act. The initiation of penalty proceedings has happened by recording of satisfaction in the assessment order and the issuance of notice u/s 274 is thus in continuation of recording of such satisfaction and has thus to be read along

with the assessment order and not disjoint of the assessment order. It is not a case where the penalty has been initiated for one limb and finally levied in respect of another limb. The AO has been consistent in his approach and his action doesn't reflect any non-application of mind. In light of above discussions, we therefore do not feel there is any infirmity in the initiation of penalty proceedings as contended by the ld. AR. The additional ground of appeal is thus dismissed."

14. Further, reliance was placed on the Hon'ble High Court of Madras in case of Sundaram Finance Ltd. vs. CIT [2018] 93 taxmann.com 250(Madras) for the proposition that this issue can never be a question of law in the assessee's case as it is purely a question of fact. It was further submitted that as per section 271(1)(c), the penalty may be imposed for furnishing inaccurate particulars of income or for concealment of income and an opportunity of being heard is to be afforded to the assessee before levy of penalty. It may be mentioned that the two limbs may be independent of each other or in some cases, they may be over lapping. In fact, the notice was issued for both the limbs and thus, no prejudice was caused to the assessee. It is not the case, where penalty was initiated for one limb and levied for other limb. It was accordingly submitted that the mere fact that the penalty notice does not mention the specific charge for imposition of penalty, the same cannot be a reason for invalidating the penalty proceedings.

15. Regarding the finding of the ld. CIT(A) that the assessment order is silent on disclosure being relatable to seized assets or incriminating transactions, it was submitted by the ld. CIT(A) that the

ld. CIT(A) has not considered the statement of Sh. Vivek Sethia and Sh. Kamal Sethia recorded during the course of search u/s 132(4) on 17.12.2014/19.12.2014 wherein Sh. Vivek Sethia has made total disclosure of Rs. 20.10 crore on the basis of a number of incriminating documents found during the course of search. The above disclosure was made by Sh. Vivek Sethia on his own and on behalf of his father Sh. Kamal Sethia, which has been confirmed by Shri Kamal Sethia also. The above disclosure of Rs. 20.10 crore include disclosure of undisclosed income of Rs. 9.92 cr. each by Sh. Vivek Sethia and Sh. Kamal Sethia and our reference was drawn to Question No. 19,21,26,27,28,37 and 39 of the statement recorded of Sh. Vivek Sethia u/s 132(4) of the Act.

16. Regarding the finding of the ld. CIT(A) that the assessee revised its ROI within time available u/s 139, hence explanation 5A to section 271(1)(c) is not applicable, it was submitted that first of all, the question comes as to whether the assessee can revised its ROI. It was submitted that the assessee has filed its ROI u/s 139 on 27.07.2014. Thereafter, a search was conducted on 17.12.2014 during which the assessee has declared undisclosed income, on the basis of incriminating material found during the search, in his statement recorded u/s 132(4). Thereafter, a notice u/s 153A was issued to the assessee on 11.02.2015 and the assessee has filed ROI on 19.03.2015 and on 27.03.2015 declaring the total income of Rs. 3,85,78,660/- including undisclosed income of Rs. 3,63,07,500/-. It was submitted that u/s 139(5), assessee can revise return of income where he discovers any omission or any wrong statement which is not the case of the assessee. It was submitted that no cognizance could be given

to the revised ROI filed on 19.03.2015 i.e. after the search and issue of notice u/s 153A of the Act.

17. Regarding the finding of the ld. CIT(A) that explanation 5A to section 271(1)(c) cannot be applied to the facts of instant case in view of the term "due date" for filing of return of income as used in clause (b) to the above explanation, it was submitted that the ld. CIT(A) has not examined clause (a) to the said explanation. Referring to clause (a) of the explanation 5A wherein it has been stated that for a previous year which has ended before the date of search and where the return of income for such previous year has been furnished before the said date (date of search) but such income has not been declared therein, then notwithstanding that such income is declared by the assessee in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of income or furnished inaccurate particulars of such income. In the instant case, the search was conducted on 17.12.2014 relevant to previous year 2013-14 which has ended before the date of search and the assessee has filed its return of income for the relevant assessment year on 24.07.2014 wherein he has not disclosed the undisclosed income of Rs. 3,63,07,500/- in such return of income as the total income declared therein was only Rs. 22,71,160/-. Therefore, in view of these facts the clause (a) to explanation 5A is clearly applicable and not clause (b) as held by the ld. CIT(A).

18. Regarding the decision of the Co-ordinate Bench in case of ITO vs. Gope M Rochlani [2014] 49 taxmann.com 46 (Mumbai Trib.) relied upon by the ld. CIT(A), the ld. CIT DR referred to the Hon'ble Calcutta High Court decision in case of CIT vs. Prasanna Dugar [2015] 59

taxmann.com 99 (Calcutta) wherein the said decision has been distinguished and it has been stated therein that clause(b) shall not apply to those cases where the assessee had filed a return but did not disclose the income, as in this case, his case shall be covered by clause (a), which provides that where the return of income for such previous year has been furnished before the said date but such income has not been declared therein. It was further submitted that the SLP filed by the assessee against the above referred judgment of Hon'ble High Court has been dismissed by the Hon'ble Supreme Court in Prasanna Dugar vs. CIT [2016] 70 taxmann.com 175 (SC). It was accordingly submitted that the case of the assessee is clearly covered under explanation 5A to section 271(1)(c) and thus, the order of AO may kindly be restored and the order of ld CIT(A) be set-aside.

