

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'G', NEW DELHI**

**BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER  
AND  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

ITA Nos.2044 & 2045/Del/2014  
Assessment Years: 2006-07 & 2007-08

M/s. Spaze Towers Pvt. Ltd., Spazedge, Sector -47, Sohna Road, Gurgaon	<b>Vs.</b>	DCIT, Central Circle-II, Faridabad
<b>PAN :AACCK8088R</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

**And**

ITA No.2558/Del/2012  
Assessment Year: 2008-09

DCIT, Central Circle-II, Faridabad	<b>Vs.</b>	M/s. Spaze Towers Pvt. Ltd., Spazedge, Sector -47, Sohna Road, Gurgaon
<b>PAN :AACCK8088R</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by	Shri Rakesh Arora, CA
Department by	Shri S.S. Rana, CIT(DR)

Date of hearing	10.10.2018
Date of pronouncement	20.11.2018

**ORDER**

**PER O.P. KANT, AM:**

The aforementioned appeals by the assessee and the Revenue are directed against separate orders dated 23/01/2014; 23/01/2014 and 30/03/2012 passed by the Ld. Commissioner of Income-tax (Appeals)-Central, Gurgaon [in short 'the Ld. CIT(A)']

for assessment years 2006-07, 2007-08 and 2008-09 respectively. The issues involved in these appeals are identical in the same set of circumstances and therefore, these appeals were heard together and disposed off by way of this consolidated order for convenience.

**ITA No.2044/Del/2014 for AY:2006-07 (Assessee)**

**2.** First we take up the appeal having ITA No. 2044/Del/2014 for assessment year 2006-07, wherein following grounds have been raised by the assessee:

1. *the Learned CIT(A) has erred in law & facts of the case in sustaining the penalty of Rs.5,23,076/- u/s 271(1)(c) of the Income Tax Act, 1961, rejecting the submissions and explanations of the Assessee Company, which is arbitrary, unjustified and bad in law.*
2. *The assessee craves the right to add, amend or modify any ground of appeal.*

**3.** Briefly stated facts of the case are that in the case of the assessee, a search and seizure action under section 132 of the Income Tax Act, 1961 (in short 'the Act') was carried out on 29/04/2008. During the course of search proceeding, statement of Sh. J.S. Chawla, Director of assessee company, were recorded on oath u/s 132(4) of the Act and he surrendered an aggregate amount of Rs.27 crores as undisclosed income for the entire group for assessment year 2008-09 on the basis of the documents found in seized during the course of the search. The assessee did not file any regular return of income for the year under consideration, which it was required to file as per the provisions of section 139 of the Act. Consequent to the search action, the Assessing Officer issued notice under section 153A of the Act

requiring the assessee to file the return of income in respect of the assessment year under consideration, which was duly served upon the assessee and in response the assessee filed return of income declaring Nil income. During the assessment proceedings under section 153A of the Act, the Assessing Officer confronted seized documents appearing at page No. 77 of Annexure A-7 seized from Party No.1, which was having mention of transaction of some property for an amount of Rs.15,54,000/-. It was explained by the assessee that said amount was part of the surrender of additional income of Rs.27.00 crores made by Sh. J.S. Chawla under section 132(4) of the Act and offered in the return of income filed for assessment year 2008-09 by the assessee. It was submitted that exact detail on the page were not remembered and thus this income was included in assessment year 2008-09 instead of AY 2006-07. In view of the Assessing Officer, the relevant seized material was dated 10/02/2006, which is relating to the assessment year under consideration, accordingly, he added the income in the year under consideration and initiated penalty proceedings under section 271(1)(c) of the Act read with Explanation 5A. The Assessing Officer issued show cause notice to the assessee as why the penalty under section 271(1)(c) of the Act may not be levied. According to the assessee, it was merely shifting of income from assessment year 2008-09 to assessment 2006-07 and in fact there was no additional income for the year under question. The assessee further submitted that though it has not challenged the same in quantum appeal, it should not render the assessee liable for penalty under section

271(1)(c) of the Act. According to the assessee change of the assessment year is due to difference of opinion of the year of taxability only and not because of any finding, which was not available before the search team. The assessee submitted that the surrender was made in assessment year 2008-09 under bonafide belief that the document pertain to assessment year 2008-09. The assessee submitted that entire surrender of Rs.27 crore was offered to tax and corresponding tax was also paid. He submitted that surrender was offered with the condition that no penalty proceeding and prosecution would be launched against the assessee. The assessee contended applicability of Explanation 5A to section 271(1)(c) of the Act in view of the voluntary declaration of the undisclosed income. The Assessing Officer rejected the contention of the assessee observing that in view of the deeming provisions of explanation 5A below the section 271(1)(c) of the Act, the assessee was liable for penalty and, accordingly, he levied penalty of Rs.5,23,076/- at the rate of 100% of the tax sought to be evaded. On further appeal, the Ld. CIT(A) upheld the penalty. Aggrieved, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

