

**आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम**  
**IN THE INCOME TAX APPELLATE TRIBUNAL,**  
**VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**श्री वी. दुर्गराव, न्यायिक सदस्य एवं**  
**श्री जी. मंजुनाथा, लेखा सदस्य के समक्ष**  
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &  
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

**आयकर अपील सं./I.T.A.Nos.189 to 192/Vizag/2014**  
(निर्धारण वर्ष / Assessment Years: 2005-06 to 2008-09)

Nukala Ramakrishna,  
Eluru  
[PAN: AAQPN1119J]  
(अपीलार्थी / Appellant)

Vs.

DCIT, Central Circle-2,  
Visakhapatnam  
(प्रत्यार्थी / Respondent)

**आयकर अपील सं./I.T.A.Nos.382/Vizag/2014**  
(निर्धारण वर्ष / Assessment Year: 2008-09)

DCIT, Central Circle-3(1),  
Visakhapatnam  
(अपीलार्थी / Appellant)

Vs.

Nukala Ramakrishna,  
Eluru  
(प्रत्यार्थी / Respondent)

अपीलार्थी की ओर से / Appellant by : Shri C. Subrahmanyam, AR  
प्रत्यार्थी की ओर से / Respondent by : Shri T.S.N.Murthy, DR

सुनवाई की तारीख / Date of hearing : 28.07.2016  
घोषणा की तारीख / Date of Pronouncement : 16.09.2016

## आदेश / O R D E R

**PER G. MANJUNATHA, Accountant Member:**

These four appeals filed by the assessee and one appeal filed by the revenue are directed against separate, but identical orders of the CIT(A), Visakhapatnam dated 14.3.2014 for the assessment year 2005-06 to 2008-09, confirming levy of penalty u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter called as 'the Act'). Since, the facts are identical and issues are common, they are heard together and disposed off, by this common order for the sake of convenience.

2. The brief facts of the case are that the assessee is an individual engaged in the business of rearing and trading of fish and other ancillary business activities, filed his returns of income for the assessment years 2005-06, 2006-07, 2007-08 & 2008-09 on 31.10.2015, 31.10.2006, 31.10.2007 & 30.09.2008 declaring total income of Rs.14,43,490/- Rs.9,00,890/-, Rs.25,31,170/- & Rs.75,39,560/- respectively. A search & seizure operation u/s 132 of the Act, was conducted in the residential as well as business premises of the assessee on 16.11.2007. During the course of search, the department unearthed details of investments made in the purchase of immovable properties standing in the name of the assessee and his family members including business concerns. When

these materials were confronted to the assessee, the assessee has accepted that the said investments have not been disclosed in the regular return filed for the respective assessment years and accordingly, came forward to disclose the value of such investments aggregating to Rs.3.88 crores. Further, during post search enquiries, the assessee while deposing before the investigating officer, in the statement recorded u/s 132(4) of the Act, has agreed to increase the undisclosed income to Rs.6 crores, which was further increased to Rs.7.6 crores. Consequent to search and seizure operations, the assessee has filed revised return of income in response to notice u/s 153A of the Act on 14.09.2009, disclosing total income of Rs.52,25,300/-, Rs.57,95,700/-, Rs.2,16,68,980/- & Rs.4,10,32,920/- respectively for the assessment years 2005-06 to 2008-09. Subsequently these returns were again revised and in the final revised return, the income disclosed was stood at Rs.53,56,200/-Rs.57,95,700/-, Rs.2,36,68,980/- and Rs.4,10,32,920/- respectively for the assessment year 2005-06 to 2008-09. Subsequently, the cases were taken up for scrutiny and the assessments were completed u/s 143(3) r.w.s. 153A of the Act, by determining total income at Rs.2,52,05,947/-, Rs.2,30,17,708/-, Rs.3,31,32,770/- & Rs.4,10,32,920/- respectively for the assessment year 2005-06 to 2008-09. During the course of assessment proceedings, considering the

relevant information filed by the assessee, the A.O. determined total income on the basis of estimation of income from fish rearing and trading business.

3. Thereafter, the A.O. initiated penalty proceedings u/s 271(1)(c), r.w.s. 274 of the Act and asked to explain why penalty shall not be levied for concealment of particulars of income or furnishing inaccurate particulars of income. In response to show cause notice, the assessee submitted that there is no concealment of income or furnishing inaccurate particulars of income referred to in section 271(1)(c) of the Act or explanation 5A to section 271(1)(c) of the Act, as he had declared undisclosed income admitted during the course of search. The assessee further submitted that during the course of search, he had admitted undisclosed income of Rs.7.6 crores and disclosed said income in the revised return filed for the respective assessment years. It was further submitted that the assessment was completed and income was determined on the basis of estimation without reference to any seized material, therefore, it cannot be held that there is concealment of income which warrants levy of penalty u/s 271(1)(c) of the Act. The assessee further submitted that the income finally assessed after orders of the CIT(A) is marginally higher than the undisclosed income admitted

in the revised return filed u/s 153A of the Act and the said difference is on account of estimation of higher income from fish rearing and trading business based on the certificate issued by Dy. Director of Fisheries and hence, such estimation of income should not invite the burden of levy of penalty for concealment of income.

4. The assessee further submitted that penalty cannot be levied on the income admitted in the return filed u/s 153A of the Act. As per the provisions of section 271(1)B of the Act, no penalty can be levied for income admitted in return of income and assessee offers an explanation which is bonafide and penalty can be levied, in case income assessed over and above the income admitted in the revised return of income. It was further submitted that he had admitted undisclosed income in the statement recorded u/s 132(4) of the Act, disclosed said income in the return filed in response to notice u/s 153A of the Act and paid resultant taxes before filing return of income. The penalty u/s 271(1)(c) of the Act can be levied, in case the A.O. points out any concealment or inaccurate particulars of income in the return of income. The assessee further submitted that explanation 5A of section 271(1)(c) of the Act is specifically provided for levy of penalty, in a case where search is taken place on or after 1.6.2007. As per the said explanation as it stood

applied at the time of search or filing of return, penalty can be leviable only in the case where the assessee has not filed the return of income u/s 139(1) of the Act. In case, the assessee has filed return of income u/s 139(1) of the Act, any additional income admitted in the revised return filed u/s 153A of the Act and paid consequent taxes, no penalty can be levied u/s 271(1)(c) of the Act. In support of his arguments relied upon plethora of judgements including the decision of Hon'ble Supreme Court in the case of CIT Vs. Onkar Saran & Sons (1992) 195 ITR 0001.

5. The A.O. after considering explanations furnished by the assessee, held that the assessee has deliberately concealed particulars of income or furnished inaccurate particulars of income which is proved by his conduct that he never admitted true and correct income at the time of search. The A.O. further held that the assessee has admitted undisclosed income of Rs.3.88 crores at the time of search, subsequently enhanced to Rs.7.6 crores which clearly shows that the additional income offered by the assessee is not voluntary. The department has gathered sufficient material which indicates undisclosed income invested in immovable properties and the same has not been disclosed in the regular return filed u/s 139(1) of the Act, and when

these facts were confronted to the assessee, he was agreed to offer additional income. The A.O. further observed that even during the course of assessment proceedings, the assessee has failed to disclose true and correct income which leads to estimation of income based on the certificate issued by the Dy. Director of Fisheries, which results into determination of income which is higher than the income admitted by the assessee in the return filed in response to notice u/s 153A of the Act.

