* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON : 09.07.2012
DECIDED ON : 23.08.2012

\+ ITA Nos.995/2010 & 997/2010

COMISSIONER OF INCOME TAX ….. APPELLANT

Through : Mr. N.P. Sahni, Senior Standing Counsel

Versus

SMT. MEERA DEVI …… RESPONDENT

Through : Mr. S.Krishnan, Advocate

ITA Nos.1217/2010, 1219/2010, 1220/2010,
1221/2010, 1231/2010, 1233/2010

KIRAN DEVI ……. APPELLANT

Through : Mr. S.Krishnan, Advocate

Versus

COMMISSIONER OF INCOME TAX ….. RESPONDENT

Through : Mr. Sanjeev Sabharwal, Senior Standing Counsel
with Mr. Puneet Gupta, Senior Standing Counsel

CORAM:

MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

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1. This judgment will dispose of 8 appeals which involve appreciation of common questions of fact and similar questions of law.

2. The question of law framed in respect of ITA 1217/2010, 1219/2010, 1221/2010, 1231/2010 and 1233/2010 reads as follows :

> *"Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal can uphold the penalty by invoking the main provision of Section 271(1)(c) of the Act when the charge in the initiation of proceedings and levy of penalty was under Explanation 5 of Section 271(1)(c) of the Act?"*

The question of law framed in ITA Nos. 995 and 997/2010 was as follows:

> *"Whether the ITAT was justified in not going into the merits of the case?"*

3. The first batch of appeals i.e. ITAT 1217/2010, 1219/2010, 1221/2010, 1231/2010 and 1233/2010 are hereby referred to as "*Kiran Devi's case*" and the second batch of appeals i.e. ITA 995 & 997/2010 are hereby referred as "*Meera Devi's case*". In the latter i.e. *Meera Devi's case*, the Commissioner of Income Tax is in appeal; and in *Kiran Devi's case* the Assessee is in appeal.

4. The brief facts necessary for disposal of the cases before this Court are that on 13.01.2004 a search operation under Section 132 of the Income Tax Act was conducted in the residential premises of one K.N. Mehrotra, an employee of M/s Prabhat Zarda Group. During the course of search, several loose papers, bank statements, documents etc. were found and seized. The said individual K.N. Mehrotra submitted that those papers, documents etc pertained to Smt. Meera Devi and also to Kiran Devi. These and several other documents were included in Annexure 8. Subsequently both Meera Devi and Kiran Devi were asked to explain the source of deposits by summons dated 03.03.2006, by AC-IT (Central Circle XIV). Initially no one appeared on behalf of the two assessees. Later the AO issued notice under Section 153 C to both the assessees, asking them to file return of income for the years under consideration. In response to this, the assessees filed their return on 28.03.2006. These returns were later assessed and explanations sought from the individuals.

In *Meera Devi's case*, the additional income disclosed in response to the noti under Section 153 C was ₹3,52,200/- (1999-2000); ₹5,30,471/- (2000-2001); ₹23,77,110/- (2001-2002); ₹25,39,730/- (2002-2003); and ₹19,47,220/- (2003-2004). Similarly in the case of Kiran Devi after summons were issued a return was filed showing considerable higher income on 28.03.2006. In the case of Kiran Devi the additional income disclosed under Section 153 C was ₹.3,57,410/- (1999-2000), ₹.37,12,580/- (2000-2001); ₹.55,31,900/- (2001-2002), ₹.8,76,740/- (2002-2003); ₹.18,67,320/- (2003-2004). For the last year the Assessing Officer found that the income liable to be taxed was ₹.20,05,584/- on account of an addition of ₹.7,02,964/- made under Section 68 of the Income Tax Act for unproved cash credit.

5. The Assessing Officer had also initiated penalty proceedings under Section 271 (1) (c) of the Income Tax Act, 1961 for concealment of income. After completion of assessment the penalty orders were made. The assessees appealed to the Commissioner (Appeals). The appeals of Meeri Devi were dismissed on 28.11.2007. Kiran Devi's appeals were also dismissed on 14.12.2007.