19. Now, we refer to the rebuttal and submissions of the ld AR. The ld. AR submitted that the assessee is a partner in M/s Sethia Real Estate and M/s Mangalam Vardhaman Developers LLP and Director in two companies, M/s Richwell Enterprises Pvt. Ltd. and Yashraj Commercial Complex Pvt. Ltd. These firms/companies are in the business of construction of residential complexes and other related activities and the assessee was not doing any business in his individual capacity. The assessee in his return of income has declared income from house property, remuneration and interest from these partnership firms. A search was conducted on the assessee on 17.12.2014 and statement of the assessee was recorded u/s 132(4) in which the assessee has voluntarily surrendered a sum of Rs. 9,92,49,633/- for AY 2014-15. It was further submitted that the assessee filed original return of income on 24.07.2014 before date of search and revised return of income on 19.03.2015 and return in

response to notice u/s 153A on 27.03.2015. The Assessing Officer completed the assessment without making any addition in the income of the assessee and income as per return filed in response to notice u/s 153A was accepted. Separately, the Assessing Officer initiated penalty proceedings u/s 271(1)(c) and has issued separate notices dated 24.11.2016 and 04.05.2017. The assessee filed his submission vide letter dated 23.05.2017. However, not satisfied with the reply of the assessee, the ld. AO imposed penalty of Rs. 1,23,40,919/-.

20. In this factual background, it was submitted by the ld AR that assessee carried the matter in appeal before the ld. CIT(A) who has since deleted the penalty. The ld. AR submitted that the ld. CIT(A) has rightly deleted the penalty given the following reasons namely explanation 5A to section 271(1)(c) is not applicable as the assessment order is silent on disclosure being relatable to seized assets or incriminating transactions. Secondly, the order passed u/s 143(3) read with 153A doesn t specify under which limbs the penalty is initiated nor does notice u/s 274 do so and lastly the appellant has filed revised return within time available u/s 139 and hence explanation 5A to section 271(1)(c) is not applicable.

21. The ld. AR supported the said finding of the ld. CIT(A) and submitted that explanation 5A can be invoked provided the appellant is found to be the owner of any money, bullion, jewellery or any entry in the books of accounts which represents his undisclosed income for any previous year which has ended before the date of search and where the return of income for such previous year has been furnished before the said date but such income has not been declared therein. In those cases only the penalty is leviable. It was accordingly

submitted that the prerequisite for invoking of explanation 5A is that the assessee should be found to be owner of such income as narrated therein. In the present case, no such money, bullion, jewellery or any entry in any books of accounts or documents have been unearthed during the course of search based on any incriminating material found. It was submitted that there were no entries in the books of account as the assessee was not maintaining any books of accounts, as he was not doing any business in his individual capacity. Therefore, the penalty has been imposed on the assessee only on the basis of statements of the assessee recorded during the course of search. It was further submitted that AO has nowhere demonstrated in the entire quantum as well as penalty order that the assessee was confronted with any incriminating material found during the search and on the basis of which any undisclosed income was found and disclosed by the assessee. The assessee simply in order to buy peace disclosed the additional income in his statement made u/s 132(4) of the Act which was accepted by the AO peacefully without making any further additions. Drawing reference to the assessment order dated 24.11.2016, the ld AR submitted that no mention in the order that the disclosure made by the assessee pertained to any seized assets or incriminating transactions and no incriminating documents found and considered at the time of assessment. Further referring to the penalty order u/s 271(1)(c), it was submitted that the AO has simply reproduced the provisions of explanation 5A and some case laws and not mention about any incriminating documents even at the time of passing the penalty order. Further reliance was placed on the Co-ordinate Bench decision in case of Radha Shyam Mittal vs. DCIt (2017) 88 taxmann.com 336 wherein it was held that penalty u/s 271(1)(c) read with explanation 5A cannot be levied if addition is not based on

any incriminating material found during the course of search on the basis of money, bullion, jewellery or any entry in the books of account. Further, reliance was placed on the Co-ordinate Bench decision in case of Ajay Traders vs. DCIT (2017) 81 taxmann.com 463, Dilip Kedia v. ACIT (2013) 40 taxmann.com 102 and Financial Technologies I Ltd. vs. ACIT (2015) 61 taxmann.com 91 (Mumbai ITAT).

22. It was further submitted by the ld AR that penalty is not automatic and the same is leviable only when it is so provided. However it is also settled law that deeming provision are to be strictly construed. When in general, it is not found to be a case of concealment of income but by deeming provision, concealment is to be presumed, then only in those circumstances deeming provision will apply. The onus to prove that condition exists for levy of penalty is upon the Revenue. It was further submitted that in the statement recorded u/s 132(4), the assessee had made surrender of income only to buy peace of mind and with a view to cooperate with the Income Tax Department and with the condition that no penalty would be imposed on him for the income so surrendered. During assessment proceedings also the assessee has fully cooperated with the department to complete the assessment smoothly. The Department should not have imposed penalty upon him after accepting the conditional surrender of income. It was further submitted that even there is no requirement of proving mens rea specifically, it is clear that the word conceal inherently carried 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. Thus, as the law stands, the word conceal in section 271(1)(c), would require the Assessing Officer 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.

23. Further, the reliance was placed on the decision of T. Ashok Pai vs. CIT [2007] 292 ITR 11/161 Taxmann 340 (SC), Union of India vs. Rajasthan Spg. and Wvg. [2009] 180 Taxmann 609 (SC), CIT vs. SAS Pharmaceuticals [2011] 335 ITR 259/199 Taxmann. 255/11 taxmann.com 207 (Delhi), Reliance Petro Products P. Ltd 322 ITR 158 (SC), Hindustan Steel Ltd. vs. State of Orissa [1972] 83 ITR 26 (SC), Dilip N. Shroff vs. Joint Commissioner of Income-tax, Special Range, Mumbai [2007] 161 Taxmann 218 (SC), Sudarshan Silk & Sarees vs. CIT (2008) 300 ITR 205 (SC), CIT vs. S.D.V Chandru [2004] 266 ITR 175/136 Taxman 537 (Mad.), CIT vs. Suresh Chandra Mittal [2000] 241 ITR 124/[2002] 123 Taxman 1052 (MP), and CIT vs. Suraj Bhan [2007] 294 ITR 481/159 Taxman 26 (Punj. & Har.)