6. The A.O. further held that there is no merits in the contention of the assessee that as per the provisions of explanation 5 of section 271(1)(c) of the Act, no penalty can be levied in case the assessee has filed return u/s 139(1) of the Act, before the date of search and also disclosed additional income in the revised return filed u/s 153A of the Act. But, the statutory provisions in explanation 5A of section 271(1)(c) of the Act, is clear that if a particular income is found during the course of search, which was not disclosed in the return filed before the date of search, then even if the assessee disclosed said income in the return filed subsequent to search, the assessee is deemed to have concealed particulars of his income. The A.O. further held that as per the amended provisions of explanation 5A of section 271(1)(c) of the Act,

which was amended by the Finance Act, 2009 with retrospective effect from 1.6.2007, whether or not the assessee filed regular return before due date specified u/s 139(1) of the Act, the provisions of section 271(1)(c) of the Act are applicable, once there is a difference between income disclosed as per regular return filed u/s 139(1) of the Act and income admitted in the revised return as per section 153A of the Act. The amendment brought out by the Finance Act, 2009, is clarificatory in nature, therefore, it applies to the cases where the search is taken place on or after 1.6.2007. The A.O. further observed that by taking into totality of the facts and circumstances of the case and also considering original return and various revised returns filed by the assessee, this is a fit case for levy of penalty u/s 271(1)(c) of the Act. With these observations, levied penalty under the provisions of section 271(1)(c) of the Act.

7. Aggrieved by the penalty order, the assessee preferred an appeal before the CIT(A). Before the CIT(A), the assessee reiterated the submissions made before the A.O. The assessee further submitted that there is no concealment of particulars of income or furnishing inaccurate particulars of income referred to in section 271(1)(c) of the Act, either by way of explanation 1 or explanation 5A, as the assessee has admitted

undisclosed income in the statement recorded u/s 132(4) of the Act, at the time of search and declared said undisclosed income in the revised return filed in response to notices u/s 153A of the Act, further paid taxes before filing return of income. The assessee further submitted that the A.O. has determined income on estimation basis based on the certificate issued by the Dy. Director of Fisheries Department, which is not supported by any seized documents, therefore, this cannot be considered as concealment of particulars of income or furnishing inaccurate particulars of income. The assessee further submitted that the assessing officer levied penalty u/s 271(1)(c) of the Act, without taking cognizance of the provisions of explanation 5A of section 271(1)(c) of the Act. He had filed revised returns and disclosed undisclosed income in the said return as admitted during the course of search, therefore penalty cannot be levied on such additional income disclosed voluntarily in the revised returns. It was further submitted that as per the amended provisions of explanation 5A of section 271(1)(c) of the Act, when assessee filed regular return u/s 139(1) of the Act, before the date of search and any undisclosed income admitted in the revised return u/s 153A of the Act and paid resultant taxes, then no penalty can be levied u/s 271(1)(c) of the Act. The assessee further submitted that as per the said explanation 5A, where the search is taken

place on or after 1.6.2007, no penalty can be levied in the cases where assessee has admitted undisclosed income in the statement recorded u/s 132(4) of the Act, declared said undisclosed income in the return filed in response to notice u/s 153A of the Act.

8. The CIT(A), after considering the explanation furnished by the assessee, held that the assessee has concealed particulars of income and also furnished inaccurate particulars of income, therefore, the A.O. has rightly levied penalty u/s 271(1)(c) of the Act. The CIT(A) further held that the provisions of explanation 5A is very clear that in case the assessee declares any income in any return furnished on or after the date of search and such income has not been reflected in the returns filed by him prior to search, he shall be deemed to have concealed particulars of income in respect of such additional income declared in the revised return. The amended provisions of explanation 5A of section 271(1)(c) of the Act, which is applicable in respect of search initiated on or after 1.6.2007, states that any additional income declared in the revised return would amount to deemed concealment, therefore, the assessee's contention that penalty is not exigible in respect of additional income admitted in the revised return is not acceptable. With these observations, the CIT(A) held that this is a fit case to levy penalty u/s

271(1)(c) of the Act and accordingly, the A.O. is justified in levying impugned penalty, however, the quantum of penalty may be recomputed taking into account the additional relief granted by the Hon'ble ITAT.

9. The CIT(A) further held that in so far as assessment year 2008-09 is concerned, assessee has filed second revised return of income revising income from Rs.1,82,84,170/- to Rs.4,10,32,420/- admitting net income to the tune of Rs.2.76 crores relating to Naga Hanuman Solvent Oils Pvt. Ltd. The assessee explained that initially he had thought of admitting additional income to the tune of Rs.2.76 crores in the hands of the company, however, later considered it appropriate to admit entire additional income in his individual hands, accordingly, filed revised return including Rs.2.76 crores pertains to M/s. Naga Hanuman Solvent Oils Pvt. Ltd. Though, assessee explained the reasons for filing second revised return which can be acceptable, but failed to explain the reasons for not disclosing true and correct income in the original return filed u/s 139(1) of the Act. The assessee failed to offer explanation with regard to difference in income as per original return and revised return and which was out of mistake or inadvertence. Therefore, directed the A.O. to determine the quantum of penalty with reference to the difference

between the amount declared in the original return of Rs.75,39,560/- and in the revised return of Rs.1,82,84,170/-. Aggrieved by the CIT(A) order, the assessee as well as the revenue are in appeal before us.

10. The Ld. A.R. for the assessee, submitted that the Ld. CIT(A) was erred in confirming penalty levied u/s 271(1)(c) of the Act. The A.R. further submitted that the CIT(A) ought to have deleted penalty, as there was no concealment of income or furnishing inaccurate particulars of income, since the assessee had offered additional income in the revised return filed consequent to the declaration given u/s 132(4) of the Act. The A.R. further submitted that the CIT(A) failed to appreciate the fact that the disclosure made for all the years was marginally less than the aggregate income assessed by the A.O., which was due to additional income determined on estimation basis. The A.R. further submitted that the assessee has admitted undisclosed income during the course of search, while recording statement u/s 132 of the Act, under a bonafide belief that no penalty is leviable, if income is admitted or taxes is paid on such income, therefore, it is not correct on the part of the A.O. to come to the conclusion that the assessee has deliberately concealed particulars of income or furnished inaccurate particulars of income to levy penalty u/s 271(1)(c) of the Act. The Ld. A.R. further

submitted that the CIT(A) failed to appreciate the fact that explanation 5A as it stood prior to amendments by the Finance Act, 2009 not applies to the case of the assessee and consequently erred in confirming the penalty in terms of explanation 5A of section 271(1)(c) of the Act, on the admitted income in the return filed in response to notice u/s 153A of the Act. The A.R. argued that the amendment brought out by the Finance Act, 2009 to explanation 5A of section 271(1)(c) of the Act was not existed at the time of search u/s 132 of the Act, therefore, the A.O. was erred in invoking the amended provisions of explanation 5A to levy penalty for concealment of income. The A.R. further submitted that amended explanation 5A of section 271(1)(c), has come in to the statute books on 13-8-2009, cannot be made retrospective application to the rigorous penal provisions, therefore, the CIT(A) was completely erred in confirming penalty levied u/s 271(1)(c) of the Act.

11. In so far as assessment year 2008-09 is concerned, the Ld. A.R. submitted that the penalty order passed by the A.O. u/s 271(1)(c) of the Act is void-ab-initio, as the A.O. has applied incorrect provisions to levy penalty for concealment of income or furnishing inaccurate particulars of income. The A.R. further submitted that when a specific provision is provided by way of section 271AAA, for levy of penalty where search

has been initiated on or after first day of June, 2007, the A.O. erred in levy of penalty u/s 271(1)(c) of the Act. The A.R. drew our attention to the provisions of section 271AAA of the Act and submitted that in a case, where search has been taken place on or after 1<sup>st</sup> day of June, 2007, the assessing officer bound to initiate penalty proceedings u/s 271AAA of the Act and levy penalty at 10% of the undisclosed income of the specified previous year. The A.R. drew our attention to the explanation 'undisclosed income' and 'specified previous year' and submitted that specified previous year means the previous year which is ended before the date of search, but the date of filing the return of income under sub-section (1) of section 139 of the Act, for such year has not expired before date of search and the assessee has not furnished the return of income for the previous year before the said date or in which search was conducted. The A.R. further submitted that in the assessee's case, search was conducted on 16.11.2007 and which falls under the assessment year 2008-09. As per the provisions of section 271AAA of the Act, the A.O. ought to have initiated penalty proceedings u/s 271AAA of the Act, but he had initiated penalty u/s 271(1)(c) of the Act, which is void-ab-initio and accordingly liable to be quashed. In support of his arguments, relied upon the decision of Hon'ble High Court of Delhi, in the case of New Holland Tractors (India)

Private Limited Vs. CIT (2015) 275 CTR 291 and the decision of ITAT Hyderabad in the case of Dilip Kedia Vs. ACIT (1986)/Hyd/2011.