6. Being aggrieved by the orders the said assessees approached the Tribunal. Apparently in the case of Meeri Devi three appeals were dismissed by the CIT (Appeals).

7. In the meanwhile some other individuals i.e. Ashok Kumar and Shravan Kumar were issued with similar notices and called upon to furnish returns. The assessments were completed on the basis of the revised returns filed by them which did not disclose any additions. In other cases, however, the orders of the Assessing Officer and Commissioner CIT (Appeals) concurrently imposing and affirming penalty were taken in appeal to the ITAT which on 14.03.2008 allowed them holding as follows:

"The language of provisions of Explanation 5 to Section 271(1)(c) plain and clear. As per the Explanation 5 as stood at the relevant time, if at the time of search assets which are not recorded in the books of accounts are found, the assessee is liable to penalty u/s 271 (c) for concealment even if he declares the full value of those assets as his income in the return filed after the search. In the instant cases, the assessees were not found to be the owner of any money, bullion, jewellery or other valuable articles or things during the course of search which was not disclosed in the returns of income or books of account maintained by them. Since this very condition that the assets were not found in the possession of assessees is not satisfied, the provision of Explanation 5 could not be resorted to for levy of penalty u/s 271 (1)(c) of the Act. The language of Explanation 5 to Section 271(1)(c) being plain and simple, in our considered view, the AO was not justified in taking recourse to the Explanation for imposition of penalty. Moreover, the assessees being salaried persons were not required to maintain the books of account in respect of salary income. The salary income has suffered tax at source. Likewise the income from house property is also disclosed to the department. Penalty u/s 271(1)(c) can be imposed for furnishing of inaccurate particulars of income or if the assessee fails to offer an explanation that is not substantiated and assessee fails to prove that such explanation was bonafide. The AO has wrongly invoked the provisions of Explanation 5 to impose penalty u/s 271(1)(c). Since the provisions of Explanation 5 are not attracted in the case of both the assessee, penalties imposed by the AO and confirmed by the Ld. CIT(A) deserves to be deleted in all the appeals. We order accordingly."

8. In these circumstances, when Meera Devi's appeals (ITA 564-568/Del/2008) were taken up for hearing, the Tribunal on the basis of the above reasoning (in its previous order dated 14.03.2008), allowed the appeals. Three appeals were filed by the Revenue, however, they were not considered by this Court on the ground that the tax effect was less than the prescribed amount. It is in these circumstances the two surviving appeals of Meera Devi, are being considered. In the case of Kiran Devi by a subsequent order dated 07.08.2009, another Bench of the ITAT dismissed the assessee's appeal.

9. Counsel for the assessee in both cases i.e. Kiran Devi and Meera Devi urged that the Tribunal fell into an error in not taking into consideration the fact that penalty proceedings were completely unwarranted in these cases. It was

submitted that having regard to the 5th Explanation to Section 271 (1)(c) of t Income Tax Act and the fact that the assessees had promptly responded and filed the returns after receipt of notices consequent upon the search, it could not be said that there was any intention on their part to conceal the income or that they had furnished false or inaccurate particulars in their original returns filed under Section 139 of the Act. Counsel highlighted the fact that the principle of consistency and judicial discipline demanded that Kiran Devi's appeals ought to have been allowed having regard to the order of the Tribunal in ITA 272,273 & 318/Del/2007 and connected cases, decided on 14.03.2008. That interpretation was by a co-ordinate Bench of the Tribunal. In case another Bench felt that interpretation was incorrect judicial discipline demanded, that the latter Bench should have referred the appeals for consideration by a larger or special Bench. In support of this contention, learned counsel relied upon the decision reported as *Union of India Vs. Paras Laminates Pvt. Ltd.* (1990) 186 ITR 722.