**4.** In the sole ground, the assessee has challenged confirmation of penalty of Rs.5,23,076/- levied under section 271(1)(c) of the Act. Before us, the Ld. Counsel submitted that there was reasonable cause in failure to report the income for the year under consideration and thus penalty levied may be deleted as the assessee has already paid taxes on the undisclosed income filed in assessment year 2008-09 and thus, there is no loss to

Revenue. According to the Ld. Counsel, it was an honest error and there was no concealment on the part of the assessee. In the written submission filed the Ld. counsel submitted that explanation 5A to section 271(1)(c) of the Act is not applicable in the case of the assessee because as per the clause (ii) of the deeming provisions, it attracted only on the act of the assessee to claim that such income belongs to a particular year before the search and since the assessee has not claimed that this income belongs to assessment year 2006-07, there is no question of applicability of clause (ii) in the case of the assessee.

**4.1** The Ld. counsel further submitted that at the time of making surrender, the mapping of each and every paper found during the course of the search could not be done and therefore whole amount of Rs.27 crore was offered in the year of search and taxes paid thereon. The Ld. counsel submitted that in fact the paper on the basis of which addition has been made, is a dumb document without any corroborative material in support of the same and it was merely rough noting. It was submitted that the Assessing Officer has merely shifted the income from assessment year 2008-09 to assessment year 2006-07 on account of change of opinion. In the written submission filed, the Ld. counsel relied on the decision of the Hon'ble jurisdictional High Court in the case of CIT Vs SAS Pharmaceutical (2011) 335 ITR 259, decision of the Hon'ble High Court of Jharkhand in the case of CIT Vs Ashim Kumar Agrawal, 153 TAXMAN 226 and decision of the Hon'ble High Court of Madhya Pradesh in the case of CIT Vs SV Electrical Private Limited 155 TAXMAN 158.

**4.2** In the written submission it is further mentioned that the levy of penalty is not automatic and merely certain additions have been made in the assessment order, that itself does not ipso facto mean that penalty automatically becomes leviable in relation thereto. In support of the contention the Ld. counsel relied on the decision of the Hon'ble Delhi High Court in the case of CIT Vs global sales Corporation 145 taxman 530 and other decisions.

**4.3** On the contrary, the Ld. DR submitted that assessee has not challenged in quantum proceedings the shifting of income of Rs.15,54,000/- from assessment year 2008-09 to the assessment year under consideration. According to him, once the assessee has accepted that the investment mentioned in the seized document pertain to the year under consideration, the Explanation 5A below the section 271(1)(c) of the Act is attracted in the case of the assessee being a deeming provision and thus assessee cannot escape from the liability of penalty under section 271(1)(c) of the Act. In support of the contention, the Ld. DR relied upon following decisions:

**1. Saniav Aqqarwal Vs CIT f20in 15 taxmann.com 34 (Punjab & Haryana)/T20121 211 Taxman 178 (Punjab & Haryana)(MAG.)**

*Assessee made disclosure during assessment proceeding under section 131(1) on 5-1-2006 and offered to surrender amount attributable to him in investment in property. Hon'ble P&H High Court held that no immunity could be claimed by assessee from levy of penalty in terms of Explanation 5 to section 271(1)(c)*

**2 CIT Vs Prasanna Dugar T20151 59 taxmann.com 99 (Calcutta)/T20151 371 ITR 19 (Calcutta)(MAG.)/r20151 279 CTR 86 (Calcutta)**

*Where Hon'ble Calcutta High Court held that even where subsequent to search, O' assessee voluntarily disclosed a sum and offered said sum to tax, since said amount was not disclosed in original return, penalty levied under section 271(1)(c) was justified*

**3. ACIT Vs Smt. J. Mythili (35 taxmann.com 86)**

where Hon'ble ITAT Chennai held that where there was a search upon assessee and she subsequent to search, in pursuance of notice issued under section 153A, filed returns for relevant assessment years and amount shown in returns filed as 'other income' was not a part of her regular accounts, such amount would squarely come within purview of concealed income liable to penalty under section 271 (1 )(c).