12. On the other hand, the Ld. D.R. submitted that the CIT(A) rightly upheld the penalty levied by the A.O. u/s 271(1)(c) of the Act. The D.R. further argued that it is a clear case of concealment of particulars of income or furnishing inaccurate particulars of income which is proved by the conduct of the assessee, as the assessee did not disclose true and correct income in the regular return of income filed for the respective assessment years and also even at the time of search the assessee has not disclosed true and correct income. The assessee has filed regular return u/s 139(1) of the Act for all the assessment years, however, failed to disclose true and correct income for the respective financial years, therefore, the A.O. has rightly inferred that the assessee has deliberately concealed particulars of income. The D.R. further submitted that there is no merit in the submissions of the assessee with regard to applicability of explanation 5A of section 271(1)(c) of the Act, as the law existed at the time of completion of assessment or initiation of penalty proceedings will holds good. The said section has been amended by the Finance Act, 2009 with retrospective effect from 1.6.2007 and hence, any search conducted on or after 1.6.2007 or assessment framed after

that date would fall under the amended provisions of explanation 5A of the Act, therefore, the A.O. has rightly levied penalty u/s 271(1)(c) of the Act and his order should be upheld.

13. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The factual matrix of the case is that there was a search action u/s 132 of the Act, in assessee's residential and business premises on 16.11.2007. During the course of search proceedings, the department found incriminating materials which reveals undisclosed income of the assessee in the form of investments in immovable properties and other group companies. When the said documents were confronted to the assessee, the assessee has admitted undisclosed income of Rs.7.6 crores. Consequent to search, the assessee has filed revised return of income for the assessment year 2005-06 to 2008-09 disclosing undisclosed income admitted during the course of search proceedings and paid tax before filing return of income. Subsequently, the assessment was completed u/s 143(3) r.w.s. 153A of the Act determining total income on estimation basis. Against the assessment order, the assessee preferred an appeal before the CIT(A) and the CIT(A) for the reasons recorded in his order allowed partial relief to the

assessee. Subsequently, the assessee preferred an appeal before the ITAT, and the ITAT, has allowed further relief to the assessee. The details of income returned by the assessee u/s 139(1) of the Act, total income as per revised return u/s 153A of the Act, income assessed by the A.O. u/s 153A of the Act and income finally assessed as per the order of ITAT is given for ready reference.

<i>A. Y.</i>	<i>Date of filing of return</i>	<i>Amount disclosed (in ₹)</i>	<i>Date of filing of return in response to notice u/s 153A</i>	<i>Amount disclosed in the return filed u/s 153A</i>	<i>Assessed income (in ₹)</i>	<i>Income determined (As per ITAT)</i>
2005-06	30.10.05	14,43,490	30.01.09	53,56,197	2,52,05,950	73,77,640
2006-07	31.10.06	9,00,890	30.01.09	76,60,200	2,30,17,710	1,24,89,220
2007-08	31.10.07	25,31,170	30.01.09	2,16,68,980	3,31,32,770	2,87,73,950
2008-09	30.09.08	75,39,560	30.01.09 (u/s 139(4))	4,10,32,920	4,10,32,920	---

14. The A.O. levied penalty u/s 271(1)(c) of the Act, on the ground that the assessee has deliberately concealed particulars of income or furnished inaccurate particulars of income, which is evidenced from the fact that the assessee did not offered true and correct income in the regular returns filed for the respective years. The A.O. was of the opinion that it is a clear case of concealment of income, as assessee neither disclosed true and correct income in the original return u/s

139(1) of the Act, nor revised return in response to notice u/s 153A of the Act. The A.O. further was of the opinion that if search could not have taken place, the assessee would not have disclosed true and correct income. The assessee was compelled to disclose undisclosed income by virtue of incriminating documents, therefore, it cannot be considered as voluntary disclosure of income disclosed by the assessee.

15. It is the contention of the assessee that the A.O. was not correct in holding that there is a concealment of income or furnishing inaccurate particulars of income, as he had disclosed undisclosed income admitted during the course of search, in the revised return filed u/s 153A of the Act. Though, the A.O. has assessed slightly higher income than income returned, which was on account of estimation of income from fish rearing and trading business based on the certificate issued by the Dy. Director of Fisheries. Therefore, the A.O. was not correct in holding that there is a concealment of income which warrants levy of penalty u/s 271(1)(c) of the Act. The assessee further contended that explanation 5A as it stood at the time of search applies only to a non-filer assessee who was searched u/s 132 of the Act, but not for the assessee's who had filed their returns u/s 139(1) of the Act. The amendment brought out by the Finance Act, 2009, covered filers within the said explanation with retrospective effect from 1.6.2007, therefore, the retrospective

amendment brought out by the Finance Act, 2009, cannot be applicable to the penalty provisions. The assessee further contended that in his case, the search took place on 16.11.2007 and as on the date of search explanation 5A as it stood existed in the statute book did not applicable to a filer assessee, therefore, he could not be held with rigorous of a penalty by virtue of a retrospective amendment.

16. The question that came up for our consideration is on the facts and circumstances of the case, the A.O. is right in levying penalty under the provisions of explanation 5A of section 271(1)(c) of the Act or the amended provisions of explanation 5A of section 271(1)(c) of the Act, by the Finance Act, 2009, w.r.e.f. 1.6.2007 is applicable to the facts of the present case. A similar issue has been come up before this bench, in the case of Dhanekula Rama Rao Vs. DCIT Central Circle, in ITA No.665 to 669 of 2013. The coordinate bench of this Tribunal, after considering the provisions of section 271(1)(c) of the Act, explanation 5A prior to the amendment and amended provisions explanation 5A by the Finance Act, 2009, held that the provisions of explanation 5A as it stood as on the date of search or filing return of income in response to notice u/s 153A of the Act is applicable for levy of penalty, but not amended provisions of section 5A of the Act, by the Finance Act 2009. The Bench, further,

held that the pre-amended provision of explanation 5A is applicable to the assessee's, where the assessee's have not filed return of income before search and also not disclosed undisclosed income in the return of income. The amended provision of explanation 5A, by the Finance Act, 2009, w.r.e.f. 1-6-2007 is applicable to both filer assessee's and non-filer assessee's. The relevant portion of the order is extracted below:

*"16. Explanation 5A appended to section 271(1)(c) of the Act specifically deals with search cases. As per the amended provisions of explanation 5A, where in the course of a search initiated u/s 132 of the Act on or after the 1<sup>st</sup> day of June, 2007, the assessee is found to be the owner of any money, bullion or jewellery and the said income represents his income for any previous year which was ended before the date of search and the due date for filing the return of income has expired and the assessee has not filed a return, then notwithstanding that such income is declared by him in the return of income furnished on or after the date of search, he shall, for the purpose of imposition of a penalty under clause (c) of sub section 1 of this section, deemed to have concealed the particulars of his income or furnished inaccurate particulars of his income. The assessee strongly objected for application of amended provisions of the explanation 5A of section 271(1)(c) of the Act. Before we go into the facts of the present case, let us understand the provisions of law as enumerated by way of explanation 5A of section 271(1)(c) of the Act before amendment by the Finance Act, 2009 and after amendment by the Finance Act, 2009 which reads as follows:*