10. It was urged by virtue of several decisions of the various High Courts and the Supreme Court, it is an established rule of law that search proceedings and returns filed pursuant to them to be viewed strictly in accordance with the special provisions connected with it. It was submitted that the presumption which the Revenue can resort under Section 132(4A) and Section 132 (5) is discretionary and also limited and cannot be mechanically drawn but has to be supported by the facts and reasons. In this case, counsel relied upon the judgment reported as *Commissioner of Income Tax Vs. Chhabra Emporium* (2003) 264 ITR 249 (Del) to say that during the course of search, statement of the assessee is recorded under Section 132(4) in respect of any cash, amount, stock or jewellery etc. that individual is entitled to claim immunity by virtue of fifth Explanation to Section 271(1)(c) of the Act. The decision in *P.R. Mitrani Vs. Commissioner of Income Tax* (2006) 287 ITR 209 (SC) was relied upon for the proposition that presumptions under the Income tax Act are to be narrowly

construed and cannot be resorted for purposes of framing regular assessment. was also emphasized - by relying upon the ruling in *CIT Vs. Anwar Ali* (1970) 76 ITR 696 and in *CIT Vs. Jalaram Oil Mills* (2002) 253 ITR 192, that the mere fact that explanation of an assessee, in assessment proceedings is rejected by itself is not a ground for levying penalty against him or her in connection with the assessment year.

11. Learned counsel on behalf of the Revenue argued that the approach of the Tribunal cannot be faulted, in dismissing *Kiran Devi's* appeals. It was contended that as opposed to the previous order of 14.03.2008 which mechanically accepted the appeals by the assessees, and was applied without looking into individual facts and circumstances, the subsequent order in *Kiran Devi's case* is an elaborate one. Counsel for the Revenue submitted that the decision in *Meera Devi's* on the other hand suffers from the same infirmity as it does not discuss the individual facts and why fifth Explanation (to Section 271 (1) (c)) was attracted.

12. It was highlighted by the counsel for the Revenue that the search in this case took place in a third party's premises. During the course of conduct of that search, documents pertaining to these two assessees, i.e. Kiran Devi and Meera Devi were found and seized. Despite notices, they did not respond. Ultimately the Assessing Officer had to issue notices under Section 153C. It was on receipt of these notices that both the assessees approached the Assessing Officer and filed returns for the block period. These returns showed substantial increase as compared with the original (regular) returns of income which had originally been filed under Section 139. In both cases there was no explanation why the income which was subsequently disclosed under Section 153C had been omitted. In these cases the income claimed was in respect of house property or income from other source or agricultural income. The Assessing Officer brought to tax the amounts and in one assessment year alone he added

certain amount under Section 68 in *Meera Devi's case*. These clearly reflect that but for the search and seizure and subsequent proceedings, the two assessees had no intention of disclosing the income and had in fact indulged in concealing their income and amounts which had to be taxed in their original returns. This omission clearly amounted to conduct that attracted Section 271(1)(c).

13. It was urged that the Tribunal fell into an error in *Meera Devi's case* in not showing that fifth Explanation by itself does not come to the aid of the assessee but the situations which carve out exceptions to a limited extent aid the assessee to disclose the income or source of income within the time limit specified. Learned counsel submitted in this regard that while issuing a show cause notice what was required by the Assessing Officer was to merely state as to how and what constituted inaccurate particulars. In all cases it is for the assessee to show that the limited exceptions spelt out in the fifth Explanation applied. In this case, clearly, the conduct of the assessees was such that the exception to the Explanation was not attracted.

14. It can be seen from the above discussion that the assessees in this case were asked to respond to notices issued by the income tax authorities, pursuant to documents recovered during search of one K.N. Mehrotra, an employee of M/s Prabhat Zarda Group. He stated that the documents, papers and bank account particulars pertained to the assessees. It is not in dispute that even though the assessees did not initially respond to the notice, yet, when they received notices under Section 153C, both filed returns. In these returns, they disclosed substantially higher income – adding other sources, i.e. rent from house property and income from other sources. The assessees argue that they cannot be penalized, since the fifth explanation to Section 271(c) – which applies to search cases- is attracted. They also argue that the Tribunal's previous order in the connected cases bound it and the doctrine of precedent as well as

judicial discipline constrained it to follow that previous order. In case it wish to re-visit the reasoning, the proper course should have been to refer the matter to a larger Bench.