**4. Smt. Kiran Devi Vs ACIT (2009) 125 TTJ 631 (Delhi)**

where Hon'ble ITAT Delhi held that where certain income was disclosed in return filed in response to notice under section 153C following search income was not disclosed in original return, it was a clear case of concealment of income attracting penalty under section 271(1 )(c); in such a case it was not even necessary to invoke Explanation 5 to section 271(1)(c)

**5. CIT Vs S J Prasad (2008) 220 CTR 169(KER.)**

where Hon'ble Kerala High Court held that where a search was conducted in assessee's premises and during search cash of Rs. 5,75,000 was seized by department and in course of search assessee gave a statement declaring that amount belonged to another person but failed to prove same, there was concealment of income by assessee by virtue of operation of Explanation 5 to section 271(1)(c)

**6. CIT Vs Smt. Meera Devi (2012) 26 taxmann.com 132 (Delhi)/[2013] 212 Taxman 68 (Delhi)(MAG.)/[2012] 253 CTR 559 (Delhi)**

In compliance to notice u/s 153C, assessee disclosed substantially higher income adding other sources, i.e. rent from house property and income from other sources. Hon'ble Delhi High Court held that conduct of assessee in filing returns without full particulars fell within mischief of section 271(1)(c) and they would also not be entitled to claim benefit of exception, carved out in Explanation 5 to section 271(1)(c)

**7. Shourva Towers (P.) Ltd. Vs DCIT [2013] 30 taxmann.com 10 (Delhi)/[2013] 213 Taxman 20 (Delhi)(MAG.)/[2013] 359 ITR 523 (Delhi)/[2013] 255 CTR 225 (Delhi)**

Hon'ble Delhi High Court held that 'Escape route' from levy of penalty as provided by clause (2) to Explanation 5 to section 271(1)(c) is available, when assessee, in his statement not only offers or surrenders to tax amount in question which is later assessed, but also complies with other conditions of having filed return

**4.4** We have heard the rival submissions and perused the relevant material on record including the submissions filed by both the parties. The undisputed fact in the case is that no regular return of income was filed by the assessee and this income of Rs.15,54,000/-was even not offered in the return of income filed in response to notice under section 153A of the Act. This income has been added by the Assessing Officer in assessment completed under section 153A of the Act and penalty has been levied invoking explanation 5A below section 271(1)(c) of the Act. The assessee has not filed any appeal against the addition in quantum proceedings under section 153A of the Act and only challenged the penalty levied under section 271(1)(c) of the Act. Since the penalty has been levied invoking Explanation 5A below the section 271(1)(c) of the Act, it is relevant to reproduce the said section 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.”*

**4.5** On plain reading of above Explanation, it is evident that income mentioned in clause (i) or (ii) would be deemed to have been concealed, if it pertain to previous satisfying condition in clause (a) or (b).

**4.6** In the instant case, due date of filing the return of income for the relevant previous year has expired and the assessee has not filed return. Further in the return of income filed in response to notice under section 153A also this income of Rs.15,54,000/- has not been declared. Since the previous year corresponding to the assessment year in consideration has ended before the date of the search, the case of the assessee is covered by the conditions of clause (b).

**4.7** Further, in the case of the assessee addition has been made on the basis of the entry found in the seized documents and thus, clause (ii) is attracted. The Ld. counsel has argued before us that the clause (ii) would be attracted only when the assessee makes the claim that said income belong to a particular year before the search. According to the Ld. counsel, the assessee claimed that amount of Rs.15,54,000/-represented the income of the assessment year 2008-09 and it is the Assessing Officer, not the assessee has claimed that income belongs to assessment year under consideration i.e. 2006-07. This argument of the Ld. counsel is not acceptable because on the basis of the seized document the Assessing Officer has shifted the income in question to the assessment year in consideration and assessee has not objected against the same and even not challenged the

said addition in appeal. This conduct of the assessee of not objecting the addition of income to the assessment year under consideration shows that the claim of income relevant to the year under consideration has been accepted by the assessee. In such circumstances, the assessee squarely falls under the deeming provisions of Explanation 5A below section 271(1)(c) and cannot escape from liability of penalty under section 271(1)(c) of the Act. The decisions relied upon by the Ld. DR are in relation to Explanation 5 to section 271(1)(c) of the Act and not in relation to Explanation 5A. The Explanation 5 pertains to search initiated before first day of June, 2007 whereas Explanation 5A pertain to searches initiated on after first day of June, 2007. The main part of the Explanation 5 is *pari materia* with Explanation 5A except the conditions where levy of the penalty has been excluded. In the cases relied upon by the Ld. DR the penalty was held to leviable in terms of Explanation 5 to section 271(1)(c) of the Act despite the income was disclosed in the return filed consequent to the search proceeding. In the instant case, scenario is more worse and the assessee has even not disclosed the said income in the return of income filed for the year under consideration consequent to search proceeding.

**4.8** In the cases relied upon by the Ld. counsel issue of levy penalty under deeming provision of Explanation 5A to section 271(1)(c) of the Act was not for consideration before the Hon'ble Court and, therefore, those decisions are not applicable to the facts of the instant case. The assessee has failed to demonstrate any reasonable cause before us except that seized material was

not with the assessee at the time of filing return of income, which also remained unsubstantiated.

**4.9** In view of the aforesaid discussion, we are of the opinion that deeming provisions of Explanation 5A below section 271(1)(c) of the Act is attracted and for the purpose of imposition of the penalty under section 271(1)(c) of the Act, the assessee is deemed to have concealed particulars of his income or furnish inaccurate particulars of such income, thus the levy penalty by the Assessing Officer is accordingly upheld. The ground of the appeal raised by the assessee is accordingly dismissed.