*"Explanation 5A, as inserted by the Finance Act, 2007, w.e.f. 1.6.2007, read as under:*

*Explanation 5A—Where in the course of a search initiated under section 132 on or after the 1<sup>st</sup> day of June, 2007, the assessee is found to be the owner of,—*

- (i) Any money, bullion, jewellery or other valuable article or thing (hereinafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (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 the search and the due date for filing the return of income for such year has expired and 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 the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income."*

*"Explanation 5A, as amended by the Finance Act, 2009, with retrospective effect from 1.6.2007, read as under:*

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

- (i) Any money, bullion, jewellery or other valuable article or thing (hereinafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income for any previous year; or*
- (ii) Any income based on any entry in any books of accounts 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."*

*17. Explanation 5A of section 271(1)(c) of the Act provides for levy of penalty, in a case where in the case of a search initiated u/s 132 of the Act on or after the 1<sup>st</sup> day of June, 2007, the assessee is found to be owner of any money or other assets which represents his income of any of previous year which is ended before the date of search and the due date for filing the return of income for such year as expired and 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 purpose of imposition of 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. The said explanation 5A has been amended by the Finance Act, 2009 with retrospective effect from 1.6.2007 and as per the amended provisions, where in the course of search u/s 132 of the Act on or after the*

*1<sup>st</sup> day of June, 2007, the assessee is found to be the owner of any money, bullion, jewellery or other asset which represents his income for any previous year which is 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 or 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 purpose of imposition of a penalty under clause (c) of sub section 1 of this section, be deemed to have concealed the income.*

*18. A plain reading of pre amended provisions of explanation 5A of section 271(1)(c) of the Act makes it clear that it applies to the cases where the assessee has not filed any return of income for the respective assessment years u/s 139(1) of the Act. The post amended provisions of explanation 5A brought out to the statute included the cases where the assessee has filed the return or not u/s 139(1) of the Act, if the undisclosed income found during the course of search is not disclosed in the regular return filed u/s 139(1) of the Act, then the deeming fiction provided in explanation 5A would be applicable. However, the new explanation inserted in to statute by the Finance Act, 2009 has done away with the exemption from penalty, if the assessee offers the payment in the course of statement u/s 132(4) of the Act, but under this explanation as it stood at the time of introduction, deemed concealment of income assessed in consequence of search applied only if the assessee had not filed a return of income before the due date for the respective years. Thus, as per the existing provisions of explanation 5A prior to the amendment by the Finance Act, 2009, if an assessee had filed the return of income for the years covered by the search, then the addition made shall not be considered as deemed concealment. It is only by the amendment to explanation 5A by the Finance Act, 2009 (which received the assent of the President on 13.8.2009), for addition made in the course of assessment u/s 153A, will be deemed to be concealed income, even if the assessee had filed a return of income earlier for the relevant assessment years. Prior to the amendment, if an assessee has already filed a return of income, the addition made in the assessment u/s 153A of the Act cannot be deemed to be concealed income. No doubt the amendment to explanation 5A has been made applicable with retrospective effect from 1.6.2007 and is applicable to searches initiated on or after 1.6.2007. The issue is whether this amendment to explanation will apply to searches conducted or returns filed before the amended explanation become part of the statute in 2009. In our considered view, though the amendment was brought with retrospective effect from 1.6.2007, for the purpose of rigorous provisions of levy of penalty, the retrospective amendment cannot be made applicable. What is important is that it is the date of filing the return which is relevant for the purpose of concealment, because it was on that date the concealment of income occurs.*

*19. Coming to the facts of the present case on hand. In the present case on hand, admittedly, the assessee has filed the regular returns u/s 139(1) of the Act for the respective assessment years. It is also an admitted fact that the assessee has not disclosed the undisclosed income quantified during the course of search proceedings, in the returns filed under the provisions of section 139(1) of the Act.*

*However, the assessee has admitted undisclosed income in the statement recorded u/s 132(4) of the Act during the course of search and followed by filing of return u/s 153A of the Act and paid the taxes. The search is took place on 22.11.2008. The assessee has filed the returns u/s 153A of the Act for all the assessment years on 11.5.2009. In the instant case, the assessee had filed original return of income and revised return of income pursuant to notice u/s 153A of the Act and both the original and revised returns were filed before the amended explanation 5A becomes part of the statute (which received the ascent of the President on 13.8.2009). Therefore, we are of the considered view that the amended provisions of explanation 5A of section 271(1)(c) of the Act cannot be made applicable for the purpose of levy of penalty.*

20. *The A.O. levied penalty for the reason that whether or not original returns u/s 139(1) of the Act was filed before the date of search, once there was a difference between the income admitted in the revised return u/s 153A of the Act and return filed u/s 139(1) of the Act, then the deeming fiction provided by the statute by way of explanation 5A to section 271(1)(c) of the Act is applicable. We do not see any merits in the arguments of the Assessing Officer, for the reason that for claiming immunity from payment of penalty under explanation 5A of section 271(1)(c) of the Act, three conditions have to be satisfied by the assessee. Firstly, the assessee must make a statement u/s 132(4) of the Act in the course of search stating that unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which was not been disclosed in the return of income to be furnished before expiry of time specified in section 139(1) of the Act. Secondly, assessee should specify in his statement u/s 132(4) of the Act, the manner in which such income stood derived. Thirdly, assessee has to pay tax with interest, if any in respect of such undisclosed income, as held by the Hon'ble Supreme Court in the case of ACIT Vs. Gebilal Kanhaiyalal (HUF)(2012) 348 ITR 561 (SC). In the present case on hand, on perusal of the documents available on record, we find that the assessee has admitted the undisclosed income in the statement recorded u/s 132(4) of the Act. The assessee also filed the return in response to notice u/s 153A of the Act and declared the undisclosed income admitted during the course of search. Finally, the assessee has paid the relevant taxes along with interest if any in respect of such undisclosed income before filing the return of income. Therefore, we are of the considered view that immunity provided under explanation 5A of section 271(1)(c) of the Act is not taken away for the simple reason that the income disclosed by the assessee in the statement u/s 132(4) of the Act for a particular year was enhanced by the A.O. or reshuffled by the A.O. for one or other reasons. What is important is, is there any admission of undisclosed income which was further followed by filing of the return admitting such undisclosed income and payment of taxes. The assessee has fulfilled all the conditions, which liable for immunity from the levy of penalty under explanation 5A to section 271(1)(c) of the Act. Therefore, we direct the A.O. to delete the penalty levied by invoking the explanation 5A to section 271(1)(c) of the Act.*

21. *Coming the second limb of the provisions of section 271(1)(c) of the Act. The A.O. levied penalty under part A of explanation 1 to section 271(1)(c) of the Act for additions made to the returned income. The A.O. levied the penalty for the reason that the assessee has not disclosed the true and correct income, even after the*

admission during the course of statement recorded u/s 132(4) of the Act. The A.O. further was of the opinion that the assessee has disowned certain recurring deposits, however, failed to prove that those deposits are not belong to him. The A.O. while enhancing the income has brought on record the paper trail which establishes a link between the denied deposits and other benami recurring deposits admitted by the assessee. According to the A.O., there is a sufficient evidence to link the denied deposits to the deposits admitted by the assessee during the course of search. It is the contention of the assessee that those deposits which are denied by him are not belonging to him. The A.O. has considered those deposits as his undisclosed income based on the deposition given by the bank managers without confronting the statement of bank managers for his rebuttal. However, the assessee before the CIT(A) has given a conditional acceptance that if the telescoping is allowed for inter branch transfer, then he would own the 4 disowned recurring deposits as his undisclosed income. The CIT(A) after considering the explanations of the assessee allowed the telescoping of inter branch transfer and reworked the undisclosed income for the period from 2004-05 to 2009-10. According to the workings of the CIT(A), the peak credit for the above period including accrued interest has worked out to Rs.17.24 crores. The assessee further stated that the income finally assessed as per the order of CIT(A) has been worked out to Rs.17.24 crores which is marginally higher than the income declared by the assessee in his revised return u/s 153A of the Act. The assessee also explained the reasons for the difference between the enhanced income and income admitted by him. According to the assessee, the difference is occurred because of reworking of the peak credit after allowing the inter branch transfers and also accrued interest on those denied deposits. Therefore, it cannot be held that there is a purposeful concealment of income or furnishing of inaccurate particulars of income.

