आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री प्रदीप कुमार केडिया, लेखा सदस्य के समक्ष

BEFORE MS. SUSHMA CHOWLA, JM AND SHRI PRADIP KUMAR KEDIA, AM

आयकर अपील सं. / ITA No.1562/PN/2013

निर्धारण वर्ष / Assessment Year : 2009-10

Mrs.Sarita Kaur Manjeet Singh Chopra,
Flat No.104, B-Wing,
Gemini Park Avenue, NIBM Road,
Mohammadwadi,
Pune – 411060 .... अपीलार्थी/Appellant

PAN: AILPC6775B

Vs.

The Income Tax Officer,
(Central) – I, Pune .... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Dharmesh Shah
प्रत्यर्थी की ओर से / Respondent by : Shri B.C. Malakar

सुनवाई की तारीख / **Date of Hearing : 18.08.2015**		घोषणा की तारीख / **Date of Pronouncement: 30.10.2015**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

This appeal filed by the assessee is against the order of CIT(A)-I, Pune, dated 28.05.2013 relating to assessment year 2009-10 against penalty levied under section 274 r.w.s. 271(1)(c) of the Act of the Income-tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following grounds of appeal:-

1. *The Learned Commissioner of Income-tax (Appeals) has erred in law and in facts in passing order u/s. 250 of the Act dated 28.05.2013 dismissing the appeal filed by the appellant.*

2. *The learned Commissioner of Income Tax (Appeals) has erred in law and in facts in not appreciating that the penalty order passed by the Assessing officer u/s 271 (1) (c) of the Act was bad in law and invalid.*

3. *The Learned Commissioner of Income-tax (Appeals) ought to have appreciated that the initiation of the penalty u/s 271 (1)(c) of the Act Was void ab initio and hence the penalty order was also invalid.*

4. *The Learned Commissioner of Income-tax (Appeals) has erred in law and in fact in confirming the penalty u/s 271 (1) (c) of the Act to the tune of Rs.47,11,104/-.*

5. *The appellant craves leave of Your Honour to add, alter, amend and/or delete all or any of the foregoing grounds of appeal.*

3. The only issue raised in the present appeal is against levy of penalty under section 271(1)(c) of the Act at Rs.47,11,104/-.

4. Briefly, in the facts of the present case, search and seizure action was carried out against the assessee on 09.12.2009. The assessee was carrying cash of Rs.1,60,76,800/-, while travelling from Pune to Delhi by air. The Investigation Wing of Pune searched the assessee under section 132 of the Act on 09.12.2009. Subsequently, her residence was also searched and cash of Rs.1,60,00,000/- was seized during the course of search proceedings. The statement of assessee was recorded and she stated that she had sold ancestral propoperty at Delhi to one Mr. Sunil Nandra for Rs.3,40,00,000/-. However, the agreement was made for Rs.1,70,00,000/- only and the balance amount was accepted in cash. The assessee also submitted that she was having 50% share in the impugned property and balance 50% share was of her sister Mrs. Tripta Kaur. She further submitted that she had received entire cash element and her sister Mrs. Tripta Kaur was not concerned with the cash at all. The assessee, in response to notice under section 153A of the Act furnished return of income declaring total income of Rs.2,04,91,850/- on 13.09.2010. The assessee offered 50% share of the agreement value i.e. Rs.85,00,000/- and 100% share of cash element i.e. Rs.1,70,00,000/- in her hands and computed the capital

gains accordingly. The working out of capital gains is reproduced by the Assessing Officer under para 3, page 2 of the assessment order against the capital gains computed by the assessee at Rs.2,41,17,168/-. The assessee claimed exemption under section 54 of the Act against purchase of Mega Polis property at Rs.38,40,098/-. The Assessing Officer in the assessment proceedings initiated pursuant to issue of notice under section 153A of the Act and the return filed by the assessee in response thereto, issued the relevant notices under section 143(2)/142(1) of the Act. The Assessing Officer noted that the assessee had not declared the sale consideration of Rs.2,55,00,000/- in her original return of income and subsequently after the search, had declared total amount of capital gains and hence, had concealed the particulars of income. Consequently, penalty proceedings under section 271(1)(c) of the Act were initiated against the assessee. Another aspect of sale of the property noted by the Assessing Officer was the alleged claim of sale of fittings and fixtures at the said bungalow for Rs.10,00,000/-. The said amount was received by the assessee along with her sister in equal share, which was not offered to tax. The claim of the assessee before the authorities below was that the said furniture and fixtures were part of personal effects and hence, not liable for capital gain tax. The Assessing Officer was of the view that there was no mention of any furniture or personal effects and the fittings and fixtures of the entire building from bottom to top with its roof rights up to sky were sold by the assessee, as per receipt executed. Since the fittings and fixtures are attached to the property, the same were inextricably linked to the building and the consideration on transfer of such fittings and fixtures were held to be treated as capital gains.