24. It was further submitted that the order passed u/s 143(3) r/w section 153A does not specify under which limb the penalty is initiated. Nor does notice u/s 274 do so. It was submitted that for levy of penalty u/s 271(1)(c), ld. AO has to apply his mind and come to a conclusion that whether the penalty is being levied for concealment of particulars of income or for furnishing inaccurate particulars of income. It was submitted that there is heavy onus on the ld. AO initiating penalty of proving the assessee guilty of concealment of income as penalty proceedings result into undue hardship for the assessee. Thus it is inevitable that the authority levying penalty should be fully satisfied after proper application of mind that it is a fit case for levy of penalty. In the assessment order dated 24.11.2016 passed u/s 143(3) rws 153A of income tax Act, ld. AO has just mentioned that

notice u/s 271(1)(c) of the Act is being issued, without mentioning the exact nature of default of the assessee. Attention was also drawn towards the notices dated 24.11.2016 and 04.05.2017 issued by the ld. AO u/s 274 read with section 271(1)(c) and it was submitted that said notice, ld. AO has not clearly mentioned the limb, on the basis of which, penalty was proposed to be imposed. Ld. AO has simply issued a pre-printed notice without striking off the unnecessary portions of the notice. In support, reliance was placed on the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565 (Karnataka) which has been followed by Hon'ble Bombay High Court in case of Sh. Samson Perinchery (ITA No. 1154,953,1097,1226 of 2014 vide order dated 05.01.2017 and SSA'S Emerald Meadows [2016] 73 taxmann.com 241 (Karnataka High Court). It was further submitted that the Co-ordinate Jaipur Benches is also following the ratio laid down therein in case of Shankar Lal Khandelwal vs. DCIT (ITA No. 878/JP/2013), Radha Mohan Maheshwari vs. DCIT (ITA No. 773/JP/2013). Further, reliance was placed on judgment of the Hon'ble Jurisdictional High Court in case of Sheveta Construct on Co. Pvt. Ltd. ITA No. 534/2008.

25. It was further submitted that there was no difference in the income declared by the assessee in the return filed u/s 139(5)/153 and the income finally assessed by the AO. Therefore, there was no concealment of income by the assessee as the concealment has to be seen with reference to the revised return of income/return filed in response to notice u/s 153A vis a vis the assessed income. It was submitted that as per the clause (b) of explanation 5A, a penalty can be imposed on the assessee if the due date for filing of return of income for the year has expired but the assessee has not filed the

return. It was submitted that even if the income declared during search is disclosed by the assessee in return of income field on or after date of search, he shall be deemed to have concealed/furnished inaccurate particulars of such income. Here the term used is due date and not due date as specified u/s 139(1) and accordingly, even if assessee files return of income after date of search but within extended due date u/s 139(5) by including the unaccounted income admitted during search in his return of income, deeming fiction of expln. 5A shall not be attracted. It was accordingly submitted that the Assessing Officer has accepted the revised return filed by the assessee u/s 139(5) and 153A, no occasion arises to refer to the previous return filed u/s 139(1). For all purposes, including for the purpose of levying penalty u/s 271(1)(c), the return that has to be looked at is the one filed u/s 139(5) and sec. 153A and section 139(5) and 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 Assessing Officer accepts the revised return/return filed u/s 153A, the original return u/s 139(1) abates and becomes non est. The concealment has to be seen with reference to the return that is filed by the assessee. Thus, for the purpose of levying penalty u/s 271(1)(c), what has to be seen is whether there is any concealment in the return filed by the assessee u/s 139(5) or sec. 153A, and no vis-à-vis the original return u/s 139(1). It was further submitted that no penalty can be imposed on the assessee as per clause (a) of explanation 5A as the assessee had declared all the income in the revised return filed u/s 139(5) of Act which was well within the time limit prescribed under the Act. Learned AO has also accepted the same income without making any addition. Therefore, the assessee has fully complied with law by declaring entire income in

return filed u/s 139(5) and no penalty can be imposed upon him by invoking provisions of explanation 5A of section 271(1)(c). Regarding clause (b) of explanation 5A, in case of previous year has expired but the assessee has not filed the return, then even if the income declared during search is disclosed by the assessee in return of income filed on or after date of search, he shall be deemed to have concealed/furnished inaccurate particulars of such income. Here the term used is due date and not due date as specified u/s 139(1) and accordingly, even if assessee files return of income after date of search but within extended due date 139(5) by including the unaccounted income admitted during search in his return of income, deeming fiction of explanation 5A shall not be attracted.

26. Further, the ld AR placed reliance on the Co-ordinate Bench decision in case of ITO vs. Mr. Gope M. Rochlani in [2014] 40 taxmann.com 46, (Mumbai), Sanjeev Kumar Agarwal vs. ACIT, New Delhi [2019] 101 taxmann.com 223 (Delhi-Trib.), in case of Principal Commissioner of Income Tax -19 vs. Neeraj Jindal [2017] 79 taxmann.com 96 (Delhi) and Prem Arora vs. DCIT, [2012] 149 TTJ (Del) 590.