22. We have considered the submissions of the assessee and also perused the documents available on record. The A.O. levied penalty on additions made to the returned income by invoking the provisions of part A of explanation 1 to section 271(1)(c) of the Act. The A.O. was of the opinion that the assessee has not substantiated the disowned deposits with any evidences. On the other hand, he had gathered sufficient evidences and interlinked the disowned deposits to the deposit accepted by the assessee. Therefore, there is a clear concealment of income and assessee has not offered any explanation, therefore levied the penalty u/s 271(1)(c) of the Act. It is the contention of the assessee that there is no willful concealment of income and the additions made by the A.O. has been substantially reduced by the CIT(A) and after the order of CIT(A), the final income assessed has been marginally higher than by Rs.0.61 crores, when compared to undisclosed income admitted by the assessee. Therefore, no penalty is leviable u/s 271(1)(c) of the Act.

23. The question whether there was a reasonable cause for which the requirement of concerned provisions of section could not be complied with is primarily an essential question of fact and it has to be decided on each case on consideration of materials placed before the concerned authorities. The levy of penalty u/s 271(1)(c) of the Act is not automatic. Before levying the penalty, the concerned authority is required to find out that even there was any violation referred to in the said provisions of the Act and the same was without a reasonable cause.

The initial burden is on the assessee to show that there exists a reasonable cause, which was the reason for the failure referred to in the concerned provisions. Therefore, the assessing officer dealing with the matter is to consider whether the explanation offered by the assessee or the person as the case may be as regards the reason was on account of reasonable cause. In the present case on hand, right from the beginning, the assessee contends that the disowned deposits are not belonging to him. Though the A.O. has linked the disowned deposits based on the third party statement, the same has not been confronted to the assessee for his rebuttal. On the other hand, the assessee has explained that the income finally assessed by the A.O. is marginally higher than the income admitted by the assessee. The said difference is occurred on account of error in reworking of the peak credit after allowing the inter branch transfers and also interest accruals on those disowned deposits. Therefore, we are of the view that the explanation offered by the assessee appears to be reasonable and also bonafide. The A.O. without considering the explanations offered by the assessee invoked the provisions of section 271(1)(c) of the Act and levied the penalty. We further observed that the addition made to by the A.O. is on account of estimation of peak credit based on the intra branch transfers and also interest accrued on such deposits, therefore, this cannot be a case of willful concealment of income so as to attract the penalty u/s 271(1)(c) of the Act.

24. Coming to the case laws relied upon by the assessee. The assessee relied upon plethora of judgements in support of his arguments. The assessee relied upon the decision of Hon'ble Supreme Court, in the case of ACIT Vs. Gebilal Kanhaiyalal (HUF) (supra). The Hon'ble Supreme Court, in the said case held that for claiming immunity from payment of penalty under clause (2) of explanation 5A to section 271(1)(c) of the Act, three conditions have to be satisfied by the assessee. Firstly, the assessee must make a statement u/s 132(4) of the Act, in the course of search stating that unaccounted assets found during the course of search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified u/s 139(1) of the Act. Secondly, the assessee should specify in his statement u/s 132(4) of the Act, the manner in which such income stood derived. Thirdly, the assessee has to pay tax together with interest if any, in respect of such undisclosed income. The relevant portion is reproduced hereunder:

*"Explanation 5 is a deeming provision which provides where, in course of search u/s. 132, assessee is found to be owner of unaccounted assets and assessee claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after date of search, he shall be deemed to have concealed the particulars of his income for the purposes of imposition of penalty u/s. 271(1)(c). Only exceptions to such a deeming provision or to such a presumption of concealment are given in sub-clauses (1) and (2) of Explanation 5. Three conditions have got to be satisfied by assessee, for claiming immunity from payment of penalty under cl. (2) of Expl. 5 to S. 271 (1)(c), i.e. Condition No. 1.*

*Assessee must make a statement u/s. 132(4) in course of search stating that unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in return of income to be furnished before expiry of time specified in S. 139(1), such statement was made by Karta during search which concluded on August 1, 1987. Condition No.1 was fulfilled. Condition No. 2. Assessee should specify, in his statement u/s. 132(4), manner in which such income stood derived. Condition No. 2 also satisfied. Condition No. 3. Assessee had to pay tax together with interest, if any, in respect of such undisclosed income. However, as no time limit for payment of such tax stood prescribed under clause (2), third condition also stood fulfilled. Assessee has paid tax with interest upto date of payment. Therefore, assessee was entitled to immunity under cl. (2) of Expl. 5 to S. 271(1)(c). Appeal dismissed."*

25. *The assessee relied upon the decision of Hon'ble Punjab & Haryana High Court, in the case of CIT Vs. Bhan Singh Boota Singh (1974) 95 ITR 562. The Hon'ble High Court held that the law applicable for the purpose of levying penalty is the law in existence on the date of filing of return on which date the concealment had taken place. The relevant portion of the order is extracted below:*

*"It is common ground that the Explanation was added by the Finance Act of 1964 w.e.f. 1st April, 1964. In fact, cl. (c) of s. 271(1) was amended and the word "deliberately" was omitted. The answer to the question that has been referred lies in the answer to the question as to when the concealment took place. So far as the Department is concerned, it is maintained, that the concealment will be when the true state of facts is not disclosed to the Department in the return, i.e., the true particulars of the income are not disclosed to it in the return that is filed. Therefore, the disclosure, so far as the Department is concerned, is necessarily by a return. If the return had been filed before 1st April, 1964, obviously the provisions of s. 40 of the Finance Act of 1964 would not have come into play. This is conceded by the counsel for the Department. But, in the present case, the return was filed on 9th of April, 1964, when the provisions of s. 271, as they emerge after the Finance Act of 1964, had come into operation. Therefore, those provisions must govern the case because the concealment would be when the return is filed, and not prior to it. It is only when the material is furnished to the Department that they are in a posit/on to arrive at a finding whether there is or there is no concealment. It is the return that is filed which has to be seen to determine whether there has been concealment or not. It is no doubt true that in the matter of assessment of income, the law, as it prevails on the first day of the assessment year, will be applicable. But that would not be the position in the case of imposition of penalty. In the present case the return was filed on 9th of April, 1964, when s. 271, as it stands amended, was on the statute book and, therefore, effect had to be given to the provision. —Saeed Ahmad vs. IAC (1971) 79 ITR 28 (All) **relied on.**"*

26. *The assessee relied upon the decision of Allahabad High Court in the case of CIT Vs. Radha Kishan Goel (2005) 278 ITR 454. The Hon'ble High Court held that an exception is provided in clause (2) of explanation 5, where the deeming provision will not apply, if during the course of search, the assessee makes the statement under sub section 4 of section 132 of the Act that the unaccounted income found in his possession has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in section 139 of the Act and also specified in the statement the manner in which such income has been derived and also pays the tax together with interest if any, in respect of said income. The relevant portion of the order is extracted below:*

