

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“ A ” BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

Sl. No(s)	ITA No(s)	Assessment Year(s)	Appeal(s) by	
			Appellants vs. Respondent	Appellant Respondent
1.	1266/Ahd/2019	2011-12	Smt. Lopa Pankaj Dave 91-92, Atlanta 209, Backbay Reclamation Nariman Point Mumbai – 400 021 PAN: AACPD 0399 P	The DCIT Cent.Cir.1, Baroda
2.	1267/Ahd/2019	2011-12	Late Manubhai Bhailal Patel Through the Legal heir Smt.Prabhaben M.Patel -address same as above- PAN: AADPP 7766 K	-do Revenue
3.	1268/Ahd/2019	2011-12	Late Shri Ramanbhai Bhailal Patel Through L/H. Smt.Lopa Pankaj Dave -address same as above- PAN: AADPP 7762 P	-do Revenue
4.	1269/Ahd/2019	2011-12	Smt. Prabhaben M.Patel -address same as above- PAN: AAFPP 3707 Q	-do Revenue

Assessees by :	Shri M.K. Patel, AR
Revenue by :	Shri Deelip Kumar, Sr.DR

सुनवाई की तारीख/ Date of Hearing	11/12/2019
घोषणा की तारीख/ Date of Pronouncement	18 /12/2019

आदेश / O R D E R

PER BENCH:

The captioned appeals have been filed at the instance of the different Assessees against the separate orders of the Commissioner of



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Income Tax (Appeals)–12, Ahmedabad [CIT(A) in short] vide appeal nos.CIT(A)-12/7, 8, 9 and 10 /CC-1/2018-19 all dated 24/06/2019 arising in the assessment order passed under s.153A r.w.s.143(3) of the Income Tax Act, 1961(hereinafter referred to as "the Act") dated 30/01/2015 and penalty order passed u/s.271(1)(c) of the Act dated 27/03/2018 relevant to Assessment Year (AY) 2011-12.

Since all the appeals relate to the same issue involving identical facts and circumstances but to different assessees, hence the same are heard analogously and are being disposed of by way of this common order.

First we take up the appeal in the case of Smt. Lopa Pankaj Dave in ITA No. 1266/AHD/2019 for AY 2011-12.

The assessee has raised the following grounds of appeal:-

- (1) That on facts and in law the learned Commissioner of Income tax (Appeals) has grievously erred in confirming the levy of penalty u/s.271(1)(c) r.w. Explanation 5A of the Act of Rs.2,06,00,000/-.*
- (2) That on facts, in law, and on evidence on record, it ought to have been held that there is neither concealment of income nor furnishing of inaccurate particulars of income within the meaning of section 271(1)(c) of the Act and Explanation 5A is not applicable to the appellant.*
- (3) The appellant craves leave to add, alter, amend any ground of appeal.*

The solitary grievance of the assessee is that the learned CIT(A) erred in confirming the order of the AO by sustaining the penalty of ₹ 2,06,00,000/- as per the explanation 5A of section 271(1)(c) of the Act.



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2. The facts in brief are that the assessee in the present case is an individual and filed her return of income in response to the notice issued under section 153A of the Act declaring total income at Rs. 14,55,57,930.00 inclusive of the additional income of Rs. 10,00,00,000.00 disclosed during the search on account of Long Term Capital Gain on the sale of the land. There was a search and seizure operation under section 132 of the Act in the “Dhanjimama Group” of cases dated 3rd July 2012. The assessee being the part of the group was also covered under such search and seizure operation carried out dated 3rd July 2012.

2.1. Subsequently, the AO initiated the penalty proceedings under explanation 5A to section 271(1)(c) read with section 274 of the Act on account of the additional income offered in the return filed as discussed above in the assessment framed under section 153A/143(3) of the Act.

2.2. The assessee in response to such notice vide letter dated 20-03-2008 submitted that there was no incriminating material found during the search proceedings qua the additional income of Rs. 10,00,00,000.00 (10 crores) offered to tax. As such, the entire addition was made on account of the difference in rate adopted by the assessee vis-a-vis adopted by the Revenue while determining the value as on 1st April 1981 i.e. cost of acquisition. The assessee has taken the rate at Rs. 84.80 per square feet for



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the acquisition of the land whereas the AO has adopted the rate at Rs. 8 per square feet for the acquisition of such land which was subsequently determined by the Id. CIT-A as Rs. 15 per square feet. Thus the addition was made on account of the difference in the rate and not on the basis of any incriminating document found during the course of such. Accordingly, the assessee claimed that the additional income offered to tax cannot be said as undisclosed income and consequently the provisions of explanation section 5A to section 271(1)(c) of the Act cannot be applied in the case on hand.

2.3. However, the AO disagreed with the submission of the assessee by observing that the additional income was offered to tax on account of search proceedings under section 132 of the Act. In view of the above, the AO levied penalty of Rs. 2,06,00,000/- being 100% of the amount of tax sought to be evaded under the provisions of section 271(1)© read with explanation 5A of the Act.