27. We have heard the rival contentions and gone through the material available on record.

28. Firstly, we refer to the contention of the ld. DR that there is no infirmity in the penalty order, so passed by the Assessing Officer as held by the ld. CIT(A) as regards recording of the satisfaction. In this regard, it was submitted that firstly, the satisfaction while passing the assessment order is clearly discernible from the assessment order and

secondly, while passing the penalty order, the AO has given a specific finding regarding concealment of income. Therefore, even if the notice u/s 271(1)(c) is not specific, the same by itself will not result in penalty order being held as bad in law.

29. In this regard, we refer to the assessment order passed u/s 143(3) read with section 153A of the Act. In para 2 of the assessment order, the Assessing Officer has stated that pursuant to search and seizure operation carried out on 17.12.2014 at the various premises of Vardhaman Group, the business/residential premises (801, Western Height, S-21, Shyam Nagar, Jaipur) of the assessee was also covered and thereafter notice u/s 153A was issued to the assessee on 11.02.2015 and in response to the said notice the assessee furnished his return of income on 27.03.2015 declaring total income of Rs. 3,85,78,660/-which includes undisclosed income of Rs. 3,63,07,500/- which has been accepted by the assessee himself during the course of his statement u/s 132(4) of the Act and therefore, penalty proceedings u/s 271(1)(c) are being initiated separately. Thereafter, towards the end of the para 6 of the assessment order, the AO has stated that a notice u/s 271(1)(c) is being issued. Therefore, we find that the penalty proceedings have been initiated *qua* the undisclosed income which has been admitted by the assessee during the course of search in his statement u/s 132(4) of the Act and which has subsequently been reported to tax in the return filed in response to notice u/s 153A of the Act. The penalty proceedings proposed to be initiated is therefore *qua* the undisclosed income admitted during the course of search and not *qua* the addition made while passing the assessment order u/s 143(3) read with section 153A of the Act. The fact that the AO while passing the assessment order has taken note of said

disclosure of the undisclosed income by the assessee in his statement recorded u/s 132(4) during the course of search which has been subsequently been reported to tax in the return filed u/s 153A is therefore clear enough reflection of the mind of the AO and which clearly demonstrates that the Assessing Officer at the time of passing the assessment order was satisfied that the assessee is liable for penalty u/s 271(1)(c) of the Act qua the undisclosed income. Therefore, as far as recording of satisfaction at the time of passing of the assessment order is concerned, we find that the same is clearly discernable from the reading of the assessment order and there is a direction to this effect even though the AO has not said in specific terms that he is satisfied that the penalty is leviable in the instant case.

30. Now coming to the second contention of the ld DR challenging the findings of the ld. CIT(A) regarding the specific limb/charge for levy of penalty not discernible from the assessment order and also from the notice issued u/s 271 r/w 275 for levy of penalty. In this regard, we refer to the notice issued u/s 271 r/w 275 which states that:

> *"whereas in the course of assessment proceedings for AY 2014-15, it appears that as per section 274 and 275 read with section 271(1)(c) you are liable for penalty for concealment of particulars of income/furnishing of inaccurate particulars of income is concerned, you are hereby requested to appear and show cause why an order should not be made imposing penalty u/s 271(1)(c) r/w 274 of the Act."*

We therefore find that while issuing the notice u/s 271(1)(c), the specific charge in terms of concealment of particulars of income or furnishing of inaccurate particulars of income is therefore not ascertainable, however, while passing the penalty order, the AO has stated that it is a case of deemed concealment of particulars of income within the meaning of explanation 5A to section 271(1)(c) of the Act and thereafter, at para 7 of the penalty order, he has stated his final and conclusive findings that:

> *"in view of above stated facts and legal position, the assessee under consideration is clearly liable for penalty u/s 271(1)(c) on account of concealment of income and accordingly, penalty u/s 271(1)(c) is imposed on him.."*

We therefore find that while passing the penalty order, the AO has given a clear and specific finding that it is a case of concealment of income. As we have held above, the satisfaction which has been recorded while passing the assessment order is *qua* the undisclosed income admitted by the assessee during the course of search and the AO while passing the penalty order has given a clear finding that the explanation 5A to section 271(1)(c) is clearly attracted in the instant case and it's a case of deemed concealment of income by the assessee. We therefore find that there is a clear and specific finding about deemed concealment of income by the Assessing Officer while passing the penalty order. Therefore, even though the notice initiating penalty proceedings is not so specific about the specific charge, however, in the penalty order, there is a clear finding in terms of charge of deemed concealment which has been fastened on the assessee by the Assessing Officer. Therefore, we do not see any infirmity in the penalty order so passed by the Assessing Officer as far

as the argument regarding specific charge not been stated while initiating the penalty proceedings. In this regard, we refer to the decision of the Third Member in case of HPCL Mittal Energy ltd (supra) wherein it has been held that uncertain charge at the time of initiation of penalty must necessarily be substituted with a conclusive default at the time of passing the penalty order and where the same is ultimately found to be correct, no fault can be found with the penalty order. The said decision thus supports the case of the Revenue as in the instant case, the uncertain charge at the time of initiating the penalty proceedings has been substituted with a specific and conclusive default by way of concealment of income.

31. In the instant case, it therefore needs to be determined whether the assessee is actually guilty of specific charge of deemed concealment of income by virtue of explanation 5A to section 271(1)(c) of the Act as so held by the Assessing officer. In this regard, we refer the provision of explanation 5A to section 271(1)(c) of the act which reads as under:-

"[Explanation 5A - Where, in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of—

(i) 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 for any previous year; or

(ii) any income based on any entry in any books of account or

other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year,

which has ended before the date of search and,—

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

(b) the due date for filing the return of income for such previous year has expired but the assessee has not filed the return,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of 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."