*"From a perusal of Expln. 5 it is evident that in circumstances which otherwise did not attract the penalty provisions of s. 271(1)(c), a deeming provision was introduced as to attract the penalty provisions to those cases as well. But an exception is provided in cl. (2) of Expln. 5 where the deeming provision will not apply if during the course of search the assessee makes the statement under sub-s. (4) of s. 132 that the money, bullion, jewellery, etc., found in his possession has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in s. 139 and also specifies in the statement the manner in which such income has been derived and pays the tax together with interest, if any, in respect of such income. The exception appears to be to provide an opportunity to the assessee to make a clean and fair confession and to surrender his income and also to deposit the tax and interest thereon which may result in an agreed assessment. The paramount intention appears to be that in the case of fair and clean confession and surrender of his income, during the course of search further litigation may be avoided and the Revenue may get the tax and interest, etc., at an earliest and the assessee may be saved from further litigation. Under s. 132(4), it is the authorised officer, who examines on oath any person, who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing, therefore, it is for the authorised officer to record the statement in his own way. Therefore, it is not expected from the person to state those things, which are not asked by the authorised officer. During the course of search person is so tortured, harassed and put to a mental agony that he loses his normal mental state of mind and at that stage it cannot be expected from a person to pre-empt the statement required to be given in law as a part of his defence. Under s. 132(4), unless the authorised officer puts a specific question with regard to the manner in which income has been derived, it is not expected from the person to make a statement in this regard and in case in the statement the manner in which income has been derived has not been stated but has been stated subsequently, that amounts to the compliance with Expln. 5(2). In case, there is nothing to the contrary in the statement recorded under s. 132(4), in the absence of any specific statement about the manner in which such income has been derived, it can be inferred that such undisclosed income was derived from the business which he was carrying on or from other sources. The object of the provision is achieved by making the statement admitting the non-disclosure of money, bullion, jewellery, etc. Thus, much importance should not be attached to the statement about the manner in which such income has been derived. It can be inferred on the facts and circumstances of the*

*case, in the absence of anything to the contrary. Therefore, mere non-statement of the manner in which such income was derived would not make Explan. 5(2) inapplicable. For the reasons stated above, there is no error in the order of the Tribunal and the same is upheld."*

27. *The assessee also relied upon the decision of Hon'ble High Court of Andhra Pradesh in the case of CIT Vs. B. Venkatesam (2012) 349 ITR 413. The Hon'ble High Court has held that the assessee has fully complied with the provisions of clause (2) of explanation 5 to section 271(1)(c) of the Act. The assessee has admitted the additional income and paid the taxes on such undisclosed income, in such event no case for imposition of penalty was held to be made out. The relevant portion of the order is extracted below:*

*"The material on record concurrently shows that the assessee had fully complied with the provisions of clause (2) of Explanation 5 to Section 271 (1) (c) of the Act. Moreover, the assessee had not acted in a contumacious manner. In fact, the assessee had made a clean breast of the entire facts and had admitted the purchase of the property from the income which was not disclosed. The non-disclosure of the income was due to the circumstances mentioned above viz., that the assessee was an uneducated and illiterate petty contractor who received payments only after deduction of tax at source. It is under these circumstances that the assessee believed bona fide that no further tax was required to be paid. In the present case, both the CIT (Appeals) and the Tribunal were satisfied about the bona fides of the assessee. That being the position, coupled with the fact that the assessee had complied with the provisions of clause (2) of Explanation 5 to Section 271 (1) (c) of the Act, no case for imposition of penalty was made out. The appeals are dismissed." T. Ashok Pai v. CIT (2007) 292 ITR, **relied on.**"*

28. *The assessee relied upon ITAT, Hyderabad 'A' Bench, in the case of Sri Santosh Kumar Aggarwal Vs. DCIT in ITA No.665/Hyd/2015. The coordinate bench of this Tribunal, under similar circumstances held that the amended provisions of explanation 5A of section 271(1)(c) of the Act cannot be made retrospective application. The bench further held that the law as it stood at the time of filing of return is important to apply the provisions of explanation 5A of section 271(1)(c) of the Act. The relevant portion of the order is extracted below:*

8. *We have considered the rival submission and perused the relevant material on record. We find that the assessee has originally filed the return under S.139(1) of the Act on 10.10.2005 declaring an income of Rs.2,92,384. In response to the notice under S.153A dated 17.11.2011, issued subsequent to the search action of 8.9.2010, for the year under appeal, assessee has filed return of income on 14.8.2012, admitting total income of*

*Rs.19,07,254, which included additional income admitted of Rs.16,14,870 on account of undisclosed investment in Kisan Vikas patra, interest on FDR5 and bogus gifts received. Assessment was ultimately completed under 5.143(3) read with S.153A by the Assessing Officer on dated 25.3.2013, accepting the income disclosed in the said return. The main question to be considered in this case is the legal question as to the applicability of Explanation 5A to S.271(1)(c) of the Act to the present case. The said Explanation has come on to the statute book by virtue of insertion of the same below S.271(1)(c) by the Finance (No.2) Act, 2009, with retrospective effect from 1.6.2007.*

9. *An analysis of S.271(1)(c) read with Explanation 5 and Explanation 5A was done in detail by the coordinate bench of the Tribunal in the case of Dilip Kedia V/s. ACIT (supra) in paras 18 to 23 of its order dated 26.7.2013, which read as under-*

*"18. Explanation 5 has been amended by the finance Act 2007 to restrict the application of that explanation to searches initiated before 1.6 2007. Hence the Assessee cannot seek exemption under Explanation 5 to sec 271(1)(c). The cases cited by the Assessee wherein penalty was deleted applying Explanation 5, relate to search initiated prior to 1.6.2007 and hence are not applicable to the instant case.*

*19. A new explanation 5A was introduced by Finance Act 2007, w.e.f 1.6.2007 to cover searches initiated after 1.6.2007 which read 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 (hereinafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (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 the search and the due date for filing the return of income for such year has expired and 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 the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income."*

*20. While the new explanation does away with the exemption from penalty if the Assessee offers the payment in the course of statement u/s 132(4), but under this explanation as it stood at the time of introduction, deemed concealment of income assessed in consequence of search applied only if the Assessee had not had filed a return of income before the due date for filing of return in the respective years. Explanation 5A was further amended by Finance Act (no.2) 2009 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."*

*21. In the Circular No 5/2010 dated 3.6.2010 issued by the CBDT explaining the provisions of the Finance Act (no. 2) 2009, the*

*amendment to explanation 5A was explained as under:*

*"53.2 By substituting the Explanation 5A it has been clarified that the scope extends to the cases where the assessee has filed the return of income for any previous year and the income found during the course of search relates to such previous year and had not been disclosed in the said return, then such income shall represent deemed concealment of income and assessee shall be liable to pay penalty under section 271."*

22. Thus as per the existing Explanation 5A prior to the amendment by Finance (No.2) Act 2009, if an Assessee had filed the return of income for the years covered by the search, then the addition made shall not be considered as deemed concealment. It is only by the Amendment to explanation 5A by the Finance (no.2) Act 2009, (which received the assent of the president on 13.8.2009), that addition made in the course of assessment u/s 153A, will be deemed to be concealed income, even if the Assessee had filed a return of income earlier for the relevant Assessment Year. Prior to the amendment, if an assessee had already filed a return of income, the addition made in the assessment made u/s 153A cannot be deemed to be concealed income.