**ITA No.2045/Del/2014 for AY: 2007-08 (Assessee)**

**5.** Now we take up the appeal of the assessee having ITA No. 2045/Del/2014 for assessment year 2007-08, wherein following grounds have been raised:

1. *The Learned CIT(A) has erred in law & facts of the case in sustaining the penalty of Rs.9,52,578/- u/s 271(1)(c) of the Income Tax Act, 1961 for the year in question as the amount of Rs.28,30,000/- declared by the assessee in the year under consideration, rejecting the submissions and explanations of the assessee Company, which is arbitrary, unjustified and bad in law.*
2. *The assessee craves the right to add, amend or modify any ground of appeal.*

**6.** The facts of the case of the year under consideration are more or less similar to the facts of the case for the assessment year 2006-07, except few changes. In the year under consideration, the assessee filed regular return of income under section 139(1) of the Act on 31/10/2007 (prior to the date of such) declaring an income of Rs.11,86,465/-. Further,

consequent to the search , in response to the notice issued under section 153A of the Act, the assessee filed return of income declaring an income of Rs.40,16,465/-including an additional income surrendered of Rs.28, 30,000/-. The detail of the said surrendered income are as under:

S. No.	Page No/Annexure/Party	Amount (in Rs.)
1.	Party 2, Annexure 1, Page 17	26,00,000/-
2.	Cash seized from locker no. 421 with Punjab & Sindh Bank, in the name of Mr. Deepak Kumar & Rita Kumar	2,30,000/-
	<b>Total</b>	<b>28,30,000/-</b>

**6.1** The Assessing Officer completed the assessment by accepting the income returned by the assessee at Rs.40,16,465/-, however, he initiated penalty under section 271(1)(c) of the Act in respect of the surrendered amount of Rs.28,30,000/-. The Assessing Officer rejected the contention of the assessee opposing levy of the penalty and he levied penalty amounting to Rs.9,52,578/- at the rate of 100% of the amount of tax sought to be evaded. The Ld. CIT(A) sustained the penalty holding that the assessee has not discharged the primary burden of presumption of concealment with cogent explanation.

**7.** Thus we find that in the present case, the assessee has offered the income of Rs.28,30,000/- ( i.e. on which penalty has been levied) in the return of income filed in response to notice under section 153A of the Act consequent to the search action, whereas in the assessment year 2006-07, the surrendered income was not filed in the return of income filed for the assessment year 2006-07.

**8.** Both the parties agreed that issue in dispute in the year under consideration is covered by the arguments made in the appeal for assessment year 2006-07. The Ld. counsel of the assessee relied on the decision in the case of CIT Vs. Mohandas Hassa Nand, reported in 141 ITR 203 (Del.), CIT versus Reliance Petro Products Private Limited, 322 ITR 158 (SC) and CIT Vs. SAS Pharmaceuticals, 335 ITR 259 (Delhi), though he admitted that these decisions were not in relation to Explanation 5A below section 271(1)(c) of the Act. According to him as far as proceeding under section 153A is concerned, there is no allegation of furnishing inaccurate particulars of income and also returned income and assessed income being same, penalty was not leviable in view of the decision of the Tribunal in the case of Prem Arora Vs. DCIT, reported in 56 SOT 14 (Del) .

**9.** We have heard the rival submissions and perused the relevant material on record including written submissions of the both the parties. We have already discussed in detail the provisions of Explanation 5A to section 271(1)(c) of the Act in earlier paragraphs while adjudicating the appeal for assessment year 2006-07 . In view of the Explanation 5A to section 271(1)(c) of the Act, an income based on the entry in the documents found represented income of the previous year [i.e. clause (ii)], which is ended before the date of the search and the assessee has not declared such income in the regular return of income filed before the date of search [i.e. clause (a)], the assessee is deemed to have concealed particulars of his income or furnished inaccurate particulars of such income. In the instant case, in the original

return of income filed on 31/10/2007, (prior to the date of such) the said income/- of Rs.28,30,000/- was not declared. There is no dispute this factual finding. The decisions relied upon by the assessee have already been discussed and found to be not related to the Explanation 5A below the section 271(1)(c) of the Act, which has been invoked by the Ld. Assessing Officer. Since, clause (a) along with clause (ii) of Explanation 5A is attracted, in the instant case, the assessee is liable for penalty under section 271(1)(c) of the Act. Accordingly, in view of the deeming provisions of Explanation 5A to section 271(1)(c) of the Act, we hold the assessee liable for penalty under section 271(1)(c) of the Act for concealment of particulars of income or inaccurate particulars filed. The ground of the appeal of the assessee is accordingly dismissed.