5. The Assessing Officer issued show cause notice under section 274 r.w.s. 271(1)(c) of the Act to the assessee in response to which, the assessee furnished written submissions. In the written submissions, the assessee

claimed that it had suo motu offered income from long term capital gains and since the income was offered at the first available opportunity of hearing, no malafide intention could be attributed to the said disclosure and since the said transaction was duly accounted for by the assessee and the income was calculated in respect of the consideration stated in the agreement. The Assessing Officer did not accept the contention of the assessee for the following reasons:-

> *"i) Assessee has sold her ancestral property for Rs.3,40,00,000/-. However, the agreement is made for Rs.1,70,00,000/- only. The reason for showing the under value of the property is to conceal income liability and other statutory liabilities.*
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> *ii) The agreement value is received by the assessee by Pay order / D.D. etc., and the same is reflected in her bank accounts. But the cash consideration is not reflected either in agreement or bank or elsewhere.*
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> *iii) The assessee has shared agreement cost with her sister but the cash consideration is claimed to be received by the assessee only. The cash consideration is not parted with her sister who had equal share in the property.*
>
> ***iv) The assessee had filed her original return for A.Y. 2009-10 on 10-07-2010. All these transactions both cheque as well as cash are not reflected in her return of income.***
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> *v) After 19-20 months from the sale of the property, when the assessee was carrying cash from Pune to Delhi, she was searched by the Income Tax Department and then only the assessee committed that the cash is received by her out of sale of the ancestral property of Delhi. Till that date she did not file her revised return.*
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> *vi) When the search was carried out on 09-12-2009 and when the cash was found in her possession then only she admitted true facts of the sold property. If search would not have taken place, she would not have offered this cash as an additional income.*
>
> *vii) The revised return is filed only after search action i.e. on 13-09-2010. Since the cash was found and seized the assessee had no option but to offer the amount for taxation. She filed her return accordingly.*

6. The contention of the assessee that she had suo motu filed return of income and offered the said income at first available opportunity of hearing was held to be untrue and since the assessee had concealed her income from capital gains and only after search, she had filed her revised return, the assessee was held to be liable for the levy of penalty under section 271(1)(c) of the Act. Similarly, in respect of the amount received against fittings and fixtures,

the Assessing Officer held that the same was not exempted from tax and the assessee had concealed her income in this regard also and was liable to levy of penalty under section 271(1)(c) of the Act. The Assessing Officer thus, levied penalty under section 271(1)(c) of the Act on the difference of tax on assessed income and the original return of income i.e. the difference between Rs.47,12,024/- and Rs.920/- and minimum penalty of Rs.47,11,104/- was levied upon the assessee.

7. Before the CIT(A), the learned Authorized Representative for the assessee stressed that the Assessing Officer had unfairly held that the assessee had not offered the cheque amount or cash component of the sale consideration for tax. He further pointed out that the capital gains were worked out on consideration of Rs.2.55 crores i.e. Rs.85,000/- being assessee's share for cheque transaction and Rs.1.70 crores being cash component entirely offered by the assessee, after search. It was also explained by him that in the original return of income, sale consideration of Rs.85,000/- on sale of ancestral property was declared. However, excessive exemption on account of investment in new residential house was claimed on two residential properties amounting to Rs.63,89,143/-, under legal advice. However, while filing return of income in response to notice under section 153A of the Act, the correct exemption of Rs.38,40,098/- was claimed. The written submissions furnished by the assessee before the CIT(A) are incorporated under para 33 at pages 4 to 7 of the appellate order along with additional submissions made by the assessee under para 3.4 at pages 7 to 9 of the appellate order. After considering the various factors on which penalty under section 271(1)(c) of the Act could be levied, the CIT(A) observed that *The penalty under sec. 271(1)(c) is a penalty for concealment of income or for furnishing of inaccurate particulars, or, under the extended definition by the virtue of Explanation 5A to sec. 271(1)(c), for a deemed concealment of income.* The CIT(A) further held that