32. On perusal of the explanation 5A to section 271(1)(c), it lays down the following essential conditions which needs to be satisfied before the assessee is fastened with the penalty u/s 271(1)(c) of the Act:

(1) Firstly, it talks about a situation where the search has been initiated u/s 132 on or after the 1st day of June, 2007. In the present case, the search has been conducted on the assessee on 17.12.2014. Therefore, this condition is satisfied in the instant case.

(2) The second condition is that in the course of search so conducted, the assessee is found to be the owner of any money, bullion, jewellery

or other valuable article or thing and the assessee claims that such 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 search. In the instant case, there is nothing on record which demonstrates that any money, bullion, jewellery or other valuable article or thing has been found during the course of search and even this is not the case of the Revenue. Therefore, this condition is not relevant in the instant case and has not been dealt upon by us.

(2A) The second alternate condition is that during the course of search, the assessee is found to be owner of any income based on any entry in books of accounts or other documents or transactions and the assessee claims that such entry in the books of accounts or other documents or transactions represent his income wholly or in part for any previous year which has ended before the date of search. We find that this condition is relevant in the instant case and we will examine whether this condition is sa isfied or not in the subsequent paragraphs shortly.

(3) The third condition is that where the return of income for "such previous year" has been furnished before the "said date" but such income has not been declared therein. The phrase "such previous year" refers to the previous year which has ended before the date of search and "such income" refers to the income in respect of which the assessee is found to be owner based on any entry in books of accounts or other documents or transactions during the course of search and the assessee claims that such entry in the books of accounts or other documents or transactions represent his income wholly or in part for such previous year. The phrase "said date" refer to the date of search. Therefore, this condition is to be read along

with the second alternate condition in the sense that the assessee has to be found to be owner of the undisclosed income and he admits the same and further, such undisclosed income has not been disclosed in the return of income filed before the date of search. In the instant case, the assessee has originally filed his return of income u/s 139(1) on 24.07.2014 declaring total income of Rs. 22,71,160/- and thereafter, the search was conducted on the assessee on 17.12.2014. Therefore, it is a case where the return of income for such previous year relevant to the impugned assessment year has been duly furnished by the assessee u/s 139(1) before the date of search. In the said return of income, the undisclosed income of Rs. 3,63,07,500/- as per statement u/s 132(4) has not been included and reported by the assessee. In this regard, the contention of the ld AR is that the assessee had declared the undisclosed income in the revised return filed u/s 139(5) on 19.03.2015 wherein he has included the undisclosed income of Rs. 3,63,07,500/. Therefore, this condition is not satisfied in the instant case and penalty should not be levied. However, we are afra d, we cannot accede to the said contention of the ld. AR as this condition talks about furnishing of income before the date of search which is 17.12.2014 and before the said date of search, the only return which has been filed is on 24.07.2014 which has been filed u/s 139(1) wherein the assessee has disclosed the total income of Rs. 22,71,160/- and has therefore not included the undisclosed income as per the statement recorded u/s 132 (4) of the Act. At the same time, as we have stated above, this condition has to be read along with second alternate condition in the sense that the assessee has to be firstly found to be owner of the undisclosed income and he admits the same and only in a scenario where the same is satisfied, the question of declaring such undisclosed income in the return of income

will arise for consideration. Where it is ultimately determined that the assessee is found to be owner of the undisclosed income, the fact that such undisclosed income has not been declared in the return of income filed before the date of search, this condition can be said to be satisfied.

(3A) Now coming to the third alternate condition, it talks about a situation where the assessee has not filed his return of income and due date for filing the return of income for "such previous year" has expired. In the instant case, the assessee has duly filed his return of income, therefore, this alternate third condition does not apply at first place. This condition can be invoked and examined only in a scenario where the assessee has not filed his return of income at all for the impugned assessment year and only in that scenario, the various contentions raised by the ld. AR arise for consideration regarding the concept of the due date of filing the return of income and whether reference to due date has to be extended as not limited to due date as specified u/s 139(1) but the extended due date u/s 139(5) wherein the assessee claimed to have filed his revised return of income on 19.03.2015. Given that the assessee has already filed the return of income u/s 139(1) on 24.07.2014 before the date of search, this alternate third condition is not applicable and thus, we don't see any necessity to examine the aforesaid contentions so raised by the ld AR in this regard.

33. Therefore, we agree with the contention of the ld. DR that the clause (a) and not clause (b) of the third condition of explanation 5A is relevant in the instant case and the ld. CIT(A) has erred by ignoring clause (a) and straightaway examining clause (b) and holding that the appellant has filed revised return within the time available u/s 139(5)

and therefore, the explanation 5A to section 271(1)(c) is not applicable. The question whether clause (a) of the third condition of explanation 5A is satisfied in the instant case will however depend upon satisfaction of second alternate condition where it is ultimately determined that the assessee is found to be owner of the undisclosed income, the fact that such undisclosed income has not been declared in the return of income filed before the date of search, this condition can be said to be satisfied.

34. Now, coming back to the second alternate condition (Para 32(2A) supra), it need to be examined whether the same is satisfied in the instant case or not. Only in a scenario where this condition is finally held to be satisfied, the levy of penalty can be held justified by invoking explanation 5A to section 271(1)(c) as all the three conditions need to be necessarily satisfied individually as well as cumulatively.

35. The second alternate condition, as we have noted in Para 32 (2A) above has in turn, two limbs which needs to be satisfied cumulatively. The first limb provides that whether during the course of search, the assessee is found to be owner of any income based on any entry in books of accounts or other documents or transactions. The second limb states that the assessee claims that such entry in the books of accounts or other documents or transactions represent his income wholly or in part for any previous year which has ended before the date of search. The first limb relates to findings by the Revenue during the course of search that the assessee is the owner of the income for the relevant previous year and the second limb talks about the claim and the admission by the assessee that such income represents his income for the said previous year. Therefore, there has

to be finding by the Revenue that the assessee is the owner of such income for the relevant previous year and acceptance/admission by the assessee that such income represent his income wholly or in part for any previous year ended before the date of search. Further, such findings and admission should be based on any entry in books of accounts or other documents or transactions found during the course of search. Where either of the two limbs is satisfied and other limb is not satisfied, the penalty cannot be levied as the requirement is satisfaction of both the limbs individually and cumulatively.