**ITA No.2558/Del/2012 for AY:2008-09 (Revenue)**

**10.** Now, we take up appeal of the Revenue having ITA No. 2558/Del/2012 for assessment year 2008-09, wherein following grounds have been raised:-

- a) *Whether the order of CIT(A) is completely contrary to the facts and provisions of Explanation 5 A to section 271(1)(c) of the I.T.Act particularly ignoring the following provisions, "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 particular of such income.*
- b) *Whether on facts and circumstances the learned CIT(A) erred in deleting the penalty of Rs. 95,65,435/- levied u/s*

*271(1)(c) read with Explanation 5A of the I.T Act by ignoring the fact that explanation 5A is a deeming provision wherein penalty is to be levied if the assessee fulfils the condition mentioned in sub clause (a) or (b) of the Explanation 5A and that in the instant case, the assessee failed to incorporate the said amount in its return of income even after the due date had been expired thereby making itself liable for penalty in sub clause of explanation 5A of sec 271(1)(c) of the I.T.Act ?*

- c) *Whether on facts and circumstances of !d.CIT(A) erred in deleting the penalty of Rs.37,53,835/- levied u/s 271(1)(c) read with explanation 5A of the I.T.Act by ignoring the fact that the assessee failed to explain the notings found in seized materials and did not produce any documentary evidence or reconciliation with books of accounts ?*
- d) *Whether the order of CIT(A) contains perverse findings completely ignoring the facts and the provisions of Explanation 5A of 271(1)(c) of the IT Act, Some such findings, given by CIT(A), are as under:*
- (i) *“In such circumstances I feel that any levy of penalty u/s 271(1)(c) on then \ ostensible concealed income is impossible. The assessee cannot be expected to do the impossible.” (Para 4.3 of the order)*
- (ii) *“The assessee had covered himself with the immunity conferred u/s 271(1)(c) on the date of search itself.” (Para 4.9 of the order)*
- (iii) *“In such facts and circumstances I am afraid penalty cannot be levied u/s 271(1)(c) as there is no concealment or filing of inaccurate particulars. There is only a difference of opinion on the facts. It is not a case whereby the Ldi AO has made deep investigation on the documents on the basis of which he encountered or found out concealment or filing of inaccurate particulars.” (Para 4.5 of the order)*

**11.** The facts of the instant case have already been reproduced in earlier Paras. The facts, qua the issue in dispute are that search in the case of the assessee was conducted on 29/04/2008 and the regular return of income for the year under consideration was filed by the assessee on 30/09/2008 declaring total income of Rs.25,76,35,590/-. In response to notice issued under section 153A, again the assessee filed return of income declaring total income of Rs.27,69,01,087/- thereby increasing the income of Rs.1,92,65,497/- as compared to regular return of income filed.

**11.1** In the assessment order the Assessing Officer has reproduced the detail of undisclosed income of Rs.27 crore surrendered in the course of statement recorded under section 132(4) as under:

<i>Unexplained cash and jewellery:</i>	<i>Rs.5.00 crores</i>
<i>Unexplained cash investment as per agreement to sell:</i>	<i>Rs.8.00 crores</i>
<i>Unexplained income as per loose papers seized</i>	<i>Rs.4.00 crores</i>
<i>Unaccounted income in respect of Spazedge Project</i>	<i>Rs.10.00 crores</i>
<i>Total : Rs. 27.00 crores</i>	

**11.2** The Assessing Officer has also reproduced the detail of the undisclosed income of Rs.26,71,70,000/- offered to tax for the year under consideration (Rs.28,30,000/- in assessment year 2007-08) as under:

- |    |   |                         |
|----|---|-------------------------|
| 1. | <i>Unexplained cash investment as per agreement to sell vis-à-vis M/s Kay Kay Designer T Owners Pvt. Ltd.</i> | <i>Rs.8,00,00,000/-</i> |
| 2. | <i>Income lying as unaccounted cash (asset):</i>  | <i>Rs.5,22,50,000/-</i> |

*[this is out of undisclosed incomes, documents relevant to which were found during the search to the extent of income of Rs.4,66,86,971/- only]*

3.	<i>Undisclosed income utilized for undisclosed expenditure, as traced out from the seized documents</i>	Rs.1,92,65,493/-
4.	<i>Undisclosed income in respect of Spazedge project by adopting %</i>	Rs.11,56,54,507/-
	<i>Total</i>	Rs.26,71,70,000/-

**11.3** In the assessment order, the Ld. Assessing Officer accepted the undisclosed income offered of Rs.5,22,50,000/- against unaccounted cash, Rs.8,00,00,000/- against unexplained cash investment as per the agreement to sell vis-à-vis M/s Kay Kay designer Tower Private Limited, Rs.11,56,54,507/- against undisclosed income in respect of Spazedge project.