where two legal interpretations were plausible and where there was honest and bonafide difference of opinion, penalty for concealment should not and could not be imposed. The CIT(A) noted the two contentions raised by the assessee as to why penalty under section 271(1)(c) of the Act should not be levied. The first contention was that in response to notice under section 153A of the Act, the assessee had declared income from capital gains by enhancing the sale value in the computation of income and even tax was duly paid on the same. As per the assessee, since the income was offered in the return of income, the same could not be considered as concealed income in view of immunity provided in Explanation 5 to section 271(1)(c) of the Act. The second plea raised by the assessee was that in the original return of income, the assessee had claimed excess deduction of Rs.1,17,89,143/- comprising of re-investment in new residential properties for Rs.63,89,143/- and investment in capital gains of Rs.54,00,000/-. However, while filing the return in response to notice under section 153A of the Act, the assessee claims that it was advised that the claim in respect of two residential properties was a wrong claim and the exemption was available only in respect of investment in one residential property. Accordingly, the assessee had *suo motu* reduced the said claim to Rs.38,40,098/-, resulting in enhancement of income to the extent of Rs.39,49,045/-. The assessee claimed that she was under bonafide belief that the same was allowable under the Act as also under the advice of Tax consultant.

8. The CIT(A) dismissed the first contention of the assessee that since the black money or unrecorded part of sale consideration was declared by the assessee in her statement during search and disclosed at first available opportunity of hearing, she was not liable for levy of penalty for concealment. The CIT(A) observed that the money or cash was seized by the Department and only thereafter, the assessee declared the said amount in the return of income

filed pursuant to notice issued under section 153A of the Act and no such income was declared in the original return of income on 30.07.2009, prior to the date of search. Further, the CIT(A) held that Explanation 5A to section 271(1)(c) of the Act squarely applied to the facts of the case. The CIT(A) further held that immunity claimed under Explanation 5A to section 271(1)(c) of the Act or section 271AAA of the Act was not available to the assessee as it represent neither the current year income i.e. search year nor has it been disclosed in return of income also filed by her under the provisions of section 139(1) of the Act on 30.07.2009. The second contention of the assessee that it had disclosed the entire capital gains and had claimed deduction in respect of more than one house property on the advice of Consultant, the CIT(A) held that such benefit was not allowable in view of clear-cut provisions of section 54 of the Act and in the absence of any ambiguity, there was no merit in the claim of the assessee. Further, the claim of the assessee of depositing the amount in the capital gains account as envisaged under section 54(2) of the Act was also not correct since the assessee had availed the deduction under section 54 of the Act in respect of two properties. Reliance on the Chartered Accountant's opinion vis-à-vis computation of capital gains in the hands of the assessee and consequently, non-levy of penalty under section 271(1)(c) of the Act, was also rejected by the CIT(A). Reliance in this regard was placed on the ratio laid down by the Hon'ble Delhi High Court in CIT Vs. Escorts Finance Ltd. (2010) 328 ITR 44 / (2009) 183 Taxman 453 and Hon'ble Kerala High Court in Kuttookaran machine Tools Vs. ACIT (2009) 313 ITR 413 (Ker). In view thereof, the CIT(A) held that the conduct of assessee as evidenced during the course of proceedings under the Act could not be held to be bonafide and the assessee was held to have concealed particulars of her income, by not revealing the unrecorded part of sale consideration of her ancestral property and also to have furnished inaccurate particulars of income by claiming incorrect, illogical and untenable exemptions under the Act. The CIT(A) held that the only claim which is held to

be bonafide is the claim of exemption of Rs.5,00,000/- in respect of fittings and fixtures, which were items of personal effects and were not taxable under section 224(2) of the Act. The CIT(A) upheld the levy of penalty by the Assessing Officer under section 271(1)(c) of the Act @ 100%. However, the Assessing Officer was directed to re-compute the penalty by granting the benefit of Rs.5,00,000/-, which was held to be beyond the scope of concealed income.