36. In that context, we need to examine the findings of the ld CIT(A) where he says that the deeming fiction so created by the explanation 5A have to be read strictly and where the assessee is not found to be owner of such income during the course of search, merely because undisclosed income has been declared in the return filed after search, admitting such undisclosed income, the deeming fiction cannot be invoked. We agree with the said reading of the provisions by the ld CIT(A) as the deeming provisions and that too, in the context of levy of penalty so contained in explanation 5A to section 271(1)(c) have to be read strictly and only in a scenario, the conditions specified in the statue are satisfied, the penalty can be held justified.

37. Further, the ld CIT(A) has stated that in the instant case, the AO has not examined whether income has been found by way of any incriminating material found during the course of search and no finding has been recorded by the AO as to how the assessee has earned additional income *qua* the seized material found during the course of search. The ld AR has supported the aforesaid findings of the ld CIT(A) in his submissions. The ld CIT DR has however contested

the said findings of the ld CIT(A) and submitted that the ld CIT(A) has not considered the statement of Shri Vivek Sethia and Shri Kamal Sethia recorded during the course of search u/s 132(4) wherein they have made a disclosure of Rs 20.10 crores (which includes disclosure of Rs 3.63 crores for the impugned assessment year) on the basis of a number of incriminating documents found during the course of search. It was further submitted by the ld CIT DR that the powers of the ld CIT(A) are co-terminus with that of the AO and if the AO has not stated these facts in the assessment order, he can well consider them in the appellate proceedings.

38. We, therefore, find that there is atleast an acceptance by the Revenue of the legal proposition that there has to be finding by the AO to the effect that the assessee is found to be the owner of such income for the relevant previous year and also the admission/acceptance by the assessee, and merely basis the admission in statement u/s 132(4) or subsequent acceptance thereof by the assessee by way of including the undisclosed income in the return filed after the date of search, is not sufficient to invoke the deeming provisions of explanation 5A of the Act as both the limbs needs to be satisfied cumulatively.

39. Further, such findings by the AO that the assessee is the owner of income should be based on any entry in books of accounts or other documents or transactions found during the course of search. The only finding that we have noted in the penalty order is that the assessee has declared undisclosed income during the course of search in his statement u/s 132(4) and the same has been accepted and offered to tax subsequently in the return of income so filed in response to notice

u/s 153A of the Act. Admittedly and undisputedly, there is, however, no finding in the penalty order to the effect that the assessee is found to be the owner of income based on any entry in books of accounts or other documents or transactions found during the course of search. In our view, the penalty proceedings, being independent of quantum proceedings, such findings should necessarily reflect in the penalty order and in absence thereof, on this ground itself, the impugned penalty proceedings deserve to be set-aside.

40. Having said that, since the ld CIT DR has drawn our reference to statement of the assessee, Shri Kamal Sethia and his son, Shri Vivek Sethia recorded u/s 132(4) during the course of search, we refer to these statements. At the outset, we may state that the statements alone cannot be held as incriminating material found during the course of search. What is essential to determine, as mandated by the clear language so provided in the explanation 5A to section 271(1)(c), is the basis of such statements and whether there are any tangible material by way of any entry in books of accounts, documents or transactions which have been found during the course of search and which support and corroborates such statements.

41. In the assessee's statement recorded u/s 132(4) on 19.12.2014, in question No. 4, the assessee's reference was drawn to Annexure-AS 1 to 11 seized during the course of search in respect of which Shri Vivek Sethia, the son of the assessee, in his separate statement recorded u/s 132(4), has admitted an amount of Rs. 20,10,07,385/- as the undisclosed income from their construction business and which has not been recorded in the books of accounts maintained by their group companies/firms. In response, the assessee has stated that he

has gone through the statement so recorded of his son, Shri Vivek Sethia and he is in acceptance with the same and basis the same, an amount of Rs. 9,92,49,633/- was admitted as undisclosed income for various years including Rs. 3,63,07,500/- which has been surrendered for the impugned assessment year. What the assessee therefore has stated in his statement is that the documents found during the course of search relates to the undisclosed income relating to the construction business and which has not been recorded in the books of accounts of the companies/firms. The basis of the said statement is the documents found during the course of search which has been elaborately discussed in the statement of Shri Vivek Sethia as we have noted below.

42. We now refer to the statement of Sh. Vivek Sethia recorded u/s 132(4) during the course of search. In response to Question No. 4 wherein his source of income was asked, he has submitted that his source of income is from interest, remuneration and salary from the firm/companies wherein he is a Director/partner. In response to Question No. 7, he has stated that the Vardhaman Group carried out the construction activities through various companies and firms such as M/s Sethia Real estate, M/s Richwell Enterprises Pvt. Ltd., M/s Manglam Vardhman Developers and others. In response to Question No. 12 wherein he was asked in terms of various projects being carried out by these companies and the firms, he has stated that the project Silver Crown has been carried out by M/s Sethia Real estate, project Imperial Heights and project Horizon by M/s Richwell Enterprises and project Arcadia Greens by M/s Manglam Vardhaman Developers. The statement of Shri Vivek Sethia thus corroborates the statement of the assessee, as we have noted above, that the

construction business was undertaken by the companies/firms and not by the assessee and his son in their individual capacity.