23. No doubt the amendment to Explanation 5A has been made with retrospective effect from 1.6.2007 and is applicable to searches initiated after 1.6.2007, the issue is whether this amendment to Explanation will apply to returns filed before the amended explanation became part of the Statute in 2009. In the instant case the Assessee had filed return of income on 7.7.2008. He filed revised return pursuant to notice u/s 153A on 12.11.2008. Thus both the original return as well as the revised return was filed before the amendment to **Explanation 5A** became a part of the Statute. The Supreme Court in the cases of Addl CIT v Onkar saran (195 ITR 1) has held that in case of return filed in response to Notice u/s 148, law prevailing as on the date of filing of return will govern the levy of penalty by holding as under:

*"Even in a case where a return filed in response to a notice under section 148 involved an element of concealment, the law applicable would be the law as it stood at the time when the original return was filed for the assessment year in question and not the law as it stood on the date on which the return was filed in response to the notice under section 148."*

10. In this case, even though both the returns were not filed before the Explanation 5A was introduced, it is a fact that original return has been filed much before the said provision came on to the statute. It is to be noted that the assessee filed the original return of income on 10.10.2005. In the event a search has occurred before the 1st day of June, 2007, i.e. after filing of return by the assessee, and on or before the day 5A has been introduced, then assessee's case would have been governed by Explanation 5, in which case, as assessee has

*disclosed the amounts under 8.132(4) followed by the return, no penalty could be levied as per the provisions of Explanation 5 available upto the date <sup>30th</sup> May, 2007. In the event a search has occurred after the 1 day of June, 2007, but before 13.8.2009, i.e. amendment of S.271(1)(c) by insertion of Explanation 5A, by the Finance Act, 2009, then Explanation 5A as it is existing would make the assessee free from the provisions of S.271(1)(c). If in that period the assessee has filed the return, Explanation 5A would not have been applicable, and the assessee would have been exempt from penalty. Since the date of search happened to be 8.9.2010, i.e. after the new Explanation 5A was brought on statute, the assessee was covered by the new Explanation 5A. As considered above in different eventualities, the assessee was not visited with penalty, except in the last considered situation of search being conducted after 13.8.2009.*

*11. The Supreme Court in the case of Addl CIT v Onkar Saran (195 ITR 1) has held that in case a return is filed in response to Notice u/s 148, law prevailing as on the date of filing of return will govern the levy of penalty. It observed that even in a case where a return filed in response to a notice under section 148, which involved an element of concealment, the law applicable would be the law as it stood at the time when the original return was filed for the assessment year in question and not the law as it stood on the date on which the return was filed in response to the notice under section 148.*

*12. This was followed by the Apex Court in the case of B.N.Sharma V/s. CIT (226 ITR 442). Therefore the law prevailing as on the date of filing of return should be the basis of levy of penalty and not on the subsequent amendment, even if the amendment is retrospective. The Delhi High Court in the case of Engineers Impex (P) Ltd. & Ors. Vs. D.D. Sharma (244 ITR 247) has held as under:*

*"12. Penal provisions in the statutes have to be considered strictly in the sense that if there is a reasonable interpretation which would avoid the penalty, that interpretation ought to be adopted. When the legislature imposes a penalty, the words imposing it must be clear and distinct. [CIT vs. T.V. Sundaram Iyenger & Sons (P) Ltd. 1976 CTR (SC) 25 AIR 1976 SC 255 : TC 68R.372].*

*13. If by an amendment in an existing statute or by an enactment an ex post facto offence is created, it will be violative of Art. 20(1) of the Constitution. Art. 20(1) is designed to prevent a person from being prosecuted for an act or omission which was considered innocent when done. [G.P. Nayyar vs. State (Delhi Admn) AIR 1979 SC 602]. An Explanation is appended to a section to explain the meaning of the words contained in the section and normally is to be read to harmonise with and to clear up any ambiguity in the main*

*section. However, in the present case, the Explanation inserted has widened the scope of the main section and has created an obligation breach of which entails penalty and subjects to criminal prosecution. This Explanation to s. 194A has been inserted w.e.f. 1st June, 1987, and obviously is prospective and not retrospective. In case, it was to have the retrospective effect, it would be violative of Art. 20(1) of the Constitution. As the Explanatory Note noticed above itself states, the liability for deduction of tax at source from the interest payable under the existing provisions arises only if interest was actually paid or credited to the "account of the payee". This also clarified the correct scope of s. 194A as existed before the Explanation was inserted and that the scope of this section has been widened by the insertion of the Explanation w.e.f. 1st June, 1987, which has created a liability and obligation to deduct tax on interest even where the interest income is credited to any account in the books of account of the payee including credit given in the account called "interest payable account" or "suspense account".*

*Similar view is also taken by the coordinate bench of the Tribunal in the case of Dilip Kedia V/s. ACIT (supra), wherein the penalty was not sustained as both the returns were filed much before the Explanation 5A was brought on statute.*

*13. Considering all these aspects and the fact that the assessee has a good case on merits and that the provisions of Explanation 5A are not applicable on the date of filing of the original return, we are of the opinion that Explanation 5A as it stood on the date of filing the return in response to notice under S.153A by the assessee would not cover the case of the assessee, so as to warrant levy penalty under S.271(1)(c). Since the assessee bonafidely declared the additional income in the course of search and filed return and paid taxes thereon, we are of the opinion that penalty levied on such amount cannot be sustained. Accordingly, we allow the appeal of the assessee and delete the penalty of Rs.12,84,177 sustained by the CIT(A)."*

*29. Considering the overall facts and circumstances of this case, we are of the view that the provisions of explanation 5A as it stood on the date of search or filing of return in response to notice u/s 153A of the Act is important to reckon whether the deeming fiction provided in the said provisions is applicable or not. The pre amended provisions of explanation 5A was applicable where the assessee has not filed any return before the search and also not disclosed the undisclosed income in his return of income. The amended provisions of explanation 5A which was brought into the statute by the Finance Act, 2009 was applicable in case of filers and non-filers of the returns. In the present case on hand, the law applicable as on the date of search, which was pre amended provisions of explanation 5A as per which no penalty can be leviable, in case the assessee has filed the return of income u/s 139(1) of the Act before the date of search whether or not the*

*undisclosed income is disclosed in the said return. Admittedly, in this case, the search is taken place on 22.11.2008. The assessee has filed the return on 11.5.2009. Both original return as well as revised return u/s 153A of the Act has been filed before the amended provisions were brought into the statute (which was received ascent of President on 13.8.2009). Therefore, we are of the view that the explanation 5A of section 271(1)(c) of the Act is not applicable in the present case. Accordingly, we direct the A.O. to delete the penalty levied under explanation 5A of section 271(1)(c) of the Act for all the years. Similarly, in respect of penalty levied under part A of explanation 1 of section 271(1)(c) of the Act, the assessee has given explanations which appears to be reasonable and bonafide. The A.O. without appreciating the facts has levied the penalty. Therefore, we direct the A.O. to delete the penalty levied under explanation 1 of section 271(1)(c) of the Act for all the years.*

17. Considering the facts and circumstances of this case and also respectfully following the coordinate bench decision, in the case of Dhanekula Rama Rao (supra), we are of the view that the provisions of explanation 5A as it stood as on the date of search or filing of the return u/s 153A of the Act, is important to reckon whether the deeming fiction provided in the said provisions is applicable or not. The pre-amended provisions of explanation 5A is applicable to a non filer assessee's, where the assessee's is not filed return of income before the search and also not disclosed the undisclosed income in the return of income. The amended provision of explanation 5A, which is brought into the statute by the Finance Act 2009, (which was received ascent of President on 13.8.2009) is applicable to both filers and non-filers of returns. In the present case on hand, the law applicable as on the date of search, which was pre-amended provisions of explanation 5A, as per which no penalty

can be leviable, in case the assessee has filed return of income u/s 139(1) of the Act before the date of search, whether or not undisclosed income is disclosed in the said return. Admittedly in this case, the search is taken place on 16.11.2007. The assessee has filed return of income u/s 153A of the Act u/s 30.1.2009. Both original return u/s 139(1) of the Act and the revised return u/s 153A of the Act have been filed before the amended provisions were brought into the statute (which was received ascent of President on 13.8.2009). Therefore, we are of the view that the amended provisions of explanation 5A of section 271(1)(c) of the Act is not applicable in the instant case. Accordingly, we direct the A.O. to delete the penalty levied u/s 271(1)(c) of the Act, for the assessment year 2005-06, 2006-07 & 2007-08.