9. The assessee is in appeal against the order of CIT(A).

10. The learned Authorized Representative for the assessee pointed out that the penalty under section 271(1)(c) of the Act was levied upon the assessee on two accounts i.e. unaccounted sale proceeds and also on account of withdrawal of exemption claimed under section 54 of the Act. After taking us through the facts of the case and the original computation of income placed at page 1 of the PB and revised computation of income placed at pages 2 and 3 of PB, the learned Authorized Representative for the assessee pointed out that the assessee had offered the income at the first instance. Our attention was further drawn to the answers to the queries raised during the course of investigation by the Investigation Wing at the airport and additional income was offered in bonafide manner though after search. In such circumstances, where the assessee had offered the income in return of income, after surrendering additional income, the learned Authorized Representative for the assessee stressed that the discretion should be exercised in favour of the assessee. Reliance in this regard was placed on the ratio laid down by the Hyderabad Bench of Tribunal in Shri PV Ramana Reddy Vs. ITO in ITA Nos.1852 to 1857/Hyd/2011, relating to assessment years 1999-2000 to 2005-06, order dated 06.01.2012. Another issue raised by the assessee was that no satisfaction was recorded by the Assessing Officer since in the hands of the assessee, it was not case of any addition or disallowance and where no

satisfaction had been recorded, no penalty under section 271(1)(c) of the Act was leviable. Reliance was placed on the ratio laid down by Nagpur Bench of Tribunal in DCIT Vs. Purti Sakhar Karkhana (2013) 23 ITR (Trib) 667 (Nagpur). Our attention was then drawn to the provisions of section 153A of the Act and it was pointed out that in the case of assessee, where the assessment had got abated, the original return of income could not be considered and whatever the declaration was made in the original return of income, could not be considered for invoking the provisions of section 153A of the Act. The learned Authorized Representative for the assessee placed reliance on the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. Continental Warehousing Corporation (NHAVA Sheva) Ltd. & Anr. (2015) 374 ITR 645 (Bom). Another reliance was placed on decision of Pune Bench of Tribunal in Smt. Pramila D. Ashtekar Vs. ITO (2013) 39 taxmann.com 103 (Pune – Trib.). Without prejudice and strictly in the alternate, the learned Authorized Representative for the assessee pointed out that the penalty under section 271(1)(c) of the Act was leviable only on the tax portion of the demand and not on the surcharge, educational cess charged from the assessee.

11. The learned Departmental Representative for the Revenue pointed out that para 3.2 of the assessment order reveals the satisfaction recorded by the Assessing Officer i.e. after elaborate discussion of the issue, where the assessee was found carrying cash and searched on the assessee only on the interception at airport itself, cash was found and declared by the assessee. The learned Departmental Representative for the Revenue pointed out that the Assessing Officer after discussing the facts of the case ad recorded satisfaction for initiation of penalty proceedings under section 271(1)(c) of the Act and in such facts, the argument of the assessee was not valid. He further pointed out that the search on the assessee took place on 09.12.2009. The registered sale deed was executed on 17.04.2008 and the assessee furnished original return of

income on 30.07.2009 declaring income of Rs.1,88,930/-. He further stated that when the assessee filed the return of income, she was aware of the sale consideration and not only there was concealment on the part of assessee but also wrong declaration made by the assessee. The learned Departmental Representative for the Revenue further stressed that even if the assessment was abated, no such income was declared in the original return of income filed by the assessee and there is no question of abatment in this regard. The learned Departmental Representative for the Revenue stressed that in the facts of the present case, the assessee had admitted to have accepted higher sale consideration than the declared in the original return of income and also accepted to have claimed wrong deduction under section 54 of the Act. In case, there was no interception of the assessee at the airport, no declaration would have been made by the assessee and there was willful attempt not to declare correct income in the original return of income filed by the assessee, with an intention. The learned Departmental Representative for the Revenue placed reliance on the order of CIT(A) with special reference to paras 3.3 onwards. Further, reliance was placed upon by the Hon'ble Madras High Court in CIT Vs. S. D. V. Chandru (2004) 266 ITR 175 (Mad). The learned Departmental Representative for the Revenue stressed that where the knowledge had come with the Department of escapement of income after the search, Explanation 5A to section 271(1)(c) of the Act was attracted.