**11.4** In addition to the above the Assessing Officer made following additions to the income returned under section 153A of the Act:

- 1. Payment of the commission of Rs.51,398/-not reflected in books of accounts (para 10.6.2 of the assessment order).*
- 2. Additional amount of Rs.7,02,437/- paid for which there is no corresponding entry in the books of accounts (Para10.7.2 of the assessment order)*
- 3. Rs. 30,00,000/- paid has not been recorded in the books of accounts (para 10.8.2 of the assessment order).*

**11.5** The Assessing Officer initiated penalty under section 271(1)(c) of the Act read with Explanation 5A in respect of the above additions. The Ld. Assessing Officer further reduced the

income of the assessee amount of Rs.15,54,000/-which, he shifted from current assessment year to assessment year 2006-07.

**11.6** We also note that the Assessing Officer initiated penalty under section 271(1)(c) of the Act in respect of the following amount, though no separate addition was made in the assessment order under section 153A of the Act:

1. *Petty amount of expenditure of Rs.9,73,300/-considered as part of offer of Rs.1,92,65,493/-as income from other sources.*
2. *Brokerage of Rs.7,58,205/-paid in cash considered as paid out of income of Rs.1,92,65,493/- offered as income from other sources.*
3. *Cash of Rs. 3 lakh considered as part of offer of Rs.1,92,65,493/-*
4. *Expenditure aggregating Rs.5,35,340/-considered as part of offer of Rs.1,92,65,493/-*
5. *Cash expenditure Rs.93,000/-considered as part of offer of Rs.1,92,65,493/-*
6. *Amount of Rs. 5 lakh considered as part of offer of Rs.1,92,65,493/-*
7. *Expenses aggregating to Rs.8.11 Lacs considered as part of offer of Rs.1,92,65,493/-*
8. *Expenses aggregating to Rs.40,78,500/-considered as part of offer of Rs.1,92,65,493*

9. *Cash payment of Rs.2,04,000/-considered as part of offer with Rs.1,92,65,493/-*
10. *Cash expenditure of Rs.13,12,627/-considered as part of offer of Rs.1,92,65,493/-*

**11.7** In para 15 of the assessment order, the Assessing Officer also noted of issue of separate notice of penalty under section 271AAA in respect of the disclosure of Rs.24,79,04,507/- containing amount discussed in paragraph 8 ( unaccounted cash of Rs. 5,22,50,000), paragraph 9 (unexplained investment purchase of the property amounting to Rs.8 crore), paragraph 10 (undisclosed cash of Rs.5.225 crores) , paragraph 12 ( undisclosed income in respect of the project amounting to Rs.11,56,54,507/-).

**11.8** The Assessing Officer issued show cause notice for levy of penalty under section 271(1)(c) of the Act in respect of the total amount of Rs.1,33,19,328/- which consisted of Rs.37,53,853/- and Rs.95,65,435/-. The first amount of Rs.37,53,853/- which comprised of Rs.30,00,000/-; Rs.7,02,437/- and Rs.51,398.20 as mentioned in para 11.4 of this order. The second amount of Rs.95,65,435/-comprised of the amounts as mentioned in para 11.6 of this order for which were held as out of books of accounts, no separate addition was made as same were considered against offer of income from other sources of Rs.1,92,65,493/-.

**11.9** Before the Assessing Officer, the assessee contended that Explanation 5A below the section 271(1)(c) is not applicable in the instant assessment year as the search had taken place on

29/04/2008 and on said date due date of filing of return of income was not expired. In such case, penalty cannot be levied invoking the deeming provision of Explanation 5A below section 271(1)(c) of the Act.

**11.10** The Ld. Assessing Officer did not accept the contention of the assessee and levied the penalty on the amount of Rs.95,65,493/- observing as under:

*“From the submissions made by the assessee it is seen that the assessee has accepted to the transactions or contents in the documents seized to be out of books and has therefore agreed to surrender . Secondly while explaining all the documents mentioned above has stated that it has incorporated the income arising out of the above documents as income from other sources from which it is all the more clear that the assessee has accepted to earning the same from undisclosed sources. That the assessing officer has accepted in the disclosure of the assessee does not immune the assessee from penalty proceedings since element of concealment exists in the disclosure made by the assessee simply due to the fact that but for the search, the assessee would have not disclosed this income. Since the assessee itself while explaining the documents seized as well as the disclosure made has agreed to out of books transactions , nothing more is required to prove the concealment involved with respect to Rs 95,65,493.”*

**11.11** Thus, according to the Assessing Officer the assessee failed to include the undisclosed income of Rs.95,65,493/- in the return of income filed under section 139(1) and therefore, falls under the ambit of sub-clause (b) of Explanation 5A of section 271(1)(c) of the Act. The Assessing Officer is of the view that mere acceptance of the disclosure of the assessee did not automatically give immunity from penalty proceeding since element of concealment exist in the disclosure made by the assessee because

if there had been no search, the assessee would not have disclosed the above amount.