15. There is some authority for the assessees' argument that a Bench of a Tribunal should not depart from an earlier view expressed by it, in the interests of consistency and stability in the administration of law. The Court is also aware that the Tribunal is a quasi-judicial authority, and is not a court of record. There are important exceptions to the doctrine of precedent, which reinforce the public interest in proper administration of justice. The first is that a decision is an authority for what it says, in the context of the facts. The second is that if the previous decision is *per incuriam*, the Tribunal, or court is not bound to consider it as a binding precedent.

16. In this context, it would be necessary to notice that Section 271 (1) (c) empowers the Assessing Officer to impose penalties wherever the assessee does not furnish accurate particulars, in the form of returns, such as concealing the sources of income, or withholding true and full information. This duty was spelt out by the Supreme Court as one cast on the assessee to disclose all facts, including every potential income. In *Calcutta Discount Company v Income Tax Officer* AIR 1961 SC 372 the Supreme Court underlined this duty in the following terms:

> *"a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material, and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his Possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise-the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain*

on a correct interpretation of the taxing enactment, the proper t leviable. Thus, when a question arises whether certain income received by an assessee is capital receipt, or revenue receipt, the assessing authority has to find out what primary facts have been proved, what other facts can be inferred from them, and taking all these together, to decide what the legal inference should be.

There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee."

If one keeps the above duty (on the part of each assessee) in perspective, the question of whether the particulars furnished were inaccurate, or there was a deliberate withholding of information has to be viewed in the context of facts of every case. In the present case, both assessees had not furnished the particulars or sources of income which they ultimately disclosed (after being called upon to do so, by the A.O., through notice under Section 153C) when they filed their returns. This clearly amounted to non-disclosure of relevant particulars. The facts subsequently disclosed by them were pursuant to the search in someone else's premises. Had the search not taken place, they would have kept quiet, thus allowing that part of the income to remain outside the fold of taxation. Clearly, therefore, their conduct in filing returns without full particulars fell within the mischief of Section 271 (1) (c). The question then is whether they were entitled to claim the benefit of the exception, carved out from the main Explanation to that provision.

17. This Court is conscious of the fact that taxing statutes have to be construed in their own terms, and there is no question of equity playing any role in that function. If that perspective is kept in mind, it is apparent that the Explanation 5 to Section 271 (1) (c) is premised on search of the assessee. The main part of the Explanation creates a legal fiction, (i.e. the assessee *shall, for the purposes of imposition of a penalty under cl. (c) of sub-s. (1) of this section, be deemed to have concealed the particulars of his income or furnished*

inaccurate particulars). The assessee can, in limited circumstances, avail t benefit of the exceptions ("unless") if

(1) for any previous year which has ended before the date of the search, (but for which the return of income for such year has not been furnished before that) or, where such return has been furnished before the said date, it has not been declared in it, he satisfies that such income is, or the transactions resulting in such income are recorded before the date of the search or

(2) for any previous year which is to end on or after the date of the search, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income unless he satisfies that on or before such date, in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the Chief Commissioner or Commissioner before the said date (i.e. the date of search) or

(3) The assessee, in the course of the search, makes a statement under sub-section (4) of Section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in sub-section(1) of Section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.

18. The structure of the provision, and the Explanation make it clear that the first part, i.e. concealment of income, or furnishing of inaccurate particulars,

results in the presumption, that it is liable for penalty. The onus is upon t assessee, whose premises are subjected to search, and from where the books of account pertaining to the undisclosed particulars are found, to show that he falls within the two exceptions, carved out of the Explanation. In other words, the Explanation enacts a presumption that where undisclosed particulars are found in the course of a search, in the form of assets, or from books of account, the two exceptions are attracted. These exceptions are qualified, and in turn are premised on disclosures at specified points of time.