12. The learned Authorized Representative for the assessee in rejoinder pointed out that the language of the assessment order especially para 3.2 reflects the presumption that the levy of penalty under section 271(1)(c) of the Act was automatic. Hence, no satisfaction having been recorded by the Assessing Officer, no penalty could be levied under section 271(1)(c) of the Act. The next plea raised by the learned Authorized Representative for the assessee was that the reduction in claim of deduction under section 54 of the Act was not

concealment of income and since it was a bonafide claim, no penalty under section 271(1)(c) of the Act was attracted.

13. We have heard the rival contentions and perused the record. Search and seizure action was carried out against the assessee on 09.12.2009. While travelling from Pune to Delhi by air, the assessee was found to be in possession of cash of Rs.1,60,76,800/-. The assessee was searched by the Investigation Wing under section 132 of the Act on 09.12.2009 and residence was also searched and cash of Rs.1.60 crores was seized during the search proceedings. In the course of recording of statement during the search proceedings, the assessee admitted that she had sold her ancestral property at Delhi for Rs.3.40 crores, for which the Agreement was made for Rs.1.70 crores and the balance amount was received in cash. The claim of the assessee was that though she had 50% share in the impugned property and the balance 50% share was owned by her sister Mrs. Tripta Kaur, but she had received the entire cash consideration and the cheque consideration was divided 50 : 50. In response to notice issued under section 153A of the Act, the assessee offered 50% of the Agreement value i.e. Rs.85 lakhs and 100% of the cash element i.e. Rs.1.70 crores in her hand and computed the income from capital gains and declared total income of Rs.2,04,91,850/- on 13.09.2010. Against the income from capital gains computed at Rs.2,41,17,168/-, the assessee also claimed exemption under section 54 of the Act at Rs.38,40,098/-, on account of investment in Mega Polis property. The Assessing Officer while completing assessment, noted that the assessee had not declared the sale consideration of Rs.2.55 crores in the original return of income filed and subsequently after the search, the declaration was made on account of total amount of capital gains. The Assessing Officer recorded satisfaction in the body of the assessment order to the extent that the assessee had concealed the particulars of income and penalty proceedings under section 271(1)(c) of the Act were initiated. Beside

the above said, there was another aspect of sale of property, wherein the assessee had claimed that it had sold fittings and fixtures of the said bungalow for Rs.10 lakhs. However, in the absence of list of furniture or personal effects sold, the Assessing Officer was of the view that the fittings and fixtures attached to the property were inextricably linked to the building and consideration received thereon, was to be treated as capital gains. The Assessing Officer also initiated penalty proceedings under section 271(1)(c) of the Act with regard to the said addition. Consequent thereto, the Assessing Officer rejecting the claim of the assessee that it had *suo motu* offered the income from long term capital gains, and no malafide intention could be attributed to the said disclosure, hence, there was no merit in levy of penalty, held the assessee exigible to levy of penalty under section 271(1)(c) of the Act and levied penalty of Rs.47,11,104/-. The CIT(A) elaborately considered the issue and upheld the levy of penalty. The assessee is in appeal against the order of CIT(A) in confirming the levy of penalty under section 271(1)(c) of the Act.

14. The first aspect of the issue raised by the assessee before us is that where no satisfaction has been recorded by the Assessing Officer, since in the hands of assessee, there was no addition whatsoever, as the income offered by the assessee was accepted in toto, no penalty under section 271(1)(c) of the Act could be levied. From the perusal of assessment order, it is clear that the Assessing Officer after considering the facts of the case and also the return of income filed by the assessee pursuant to issue of notice under section 153A of the Act vide para 3.2 noted that the total sale consideration of the ancestral property was Rs.3.40 crores, out of which Rs.1.70 crores was received in cash and Rs.1.70 crores was received in cheque. The cheque amount was shared by the co-owner. However, the entire cash amount was claimed to be received by the assessee. The Assessing Officer further considered that the assessee had offered the cheque amount and cash amount aggregating to Rs.2.55 crores

for taxation under the head 'long term capital gains'. The Assessing Officer further observed that since the assessee had not declared this amount of capital gains in her original return and subsequently, after search has declared the total amount of capital gains and thus, concealed the particulars of income and consequently, penalty proceedings under section 271(1)(c) of the Act were initiated separately by the Assessing Officer. The above said finding of the Assessing Officer is the deemed satisfaction recorded by the Assessing Officer before initiating penalty proceedings under section 271(1)(c) of the Act and in view thereof, we find no merit in the plea of the assessee in this regard.