43. Now coming to the specific disclosure made by Sh. Vivek Sethia relevant for the impugned assessment year, we refer to Question No. 26 wherein the assessee and his son have surrendered an amount of Rs. 7,05,00,000/-(Rs 3,17,50,000). The said surrender is basis a document seized during the course of search referred to Annexure-AS, Exhibit- 5, Page No. 1/6. On perusal of the said single piece of unsigned and loose paper so found and seized during the course of search, it list down certain expenses and other payments recorded on various dates with the heading "M/s Manglam Vardhaman Developers cash account" relating to expenditure pertaining to project Arcadia Greens being executed by M/s Manglam Vardhaman Developers. Similarly, we refer to Question No. 31 which relates to project Horizon being carried out by M/s Richwell Enterprises Pvt. Ltd. Basis an agreement dated 06.09.2013 between Sh. Shyambabu Dangayach and M/s Richwell Enterprises Pvt. Ltd wherein there is a mention of cash payment of Rs. 12 lacs to the seller, the amount was surrendered equally by the assessee and his son in their individual hands. Similarly, in question no. 33, there is a surrender of Rs. 28,04,000/- in respect of land purchased at village Udaipuriya based on an agreement dated 17.11.2013 between M/s Richwell Enterprises Pvt. Ltd and Smt. Sugni Devi for purchase of agricultural land at village Udaipuriya which is signed by the seller Smt. Sugni Devi and not by the assessee. Subsequently, the sale deed dated 18.11.2013 was registered in the name of the company for Rs. 10,21,000/-. Similarly, in question no. 35 & 37, there are payments towards purchase of land at village Hatoz for Rs 11,11,000 and MaHinglaz Nagar for Rs. 40,00,000/- respectively

which has been surrendered equally in the hands of the assessee and his son.

44. We therefore find that basis the documents found and seized during the course of search, read along with the statements so recorded u/s 132(4), all these expenditure towards capital cost/purchase of land totaling Rs 7,26,15,000 relates to various construction projects being executed by M/s Manglam Vardhaman Developers and M/s Richwell Enterprises Pvt. Ltd. and even the land purchase agreements are in the name of these companies/firms and not in the individual names. What therefore has been found by the Revenue during the course of search basis the documents so found and seized is the undisclosed expenditure which relates to the construction business being undertaken by these companies/firms and which has not been recorded in the books of accounts of the companies/firms before the date of search. Therefore, it is clear that basis the documents so found and seized during the course of search, the assessee is not found to be the owner of any undisclosed income.

45. Given that the admission and surrender has been made by the assessee in his individual capacity and not by the companies/firms, the second limb can only be said to be satisfied in the instant case. As we have stated above, the first limb relates to findings by the Revenue during the course of search that the assessee is the owner of the income for the relevant previous year and the second limb talks about the claim and the admission by the assessee that such income represents his income for the said previous year. Therefore, there has to be finding by the Revenue that the assessee is the owner of such income for the relevant previous year and acceptance/admission by

the assessee that such income represent his income wholly or in part for any previous year ended before the date of search. In the instant case, the first limb is not satisfied, therefore, the penalty cannot be levied as the requirement is satisfaction of both the limbs individually and cumulatively.

46. The fact that the construction business and various constructions projects were undertaken by the Companies/firms and not by the assessee and his son in their individual capacity is an admitted position which has been accepted and acknowledged by the Revenue. Admittedly, the assessee is a partner in M/s Manglam Vardhman Developers and also a Director in M/s Richwell Enterprises Pvt. Ltd. However, by merely becoming a partner in a firm or a director in the company, the transactions undertaken by the firm/companies will remain the transactions of the firm/companies even though the same have been executed/undertaken by the partner/director in his fiduciary capacity. A partner/director represents the interest of the firm/company he is representing and not his individual interest. Only in a scenario, where it is found that he is using such fiduciary capacity for his personal and individual interest, corporate veil can be lifted. In the instant case, this is not even the case of the Revenue. The Revenue has accepted the return of income filed by the assessee originally u/s 139(1) wherein he has declared income from house property, remuneration and interest from these firms and the share in the profits on the firm has been claimed as exempt. Subsequently, in response to notice u/s 153A, the assessee has reiterated his income as per the original return of income wherein share in the profits of the firm has been claimed as exempt besides the amount surrendered during the course of search and which has been accepted by the

Revenue. Similarly, the ld AR has stated at the Bar that the return of income of M/s Manglam Developers for AY 2014-15 has been accepted by the Revenue as carrying on the business of construction of residential complexes and other related activities and also the fact that the assessee is a partner in that firm. Similarly, the return of income of M/s Richwell Enterprises for AY 2014-15 has been accepted as carrying on the business of construction of residential complexes and other related activities and also the fact that the assessee is a Director is said company. We therefore find that the assessee and his son were not doing any construction business in his individual capacity rather the business of construction of residential complex and other related activities have been carried out by the companies/firms wherein the assessee and his son were partner/Director Therefore, basis the statements of the assessee and his son, other documents/transactions found during the course of search and even as per the tax filings which have been accepted by the Revenue, we find that that it is the companies/ firms and not the assessee and his son which are found to be the owner of the undisclosed income. The fact that the assessee and his son have declared the undisclosed income in their individual return of income and have paid taxes thereon and the fact that the Revenue has also accepted the same, the same is true as far as the quantum proceedings are concerned and which has now attained finality, however, when it comes to penalty proceedings, the provisions have to be read strictly and only where the conditions specified therein are satisfied, the penalty can be held justified.