18. Coming to the assessment year 2008-09. The Ld. A.R. for the assessee submitted that penalty order passed by the A.O. u/s 271(1)(c) of the Act, is void-ab-initio and liable to be quashed, as the A.O. has applied inappropriate provisions of section 271(1)(c) of the Act. The Ld. A.R. further submitted that when a separate provision is provided by way of section 271AAA of the Act, for the cases where search is taken place on or after 1.6.2007, the A.O. was erred in applying the provisions of section 271(1)(c) of the Act. The Ld. A.R. further submitted that as

per the provisions of section 271AAA of the Act, where search is taken place on or after 1.6.2007, the assessee shall be liable to pay penalty of 10% of the undisclosed income of the specified previous year. The A.R. drew our attention to the explanation 'undisclosed income' and 'specified previous year' and as per the said explanation, specified previous year means the previous year which is ended before the date of search, but the date of filing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or in which search was conducted. In the present case on hand, the search was conducted on 16.11.2007 which falls under the assessment year 2008-09 and accordingly, the A.O. was bound to initiate penalty proceedings under the provisions of section 271AAA of the Act, but the A.O. has levied penalty u/s 271(1)(c) of the Act therefore, his order should be quashed. In support of his arguments, the assessee relied upon the decision of ITAT, Delhi bench in the case of Aswini Kumar Arora Vs. ACIT in ITA No.844/Del/2014 dated 19.5.2016 and ITAT, Ahmedabad bench decision in the case of Dr. Naman A. Shastri Vs. ACIT 561 to 563/AHD/2011 and also the decision of ITAT, Ahmedabad bench in the case of DCIT Vs. Subhash M. Patel in ITA No.256/Ahd/2012.

19. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The A.O. levied penalty u/s 271(1)(c) of the Act for concealment of income or furnishing inaccurate particulars of income. The A.O. was of the opinion that the assessee has deliberately concealed particulars of income which is evident from his conduct. It is the contention of the assessee that the penalty order passed by the A.O. u/s 271(1)(c) of the Act is void-ab-initio and liable to be quashed. The assessee further contended that the A.O. applied inappropriate provisions of section 271(1)(c) of the Act for levying penalty, when a separate provision is provided by way of section 271AAA of the Act to deal with penalty in cases where search is taken place on or after 1.6.2007. The assessee further contended that as per the provisions of section 271AAA of the Act, the assessee shall be liable to pay penalty of 10% of the undisclosed income of the specified previous year. He drew our attention to the provisions of section 271AAA of the Act and also explanation 'undisclosed income' and 'specified previous year'.

20. The only question that came up for our consideration is whether on facts and circumstances of the case, the penalty order passed by the A.O. u/s 271(1)(c) of the Act, is void ab initio and liable to be quashed.

Before we go into the merits of the case, let us understand the provisions of law as enumerated by way of section 271AAA of the Act.

*"(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1<sup>st</sup> day of June, 2007 [but before the 1<sup>st</sup> day of July, 2012], the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.*

(2) Nothing contained in sub-section (1) shall apply if the assessee—

*(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;*

*(ii) substantiates the manner in which the undisclosed income was derived; and*

*(iii) pays the tax, together with interest, if any, in respect of the undisclosed income.*

*(3) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).*

*(4) The provisions of sections 274 and 275 shall, so far as may be, apply in relation to the penalty referred to in this section.*

Explanation.—For the purposes of this section,—

(a) "undisclosed income" means—

*(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has—*

*(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year, or*

- (B) otherwise not been disclosed to the [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner before the date of search; or
- (ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.
- (b) "specified previous year" means the previous year—
- (i) which has ended before the date of search, but the date of filing the return of income under sub-section(1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or
- (ii) in which search was conducted."

21. A plain reading of section 271AAA of the Act, makes it clear that the assessing officer, notwithstanding anything contained in any other provisions of this Act, direct that in a case where search has been initiated u/s 132 of the Act, on or after 1<sup>st</sup> day of June, 2007, the assessee shall pay by way of penalty in addition to tax, if any payable by him, a sum computed @ 10% of the undisclosed income of the specified previous year. For the purpose of this section, undisclosed income and specified previous year has been defined. As per the said section, 'specified previous year' means the previous year which is ended before the date of search, but the date of filing the return income under sub section (1) of section 139 of the Act for such year has not expired before the date of search and the assessee has not furnished the return

of income for the previous year before the said date; or in which search was conducted. In other words, so far as penalty in respect of undisclosed income of a specified previous year is concerned, the provisions of section 271AAA of the Act would apply. In the present case on hand, on perusal of the facts available on record, we find that the search had taken place on 16.11.2007 which falls under the assessment year 2008-09 which is the year before us. The year before us was therefore, covered by the explanation of specified previous year as per explanation (b) to section 271AAA of the Act. It is not in dispute that the income in question has been assessed as income of the assessment year 2008-09 i.e. specified previous year. The assessing officer himself has treated the undisclosed income of the assessee as such. Once we come to the conclusion that the year before us is a specified previous year and the undisclosed income belongs to this year, an inevitable finding in view of the discussions above is that the provisions of section 271AAA of the Act will come into play to deal with penalty for concealment of particulars of income. It is clear from the above fact that the A.O. has not invoked correct provisions of law for levying penalty for concealment of income. Therefore, we are of the view that the A.O. was erred in levying penalty u/s 271(1)(c) of the Act, when a specific provision is provided by way of section 271AAA to deal

with penalty provisions, in cases where search is took place on or after 1.6.2007.

22. It is pertinent to discuss here the case law relied upon by the assessee. The assessee relied upon the decision of ITAT, Delhi Bench in the case of DCIT Vs. Subhash M. Patel in ITA No.256/AHD/2012 dated 20.7.2012. The coordinate bench of the Tribunal, under similar circumstances held as under:

*"It is clear from the above that the learned AO has not invoked the correct provisions of law for levying the penalty. In this case search was conducted in the premises of the assessee on 24.9.2008, thus the date of initiation of search was on 24.9.2008. From the provisions of section 271AAA it is clear that in the case where action u/s 132 is initiated on or after 1.6.2007, penalty cannot be levied u/s 271(1)(c) of the Act. Penalty can be levied only u/s 271AAA of the Act when certain conditions stipulated therein is not complied. Therefore, we do not have any option than to confirm the order of the learned CIT(A) deleting the penalty levied by the learned AO."*

23. Considering the facts and circumstances of the case and also respectfully following the coordinate bench decisions cited above, we are of the considered opinion that the penalty order passed by the A.O. u/s 271(1)(c) of the Act, is void ab initio and liable to be quashed. Accordingly, we quash the penalty order passed by the A.O u/s 271(1)(c) of the Act for the A.Y. 2008-09.

24. In the result, the appeal filed by the assessee in ITA Nos. 189 to 192/Vizag/2014 are **allowed** and appeal filed by the revenue in ITA No.382/Vizag/2014 is **dismissed**.

The above order was pronounced in the open court on 16<sup>th</sup> Aug'16.

Sd/-  
(वी. दुर्गाराव)  
(V. DURGA RAO)  
न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-  
(जी. मंजुनाथा)  
(G. MANJUNATHA)  
न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 16.09.2016

VG/SPS

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

1. अपीलार्थी / The Appellant – Nukala Ramakrishna, Maruthi Nilayam, Uppuvari Lane, Eluru.
2. प्रत्यार्थी / The Respondent – The DCIT Central-2, Visakhapatnam
3. प्रत्यार्थी / The Respondent – The DCIT Circle-3(1), Visakhapatnam
4. आयकर आयुक्त / The CIT(Central), Hyderabad
5. आयकर आयुक्त (अपील) / The CIT (A), Visakhapatnam.
6. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम / DR, ITAT, Visakhapatnam
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वरिष्ठ निजी सचिव (Sr.Private Secretary)  
आय कर अपीलीय अधिकरण, विशाखापटणम /  
ITAT, VISAKHAPATNAM