15. Now, coming to the issue that where the assessee had offered the income in the return of income filed after surrendering the additional income, can the assessee be held to have concealed its income vis-à-vis original return of income filed by the assessee. Section 271(1) of the Act makes provision for levying penalties on assessee in different eventualities, one such eventuality is for concealment of income or furnishing of inaccurate particulars of income. Only on fulfillment of the conditions stipulated in section 271(1)(c) of the Act, there arises a question of exercising power under the said provision to impose penalty. The said section lays down that where the Assessing Officer or the CIT(A) in the course of any proceedings under the Act is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income, then he may direct that such person shall pay by way of penalty stipulated in the aforesaid provision. The Explanation/s under section 271(1)(c) of the Act set out the circumstances, which justifies the levy of penalty. For searches initiated under section 132 of the Act before first day of June, 2007, Explanation 5 was introduced by the Finance Act, 2007 with retrospective effect from 01.04.2003. Under the said section, where the assessee was found to be owner of any money, bullion, jewellery or other valuable articles or things 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 had ended before the date of search, but the return of income for such year had not been furnished before the said date, or where the return of income had been furnished but such income had not been declared therein or for any previous year which is to end on or after the date of search, then notwithstanding that such income was declared by him in the return of income, he was deemed to have concealed particulars of his income or furnished inaccurate particulars of income, unless the income or the transactions were recorded in the books of account or the person in the course of search makes a statement under section 132(4) of the Act that the said money, bullion, jewellery, valuable articles or things, has been acquired by him out of his income, which has not been so far disclosed, but specifies the manner in which the said income has been derived and pays the taxes together with interest. Under Explanation 5, an exemption was provided to the person who was searched and was found in possession of money, bullion, jewellery, valuable articles or things, then in case he declared the same under the statement recorded under section 132(4) of the Act and thereafter, pays the taxes on the same, no penalty under section 271(1)(c) of the Act was levied on such person.

16. However, for searches initiated under section 132 of the Act on or after first day of June, 2007, another Explanation 5A was applicable, which was introduced by the Finance Act, 2007 w.e.f. 01.06.2007. The original Explanation 5A provided that where in the course of search, the assessee was found to be the owner of any money, bullion, jewellery, valuable articles or things and the assessee claims that such asset had been acquired by him by utilizing wholly or in part his income for any previous year or any income is based on any entry in books of account or other documents or transactions and he claims that the same represents his income for any previous year, then where the period has ended before the date of search and the due date for filing the return of income

for such year has expired and the assessee has not filed the return of income, 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 section 271(1)(c) of the Act, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of income. The said Explanation 5A was substituted by the Finance (No.2) Act, 2009 with retrospective effect from 01.06.2007 with the amendment that where the return of income for such previous year had been furnished before the date of search, but such income had not been declared therein or where the due date of filing the return of income for other previous year has expired, but the assessee had not filed the return of income, then notwithstanding the fact that the said income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars of his income.

17. The deeming provisions of Explanation 5A under section 271(1)(c) of the Act are applicable to all the searches initiated under section 132 of the Act on or after first day of June, 2007. The conditions laid down in the Explanation 5A is where during the course of search, the assessee is found to be in possession of any money, bullion, jewellery, valu able articles or things and the assessee claims that such assets have been acquired by him by utilizing wholly or in part his income, for any previous year on any income based on any entries in books of account, or other documents or transactions and he claims that such entries in the books of account or other documents or transactions represent his income for any previous year, then in cases where the return of income for such previous year had been furnished by the assessee prior to the date of search, but the said income had not been declared in the said return of income or the due date for filing the return of income had expired for such previous year and the assessee had not filed the return of income, it is further laid down that

notwithstanding the fact that such income which has been discovered due to the search proceedings, is declared by him in any return furnished on or after the date of search, but irrespective of the same, he would be deemed to have concealed the particulars of income or furnished inaccurate particulars of income. Reading the above said provisions of the Explanation 5A to section 271(1)(c) of the Act, it is noted that the person is deemed to have concealed particulars of his income or furnished inaccurate particulars of such income, which is equivalent to the value of money, bullion, jewellery, valuable articles or things from the possession of the assessee during the course of search conducted on or after first day of June, 2007. Further, where any income is based on any entry in any books of account or other documents or transactions and he claims that all the above said represents his income for any previous year, then the Explanation lays down to that extent, the person would be deemed to have concealed his particulars of income or furnished inaccurate particulars of income.