47. Looking at the matter from another perspective, as we have noted above, basis the documents found and seized during the course of search, read along with the statements so recorded u/s 132(4),

what has been found is the expenditure towards capital cost/purchase of land relating to various construction projects being executed by M/s Manglam Vardhaman Developers and M/s Richwell Enterprises Pvt. Ltd The question that arises for consideration is whether the said expenditure towards capital cost/purchase of land, represents or deemed to represent income in the hands of the assessee. In case of Shri Rajendra Kumar Gupta *(Supra),* relied upon by the ld CIT DR, the Bench had an occasion to examine in context of definition of undisclosed income so defined in section 271AAB whether cash advances for purchase of land represents income by way of any entry in the books of account or other documents or transactions found in the course of a search under section 132. In the said decision, it was held as under:

> *"21. During the course of search, a note book (diary) has been found referred to as Ann. AS wherein there are certain notings relating to cash advances given to various persons totaling to Rs 82,80,000. Referring to the statement of he assessee in respect of these notings recorded u/s 132(4), ld CIT(A) has given a finding that the assessee has given a generalized statement without specifying the complete particulars of persons to whom loans were given and also failed to substantiate the same. The said findings have not been disputed by the Revenue and therefore, merely based on surrender and generalized statement of the assessee, in absence of anything specific to corroborate such entries, can it be said that such entries/notings represent undisclosed income of the assessee. As per the definition of undisclosed income u/s 271AAB, the said cash advances cannot be stated to be*

income which is represented by any money, bullion, jewellery or other valuable article or thing. Whether it can then be said that such undisclosed cash advances represents income by way of any entry in the books of account or other documents or transactions found in the course of a search under section 132. A cash advance per se represents an outflow of funds from the assessee's hand and an income per se represents an inflow of funds in the hands of the assessee. Therefore, once there is an inflow of funds by way of income, there can be subsequent outflow by way of an advance to any third party. Giving an advance and income thus connotes different meaning and connotation and thus cannot be used inter-changeably. In the definition of undisclosed income, where it talks about "income by way of any entry in the books of account or other documents or transactions found in the course of a search under section 132", what perhaps has been envisaged by the legislature is an inflow of funds in the hands of the assessee which has been found by way of any entry in the books of accounts or other documents, and which has not been recorded before the date of search in the books of accounts or other documents maintained by the assessee in the normal course and not vice-versa. We are also conscious of the fact that there are deeming provisions in terms of section 69 and 69B wherein such amounts may be deemed as income in absence of satisfactory explanation. In our view, the deeming fiction so envisaged under Section 69 and Section 69B cannot be extended and applied automatically in context of section 271AAB. It is a well-settled legal proposition that the deeming provisions are limited for the purposes that have been brought on the statute book and have

therefore to be applied in the context of provisions wherein they have been brought on the statue book and not otherwise. In the instant case, the deeming provisions contained in section 69 and section 69B could have been applied in the context of bringing to tax such investments to tax in the quantum proceedings, though the fact of the matter is that the AO has not even invoked the said deeming provisions in the quantum proceedings. Therefore, even on this account, the deeming fiction cannot be extended to the penalty proceedings which are separate and distinct from the assessment proceedings and more so, where the provisions of section 271AAB provide for a specific definition of undisclosed income. Where a specific definition of undisclosed income has been provided in Section 271AAB, being a penal provision, the same must be strictly construed and in light of satisfaction of conditions specified therein and it is not expected to examine other provisions where the same has been defined or deemed for the purposes of bringing the amount to tax. In light of the same, the undisclosed investment by way of advances can be subject matter of addition in the quantum proceedings, as the same has been surrendered during the course of search in the statement recorded u/s 132(4) and offered in the return of income, however the same cannot be said to qualify as an undisclosed income in the context of section 271AAB read with the explanation thereto and penalty so levied thereon deserved to be set-aside."

48. Though the said decision has been rendered in context of section 271AAB, we believe that the definition of undisclosed income

so far as it is relevant in the present context is similarly worded. In explanation 5A to section 271(1)(c), it talks about "where in course of search initiated under section 132 on or after 1st day of June, 2007, the assessee is found to be the owner of any income based on any entry in any books of account or other documents or transactions" and in section 271AAB, it talks about "any income of the specified previous year represented wholly or partly by any entry in the books of accounts or other documents or transactions found during the course of search u/s 132" and therefore the reasoning applied therein applies equally in the instant case and therefore, capital expenditure and payment towards purchase of land cannot be held as undisclosed income in the hands of the assessee.

49. In light of above discussions and in the entirety of facts and circumstances of the case, we are of the considered view that the assessee cannot be fastened with the penalty so envisaged under explanation 5A to section 271(1)(c) and the order of the ld CIT(A) directing deleting of penalty is upheld for the reasons as stated above. The matter is decided in favour of the assessee and against the Revenue.

ITA No. 1499/JP/2018

50. Both the parties fairly submitted that the facts and circumstances of the case are exactly identical as in ITA No. 1498/JP/2018 and have reiterated the submission made therein. Therefore, our findings and direction contained in ITA No. 1498/JP/2018 shall apply equally in the instant case and the order of

the ld CIT(A) is upheld directing deletion of penalty. The matter is decided in favour of the assessee and against the Revenue.

In the result, both the appeals filed by the Revenue are dismissed.

Order pronounced in the open Court on 07/06/2019.

Sd/-	Sd/-
(विजय पाल राव)	(विक्रम सिंह यादव)
(Vijay Pal Rao)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 07/06/2019.
*Ganesh Kr
आदेश की प्रतिलिपि अग्रेशित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- DCIT, Central Circle-1, Jaipur
2. प्रत्यर्थी/ The Respondent- Sh. Kamal Sethia, Jaipur & Sh. Vivek Sethia, Jaipur
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur.
6. गार्ड फाईल/ Guard File {ITA No. 1498 & 1499/JP/2018}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar