

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO.632 of 2017

FOR APPROVAL AND SIGNATURE :

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

and

HONOURABLE MR. JUSTICE NIRZAR S. DESAI

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Approved for Reporting	Yes	No
		<u>NO</u>

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JAYABEN RATILAL SORATHIA

Versus

ASSISTANT COMMISSIONER OF INCOME TAX

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Appearance :

MR B S SOPARKAR for the Appellant.

MAUNIL G YAJNIK for the Opponent.

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CORAM: HONOURABLE MR. JUSTICE BHARGAV D. KARIA

and

HONOURABLE MR. JUSTICE NIRZAR S. DESAI

Date : 14/10/2026

JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard Mr. B. S. Soparkar, learned advocate for the appellant - assessee and Mr. Maunil G. Yajnik, learned Senior Standing Counsel for the respondent - revenue.

2. This appeal is filed under Section 260-A of the Income Tax Act, 1961 (for short 'the Act') challenging the order dated

17.4.2017 passed by the Income Tax Appellate Tribunal, Rajkot Bench, Rajkot (for short 'the Tribunal') in ITA No.68/RJT/2010 for the Assessment Year 2006-07.

3. This appeal is admitted by order dated 29.8.2017 for consideration of the following substantial question of law :-

“[A] Whether the Income Tax Appellate Tribunal committed an error in confirming imposition of penalty by the Assessing Officer in the order of assessment under section 153A read with section 153C of the Act, there was no addition to the returned income ?”

4. The brief facts of the case are as under :-

4.1 A search was carried out in the case of the son of the appellant at the premises of Shri Sanjay R. Sorathia on 11.10.2006. During the course of search, statement of the son of the assessee was recorded under Section 132 (4) of the Income Tax Act, 1961 (for short 'the Act') wherein the son of the assessee admitted the undisclosed income of Rs.64.54 Lacs in the case of the assessee. By letter dated 14.8.2008, the assessee informed the Assessing Officer that pursuant to the search action as per the statement of her son, extra sale proceeds in respect of the property known as Madhuban Green Villas was yet to be recorded in the books of account and it was also explained as to why such income was not offered for tax in the return which was filed under Section 139 (1) of the Act on 31.3.2007.

4.2 Thereafter, notice under Section 153C of the Act was issued on for the Assessment Year 2006-07. The assessee furnished the return of income for the year under consideration in response to the said notice on 23.10.2008 declaring the income of Rs.64,28,970/-. The assessee also paid the tax on the income declared in the return filed under Section 153A pursuant to the notice under Section 153C of the Act.

4.3 The Assessing Officer completed the assessment on the return of income disclosed without any inquiry as to from where the additional income so disclosed was earned. The Assessing Officer initiated the penalty proceedings as the additional income so disclosed in the return filed under Section 153A pursuant to the notice under Section 153C of the Act as the concealed income for the year for consideration because the said income was not shown in the return filed under Section 139 (1) of the Act for the year under consideration by the assessee. After considering the reply of the assessee, the Assessing Officer imposed the penalty of Rs.21,16,092/- under Section 271(1)(c) of the Act for the year under consideration on the additional income of Rs.64.65 Lacs disclosed in the return filed pursuant to the notice under Section 153C of the Act.

4.4 Being aggrieved by the penalty order, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) (for short 'CIT (Appeals)'). The CIT (Appeals) deleted the penalty relying upon the decision of the Rajkot Tribunal in the case of M/s. Balaji Multiflex Private Limited delivered on 10.08.2010 in IT(SS) No.64 & 65/RJT/2009 by observing as under :-

“3.3 I have carefully considered the submission of the Learned Counsel and also considered the penalty order so passed by the Assessing Officer. I have also gone through the decisions relied upon by the Ld. Counsel including the decision dated of the the Hon'ble Rajkot Tribunal in the case of M/s. Balaji Multiflex P Ltd delivered on 10.08.2010 in IT(SS) No. 64 & 65/RJT/2009. The Assessing Officer had imposed the penalty basically on the ground that though the appellant had disclosed the income u/s 132(4) and declared the income in the return filed u/s 153C but the required taxes had not been paid and therefore, the appellant cannot derive support from the decision of the Hon'ble Gujrat High Court in Mahendra C. Shah 299 ITR 355 (Guj.). However, the Ld. Counsel has categorically submitted that such finding of the Assessing Officer is factually untrue. It is evident from the correspondence of the appellant that the taxes due as per return of income were paid by the appellant. The cash seized was not appropriated against the tax liability by the department even after written request of the appellant cannot be considered as non- payment of taxes.

3.4 First of all, I would like to bring it on record that I have confirmed the penalties imposed by the Assessing Officers of Central Circles of Rajkot and Baroda which were imposed on the additional income disclosed in the 153A returns. These

penalties were confirmed by me by relying on the decisions of the Hon'ble Delhi Tribunal in the case of Smt. Kiran Devi vs. Asstt. CIT [2009] 125 TTJ (Delhi) 631, Hon'ble Bangalore Tribunal in the case of Dy.CIT vs. K. Natarajan [2009] 33 SOT 92 (Bang.) and Hon'ble Ahmedabad Tribunal in the case of ACIT vs. Kirit Dahyabhai Patel [2009] 121 ITD 159 (Ahd.) (TM). In some of the cases, reliance was placed on the decision of the Hon'ble Calcutta High Court in the case of CIT vs. Suresh Chand Bansal 223 CTR (Cal.) and on the decision of the Hon'ble Rajasthan High Court in the case of CIT vs. Kanhaiyalal 214 CTR (Ral.) 611 on behalf of the appellants which were not considered on account of the decision of the Hon'ble Ahmedabad Tribunal in the case of ACIT vs Kirit Dahyabhai Patel [2009] 121 ITD 159 (Ahd.) (TM).

3.5 However, Hon'ble Rajkot Tribunal, which is the jurisdictional Tribunal for the CIT(A)-IV, Ahmedabad, had changed the entire scenario in the case of Dy.CIT vs. M/s Balaji Multiflex P. Ltd. for the A.Y. 2004-05 and A.Y.-2005-06 by dismissing the departmental appeals vide order dated 10.08.2010 in IT(SS) No. 64 & 65/RJT/2009. In the aforesaid cases of both the years, the penalties imposed by the Assessing Officer were deleted by my predecessor by holding that the Assessing Officer had not discharged the burden to prove the concealment of income. The penalty was levied

purely on the basis of additional income disclosed in the returns filed u/s 153C of the Act. He had also held that in a case where all the necessary particulars are declared by the assessee in the return of income, it cannot be said that the assessee has concealed his income or furnished inaccurate particulars of income in respect of the undisclosed income. The matter was carried to the Tribunal by the department. The Hon'ble Rajkot Tribunal in the cases of Dy.CIT vs. M/s Balaji Multiflex P. Ltd. (supra) has dismissed the departmental appeals for both the years. The decision of the Hon'ble Rajkot Tribunal is binding on CIT(A)-IV, Ahmedabad being Jurisdictional Tribunal if the facts of the case resembles. As is evident, the Hon'ble Tribunal in their order had relied on the decisions of Hon'ble Calcutta High Court in the case of CIT vs. Suresh Chand Bansal 223 CTR (Cal.) 128, Hon'ble Allahabad High Court in the case of Bhairav Lal Verma vs. UOI 146 CTR (All.) 16, Hon'ble Rajasthan High Court in the case of CIT vs. Kanhaiyalal 214 CTR (Ral.) 611 and Hon'ble MP High Court in the case of CIT vs. Suresh Chand Mittal 241 ITR 124 (MP) which was latter on affirmed by the Hon'ble Supreme Court in the case of CIT vs. Suresh Chand Mittal 251 ITR 9 (SC). The Hon'ble Tribunal however, distinguished the decision of the Third Member Bench of the Hon'ble Ahmedabad Tribunal in the case of ACIT vs. Kirit Dahyabhai Patel 121 ITD 159 (A hd.)(TM)."

4.5 After considering the decision of the Rajkot Bench Tribunal in the case of Dy. CIT v. M/s. Balaji Multiflex Private Limited, the CIT (Appeals) deleted the penalty and observed as under :-

"3.6 I have carefully gone through the facts of the case and aforesaid finding of the Hon'ble Rajkot Tribunal. The Hon, ble Rajkot Tribunal, relying on the decision of Hon'ble Calcutta High Court in the case of CIT vs. Suresh Chand Bansal 223 CTR (Cal.) 128, has held vide para-7.1 of the order that "In the present case too, the offer of additional income was held to be good offer. All these together present the factual context which must be considered before taking a decision about whether the appellant should be held guilty of concealment of income offered in each of the assessment years. The conclusion that income belonged to the assessee, is based on the offer of the assessee and not entirely on the seized documents. As the said offer is said to have been made to avoid litigation and is an estimate of income that might not have been taxed and as no attempt was made even to find out the locus of the earning and the person who concealed such earning, penalty u/s 271(1)(c) fails to stand."

3.7 The Hon'ble Tribunal vide para-8 while distinguishing the case of the Hon'ble Ahmedabad Tribunal had observed that In the case of Kirit

Dahyabhai Patel, substantial incriminating documents were found which led to the adverse inference that the assessee had concealed the particulars of his income. Whereas, in the case of the present assessee, there is no incriminating material which draws adverse inference. Where there is no evidence of concealment, the very levability of concealment penalty does not arise. Reference was made to the decision of the Allahabad High Court in the case of Bhairav Lal Verma Vs. Union of India (1998) 146 CTR (All) 16 wherein it was held that "As a principle of law it cannot be held that the disclosure of the concealed Income after the raid or search cannot be voluntary. It is a question which has to be decided by the department in each case on the basis of the material available on the record. The criteria for deciding this question is to find out as to whether the department has any incriminating material with regard to the disclosed income. If the answer is in the affirmative, the disclosure cannot be said to be voluntary. But if the department has no incriminating material with regard to the income disclosed, the disclosure is liable to be treated as voluntary even if it was made after search."

3.8 It was held vide para-9 of the order that "It is also pertinent to point out that the Hon'ble High Court of Kolkata in the case of CIT vs Suresh Chand Bansal (supra) held that, additional income offered

by the assessee after the search having been accepted in its entirety without detailed discussion of the seized documents and without making any attempt to obtain the explanation of the assessee, penalty u/s 271(1)(c) is not leviable."

3.9 Therefore, in view of the facts of the case and by following the binding decision of the Hon'ble Rajkot Tribunal as aforesaid, it is held that the appellant had not concealed the particulars of income. The disclosure of additional income in the return filed in response to the notice issued u/s 153C of the Act was voluntary and the same was accepted by the Assessing Officer in its entirety without linking it to any material recovered or seized during the course of search and without making any attempt to obtain the explanation of the assessee. The Explanation-5 to sec. 271(1) of the Act cannot be applied in the case of the appellant as the Assessing Officer had nowhere established that the assessee was found to be the owner of any money, bullion, jewellery or other valuable article or thing, which had not been accounted for. Even if, it is accepted that the assessee was found in possession of unexplained records in the course of search and in the course of the recording of the statement it was inter alia deposed that such income was unrecorded, the deeming fiction should be that the assessee concealed the income representing the quantum of such

income/investment and this fiction comes to an end when the corresponding amount was offered for taxation and the source of investment was also explained. The assessee offered the amount of additional income for tax in the respective years, which had not been challenged by the Assessing Officer. Therefore, the benefit of Explanation 5 is available to the assessee on the facts and in the circumstances of the case. This view is supported by the finding of the Hon'ble Tribunal recorded in para-10 of their order. The charge against the assessee is concealment of particulars of income. Where the charge is of concealment, the Assessing Officer has to establish that the assessee has not disclosed the particulars of income under the main provisions or the case of the assessee falls within the scope of the deeming fictions created under the explanations. The burden is upon the Assessing Officer to establish the existence of the charge on the basis of material on record. Reference may be made to para-11 of the order of the Hon'ble Tribunal dated 10.08.2010. The Assessing Officer could not establish the charge of concealment of income on the appellant. Considering these specific facts, no penalty was imposable on the appellant for concealment of particulars of income for the year under consideration.

3.10 In view of the above discussion in para-3 3 to para-3.9 and respectfully following the aforesaid

decision of the Hon'ble Rajkot Tribunal in the case of Dy.CIT vs. M/s Balaji Multiflex P. Ltd. (supra), it is held that the Assessing Officer was not justified in imposing the penalty u/s 271(1)(c) of the Act for concealment of particulars of income in the case of the appellant for the A.Y. 2006-07. The penalty so levied for Rs. 21,16,092/- is hereby deleted.”

4.6 Being aggrieved, the revenue preferred appeal before the Income Tax Appellate Tribunal, Rajkot Bench, Rajkot (hereinafter referred to as ‘the Tribunal’) and the Tribunal after considering the submissions made by both the sides, set aside the order of the CIT (Appeals) and restored the order of the Assessing Officer for levy of the penalty under Section 271(1)(c) of the Act as under :-

“6. We have considered the rival submissions and perused the orders of the lower authorities both concerning quantum proceedings as well as penalty proceedings. The short question in dispute is whether in given facts, penalty under s.271(1)(c) can be imposed on income declared in the return filed under s.153C of the Act pursuant to search proceedings or not. During the course of search under s.132 of the Act at the residential premises of the assessee, certain incriminating documents were found wherein details of sale of plot of land was found to be recorded. The son of the assessee based on the incriminating document made a disclosure of undisclosed income of Rs.65 lakhs during the

course of search. However, in spite of disclosure, the return filed under s.139(1) after search did not include the admitted undisclosed income of Rs.65 lakhs and in original return so filed (after search), a business loss of Rs.2,30,089/- was declared in total disregard of the income disclosed at the time of search. It is only after proceedings under s.153C were initiated, the undisclosed income in the form of extra sale proceeds to the tune of Rs.64,54,000/- was credited to the capital account of the assessee and brought to tax. The AO did not consider the aforesaid action of declaring the additional income after issuance of notice under s.153C of the Act in the realm of bonafide. It is the case of the assessee that Explanation-5 to section 271(1)(c) is not applicable in the facts of the present case in view of the escape route provided in clause(2) to Explanation-5. In confirmity thereto, the CIT(A) observed that Explanation-5 to section 271(1)(c) cannot be applied against the assessee as the AO has not established that the assessee was found to be owner of any money, bullion, jewellery or other valuable article or thing in which has not been accounted for. The CIT(A) also observed that the default committed by assessee, if any, towards concealment had come to an end when the corresponding amount was offered for taxation and the source of investment was also explained. The CIT(A) noted that the assessee has offered the additional income for tax in respective which has

not been challenged by the AO. Therefore, the benefit of exception provided for inapplicability of Explanation-5 is available to the assessee.

7. We fail to comprehend the rationale for grant of relief by CIT(A). We observe that the AO has clearly recorded a finding of fact that certain incriminating documents were found from the premises of the assessee wherefrom the details of transaction carrying specific identification [RS No.107 of Madhuben Green Villas Project] of asset was unearthed. The disclosure of the aforesaid amount was also admitted on behalf of the assessee. In spite of this, the return filed after the search in the regular course under s.139(1) of the Act (and more pertinently after search) was without the inclusion of the aforesaid undisclosed income. It was only after the case of the assessee was clubbed with other search matter, and proceedings under s.153C were initiated, the undisclosed income in the form of extra sale proceeds (equivalent to money) was declared by way of two returns filed on the same date, one as revised return under s.139(4) and other under s.153C of the Act. Therefore, the sequence of event would show that the assessee has not readily offered the income in the return filed after the search. It was only after pursuance by way of notice issued under s.153C that the return filed after search was grudgingly revised to include the aforesaid income. Thus, it is difficult to hold that

assessee has satisfied the cumulative conditions provided in Sub-clause (2) to. Explanation-5 to escape the clutches of penalty. We also do not find merit in the argument on behalf of the assessee that the assessee was not found to be the owner of any money, bullion, jewellery or other valuable article or thing as a condition precedent for invocation of Explanation-5 to section 271(1)(c) of the Act. The incriminating documents found clearly demonstrated the unaccounted sale proceeds on sale of plot which is nothing but unaccounted money in the control of assessee as hidden from the Income Tax Department. The opportunity was available to the assessee to come out clean on such disclosure which was not initially availed. The income was ultimately declared when the assessee was left with no choice and taxes were also paid belatedly albeit before the completion of the assessment."

4.7 The Tribunal after referring to the decision of this Court in the case of **Kirit Dahyabhai Patel v. ACIT (2015) 280 CTR 216**, as relied upon on behalf of the assessee, held that the same is misplaced and referred to and relied upon the decision of the coordinate Bench of the Tribunal in the case of Vijay K. Shah v. ITO in IT(ss)A No.54/Ahd/2014 for Assessment Year 2003-04 for restoration of the penalty, by observing as under :-

"9. In the present case as noted above, the facts are gross and peculiar. The assessee was found to

be a reluctant tax compliant who in spite of having the opportunity to come with clean hands did not choose to do so and continued to defy his own admission of undisclosed income unearthed backed by specific details. Thus, the decision of the Hon'ble Jurisdictional Gujarat High Court rendered in the case of Kirit Dahyabhai Patel (supra) is of no assistance to the assessee. The order of the CIT(A) in granting relief is dictated by misappreciation of facts and law. Accordingly, the order of the CIT(A) is quashed and the order of the AO imposing the penalty is restored."

5. Learned advocate Mr. B. S. Soparkar for the appellant submitted that the appellant - assessee filed a return under Section 153A pursuant to the notice under Section 153C of the Act in which the undisclosed additional income of Rs.64.54 Lacs was disclosed as per the statement made by her son under Section 132 (4) of the Act and paid the tax. It was submitted that reliance placed by the Tribunal on the return filed under Section 139(1) of the Act prior to after the search but before the return filed under Section 153C of the Act to attribute *mens rea* on the part of the assessee is not correct as per the scheme of the Act. It was submitted that once a return under Section 153A pursuant to the notice under Section 153C is filed, the pending returns which are yet to be processed have to be ignored as the same would be abated and, therefore, the return filed by the assessee under Section 139(1) or the revised return filed under Section 139 (4) of the Act would be of no consequence as the only return which is required to be processed would be the return filed under Section 153A in response to the

notice under Section 153C of the Act. In support of his submissions, reliance was placed on the decision of the Hon'ble Bombay High Court in the case of **Principal Commissioner of Income Tax v. JSW Steel Limited, reported in (2020) 422 ITR 71 (Bom)**. It was, therefore, submitted that as per the provisions of Section 271(1)(c) read with Section 271(iii) and Explanation 4 (c) of the said Section, there is no difference between the tax paid by the assessee and the tax made payable as per the assessment order passed and as such, there is no tax sought to be evaded by the assessee so as to levy the penalty under Section 271(1)(c) of the Act.

6. On the other hand, learned Senior Standing Counsel Mr. Maulin G. Yajnik for the revenue submitted that in the peculiar set of facts of the case, the assessee had already an opportunity to file a regular return under Section 139 (1) of the At which the assessee did not do and subsequently after pursuant to the issuance of notice under Section 153C, the assessee filed two returns, one revised return filed under Section 139(4) and another revised return filed under Section 153A in response to the notice under Section 153C of the Act. It was, therefore, submitted that as the Tribunal was justified in restoring the penalty as the assessee though having opportunity to come with clean hands, did not chose to do so and had continued to defiance his own admission of undisclosed income unearth during the course of search in case of her son. It was, therefore, submitted that the reliance placed on the decision of this Court by the assessee before the Tribunal in the case of Kirit Dahyabhai Patel v. ACIT (2015) 280 CTR 216 was rightly not considered by the Tribunal as the same would not be applicable in the facts of the present case. It was further submitted

that benefit of Explanation 5 to Section 271(1)(c) granted by the CIT (Appeals) is also rightly rejected by the Tribunal as it was the case of the assessee only that Explanation 5 would not be applicable inspite of that, the CIT (Appeals) has recorded that Explanation 5 would be applicable only in case of a searched person only from whom any money, bullion, jewellery etc. is found during the course of the search and the same would not be applicable in the case of other than a searched person to whom notice under Section 153C of the Act could have been issued. It was, therefore, submitted that the question of law may be answered in favour of the revenue and against the assessee.

7. Having heard learned counsel for the respective parties and considering the facts of the case, the following undisputed facts emerge from the record :-

(I) That the assessee was subjected to the notice under Section 153C of the Act pursuant to search conducted at the residential premises in case of her son on 11.10.2006.

(II) That during the course of the search, the son of the assessee admitted that the assessee was having undisclosed income of Rs.64.65 Lacs in the case of the assessee.

(III) The assessee filed return under Section 139(1) on 31.3.2007 without disclosing the additional income of Rs.64.54 Lacs. Thereafter, notice under Section 153C of the Act was issued by the Assessing Officer.

(IV) The assessee after receipt of the notice under Section

153C, filed a revised return under Section 139 (4) as well as return under Section 153A of the Act disclosing the additional income of Rs.64.54 Lacs on 23.10.2008.

(V) The Assessing Officer passed an assessment order in the return filed under Section 153A in pursuance of the notice issued under Section 153C of the Act for the year under consideration i.e. Assessment Year 2006 - 07 and accepted the return income as well as the tax paid by the assessee. The Assessing Officer initiated the penalty proceedings under Section 271(1)(c) of the Act for the alleged concealment of income of Rs.64.65 Lacs.

The Assessing Officer has observed in the assessment order as under :-

“4. During the course of search u/s.132 of the Act, at the residential premises of the assessee Incriminating papers, which are contained in small diary placed in one loose paper file as per Annexure A-1 was seized. In this diary, the details of the sale of plots of land of R. S. No.107 of Madhuban Green Villas project are recorded. Shri Sanjay R. Sorathla, son of the assessee had, based on this small diary, seized In the loose paper file Annexure A-1, made disclosure of undisclosed Income of Rs.65,00,000/- during the course of search. Still, however, in the return of income filed u/s.139(1), after search, this admitted undisclosed income of Rs.65,00,000/- was not shown and the return filed after search and

return of income showing business loss of Rs.2,30,089/- was filled with Assessing Officer at Gandhidham in total disregard to the Income disclosed as above. It is only pursuant to the fact that the case was assigned to this Circle through a separate order passed u/s.127, and, that the proceedings u/s.153C of the Act were Initiated from Central Circle 1, Rajkot, that the undisclosed Income in the form of extra sale proceeds to the tune of Rs.64,54,000/- has been credited to the capital account of the assessee and brought to tax as above. In the same way extra sale proceeds to tune of Rs.16,29,612/- have also been shown in the return of Income for A.Y.2007-08 filed on the same day i.e. on 23-10-2008. In view of above, penalty proceedings u/s.271(1)(c) of the Act are Initiated for concealment of Income of Rs.64,65,000/- for the year under consideration.

5. Subject to above, the total Income of the assessee is determined as under :-

Total Income as per return of incomeRs. 64,28,970/-

Total assessed Income Rs.64,28,970/-

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Agricultural Income for rate purpose Rs. 21,100/-

Assessed u/s.153C of the IT Act, 1961. Charge tax.

Charge interest u/s.234-A,234-B,234-C. Give credit for prepaid taxes after due verification. Demand

notice and challan Issued accordingly. Issue penalty notice u/s.274(2) r.w.s. 271(1)(c) of the Act for concealment of income.”

(VI) Thereafter, in the penalty proceedings, the Assessing Officer levied the penalty discarding the reply and explanation tendered by the assessee on the ground that the assessee has concealed the income of Rs.64.65 Lacs levied the penalty by observing as under :-

“6. I have carefully considered the submissions made by the assessee. The assessee's submission is not acceptable for the reasons stated as under :

(1) The assessee vide a statement u/s.132(4) of the I.T.Act 1961 had admitted the undisclosed income of Rs.65,00,000/-.

(2) In the post search return of income filed by the assessee, the assessee ought to have included the admitted disclosure of Rs.65,00,000/- and filed the return of income accordingly.

(3) In total disregard of the above factual position, the assessee filed a return of Income declaring a loss of Rs.2,30,089/- with the ITO having territorial jurisdiction.

4) Although the assessee had filed a revised return of income declaring the said disclosed

income on 27.10.2008. However, the said return was considered to be invalid being it filed beyond the time limit prescribed by the Act.

(5) The assessee had filed a return of income in response to notice u/s.153C. However, it is noticed that the assessee has not made the required payment of taxes on the declared amount for the year in question, as the amount claimed by the assessee to have paid pertains to Asstt. year 2007-08 and not to the Asstt. year 2006-07, the asstt. year in question.

(6) Thus, although the assessee made the disclosure of undisclosed income u/s.132(4) of the Act, she has not made the payment of taxes. Therefore, with due respect to the Hon'ble High Court, the ratio of its decision in the case of CIT Vs. Mahendra C Shah 299 ITR 355 will not apply to the present case.

(7) Thus, the assessee had committed a default of concealing the income which is punishable u/s.271(1)(c) of the I.T. Act.

Thus, despite the assessee had admitted u/s.132(4) of the Act disclosure of Rs.65,00,000/- for the sale of plot of land which ought to have declared by the assessee on his own, she had knowingly and intentionally avoided the inclusion of the said

income and concealed the income.

7. In view of the above, I am satisfied that this is a fit case for levy of penalty u/s.271(1)(C) of the Act. The computation of penalty leviable is as under:-

(a) Amount of income on which tax is sought to be evaded.	64,65,000/-
(b) Amount of tax evaded.	21,16,092/-
(c) Penalty levied u/s. 271(1)(c) for concealment of income at the rate of 100% of tax evaded.	21,16,092/-
(d) Penalty u/s.271(1)(c) at the rate of 300% of tax evaded.	63,48,276/-

8. I, therefore, impose a penalty of Rs.21,16,092/- (Rupees twenty one lac sixteen thousand ninety two only) being 100% of the tax sought to be evaded as against maximum penalty leviable of Rs.63,48,276/- at the rate 300% of tax sought to be evaded.”

(VII) The CIT (Appeals) as observed herein above deleted the penalty by relying upon Explanation 5 to Section 271(1) of the Act by applying the decision of the Tribunal, Rajkot Bench in the case of M/s. Balaji Multiflex Private Limited.

(VIII) The Tribunal thereafter set aside the order passed by the CIT (Appeals) and restored the order of penalty relying upon the coordinate Bench of the Tribunal in the case of Vijay K. Shah v. ITO in IT(ss)A No.54/Ahd/2014 on the ground that the assessee did not come with clean hands inspite of giving opportunity and

continued to defy his own admission of undisclosed income unearthed backed by specific details. Reliance placed by the assessee on the decision of this Court in the case of Kirit Dahyabhai Patel v. ACIT (2015) 280 CTR 216 was also held to be misplaced by the Tribunal.

8. It would, therefore, be germane to refer to the relevant provisions of the Act as under :-

8.1 Section 271 (1) (c) & 271 (1) (iii) of the Act with Explanation 4 & 5 reads as under :-

“271. Failure to furnish returns, comply with notices, concealment of income, etc.

(1) If the Income-tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that any person -

(a)

(b) has failed to comply with a notice [under sub-Section (2) of Section 115WD or under sub-Section (2) of Section 115WD or under sub-section (1) of section 142 of sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142, or

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income or

(d) has concealed the particulars of the fringe

benefits or furnished inaccurate particulars of such fringe benefits,],

he may direct that such person shall pay by way of penalty, —

[(i)

(ii) in the cases referred to in clause (b), in addition to tax, if any, payable by him a sum of ten thousand rupees for each such failure;]

(iii) in the cases referred to in clause (c) or clause (d), [in addition to tax, if any, payable] by him, a sum which shall not be less than, but which shall not exceed [three times], the amount of tax sought to be evaded by reason of the concealment of particulars of his income [or fringe benefits] or the furnishing of inaccurate particulars of such income [or fringe benefits].”

Explanation 4 - For the purposes of clause (iii) of this sub-section, the expression "the amount of tax sought to be evaded", -

(a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, means the tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income;]

(b) in any case to which *Explanation 3* applies, means the tax on the total income assessed;

(c) in any other case, means the difference between the tax on the total income assessed and the tax that

would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished.]

Explanation 5.—Where in the course of a search initiated under Section 132, 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 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,—

(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.”

8.2 Section 153A (1) of the Act reads as under :-

“153A. Assessment in case of search or requisition.

(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall —

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and

verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate:

Explanation — For the removal of doubts, it is hereby declared that -

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as

applicable to such assessment year.”

8.3 Section 153C of the Act reads as under :-

“Assessment of income of any other person.

153C. (1) Notwithstanding anything contained in Section 139, Section 147, Section 148, Section 149, Section 151 and Section 153, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned, belongs or belongs to a person other than the person referred to in Section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue such other person notice and assess or reassess the income of the other person in accordance with the provisions of Section 153A;

Provided that in case of such other person, the reference to the date of initiation of the search under Section 132 or making of requisition under Section 132A in the second proviso to Section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person.

(2) Where books of account or documents or assets seized or requisitioned as referred to in sub-section (1) has or have been received by the Assessing Officer having jurisdiction over such other person

after the due date for furnishing the return of income for the assessment year relevant to the previous year in which search is conducted under Section 132 or requisition is made under Section 132A and in respect of such assessment year —

(a) no return of income has been furnished by such other person and no notice under sub-section (1) of Section 142 has been issued to him, or

(b) a return of income has been furnished by such other person but no notice under sub-section (2) of Section 143 has been served and limitation of serving the notice under sub-section (2) of Section 143 has expired, or

(c) assessment or reassessment, if any, has been made, before the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person, such Assessing Officer shall issue the notice and assess or reassess total income of such other person of such assessment year in the manner provided in Section 153A.”

9. On perusal of the above provisions, it is clear that once notice under Section 153C is issued, any pending return filed by the assessee for any of the assessment year would abate. Therefore, the return of income filed by the assessee under Section 139(1) or 139(4) will not be considered as a valid return for the purpose of framing the assessment. Admittedly, the assessee in the return filed under Section 153A in response to the notice under Section 153C has disclosed the additional income of Rs.64.65 Lacs and paid the tax thereon. Therefore, considering the provisions of

Section 271(1)(iii) read with Explanation 4 (c), there is no tax sought to be evaded which can be considered for the levy of penalty under Section 271(1)(c) even if it is presumed that the assessee has concealed the income in the return filed under Section 139(1) or a revised return filed under Section 153A of the Act. Therefore, reliance placed by the CIT (Appeals) on Explanation 5 is rightly held by the Tribunal as not applicable. On perusal of Explanation 5, the same would apply only in case of a searched person from whom the money, bullion, jewellery etc. is found during the course of search and searched person has paid the tax on the amount of such value of such money, bullion, jewellery etc. after the search, there would be no penalty under Section 271(1)(c) of the Act on the ground of concealment.

10. However, in the facts of the case, when the assessee has disclosed the additional income by way of return of income filed under Section 153A in response to the notice issued under Section 153C of the Act and when the Assessing Officer has accepted such return without any further addition, the provision of Section 271(1)(c) of the Act would not be applicable.