18. Now, coming to the main provisions which constitute two portions i.e. what is concealment and quantum of penalty to be levied. The question is quantum of income on which penalty is to be levied. The said issue was before the Pune Bench of Tribunal in ACIT Vs. Mulay Construction P. Ltd. & Ors. in ITA Nos.116 to 119/PN/2012 & Ors. and it was held as under:-

> *"16. The next limb of argument of the Ld. counsel is that Explanation 5A(ii) contemplates "income" and not the "expenditure". In this case, it is undisputed fact that the assessee came forward and declared "income" which was pertaining to the amount covered by the unrecorded expenditure but the fact remains that the assessee did not declare any 'expenditure' but it is only the income. The Ld. Counsel referred to the definition of the income given in sec. 2(24) of the Act. The scope of the said definition has been explained by the Hon'ble Supreme Court in the case of EMIL Webber (supra) which has been relied upon by the Ld. Counsel The relevant portion is in para no 7 which reads as under:*
>
> > *"7. The definition of 'income' in clause (24) of Section 2 of the Act is an inclusive definition. It adds several artificial categories to the concept of income but on that account the expression 'income' does not lose its natural connotation. Indeed, it is repeatedly said that it is difficult to define the expression 'income' in precise terms. Anything which can properly be described as income is taxable under the Act unless, of*

course, it is exempted under one or the other provision of the Act. It is from the said angle that we have to examine whether the amount paid by Ballarpur by way of tax on the salary amount received by the assessee can be treated as the income of the assessee. It cannot be overlooked that the said amount is nothing but a tax upon the salary received by the assessee. By virtue of the obligation undertaken by Ballarpur to pay tax on the salary received by the assessee among others, it paid the said tax. The said payment is, therefore, for and on behalf of the assessee. It is not a gratuitous payment. But for the said agreement and but for the said payment, the said tax amount would have been liable to be paid by the assessee himself He could not have received the salary which he did but for the said payment of tax. The obligation placed upon Ballarpur by virtue of Section 195 of the Income Tax Act cannot also be ignored in this context. It would be unrealistic to say that the said payment had no integral connection with the salary received by the assessee. We are, therefore, of the opinion that the High Court and the authorities under the Act were right in holding that the said tax amount is liable to be included in the income of the assessee during the said two assessment years."

17. As per interpretation made by the Hon'ble' Supreme Court of sec. 2(24) of the Act, it is clear that it is an 'inclusive' definition and it covers all income come under charging provisions of the Act. If the argument of the learned counsel is to be accepted then no income can be taxed u/s. 68, 69, 69A, 69B, 69C & 69D.

18. It is necessary to refer to Explanation 5A which reads as under:

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

(i) Any money, bullion, jeweler 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 other 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, he deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income."

19. So far as the present assessee is concerned, clause (ii) to Explanation 5A is applicable. Admittedly, the expenditure which was not recorded has been found by way of entries in the seized documents. While explaining the scope of Explanation 5A in the case of Chandan K. Shewani (supra) the Tribunal has held that to patch out the lacuna due to the judicial interpretation of Expl. 5 of Sec. 271(1)(c) which was on the statute book upto 31-5-2007, Explanation 5A

has been substituted for Expl. 5 by the Finance Act, 2007 w.e.f 1-6-2007. The said explanation was further amended by the Finance(No.2) Act, 2009 with retrospective effect from 01-07-2007 which is reproduced hereinabove. The Ld. Counsel has raised an important legal question whether the income declared by the assessee which is pertaining to the unrecorded expenditure can said to be the income which is contemplated in Explanation 5A(ii)? The answer to this question is in sec. 69-C which reads as under:-