**11.12** In respect of the amount of Rs.37,53,835/-the Assessing Officer levied the penalty observing as under:

*“The above contention cannot be accepted since if the assessee considered addition made by the A.O. of Rs 37,53,835/- as covered up by Rs 55,63,029/- which is a balancing figure not covered up by any discrepancies then firstly the assessee should have objected to it during the course of assessment proceedings and should have proved how Rs 55.63,029/- is only a balancing figure which was surrendered by the assessee in order to complete the lumpsum declaration of Rs 27Cr.The assessee has failed to do so in assessment as well as in penalty proceedings, secondly, the total disclosure made by the assessee of Rs 27 Cr is made by the assessee voluntarily after considering the documents, cash found and jewellery. Rather the assessee has itself in submission as per para No 2.3.3, stated that it had evaluated all the papers seized and then enhances its income while filing return u/s 153A of the I.T. Act. So there is no question of any amount being merely a balancing amount which covers no discrepancies, to that extent assessee’s submission is self contradictory.”*

**11.13** In this manner, the Ld. Assessing Officer levied penalty amounting to Rs.45,27,240/- at the rate of 100% of the amount of tax sought to be evaded.

**11.14** The Ld. CIT(A), however, deleted the penalty on the ground that determination of the penalty levied has to be made on the basis of the return filed under section 153A of the Act and not on the basis of the return filed under section 139(1) of the Act. The relevant finding of the Ld. CIT(A) is reproduced as under:

*“4.3. I have gone through the facts of the case and the submissions of the assessee. It is an admitted fact that the search and seizure operation was conducted on 29.04.2008. The assessee*

*obtained copies of the seized materials on 23.02.2010, as intimated by the AO, Central Circle-11, Faridabad vide letter dated 20.03.2012 when requested for the precise date. In other words, the assessee filed the regular return of income u/s 139(1) prior to obtaining copies of the seized records. In such circumstances I feel that any levy of penalty u/s 271(1) (c) on the ostensible concealed income is impossible. The assessee cannot be expected to do the impossible.*

*4.4 Be that as it may I also find that the assessment order has been framed on the basis of the return filed u/s 153A. As such the return filed u/s 139(1) is not the basis on which the assessment order has been finalized. In such circumstances the return filed u/s 153A should therefore be taken as the valid return, while the return u/s 139(1) is at best only for the record.*

*4.5 Thus any determination whether penalty is to be levied u/s 271(1)(c) is to be seen on the basis of the return filed u/s 153 A. The said return reflects the correct income which had been declared and surrendered by the assessee during the search. In fact the income declared in the return is more than the surrendered amount of Rs. 27 crores in the statement recorded u/s 132(4). In such facts and circumstances I am afraid penalty cannot be levied u/s 271(1)(c) as there is no concealment or filing of inaccurate particulars. There is only a difference of opinion on the facts. It is not a case whereby the Ld. AO has made deep investigation on the documents on the basis of which he encountered or found out concealment or filing of inaccurate particulars.*

*4.6.....*

*4.7.....*

*4.8.....*

*4.9 Lastly I may also stated that the assessee had covered himself with the immunity covered u/s 271(1)(c) on the date of search itself. The return of income u/s 139(1) was filed later without availing the copies of the seized documents and in the return filed in response to section 153A, the assessee amended any errors it may have inadvertently missed out earlier by declaring an income higher than the surrendered amount.”*

**11.15** Aggrieved with the finding of the Ld. CIT(A) of deleting the penalty, the Revenue is in appeal before the Tribunal raising the grounds as reproduced above.

**12.** Before us, the Ld. counsel of the assessee also filed application under rule 27 of the ITAT Rules, 1963 submitting that in the instant case penalty could have been levied under section 271AAA of the Act and not under section 271(1)(c) as only done by the Assessing Officer and, thus, order of the Ld. CIT(A) cancelling the penalty imposed under section 271(1)(c) might be sustained albeit on the ground of legal submission that in the specified year the penalty under section 271AAA could be levied.

**13.** The Ld. DR opposed admission of the application under Rule 27 of the ITAT Rules on the ground that under Rule 27, the assessee may support the order appeal against on any of the grounds decided against him. According to him, in the present case, no ground is decided against the assessee and therefore assessee is not entitled to file application under Rule 27 of the ITAT Rules.

**14.** We have heard the submission of the both the parties on the issue of application under Rule 27 of the ITAT rules. The rule 27 of the ITAT Rules read as under:

***“Respondent may support order on grounds decided against him.***

***27. The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him.”***

**15.** The present appeal has been filed by the Revenue and thus, the assessee is respondent. In view of the plain reading of the rule, it is evident that respondent may file application supporting the order on any of the ground decided against him.

But in the present case the Ld. CIT(A) has decided all the grounds in favour of the assessee, thus, we do not find any reason for entertaining the application of the assessee under rule 27 of the ITAT Rules and accordingly, said application was rejected and parties were directed to argue the appeal of the Revenue.