2.4. Aggrieved assessee preferred an appeal to the learned CIT(A) who confirmed the order of the AO by observing that the additional income declared in the return filed in response to the notice issued under section 153A of the Act and on account of search initiated under section 132 of the Act. Accordingly the learned CIT (A) confirmed the order of the AO.



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Being aggrieved by the order of the learned CIT (A) the assessee is in appeal before us.

3. The Id. AR before us submitted that the additional income was offered to tax voluntarily by the assessee which is not based on any seized materials found during the search having some incriminating values. Similarly, there was also not any reference to the incriminating document found during the course of search in the order of the respective authorities.

4. On the contrary, the Id. DR submitted that the additional income was offered to tax by the assessee as a result of search proceeding carried out under section 132 of the Act. The Id. DR vehemently supported the order of the Authorities Below.

5. We have heard the rival contentions of both the parties and perused the materials available on record. The penalty in the case on hand was levied under explanation 5A of section 271(1)(c) of the Act which reads as under:

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

(i) any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income for any previous year; or

(ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other



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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.]”*

5.1. A plain reading of the provisions reveals that the penalty shall be levied if the assessee in the course of such initiated under section 132 of the Act was found to be the owner of any money, bullion, jewellery or other valuable article or there is some income based on the entry in the books of accounts/documents. Then, it shall be presumed that the assessee has either concealed the particulars of income or furnished inaccurate particulars of income. However in the case on hand, we note that there is no such allegation made by the authorities below as discussed above.

5.2. From the preceding discussion, we note that the assessee has already disclosed impugned long term capital gain in the return filed under section 139 of the Act. But the addition in the assessment framed under section 153A r.w.s. 143(3) of the Act was made on account of the difference in the rate adopted by the assessee vis-a-vis adopted by the Revenue as on 1st



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April 1981. The assessee has taken the rate at Rs. 84.80 per square feet for the acquisition of the land whereas the AO has adopted the rate at Rs. 15 per square feet for the acquisition of such land as on 1-4-1981. Thus the addition was made on account of the difference in the rate and not on the basis of any incriminating document found during the course of search.

5.3. As such, the additional income in the return filed under section 153A of the Act was voluntarily and without having found any income/documents by the Revenue in the manner provided under explanation 5A to section 271(1)(c) of the Act. As such, there was not found any undisclosed income by the Revenue in the course of such conducted under section 132 of the Act. Thus, it is inferred that such addition was not based on the document found during the course of search.

5.4. Now the question arises, whether the assessee can be visited with the penalty with respect to the income disclosed by him in such proceedings voluntarily and without finding any incriminating document during the course of search. To our mind the answer stands in favour of the assessee. In holding so we draw support and guidance from the order of ITAT in the case of Ajay Traders Vs. DCIT reported in 81 taxmann.com 463, wherein it was held as under:

“The assessee disclosed an additional income on account of unaccounted sales. Based on said disclosures, the Assessing Officer imposed penalty under section 271(1)(c) by invoking Explanation 5A to said section.

Held that it was undisputed fact that during the course of search, no incriminating documents were found and seized. The assessee surrendered the additional income



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under section 132(4) at Rs.15 lacs and requested not to impose penalty under section 271(1)(c). The Assessing Officer imposed the penalty by invoking the Explanation 5A to section 271(1)(c). For imposing the penalty under Explanation 5A on the basis of statement recorded during the course of search, it is necessary to be found incriminating documents and is to be considered at the time of assessment framed under section 153A. As no incriminating documents were found during the course of search, therefore, Explanation 5A to section 271(1)(c) is not applicable. Accordingly, the penalty was to be deleted.”

5.5. From the above order, it is clear that there cannot be any penalty under explanation 5A to section 271(1)(c) of the Act until and unless it supported on the basis of incriminating document.

5.6. At the time of the hearing, a query was raised to the Ld. DR whether the income disclosed by the assessee in pursuance to the search was based on the incriminating document, but he failed to bring any material on record. Therefore, in the absence of any documentary evidence, we infer that the additional income offered to tax cannot be subject to the penalty under explanation 5A to section 271(1)(c) of the Act.

6. In the result, assessee's appeal in ITA No.1266/Ahd/2019 for AY 2011-12 is allowed.

Coming to the other appeals filed by the assessee bearing ITA Nos. 1267 to 1269/AHD/2019 for the A.Y. 2011-12



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7. At the outset, we note that in the identical facts and circumstances, we have deleted the penalty imposed under section 271(1)(c) of the Act vide Paragraph Nos.5.1. to 5.6 of this order. Respectfully, following the same, we delete the penalty imposed by the AO which was subsequently confirmed by the Ld. CIT (A). Hence, the ground of appeal(s) of the assessee(s) is allowed.

8. In the result, these three appeals of the assesseees are also allowed.

9. In the combined result, all the four appeals of all the assesseees are allowed.

This Order pronounced in Open Court on	18 /12/2019
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**Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated 18/12/2019

टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS



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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-12, Ahmedabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
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