11. The Bombay High Court in the case of **Principal Commissioner of Income Tax v. JSW Steel Limited** (Supra) while considering the scope of application of the return filed under Section 153A of the Act, has held in paragraphs 8.1 to 9 as under :-

“8.1. In other words, Section 153-A(1) provides that where a person is subjected to a search under Section 132 or his books of accounts, etc. are requisitioned under Section 132-A after 31.05.2003,

the assessing officer is mandated to issue notice to such person to furnish return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made. Such returns of income shall be treated to be returns of income furnished under Section 139. Once returns are furnished, income is to be assessed or re-assessed for the six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Thus, once Section 153-A(1) is invoked, assessment for 6 assessment years immediately preceding the assessment year in which search is conducted or requisition is made becomes open to assessment or re-assessment. Two aspects are crucial here. One is use of the expression “notwithstanding” in sub-section (1); and secondly, that returns of income filed pursuant to notice under Section 153-A (1)(a) would be construed to be returns under Section 139. The use of *non obstante* clause in sub-section (1) of Section 153-A i.e., use of the expression “notwithstanding” is indicative of the legislative intent that provisions of Section 153-A(1) would have overriding effect over the provisions contained in Sections 139, 147, 148, 149, 151 and 153.

8.2. Having noticed the above, we may also refer

to the second and the third proviso to Section 153-A(1). For the sake of convenience, the second and the third proviso to Section 153A(1) of the said Act which is relevant is reproduced below and reads thus :

“Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this [sub-section] pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate:

Provided also that the Central Government may by rules made by it and published in the Official Gazette (except in cases where any assessment or reassessment has abated under the second proviso), specify the class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made.”

8.3. The second proviso says that any assessment or re-assessment proceedings falling within the said period of six assessment years pending on the date of initiation of search under Section 132 or making of requisition under Section 132-A shall abate. The

third proviso mentions that the Central Government may frame rules to specify such class or classes of cases in which the assessing officer shall not be required to issue notice for assessing or re-assessing the total income for the said six assessment years.

8.4. Reverting back to the second proviso what is to be noticed is that as per this proviso, any assessment or re-assessment in respect of any assessment year falling within the said period of six assessment years is pending on the date of initiation of search or making of requisition, those assessment or re-assessment proceedings shall abate. In other words, pending assessment or re-assessment proceedings on the date of initiation of search or making of requisition shall abate.

8.5. That brings us to the crucial expression, which is 'abate'. The ordinary dictionary meaning of the word 'abate', as per Concise Oxford English Dictionary, Indian Edition, is to reduce or remove (a nuisance). Derivative of abate is abatement. In Black's Law Dictionary, Eighth Edition, 'abatement' has been defined to mean an act of eliminating or nullifying; the suspension or defeat of a pending action for a reason unrelated to the merits of the claim. In Supreme Court on Words and Phrases (1950-2008), "abating" has been defined to mean "an extinguishment of the very right of action

itself”; to “abate”, as applied to an action, is to cease, terminate, or come to an end prematurely.

9. Therefore, from a critical analysis of the provisions contained in Section 153-A(1) of the Act more particularly the key expressions as referred to above, it is evident that assessments or re-assessments pending on the date of initiation of search would stand abated. Return of income filed by the person concerned for the six assessment years in terms of Section 153-A(1)(a) would be construed to be a return of income under Section 139 of the Act.”

12. In view of the above detailed explanation given by the Hon’ble Bombay High Court for applicability to Section 153A and abatement of the returns filed prior to which are pending for further process at the time of filing of such return, the Tribunal was not justified in considering the return filed by the assessee under Section 139(1) or 139(4) for the purpose of holding that the assessee had not come with clean hands inspite of giving an opportunity and as such, the Tribunal was not justified in restoring the order of penalty. It is pertinent to note that the reasoning given by the CIT (Appeals) was not in accordance with law though the conclusion was correct. Therefore, without going into further merits, we hereby quash and set aside the order dated 17.4.2017 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad in I.T.(ss) A. No.68/RJT/2010 for levy of the penalty on the ground that once the assessee has disclosed the additional income in the return filed under Section 153A in response to the

notice issued under Section 153C, the returns filed earlier under Section 139(1) or 139(4) which are yet to be processed had abated and, therefore, in absence of any further difference in the tax payable and the tax paid, resulting into there is no tax sought to be evaded as per Explanation 4 (c) of Section 271 of the Act, no penalty could have been levied in the facts of the case. The question of law is, therefore, answered in favour of the assessee and against the revenue.

The appeal is accordingly allowed.

(BHARGAV D. KARIA, J)

(NIRZAR S. DESAI, J)

SAVARIYA