**16.** The Ld. DR supporting the grounds raised that Ld. CIT(A) was not justified in cancelling the penalty under section 271(1)(c) of the Act invoking Explanation 5A. According to him, penalty under 271(1)(c) of the Act could be levied in case of additions made other than the undisclosed income surrendered during the course of statement under section 132(4) of the Act. The Ld. AR submitted that in view of the deeming provisions of Explanation 5A, the assessee is liable for the penalty even though the said income has been included in the return filed in response to notice under section 153A of the Act.

**17.** The Ld. counsel of the assessee, on the other hand, opposed the arguments of the Ld. DR and submitted that penalty under section 271(1)(c) of the Act invoking Explanation 5A cannot be invoked where the due date of filing of the return of income for such previous year has not expired. He also submitted that in the specific previous year only penalty under section 271AAA could be levied, and therefore, the Assessing Officer was not justified in levying penalty under section 271(1)(c) of the Act. According to him, the Ld. CIT(A) was justified in deleting the penalty.

**18.** We have heard the rival submissions and perused the relevant material on record. The undisputed facts in the case are that search was conducted on 29/04/2008 and the due date for

filing return of income for the assessment year 2008-09 was not expired before the date of the search.

**19.** In the present appeal, the Assessing Officer has invoked Explanation 5A for levy of penalty under section 271(1)(c) of the Act.

**20.** From the plain reading of the Explanation 5A, it is evident that for invoking the clause (i) or (ii) in respect of any previous year, which has ended before the date of the search either of condition as under should be satisfied:

- (a) the return of income for such previous year has been furnished before the said date but such income has not been declared in or
- (b) the due date for filing return of income for such previous year has expired but the assessee has not filed return of income.

**21.** We note that in the instant case the due date of filing of the return of income for the previous year corresponding to the year under consideration had not expired on the date of the search i.e. condition (b) and therefore the Explanation 5A could not be attracted for holding the assessee liable for levy of penalty under section 271(1)(c) of the Act.

**22.** The other argument of the Ld. counsel of the assessee is that the penalty in case of a specified year could be levied under section 271AAA of the Act only. On perusal of the relevant provisions we find that penalty under section 271AAA of the Act can be levied in respect of undisclosed income in a specified

previous year if any of the following 3 conditions contained in section 271AAA(2) are not fulfilled:

**“Penalty where search has been initiated.**

**271AAA. (1)** .....

(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.”

**23.** The specified previous year has been defined under the section as under:

*“Explanation.—For the purposes of this section,—*

(a) .....

(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.”

**24.** Since the previous year corresponding to the present assessment year ended before the date of such i.e. 31.03.2008 and due date of filing of the return of income had not expired before the date of the search, the previous year corresponding to present assessment year under consideration is a specified previous year, and thus penalty under section 271AAA could be levied. The penalty under section 271AAA of the Act could be levied in specified previous year in respect of the undisclosed

income unless **admitted in a statement under section 132(4) and specified the manner in which income is derived and the manner has to be substantiated and tax has paid on the undisclosed income.** In case any of the 3 conditions are not fulfilled, the penalty under section 271AAA would be levied.

**25.** But, if the Assessing Officer has made any addition other than the undisclosed income stated under section 132(4) and find the assessee liable for concealment of particular of income or furnishing inaccurate particular of income, he may initiate penalty under section 271(1)(c) of the Act in respect of those additions. The Assessing Officer may levy penalty invoking the main provisions of the section 271(1)(c) of the Act and Explanation other than Explanation 5 and 5A, if applicable, but cannot take shelter of deeming provisions of Explanation 5/5A for levy of penalty under section 271(1)(c) of the Act. Because, the deeming Explanation 5A cannot be invoked for a specified previous year, which has been specifically barred by way of clause (a) or (b) of the Explanation 5A.

**26.** In the instant case before us, the Assessing Officer has levied penalty under section 271(1)(c) of the Act only invoking the Explanation 5A below section 271(1)(c) of the Act and not held the assessee liable for concealment of particular of income or furnishing of inaccurate particular of income on the basis of Explanation other than Explanation 5A.

**27.** In view of the aforesaid discussion, the penalty levied by the Assessing Officer under section 271(1)(c) of the Act is cancelled and the action of the Ld. CIT(A) in deleting the penalty

is upheld. The grounds of the appeal of the Revenue are accordingly dismissed.

**28.** In the result, the appeal filed by the Revenue as well as the application filed under Rule 27 of the ITAT Rules by the assessee are dismissed.

**Order is pronounced in the open court on 20<sup>th</sup> November, 2018.**

**Sd/-**  
**KULDIP SINGH**  
**JUDICIAL MEMBER**

**Sd/-**  
**O.P. KANT**  
**ACCOUNTANT MEMBER**

Dated: 20<sup>th</sup> November, 2018.

RK/-(D.T.D.)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi