M/S. Duraipandi & S.Thalavaipandian ... vs The Assistant Commissioner Of Income ... on 10 April, 2019

Author: V.K

Bench: Vineet Kothari, C.V.Karthikeyan

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.04.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

Tax Case Appeal Nos. 203, 160, 161, 164, 175, 177, 178, 182
204 to 209 of 2019

M/s. Duraipandi & S.Thalavaipandian AOP

Appellant / Respondent in T.C.A.Nos. 203,
204, 205, 206, 207, 208 7 209 of 2019

Vs.

The Assistant Commissioner of Income Tax
Company Circle 3(4)
Chennai - 34.

Respondent/Appellant in T.C.A.Nos. 203, 204
205, 206, 207, 208 & 209 of 2019

PRAYER IN T.C.A.No. 203 of 2019: Tax Case Appeal filed un
Section 260A of the Income Tax Act, 1961 against the order of the
Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated
06.01.2017 made in ITA No.1838/Mds/2016.

PRAYER IN T.C.A.No. 204 of 2019: Tax Case Appeal filed under
Section 260A of the Income Tax Act, 1961 against the order of the
Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated
06.01.2017 made in ITA No.1839/Mds/2016.

PRAYER IN T.C.A.No. 205 of 2019: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated 06.01.2017 made in ITA No.1840/Mds/2016.

PRAYER IN T.C.A.No. 206 of 2019: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated 06.01.2017 made in ITA No.1835/Mds/2016.
PRAYER IN T.C.A.No. 207 of 2019: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated 06.01.2017 made in ITA No.1836/Mds/2016.

PRAYER IN T.C.A.No. 208 of 2019: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated 06.01.2017 made in ITA No.1841/Mds/2016.
PRAYER IN T.C.A.No. 209 of 2019: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated 06.01.2017 made in ITA No.1837/Mds/2016.

Principal Commissioner of Income Tax
Central 1
No.108, Mahatma Gandhi Road
Chennai. Appellant / Respondent in T.C.A.Nos. 160, 161, 182, 164, 175, 177, 178 of 2019

Vs.

Shri.S.Duraipandi & Shri. S.Thalavaipandi (AOP)

Respondent/Appellant in T.C.A.Nos.160, 161,

PRAYER IN T.C.A.No. 160 of 2019: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated 06.01.2017 made in ITA No.1672/Mds/2016.

PRAYER IN T.C.A.No. 161 of 2019: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated 06.01.2017 made in ITA No.1669/Mds/2016.

PRAYER IN T.C.A.No. 182 of 2019: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated 06.01.2017 made in ITA No.1668/Mds/2016.

PRAYER IN T.C.A.No. 164 of 2019: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated 06.01.2017 made in ITA No.1666/Mds/2016.

PRAYER IN T.C.A.No. 175 of 2019: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated 06.01.2017 made in ITA No.1667/Mds/2016.

PRAYER IN T.C.A.No. 177 of 2019: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated 06.01.2017 made in ITA No.1670/Mds/2016.

PRAYER IN T.C.A.No. 178 of 2019: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated 06.01.2017 made in ITA No.1671/Mds/2016.

For Appellants in
all T.C.A.Nos. : Mr. R.Sivaraman

For Respondents in
all T.C.A.Nos. : Mr. T.R.Senthilkumar
Senior Standing Counsel

COMMON JUDGMENT

(Delivered by DR.VINEET KOTHARI, J) The present batch of Appeals and Cross Appeals filed by the Assessees Duraipandi and S.Thalavaipandian, Association of Persons and by the Revenue giving rise to the substantial questions of law, which are framed below arise from the order of the learned Income Tax Appellate Tribunal dated 06.01.2017 for the Assessment Years 2002-2003; 2003-2004; 2004-2005; 2005-2006; 2006-2007; 2007- 2008; and 2008-2009 respectively, whereby the learned Tribunal in http://www.judis.nic.in 5/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 the Cross Appeals filed by both the parties dealt with the issues of imposition of penalty under Section 271(1)(c) of the Income Tax Act 1961 and granted partial relief to the Assessee by setting aside penalty on one issue but also restored the penalty under Section 271(1)(c) of the Act on another issue.

2. The facts in brief leading to the filing of the present Appeals by both the sides are narrated in brief as under.

3. A search was carried out at the business place of the Assessee on 16.05.2007 and inter alia cash of Rs.1.65 crores was found at the residential house and in the Bank locker of the Assessee.

Cash of Rs. 2 crores was also found in the place of a third party, Smt. Jaya Krishnamurthy, who also stated in the course of statements that the said cash was borrowed as loan from one of the Assessee, namely, Duraipandi. The Assessee filed its returns after search in the capacity of an AOP for the first time claimed in the course of the present penalty proceedings under Section 271(1)(c) of the Act that they had also derived agricultural income during the Assessment Years in question from the Agricultural lands taken on lease from the agriculturalists during these years in question. However, we are not concerned with the assessment of tax liability in the present set of http://www.judis.nic.in 6/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 Appeals, but are only concerned with the questions of penalty under Section 271(1)(c) of the Act. While defending during the penalty proceedings before the Assessing Authority, the Assessee claimed the immunity from penalty in view of Explanation 5(2) of Section 271(1)(c) of the Act on the ground that he had made the disclosure of his undisclosed income in the statements recorded under Section 132(4) by the authorities during the course of search and had also specified the manner in which such income was derived from his real estate business and had also paid tax though belatedly together with interest in respect of such income and therefore claimed such immunity under the exception in clause (2) to Explanation 5 which mainly enacts a presumption of concealment against the Assessee.

Besides the aforesaid immunity claimed by the Assessee, the Assessee claimed that part of his undisclosed income represented agricultural income, not liable to tax.

4. The First Appellate Authority, namely, CIT (Appeals) vide its order dated 31.03.2015 only allowed the Appeals filed by the Assessee but also dismissed the Appeals filed by the Assessee and upheld penalty under Section 271(1)(c) to the extent the Assessee claimed income from agricultural operations which was however treated taxable income as "Income from Other Sources" by the Assessing Authority with the following observations:-

> http://www.judis.nic.in 7/38 Judgement dated 10.04.2019 in T.C.A.Nos.
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> 203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 "6.1.4. In view of the above discussed factual and legal position, it is held that in the facts and circumstances of the case the appellant is liable for penalty under Section 271(1)(c) as the appellant had not been able to substantiate the claims made in the returns of income for all the assessment years under appeal with regard to have been earned the agricultural income that had been claimed exempt from taxation. Thus the action of the AO in levying penalty on the amounts of income claimed as income from agricultural operations but brought to tax as income from other sources on account of failure on the part of the appellant to substantiate the same in respect of all the assessment years under appeal is upheld. The grounds of appeal, as they relate to the levy of penalty on agricultural income being treated as income from other sources, in respect of all the assessment year under appeal are dismissed."

5. However with regard to immunity claimed by the Assessee as per Clause 5(2) of the Explanation the learned CIT (Appeals) also accepted the contentions raised by the Assessee and set aside the penalty under Section 271(1)(c) of the Act with the following http://www.judis.nic.in 8/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 observations:-

> "6.2 As regards levy of penalty on the income returned in the returns of income filed in response to notice under Section 153A, the contentions on behalf of the appellant, as discussed above, in brief, are that-
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> The appellant had made a disclosure under Section 132(4) and the return of income was filed based on the disclosure made under the said section and the taxes were paid subsequently.
>
> The appellant is entitled to immunity from penalty under Section 271(1)(c) on the income disclosed under Section 132(4) as per the provisions or Explanation 5 to the said section as the appellant had complied with the conditions laid down therein and approved in the decision of the Hon'ble Supreme Court in the case of ACIT Vs. Gebilal Kanahya Lal 348 ITR 561.

It has been held by the Hon'ble Supreme Court in the case of ACIT vs. http://www.judis.nic.in 9/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 Gebilal KanahyaLal 348 ITR 561 that since the section does not specify any time limit for payment of tax the interest, the assessee is entitled for immunity from penalty under clause 2 of Explanation 5 to Section 271(1)(c) if the complies with the payment of taxes with interest subsequently.

The appellant relied on the decision of the jurisdictional High Court of Madras in the case of CIT vs. SDV Chandru (266 ITR 175) for the proposition that the provisions of Explanation 5 to Section 271(1)(c) with regard to immunity from penalty on the income disclosed under Section 132(4) is available for the earlier years also that had ended before the date of search.

It has also been argued during the course of appeal hearings that as per the scheme of assessment of search cases under Section 153A, no penalty is leviable on the income returned in the return of income filed in response to notice under Section 153A as the said return is treated as return filed under Section 139. It was submitted that Section 153A start with a http://www.judis.nic.in 10/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 non obstante clause and excludes the procedure covered by Sections 139, 147, 148, 149, 151 and 153 in respect of search cases.

6.2.1. I have considered the submissions of the appellant and have also gone through the relevant case laws in this regard. The submission of the appellant are found to be tenable in law as per the decisions discussed hereunder.

6.2.7. In view of the facts of the appellant's case in respect of all the assessment years under appeal and the legal position, as discussed above, I am of the considered view that penalty under the provisions of Section 271(1)(c) is not leviable on the income that had been returned by the appellant's in the return of income filed in response to notice under Section 153A of the Act in these assessment years under appeal. The penalty under the provisions of Section 271(1)(c) is leviable only on the amount of income in that had not been admitted by the appellant in the return filed in response to notice under Section 153 A and is added to the http://www.judis.nic.in 11/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 appellant's income in the assessment under the provisions of section 153A. Thus the penalty levied by the AO on the returned income in the return of income filed in response to Section 153A is deleted in respect of all the assessment years under appeal and the grounds of appeal in this regard are allowed.

After considering the submission of the appellant on all the grounds of appeals in respect of all the assessment years under appeal, the appeals in ITA.Nos. 107 to 113/13-14 are partly allowed."

6. Both the parties, aggrieved with the said order, filed Cross Appeals before the learned Income Tax Appellate Tribunal which reversed the findings of the learned CIT (Appeals) on both the Appeals, in the following manner.

7. On the applicability of Clause 5(2) of the Explanation under Section 271(1)(c) of the Act, the learned Tribunal restored the penalty and denied the immunity with the following observations:-

> "5.6 The Id. Counsel for the assessee has not disputed the position that section http://www.judis.nic.in 12/38 Judgement dated 10.04.2019 in T.C.A.Nos.
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> 203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 271(1)(c) is applicable to an assessment made under Section 153A, it is not necessary for us to examine that position. The main question before us, which was debated at length, was whether the immunity granted under Explanation 5(2) to Section 271(1)(c) is available to the assessee or not. The Madras High Court in S.D.V.Chandru's case (266 ITR 175) has held that the words in Explanation 5(2)" ..... has been acquired out of his income which has not been disclosed in his return of income to be furnished before the expiry of time specified in subsection (1) of Section 139" are not to be read as referring to income so far not disclosed in respect of the previous year which is to end after the date of the search and that the words which refer to the time limit under Section 139(1) are "only a reiteration of the legal requirement regrading the time within which returns should be normally be filed." In this view of the matter, it was held that no penalty can be imposed on the basis of the returns filed after the date of the search, pursuant to declaration under Section 132(4), in which additional income was shown by the assessee though such returns related to earlier assessment years. To the same effect is the Judgement of the Rajasthan High http://www.judis.nic.in 13/38 Judgement dated 10.04.2019 in T.C.A.Nos.
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> 203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 Court in CIT V. Kanhaiyalal (299 ITR 19). In fact, in this case the High Court has observed that it is not merely the right of the assessee to file returns for the earlier assessment years after the date of the search pursuant to declarations made under Section 132(4) but it is his obligation to do so and the immunity conferred by Explanation 5(2) cannot be taken away or watered down. The view taken by the Madras High Court in S.D.V. Chadru's case (supra) has been noticed by the Ahmedabad Bench of the Tribunal in the group case of Rupesh Bholidas Patel [2009] 309 ITR (AT) 217 (Ahd) but the Bench has preferred to follow the Judgement of the Bombay High Court in the case of Sheraton Apparels v. ACIT 256 ITR 20. since a view has already been taken as to the availability of the immunity under Explanation 5(2) to section 271(1)(c) by an order of the Ahmedabad Bench, that too in a case belonging to the same group and after referring to the Judgement of the Madras High Court in S.D.V. Chandru's case (supra), judicial

discipline requires that we should not deviate from that view.

5.7. The statement of objects and reasons to the Taxation Laws (Amendment and http://www.judis.nic.in 14/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 Miscellaneous Provisions) Bill, 1986 (161 ITR St.63), and the circular No. 469 (162 ITR St.

21) to which my attention was drawn do not advance the case of the assessees. The statement of objects and reasons says that the amendment was being made “to remove an anomaly in the existing provisions in respect of cases where penalty is imposable for concealment of income even if the taxpayer has no intention to fabricate evidence or to conceal his undisclosed income after search and seizure.” The anomaly and the remedial amendment made are explained by the above circular in the following words: “As per the existing Explanation 5 to Section 271(1) of the Income-tax Act, if at the time of search, assets which are not recorded in the books of account are founds, a taxpayer is liable to penalty for concealment even if he declares the full value of those assets as his income in the return filed after the search. This provisions has been found to operate, even in cases where the assesssee has no intention to fabricate any evidence and he includes in his return the income out of which such assets have been acquired. Hence, by the Amending Act, it has been provided that if an assessee in such cases makes a statement during the course of the search admitting that the assets http://www.judis.nic.in 15/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 found at his premises or under his control have 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 prescribed in clause (a) or (b) of Section 139(1) and specifies in the statement the manner in which such income has been derived and pays the taxes that are due thereon, no penalty shall be leviable”. (pages 38 7 39 of 162 ITR St.) 5.8. The above circular explaining the amendment shows that "the benefit' of immunity conferred by the Explanation 5(2), as amended by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 with effect from 10.09.1986, is confined to the return for the year in respect of which the previous year is yet to end or even though ended, the time for filing the return under Section 139(1) is yet to expire. In the present case, the search took place on 04.09.2003. In respect of the assessment year 2003-04, for which the previous year would have ended on 31.03.2003, the return under Section 139(1) would be due latest by 31.10.2003. In respect of all the earlier years, needless to add, the due dates for filing returns under Section 139(1) would have http://www.judis.nic.in 16/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 ended much earlier. Returns were filed by the assessees after the search, in response to notices issued under Section 153A on 31.05.2004. The additional income declared in these returns do not fall under the category of the return mentioned in Explanation 5(2) to Section 271(1)(c). Therefore, the assessees are not entitled to the immunity from penalty.

5.9. From the above it becomes clear that in view of the decision of the Co-ordinate Bench of the Tribunal in the case of Rupesh Bholidas Patel (309 ITR (AT) 217 (Ahd), the statement of objects and reasons to the Taxation Laws (Amendment and Miscellaneous Provision Bills) 1986 as well as Circular No.469 and also decision of the Hon'ble Bombay High Court in the case of Sheraton Appealers vs. ACIT [256 ITR 20] (Bom), reached a conclusion that the immunity provided by Explanation 5 to Section 271(1)(c) would be available only to the return for the year in respect of which the previous year is yet to end or even though ended, or the time for filing the return under Section 139(1) is yet to expire.

5.10. From the above, it is clear that even if an income is declared after the search, http://www.judis.nic.in 17/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 the same was deemed to have been concealed for the purpose of Sec. 271(1)(c). It cannot be said that these observations are totally out of context because the Hon'ble Court was concerned with the levy of penalty and immunity under clause (1) of Explanation 5. Therefore, the above observations, in our opinion, are of binding nature. When similar situation arose before the Pune Bench in the case of DCIT Vs. Omkareshwar R. Kalantri & Ors. [2010] 42 debtor 489, wherein assessee relied on the decision of the Co- ordinate Bench in the case of Sarla M.Ahuja v. DCIT [I.T.A.No. 1301 (PN)/2007] for deletion of the penalty but the revenue placed reliance on the decision of the Third Member in the case of ACIT vs. Kirit Dahyabhai Patel [121 ITR 159 (Ahd)].

Thus despite of contrary decision of the same Bench, Pune Bench has also placed reliance on the decision of the Third Member in the case of ACIT vs. Kirit Dahyabhai Patel [supra] has been followed in the case of Mahendra Mittal v. ACIT [2011] 132 ITD Further, the same decision has been followed in the case of Ahit B.Zota v. ACIT http://www.judis.nic.in 18/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 [2010] 40 SOT 543. In view of the decisions of Mumbai Benches, we are of the view, that immunity under clause (2) of Explanation 5 to Section 271(1)(c) would not be available if assessee has not disclosed the income before the date of the search in the return to be furnished before the time allowed under Section 139(1).

5.11 The Ld. Counsel of the assessee had also emphasised that Sec. 153A puts a non obstante clause and, therefore, returned already filed would abate. Now if the additional income declared in the fresh return u/s. 153A is accepted, then there will not be any difference in the returned income and the assessed income and, therefore, penalty is not leviable.

5.12. In view of the above discussions, we are of the opinion that though the assessee has admitted during the course of search and disclosed in the return filed in response to notice under Section 153C by offering additional income is clearly liable to levy of penalty under Section 271(1)(c) of the Act. Accordingly, the order passed by the Id. CIT (A) on this issue is reversed and that of the Assessing Officer is restored.

http://www.judis.nic.in 19/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 Accordingly, all the appeals of the Revenue are allowed."

8. On the issue of agricultural income however the learned Tribunal felt that since the learned CIT (Appeals) had estimated income of agricultural income on flat rate of Rs.22 lakhs for each of the six Assessment Years in question but it was held to be "Income from Other Sources", the penalty under Section 271(1)(c) of the Act could not be imposed on the Assessee. The observations of the Tribunal in this regard are also quoted below for ready reference:-

> "7. With regard to sustaining penalty on assessee's agricultural income, it is clear that the agricultural income of the assessee has been treated as income from other sources, which is undisclosed income.
>
> 7.1 We find that there is no dispute that the addition was made on estimated basis without bringing on record any material to show that there was any undisclosed income. The assessee has furnished agricultural income. In order to apply the provisions of Section 271(1)(c) of the Act, there has to be concealment of particulars of income of furnishing of http://www.judis.nic.in 20/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 inaccurate particulars of income. In the recent Judgement of the Hon'ble Supreme Court in the case of CIT v. Reliance Petro Products Pvt. Limited., 322 ITR 158, their Lordships, after considering various decisions including the decision in the case of Dilip N.Shroff v. JCIT 291 ITR 519 (SC) and UOI v. Dharmendra Textile Processors 306 ITR 277 (SC) observed.

7.2. Following the above Judgement, we are of the opinion that this is not a fit case to levy of penalty on treating the agricultural income declared by the assessee as income from other sources. Accordingly, the penalty levied under Section 271(1)(c) of the Act is deleted for all the assessment years.

8. In the result, all the appeals filed by the Revenue are allowed. The appeal of the assessee in I.T.a.No. 570/Mds/2015 is allowed for statistical purposes and the appeals of the assessee in I.T.A.Nos. 1666, 1667, 1668, 1669, 1670, 1671 & 1672/Mds/2016 are allowed."

9. Being aggrieved, both the parties have filed the present http://www.judis.nic.in 21/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 Appeals under Section 260(A) of the Act before this Court.

10. The following substantial questions of law, in our opinion, arise from the order of the learned Tribunal:-

"(i) Whether the provisions of Explanation 5(2) appended to Section 271(1)(c) of the Act are attracted in the facts and circumstances of the case or not and whether the Assessee is entitled to the immunity from imposition of penalty in the present case; and

(ii) Whether the learned Tribunal was justified in setting aside the penalty under Section 271(1)(c) of the Act on the agricultural income estimated by the learned CIT (Appeals) which was however taxed as "Income from Other Sources" by the Assessing Authority?"

11. The learned counsel for the Assessee Mr. R.Sivaraman submitted before us that the Assessee in the course of search conducted at the business place of the Assessee on 16.05.2007 had duly disclosed his undisclosed income during the course of search in his statements recorded under Section 132(4) of the Act on 23.05.2007 that to the extent of cash seized of Rs.1.65 crores, the same represented the undisclosed income of Assessee from real http://www.judis.nic.in 22/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 estate business and the Assessee undertook to pay tax with interest on the same and the Assessee in fact paid such tax with interest on various dates, of course belatedly, but since there was no time frame fixed in Clause 5(2) of the Explanation, the Assessee satisfied all the three conditions of Clause 5(2) of the Explanation and was therefore entitled to the immunity as per that clause.

12. The learned counsel for the Assessee further contended that the Assessee had made a request to the respondent authorities to adjust the cash seized at the time of search of Rs.1.65 crores against the tax liability on such undisclosed income surrendered in the statement under Section 132(4) and later in the returns filed after the search in pursuance of Notice under Section 153C of the Act. Besides the request for adjustment of Rs.1.65 crores, the learned counsel drew our attention to the following payments of tax interest made by the Assessee on various months commencing from February 2010 to February 2013 as under:-

Sl.No.	Date of Payment	Amount
1.	February 2010	12,00,000
2.	April 2010	13,00,000
3.	August 2011	30,00,000
4.	September 2011	15,00,000
5.	October 2011	10,00,000

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 Sl.No. Date of Payment Amount

6. November 2011 3,00,000

7. December 2011 12,00,000

8. January 2012 5,00,000

9. February 2012 5,00,000

10. March 2012 10,00,000

11. May 2012 3,00,000

12. July 2012 2,00,000

13. October 2012 10,00,000

14. November 2012 15,00,000

15. Jewellery Release 40,00,000

16. February 2013 46,98,227

17. February 2013 10,54, 910 Total 2,42,53,137

13. He further submitted that as per the returns filed by the Assessee for all the six Assessment years in question the admitted tax liability on the undisclosed total income of Rs.8.25 crores, was of Rs.3.50 crores, which thus stood paid by the Assessee in the aforesaid manner, (viz., cash seized Rs.1.65 Crores + 2,42,53,137 = 4,07,53,137/-) and therefore, the Assessee was entitled to immunity from imposition of penalty and the learned Tribunal has erred in restoring the penalty on the aspect by denying the immunity to the Assessee and reversing the order passed by the learned CIT (Appeals). We may state here that learned counsel for the Revenue http://www.judis.nic.in 24/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 has not disputed the aforesaid payment of taxes given in aforesaid table and Rs.1.65 Crores cash seized being adjusted against tax liability of Assessee for these Assessment Years.

14. The learned counsel for the Assessee in this regard has relied on the decision of the Hon'ble Supreme Court in the case of Assistant Commissioner of Income-tax v. Gebilal Kanhaialal HUF reported in [2012] 348 ITR 561 (SC) wherein dealing with a case involving almost similar facts, the Hon'ble Supreme Court after quoting the Explanation 5 to 5.271 (1)(c) of the Act, interpreted of these provisions in the following manner:-

"5. To answer the above question, it would be worthwhile to reproduce Explanation 5 read with clause (2) of Section 271(1)(c), which is quoted herein below:

"Explanation 5: Where in the course of a search under Section 132, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereinafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income,-

http://www.judis.nic.in 25/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019

(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 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, unless,-

(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 http://www.judis.nic.in 26/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 in clause (a) or clause (b) of 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."

6. Explanation 5 is a deeming provision. It provides that where, in the course of search under Section 132, the assessee is found to be the owner of unaccounted assets and the assessee claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income for the purposes of imposition of penalty under Section 271(1)(c). The only exceptions to such a deeming provision or to such a deeming provision or to such a presumption of concealment are given in sub-clauses (1) and (2) of Explanation 5. In this case, we are concerned with

interpretation of clause (2) of http://www.judis.nic.in 27/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 Explanation 5, which has been quoted above. Three conditions have got to be satisfied by the assessee for claiming immunity from payment of penalty under clause (2) of Explanation 5 to Section 271(1)(c). The first condition was that the assessee must make a statement under Section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in Section 139(1). Such statement was made by the Karta during the search which concluded on August 1, 1987. It is not in dispute that condition No.1 was fulfilled. The second condition for availing of the immunity from penalty under Section 271(1)(c) was that the assessee should specify, in his statement under Section 132(4), the manner in which such income stood derived. Admittedly, the second condition, in the present case also stood satisfied. According to the Department, the assessee was not entitled to immunity under clause (2) as he did not satisfy the third condition for availing the benefit of waiver of penalty under Section 271(1)(c) as the assessee failed to file his return of income on http://www.judis.nic.in 28/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 31st July, 1987 and pay tax thereon particularly when the assessee conceded on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. However, no time limit for payment of such tax stood prescribed under clause (2). The only requirement stipulated in the third condition was for the assessee to “pay tax together with interest”. In the present case, the third condition also stood fulfilled. The assessee has paid tax with interest upto the date of payment. The only condition which was required to be fulfilled for getting the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income upto the date of payment. Clause (2) did not prescribe the time limit within which the assessee should pay tax on income disclosed in the statement under Section 132(4).

7. For the above reasons, we hold that the assessee was entitled to immunity under clause (2) of Explanation 5 to Section 271(1)(c) and accordingly, the Civil appeal filed by the Department is hereby dismissed with no order as to costs.” http://www.judis.nic.in 29/38 Judgement dated 10.04.2019 in T.C.A.Nos.

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15. On the other hand, the learned counsel for the Revenue submitted that the Assessee has failed to pay the admitted tax liability of Rs.3.50 crores on the undisclosed income of Rs.8.25 crores disclosed by him in the returns filed by him after surrender in 132(4) statement and in return filed in pursuance of Notice under Section 153C of the Act, which returns were filed by the Assessee on 13/14th August 2009, for all the six Assessment years as per the details given by the learned counsel for the Assessee. The payment of tax was spread from February 2010 to February 2013 as per Table

given above and therefore, the tax paid by the Assessee at the time of filing of the returns was only Rs.1.65 crores. It represented the cash seized during the course of search. He therefore submitted that the third condition of the Clause 5(2) was not satisfied by the Assessee and therefore, he was not entitled to immunity as claimed. He further contended that with the amendment of the law with effect from 31.05.2003, the concept of Block Assessment was done away with and a new assessment procedure had been incorporated by insertion under Section 153A onwards in Chapter XIV of the Act with effect from 01.06.2003 by Finance Act 2003. He therefore submitted that the Judgement of the Hon'ble Supreme Court in the case of Gebilal Kanhaialal HUF cited supra relied upon by the learned counsel for http://www.judis.nic.in 30/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 the Assessee is not applicable to the facts of the present case as the same dealt with the applicability of Clause 5(2) in Explanation for Assessment Year 1987-1988 which was prior to the said amendment and now since the Assessee was required to file separate returns for all these six Assessment Years in question, the tax admitted in his returns filed in pursuance of the Notice under Section 153C has to be paid along with the returns filed and subsequent payment of tax cannot entitle the Assessee to the immunity as claimed by him.

16. The second contention of the learned counsel for the Revenue is that the Assessee failed to explain the sources of agricultural income. The Assessee could not satisfy the availability of agricultural land with him merely by production of two documents, namely, 'Chitta and Adangal' along with a certificate of the Village Administrative Officer. Therefore, the Assessing Authority was justified in treating the same as 'Income from Other Sources' and the learned CIT (Appeals) was justified in imposing penalty to that extent and the learned Tribunal has erred in setting aside the same by the impugned order and hence, the Revenue has filed the present batch of Appeals.

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17. He relied upon the decision of the Madras High Court in the case of B.Ramachandhiran v. CIT reported in [2014] 43 taxmann.com 430 (Madras). Paragraph No. 12 of the said Judgement is quoted below for ready reference:-

> “12. As far as the present case is concerned, if the assessee had any agricultural operation and earned income, certainly, it was always open to the assessee to bring any such material to substantiate the facts. The facts, therefore, ought to have been brought before the Assessing Officer or before the First Appellate Authority to substantiate the case of the assessee, that he had been in receipt of the income earned out of agricultural operation. In the absence of any materials shown or onus discharged in the manner known to law, we do not agree with the assessee's contention based on the decisions cited. In the circumstances, we have no hesitation in rejecting the Tax Case (Appeals) and thereby in confirming the order of the Tribunal. Consequently, the Tax Case (Appeals) stands dismissed. No costs.” http://www.judis.nic.in 32/38 Judgement dated 10.04.2019 in T.C.A.Nos.

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18. We have heard the learned counsels at length and perused the impugned order and the case laws cited before us.

19. The provisions of Explanation 5 to Section 271(1)(c) of the Act have already been quoted above in the extracted portion from the Judgement of the Hon'ble Supreme Court in the case of Gebilal Kanhaialal HUF cited supra. We do not find ourselves in agreement with the learned counsel for the Revenue that the applicability or interpretation of the said Clause 5(2) of Explanation appended to Section 271(1)(c) of the Act has changed with the amendment of law with effect from 01.06.2003 changing the procedure of assessment in the case of search under Section 132 of the Act and therefore a different interpretation than the one given by the Hon'ble Supreme Court in the case of Gebilal Kanhaialal HUF cited supra is required to be given by us. The filing of the Returns after the Notice was issued to the Assessee after search under Section 158(C) of the Act does not, for the purpose of Clause 5(2) of Section 271(1)(c) of the Act, mandate the Assessee to pay such tax admitted by him to be payable with interest on the undisclosed income admitted by him in the course of search in the statements under Section 132(4) of the Act. The only change brought about with effect from 01.06.2003 is in http://www.judis.nic.in 33/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 the procedure in the filing of Returns and in the assessment for each year independently rather than in the assessment for a Block of Period as was the position prior to 01.06.2003. The case of Gebilal Kanhaialal HUF cited supra before the Hon'ble Supreme Court also arose from a search under Section 132 of the Act. The purpose of providing the exception to Explanation 5 which otherwise enacts a presumption of concealment attracting penalty under Section 271(1)(c) of the Act, is to save the Assessee from the rigour of penalty in case he surrenders or admits the earning of undisclosed income which was not disclosed in the Returns filed by him under Section 139(1) of the Act before the date of search. Besides such disclosure in statement under Section 132(4) during the course of search he has to specify the manner of earning such undisclosed income and also has to undertake the liability of payment of tax with interest up to the date of payment on such tax liability in respect of undisclosed income.

No time frame has been fixed in the said Explanation 5(2) for the payment of tax with interest and this interest naturally in such cases has to be computed up to the date of payment.

20. There is no dispute facts before us that besides the adjustment 1.65 crores of the cash seized during the course of search and the monthly payments of taxes made by the Assessee aggregating http://www.judis.nic.in 34/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 to Rs. 2,42,53,137/- total of which would come to Rs.4,07,53,137/- the total tax paid by Assessee is in excess of the admitted tax liability of Rs.3.50 crores on the undisclosed income of Rs.8.25 crores disclosed in the six Returns filed by the Assessee on 13/14th August 2009.

Therefore, in our opinion, the Assessee not only satisfied all the three conditions, namely (I) disclosure of undisclosed income in the course of the statements under Section 132(4) of the Act; (II) specify the manner of earning the same from real estate business; and (III) payment of tax with interest for which no time frame is fixed in the said Explanation 5(2). Therefore the Assessee was entitled to the immunity from penalty under Section 271(1)(c) of the Act.

21. We do not find any merits in the contentions raised by the learned counsel for the Revenue that the payment of such tax liability in respect of undisclosed income as disclosed in the Returns of income filed by the Assessee after Notice under Section 153C of the Act, has to be made at the time of filing of the return itself.

22. As we noted above, we are not dealing with the case for assessment of tax in the hands of the Assessee as per the amended procedure of assessment in question under Section 158(C) of the Act after 01.06.2003 but we are concerned with the applicability of http://www.judis.nic.in 35/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 Clause 5(2) of Explanation to Section 271(1)(c) which is an exception to the presumption of concealment under Section 271(1)(c) of the Act.

There has been no amendment in the language of the said provision before or after 01.06.2003 and therefore the interpretation as made by the Hon'ble Supreme Court in the case of Gebilal Kanhaialal HUF cited supra is binding and applies to the facts of the present case on all fours. Therefore, in our consideration opinion, the learned Tribunal has erred in reversing the order passed by the learned CIT (Appeals), denying the immunity as per Clause 5(2) of the Explanation to the Assessee in the present case. The Appeals filed by the Assessee therefore deserve to be allowed and the same are allowed answering the first substantial question of law framed above in favour of the Assessee and against the Revenue.

23. On the second question of agricultural income being estimated by the learned CIT (Appeals) and the same being treated as 'Income from Other Sources' by the Assessing Authority, we find that the matter of there being agricultural income of the Assessee and the estimation of agricultural income by the authorities below is a finding of fact and a particular amount of the same as assessed by the Assessing Authority being reduced the learned CIT (Appeals), nonetheless remains a finding of fact and therefore, on the basis of http://www.judis.nic.in 36/38 Judgement dated 10.04.2019 in T.C.A.Nos.

203, 160, 161, 164, 175, 177, 178, 182, 204 to 209 of 2019 such findings of fact by the First Appellate Authority below if the learned Tribunal has found it to be a fit case not to impose the penalty on the Assessee under Section 271(1)(c) of the Act, we do not find any reason to interfere with the said findings of the learned Tribunal and therefore in our opinion, the second question also deserved to be answered in favour of Assessee and against the Revenue.

24. The Judgement of the Madras High Court in the case of B.Ramachandhiran v. CIT cited supra relied by the learned counsel for the Revenue is of little help to the learned counsel for the Revenue in the present case as would appear from paragraph 12 quoted above, the Co-ordinate Bench of this Court only found that from the facts as determined by the authorities below that the Assessee had been in receipt of the income earned out of agricultural operation for which in the absence of any contra material brought on record, does not give rise to any question of law and therefore, the Appeals filed by the Assessee were liable to be rejected, in a way supports our view that a finding of fact with regard to the nature of income and the extent thereof is a finding of fact which binds this Court under Section 260-A of the Act.

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25. Accordingly, answering both the questions of law in favour of the Assessee and against the Revenue, the Appeals filed by the Assessee before us are allowed and the Appeals filed by the Revenue are dismissed. No costs.

(V.K., J.) (
10.04.20

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Index : Yes/No
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