19. It would be relevant, in this context, to notice the decision of the Bombay High Court in *Sheraton Apparels, Max vs. ACIT* (2003) 1 BOMLR 888 where the Explanation was considered and interpreted. The court emphasized the expression "books of account" and held that:

> *"31. The income-tax legislation has been using the term "book" or "books of account" right from its inception. But, these terms are defined in the Act for the first time by the Finance Act, 2001, with effect from June 1, 2001. Section 2(12A) defines the said terms to mean :*
>
> > *"(12A) 'books or books of account' includes ledgers, day-books, cash books, account books, and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electromagnetic data storage device."*
>
> *32. Then above definition appears to have been framed by the Legislature keeping in view the development of computer technology. If the newly inserted definition of books of account inserted in the Income-tax Act is examined in contrast to the definition given under Section 34 of the Evidence Act, it will be clear that the stringent requirements of Section 34 are not to be found in the said definition. Obviously, for the simple reason that the purpose of both the legislations are different. So far as the cases at hand are concerned, they relate to the assessment years 1984-85 to 1988-89 ; much prior to the period of introduction of the definition which was introduced for the first time under the Finance Act, 2001.*
>
> *33. In order to appreciate the submissions keeping in view the facts of the present cases, one has to concentrate not only on the bare term "books of account" but also on the words in whose company the said term is*

appearing. The extracted sub-clause appearing hereinbelow will have be understood properly and appropriate meaning will have to be assigned keeping in mind the backdrop in which the concept of "books of account" is referred to in Sub-clause (1) of Clause (b) of Explanation 5. The words used are :

> *"such income is, or the transactions resulting in such income are recorded . . . in the books of account, if any, maintained by him for any source of income .. . before the said date."*

34. The term "books of account" referred to in Sub-clause (1) of Explanation 5 to Section 271(1)(c) means books of account which have been maintained for determining any source of income. The term "source of income" as understood in the Income-tax Act is to identify or classify income so as to determine under which head, out of the various heads of income referred to in Section 14 of the Act, it would fall for the purposes of computation of the total income for charging income-tax thereon. Thus, the term "books of account" referred to in this relevant sub-clause of Explanation 5 would mean those books of account whose main object is to provide credible data and information to file the tax returns. A credible accounting record provides the best foundation for filing returns of both direct and indirect taxes. Accounting is called a language of business. Its aim is to communicate financial information about the financial results. This is not possible unless the main objectives of the books of account are to maintain a record of business : to calculate profit earned or loss suffered during the period of time, to depict the financial position of the business ; to portray the liquidity position ; to provide up to date information of assets and liabilities with a view to derive information so as to prepare a profit and loss account and draw a balance-sheet to determine income and source thereof. Thus, the term "books of account" referred to in Explanation 5 must answer the above qualifications. It cannot be understood to mean compilation or collections of sheets in one volume. The books of account referred to are those books of account which are maintained for the purposes of the Income-tax Act and not diaries which are maintained merely as a man's private record ; prepared by him as may be in accordance with his pleasure or convenience to secretly record secret, unaccounted clandestine transactions not meant for the purposes of the Income-tax Act, but with specific intention or desire on the part of the assessee to hide or conceal income so as to avoid imposition of tax thereon.

35. The words in Explanation 5 "books of account, if any, maintained by him for any source of income" are important words signifying the

legislative intent embodied in the Explanation warranting grant immunity from penalty. The legislative intent is to admit only those books of account maintained by the assessee on his own behalf as by their very nature and circumstances are maintained for the purposes of drawing the source of income. Therefore, when books of account are tendered for claiming the benefit of Explanation 5 to Section 271(1)(c) of the Act, it must be shown to be a book, that book must be a book of account, and on the top of it that must be one maintained for the purposes of drawing the source of income under the Income-tax Act. These essential requirements must be carefully observed while implementing tax legislation in the country where secret and parallel accounts based on frauds and forgery are extremely common and responsibility of keeping and maintaining accounts for the purposes of the tax legislation is honoured in the breach rather than the observance.

36. Now, turning to the facts of the cases in hand, private diaries may have been most regularly maintained, it may have been exhibiting record of the factual facts, contemporaneously made but they were never maintained for the purposes of the Income-tax Act to draw the source of income or for the computation of total income to offer income calculated therefrom for the purposes of taxation. Such books or diaries can hardly be designed or accepted as books of account for the purposes of Explanation 5 of Section 271(1)(c) of the Act, so as to afford immunity from penalty. None of the cases cited by the appellants were close to the facts found herein, hence no reference thereto in our opinion, is necessary."

20. In these cases, it would be relevant to notice the reasoning of the Tribunal in the *Kiran Devi* batch of cases. The extracts of its order are reproduced below:

"12.1 In assessment order for assessment year 1999-2000, after recording sequence of events leading to search at residential premises of Shri K.N. Mehrotra and refusal of the assessee to attend to summons under Section 131 and action taken under Section 153C and the return filed by the assessee, the Assessing Officer as per para 5 has observed as under :

> *"Since the assessee has filed the return of income after the date of search, it is a fit case to initiate penalty proceedings as per the Explanation 5 to Section 271(1)(c) of the Income Tax Act, 1961 because the assessee has concealed her income and furnished inaccurate particulars of income.*

Hence, penalty proceedings under Expln. 5 to Section 271(1)(c) of the Act are initiated."

12.2 Similarly, other assessment order has been passed. A clear finding that assessee has concealed his income and furnished inaccurate particulars of income has been recorded in the assessment order. Penalty proceeding has been initiated in terms of Explanation 5 to Section 271(1)(c) of the IT Act. In the said Explanation it is provided as under :

"Explanation 5 : Where in the course of a [search initiated under Section 132 before the 1st day of June, 2007], the assessee is found to be the owner of 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,—

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

(b) ***for any previous year which is to end on or after the date of the search, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under cl. (c) of sub-s. (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, [unless,—***

(1) such income is, or the transactions resulting in such income are recorded,—

(i) in a case falling under clause. (a), before the date of the search; and

(ii) in a case falling under clause (b), on or before such date, in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the Chief Commissioner or Commissioner]before the said date; or

(2) he, in the course of the search, makes a statement under sub-section (4) of Section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the

expiry of time specified in sub-section(1) of Section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.]"

12.3 The exceptions provided in the Explanation have no application here and are not relevant. The highlighted (italicised in print) portion is required to be read in the assessment order in the light of reference to Explanation 5. There is, therefore, a clear finding fully supported by facts that assessee concealed income in the returns originally filed under Section 139, notwithstanding that such income was disclosed after search and after detection of the concealed income in returns in response to notices under Section 153C. These facts are clearly emerging from the assessment orders leading to valid initiation of penalty proceeding and penalty orders. In the light of unassailable facts, no prejudice has even been alleged or claimed by the assessee."

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"16. We have carefully considered submissions of assessee relating to invoking/application/non-application of Explanation 5 to Section 271(1)(c) of the IT Act. If free and without judicial constraint to follow the decision of a Coordinate Bench, we would have perhaps agreed with the view taken by learned CIT(A) to Explanation 5. The said Explanation does not mention that search should be of the assessee and copy of bank statement found in search can be treated as evidence of assessee's ownership of "money" or "other valuable article". Therefore, to examine import of Explanation 5 with reference to finding recorded by learned CIT(A), the issue could be referred for consideration. However, the finding of the Co-ordinate Benches that Explanation 5 to Section 271(1)(c) is not applicable, in our opinion, is not material for disposal of appeal. There is, therefore, no need to refer the matter to the Special Bench. This is, however, without prejudice and subject to clear and established facts on record which are not even in dispute. In the light of above facts, we are to examine the question whether assessee is liable to be penalized under Section 271(1)(c) of the IT Act.

16.1 The main contention advanced on behalf of the assessee is that penalty proceeding was initiated by invoking Explanation 5 to Section 271(1)(c) and, therefore, question has to be strictly examined in the light of above Explanation. Even main provision of Section 271(1)(c) cannot be considered or applied to uphold the levy of penalty. Other Benches of the Tribunal did not go beyond considering Explanation 5 and held that said Explanation is not applicable and thereby cancelled the penalty. In

our considered opinion, above contentions of the assessee based up Explanation 5 are to be rejected. Various explanations to Section 271(1)(c) being part of the section, need not be invoked while initiating penalty proceeding. The penalty is to be imposed if conditions prescribed by Section 271(1)(c) are satisfied. The said section is to the following effects:"

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"16.7 It is further to be understood that Explanations deal with cases of "deemed concealment" and not of actual concealment fully established. Even if burden is taken to be on the Revenue, the same is also discharged in this case. We, therefore, fail to appreciate why penalty for concealment of income under main Section 271(1)(c) cannot be imposed or upheld for not disclosing "income" in the returns originally filed under Section 139 of the IT Act. Income withheld and not shown in those returns was the concealed income which was detected by the Revenue in the search in these cases. Why assessee should not pay penalty on such concealed income is beyond our comprehension.

16.8 In our considered opinion, it was totally unnecessary on the facts of these cases for the AO to invoke (allegedly) Explanation 5 to Section 271(1)(c) of the IT Act as income not disclosed in the return under Section 139 but detected subsequently and established to be assessee's income and assessed accordingly is concealed and fully covered by Section 271(1)(c) of the IT Act. There was absolutely no need to try and bring the cases under Explanation 5 of section. It has been referred by the AO out of abundant precaution to make clear to the assessee that subsequent disclosure of income under Section 153C would not alter her default under Section 271(1)(c) of the Act committed in returns filed under Section 139 (before the search). Factual matrix is not in dispute. It is immaterial that above Explanation has been referred in the assessment order. On facts, application of Section 271(1)(c) is not affected. The proposition that assessee has an obligation to show correct income under Section139 and if it is not done, Revenue is entitled to invoke provision to Section 271(1)(c) notwithstanding that correct income is shown in response to notice under Section 148 of the IT Act or in some other proceedings is well established and is beyond doubt. For the purpose of present proceeding, there is no material difference whether the returns were filed in response to notice under Section 148 or under Section 153C of the IT Act. The legal position on the issue is more than clear."

21. The above extracts would show that the assessees did not disclose the income or the assets any time in the returns filed by them. Furthermore, the

search conducted was not in their premises; it was in the premises of someo else. Having regard to the restricted nature of the phrase "books of account" the particulars found in the premises of someone else could not be said to have been "in the course of search", because the present assessees' premises were not searched. Nor did they make any disclosure or statement, or surrender their income, during the course of search. They filed a return, which for the first time, disclosed the hitherto concealed income. Their explanations were not of the kind which therefore, fell within the exception to Explanation 5 of Section 271 (1) (c). The reliance placed by the assessees on the judgment of this court in *Chhabra* is inapposite, because in that case, the assessee surrendered the amount during, or immediately after the search. *P.R. Mitrani* does not help the assessees, because this Court is not holding that the presumption which has to be taken under the provision is irrebuttable, or sweeping. The court is merely construing the Parliamentary purpose for the fifth Explanation, and also interpreting the nature of the exceptions which allow the assessee the benefit. Clearly, the assessees in this case cannot claim any such benefit.

22. For the above reasons, the question of law in ITA Nos.1217/2010, 1219/2010, 1221/2010, 1231/2010 and 1233/2010 is answered in favour of the revenue and against the appellant. The said appeals are, consequently, dismissed. For the same reasons, the questions of law in ITA Nos. 995/2010 and 997/2010 are answered in favour of the revenue. The said two appeals are consequently, allowed.

S. RAVINDRA BHAT, J.

R.V.EASWAR, J.

AUGUST 23, 2012