> *"Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year;"*

20. So far as the Expl.- 5 which was on the statute book, the Courts have taken a view that it was having a limited application only to the extend of the money, bullion, jewellery or any valuable assets or things which were found during the course of seach and seizer operation and owned by the assessee. But the other income which was found recorded by any entry in the document seized or otherwise was not covered. It is pertinent to note that sec. 69C provides that if any unrecorded expenditure is found and the assessee fails to explain the source of the said expenditure or explanation of the assessee is not satisfactory, then to the extent of the amount covered by such expenditure is treated as income. Ultimately what is taxed under Sec. 69 C of the Act is not the expenditure but it is basically the undisclosed income which has been applied for incurring the unrecorded expenditure. In our view, there is no merit in the argument of the Ld. Counsel that the assessee has only declared the amount expenditure. We therefore, hold that to the extent of the income offered by the assessee pertaining to the expenditure in the returns filed in response to notice u/s 153A, Explanation-5A is applicable and as there is a legal presumption against the assessee in respect of the said income detected during the course of search and seizure operation, the assessee case is squarely covered by Explanation- 5(ii) as the assessee himself has admitted the said undisclosed income."

19. Applying the said proposition to the facts of the present case, we hold that the income offered by the assessee pertaining to the cash seized from the assessee and the declaration of the assessee that the said cash relates to the unaccounted cash received vide the sale transaction entered into by the assessee, which in turn, was declared by the assessee in the return of income filed pursuant to issue of notice under section 153A of the Act, is the income detected during the course of search and seizure operation. The case of the assessee is squarely covered by the provisions of Explanation 5A to section 271(1)(c) of the Act and the assessee is exigible to levy of penalty on such income which was detected during the course of search and seizure operation, which in turn has been offered by the assessee in return of income filed pursuant to notice issued under section 153A of the Act. The learned

Authorized Representative for the assessee on the other hand has placed reliance on the ratio laid down in DCIT Vs. Purti Sakhar Karkhana (supra), which is a decision of Nagpur Bench of Tribunal and Hyderabad Bench of Tribunal in Shri PV Ramana Reddy Vs. ITO (supra). In view of binding precedent of Pune Bench on the said issue, we find no merit in the reliances placed upon by the learned Authorized Representative for the assessee on DCIT Vs. Purti Sakhar Karkhana (supra) and Shri PV Ramana Reddy Vs. ITO (supra). The other reliance placed upon by the learned Authorized Representative for the assessee on the decision of Pune Bench of Tribunal in Smt. Pramila D. Ashtekar Vs. ITO (2013) 39 taxmann.com 103 (Pune – Trib.), it may be pointed out that the said order of Pune Bench of Tribunal has been recalled in MA No.112/PN/2013, order dated 21.06.2013 and has no binding effect for deciding the present issue. Further reference was made to the decision of CIT Vs. Continental Warehousing Corporation (NHAVA Sheva) Ltd. & Anr. (supra), where the Hon'ble Bombay High Court has deliberated upon the scope of 153A provisions and has no relevance to the issue before us.

20. Another aspect of the issue of levy of penalty us 271(1)(c) of the Act is the wrong claim of deduction made by the assessee under section 54 and 54F of the Act. The CIT(A) vide para 3.10 to 3.11 has deliberated upon the factual aspects of the issue, which are being referred, but not being reproduced for the sake of brevity.

21. The assessee having made a wrong claim in the return of income i.e. by way of claim of deduction under section 54 on account of investment in two properties and in respect of capital gains account with bank not having been made by the assessee, tantamount to furnishing of inaccurate particulars of income and justifiably, penalty under section 271(1)(c) of the Act is leviable on such furnishing of inaccurate particulars of income. The learned Authorized

Representative for the assessee in a written Note had furnished the break-up of income on which penalty was levied, which is as under:-

Particulars	Amount (Rs.)
Unaccounted sale proceeds on sale of property	1,70,00,000
Withdrawal of exemption claimed u/s.54 of the Act	32,77,070

22. We uphold the order of CIT(A) in confirming the levy of penalty on the above said two accounts. Dismissing the grounds of appeal raised by the assessee, we uphold the order of CIT(A).

23. In the result, the appeal of the assessee is dismissed.

Order pronounced on this 30th day of October, 2015.

Sd/-	**Sd/-**
(PRADIP KUMAR KEDIA)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 30th October, 2015.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-I, Pune;
4. आयकर आयुक्त / The CIT(Central), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune