

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA**

Before **Shri Mahavir Singh, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.1746/Kol/2011 Assessment Year :2008-09

Harish Kumar Sarawgi, Dumri Road, Whatty Bazar, Giridhi – 815301 Jharkhand [PAN No.ALDPS 5357 E]	V/s.	DCIT, Central Circle-XI, Poddar Court, 18, Rabindra Sarani, Kolkata – 700 001
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर स/By Appellant	Shri D.S.Damle, FCA
प्रत्यर्थी की ओर स/By Respondent	Shri Rajat Subhra Biswas, CIT-DR
सुनवाई की तारीख/Date of Hearing	29-10-2015
घोषणा की तारीख/Date of Pronouncement	27-11-2015

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is arising out of order of Commissioner of Income Tax (Appeals), Central-I, Kolkata in appeal No. 90/CC-XI/CIT(A).C-I/10-11 dated 28.11.2011. Assessment was framed by DCIT, Central Circle-XI, Kolkata u/s 143(3), 153B(b)/153D of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 31.12.2009 for assessment year 2008-09. Penalty levied u/s 271AAA of the Act vide order dated 29.06.2010 by Assessing Officer.

2. Only issue to be decided in this appeal of assessee is that whether the facts and circumstances of the order of Ld. CIT(A) has justified in confirming the penalty levied u/s 271AAA of the Act.

3. Briefly stated facts are that a search and seizure operation u/s 132 of the Act was conducted by the Investigation Wing of IT Department on 24.01.2008 at the business & residential premises of assessee. In the course of search documents, loose papers, books of account, computer hard discs and peripherals were found, inventoried and seized. The statement u/s 132(4) of the Act was recorded by the Authorized Officers of IT Department from Shri Harish Kr. Sarawgi. The assessee made a disclosure of Rs. 12,62,61040.00 as undisclosed income for the relevant year under consideration. The said figure of disclosure was arrived on account of the addition of the items as enumerated below:-

- a) Undisclosed bank accounts
- b) Undisclosed business capital and its profit on such transaction
- c) Undisclosed jewellery etc.,

For all the above stated disclosure penalty proceedings were duly initiated u/s. 271AAA of the Act against which assessee made the submissions that the undisclosed income offered in the return of income has been accepted by the department without making any further addition. However, the Assessing Officer in his penalty order dated 29.06.2010 has disregarded the submissions of assessee on the following reasons:-

“(i) It is a fact that disclosure was made in course of search but the disclosure was not made in the name of any person. Moreover, the assessee did not disclose any undisclosed income in the statement recorded u/s 132(4) in course of search.

(ii) There is no provision in the Act to allow credit of tax paid by other persons. Therefore, the assessee’s contention that credit of tax was not allowed, is not tenable.

(iii) Inspection of seized documents was allowed subsequent to search & seizure operation. Therefore, the plea of the assessee that correct undisclosed income could not be quantified, has no basis.

(iv) As stated earlier, that there is no provision in the IT Act to allow credit of the tax paid by the others in their individual capacity.

(v) Interest u/s. 234A, 234B & 234C has been calculated correctly as there is no provision in the IT Act to treat the seized cash as Advance Tax. Seized cash can be adjusted against the existing liability. On the date of seizure, there was no existing liability on account of tax. Therefore, the assessee’s contention on this count is not tenable and the same is summarily rejected.

(vi) It is a fact that the assessee stated the manner in which the undisclosed income was earned, but failed to substantiate the same.

To sum up, the assessee is not entitled to immunity from penalty provided in Sub-Sec. 2 of Sec. 271AAA of IT Act, 1961 as all the conditions laid down in that section have not been satisfied.

6. In view of the above, I am satisfied that it is a fit case for imposing of penalty u/s. 271AAa of the IT Act, 1961.”

Aggrieved, assessee preferred appeal before Ld. CIT(A) who confirmed the action of Assessing Officer as per vide para 4.5 of his order which is reproduced below:-

“4.5 Now the question under consideration is whether the disclosure made by Sri Santosh Kr. Sarawg can be treated as disclosure made on behalf of his brother Sri Harish Kr. Sarawgi for the purpose of claiming immunity under section 271AAA of the Act. In support of the claim the Ld. AR has relied on the decision of the Hon'ble High Court of Allahabad in the case of CIT v. Pramod Kumar Maheshwari, 294 ITR 175 (All). In the said case the surrender was made by the assessee's father and no enquiries were made from the assessee. Where as in the case under consideration the documents related to the unaccounted business was not only seized from the possession of the assessee in the premises located in different city and but also detail enquiries were made from him during the course of search proceeding. However instead of admitting and surrendering the undisclosed income, he misguided the search party stating that the documents reflects the undisclosed transaction carried out by the company M/s Bir Steel Pvt. Ltd. Moreover even otherwise in the statement recorded under section 132(4), Sri Santosh Kr. Sarawgi had not admitted any unaccounted manufacturing business being carried out by him or his family members. Hence from the above it is apparent that the appellant in the statement recorded under section 132(4) of the Act had neither admitted any undisclosed income nor specified the manner in which such income has been earned. Accordingly, it is held that the basic and primary condition for claiming immunity under section 271AAA is not satisfied. Accordingly, it is held that the assessee is liable for penalty under section 271AAA of the income Tax Act 1961. Hence the penalty of Rs.1,26,26,104/- imposed by the AO is confirmed.”

Now, being aggrieved by the order of Ld. CIT(A) assessee preferred second appeal before us on the following ground:-

“1. For that on the facts and in the circumstances of the case and in law, the CIT(Appeals)erred in upholding the penalty levied by the Assessing Officer under Section 271AAA of the I.T. Act, 1961.

2. For that on the facts and in the circumstances of the case and in law, the CIT(Appeals)erred in not appreciating that the appellant had fulfilled the conditions prescribed in Section 271AAA(2) of the IT Act, 1961`.

3. For that on the facts and in the circumstances of the case and in law, the CIT(Appeals) erred in holding that the appellant did not disclose income in the statement recorded under Section 132(4) and thereby holding that the primary condition prescribed in Section 271AAA was not fulfilled.

4. For that on the facts and in the circumstances of the case and in law, the CIT(Appeals)erred in not appreciating that the appellant had complied with the substantive conditions prescribed in Section 271AAA and the defaults as alleged by the AO were by nature technical and procedural latches.

5. For that on the facts and in the circumstances of the case and in law, the penalty levied under Section 271AAA and confirmed by the CIT(Appeals) be cancelled.”

Shri D.S. Damle, Ld. Authorized Representative appearing on behalf of assessee and Shri Rajat Subhra Biswas, Ld. Departmental Representative appearing on behalf of Revenue.

4. We have heard rival contentions of both the parties and perused the materials available on record. Ld. DR relied on the orders of authorities below. Ld. AR submitted the paper book containing pages 1 to 56 and further submitted supplementary paper book running pages from 1 to 32. The Ld.AR submitted that income declared at the time of search by assessee was duly accepted by AO in his assessment order and no addition *qua* declaration was made by the AO. Ld. AR drew our attention at page 46 of paper book, where the declaration was given by assessee stating that the trial balance, balance sheet contained details of transactions carried out in its steel wires misc. roll & nails etc., It is also observed from the assessment order that seized papers identified as SC-1 to SC-9 which are placed on page No. 15 of ID-SC-3

contain the price list for nails of different size and qualities and the said paper give particulars of indicative maximum retail price at which nails can be sold in the retail market. The seized documents identified SC-3 and SC-9 gives particulars regarding the receipt and consumption of coils. Finally, Ld. AR requested that the manner for deriving the income from the documents impounded at the time of search has been duly specified before the authorities below and prayed not to levy the penalty imposed by AO u/s 271AAA. From the aforesaid discussion, we find that penalty u/s 271AAA of the Act can be levied only if the following conditions are satisfied as specified under section 271AAA which reads as under :-

271AAA. (1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of June, 2007 [but before the 1st day of July 2012], the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.

(2) Nothing contained in sub-section (1) shall apply if the assessee,-

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) substantiates the manner in which the undisclosed income was derived; and

(iii) pays the tax, together with interest, if any, in respect of the undisclosed income.

(3) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

We understand from the reading of the provisions of Sec. 271AAA penalty will be waived if the assessee give a statement u/s 132(4) of the Act recording the undisclosed income and specifies the manner in which such income has been derived and substantiates the same and paid the tax together with interest in respect of undisclosed income. In the instant case, assessee had given the statement u/s. 132(4) of the Act by declaring the undisclosed income and has

paid tax due along with interest. However, if we analysis the manner in which the undisclosed income was derived, we find that the assessee claimed the business of coils as suggested from the seized documents mark SC-1 to Sc-9 and the same was not offered to tax. These documents include computer printout which contain stock register, details of purchases, trial balance and balance sheets etc. A pen drive was also recovered from the possession of assessee marked as PD-1. The statement of the assessee was recorded under section 132(4) where inter alia the assessee stated that the seized documents are the details of No. 2 Accounts which was never disclosed to the government authorities. We also find from the assessment order of the AO the manner in which the assessee offered the undisclosed income before him. The relevant extract of the assessment order is reproduced below:-

"6. Seized documents SC-3 to SC-9-

In course of search & seizure operation, documents marked as SC-1 to SC-9 was found and seized from the said premises. Documents marked as SC-3 to SC-9 which were seized from the said premises are the computer print outs which contain stock registers, details of purchases, trial Balances, balance sheets etc., It is pertinent to mention that the Pen Drive marked as PD-1 was seized from the possession of Sri Harish Kr. Sarawgi. The statement of the assessee was recorded in course of search & seizure operation. Sri Harish Kr. Sarawgi admitted that entries contained in the documents referred above as SC-6 to SC-9 are undisclosed accounts of M/s Bir Steels Pvt. Ltd. In this context, the relevant portion of the statement are reproduced below:

'Qs 13:- Please go through the loose bunch of computer print outs bearing ID mark SC/3 and explain the same.

Ans:- The page No. 1 to 7 is Trial Balance, P/L A/c, Balance-sheet, Sales Account and Purchase Account maintained by me under the code name, 'ABC'. These are the details of No. 2 Accounts which is not disclosed to the Govt. authorities. All the expenditures debited in the P/L Account are accounted for in the regular books of account of M/s Bir Steels Pvt. Ltd.

Pages 8 to 13 are details of unaccounted stock of wires along with details of purchase and sale of the same. All the quantitative figures are 25 kgs. Each. For example, in page 8, on 1-12-07 production of machine no. 1 was 53 bundles of 20 Gauge wire each weighing 25 kgs.

Page No. 14 is the detail of unaccounted purchase of coil and unaccounted production of nails and wires of M/s Bir Steels Pvt. Ltd.

Qs.14:- Please go through computer print-outs bearing ID mark SC/4 found and seized from your residence and explain the same.

Ans.:- This bunch of Computer print-outs taken from my pen-drive are details of sales and purchase of coils. All most all the receipts and payments made in these transactions are in '**kachha**' in cash. Most of the coil purchased in cash are from a) Shivan India Re-rolling Mill, Durgapur, b) M/s. Super Smelters, Durgapur and c) M/s. Adhunik Steel, Kolkata through their broker / commission agent, Shri Narendra Agarwal (Navinder Babu) (Page No. 31 to 34 are details of purchase of nails, Misroll, Plate and wire).

Qs.15:- Please go through the computer print-outs bearing ID mark SC/5 found and seized from your residence and explain the same.

Ans:- This bunch of computer print-outs taken from my pen-drive are the cash book and bank book. Containing the details of purchase and sale of coil which is undisclosed for the period 01-4-07 to 31-07-07.

Qs.16:- It is seen from the pen drive that the account maintained under the code name 'ABC' is only upto 31-07-07. You have already accepted that the Account of 'ABC' is the No. 2 account of M/s Bir Steels Pvt. Ltd., Another account under the code name 'XYZ' is also found to be maintained in our Pen drive from 01-08-07 to 31-12-07. Please explain the same.

Ans:- The Account of 'XYZ' is also No. 2 account of M/s Bir Steels Pvt. Ltd, Tundi Road, Mohanpur, Giridhi for the remaining period upto 31-12-07."

Qs. 26:- Please go through the loose bunch with ID mark SC/9 and explain the same.

Ans:- Page No. 1 to 36 contains details of unaccounted stock of nails, production, sale and balance stock of nails of 25 kg. bag each for the period 01-01-07 to 31-12-07. Pages 37 to 54 are details of unaccounted stock of wire, unit is a bundle of 25 kg. each. Page No. 55 to 57 are details of stock of coil in M.T. for the period 01-10-07 to 01-12-07."

We find from the above details that the explanation of the assessee has been accepted by the AO without making any addition. It shows that the manner to substantiate the income has been duly explained by assessee before AO. We are also relying in the following judgments of ITAT.

1) SPS Steel & Power Ltd. v. ACIT in ITA No. 1391 & 1414/Kol/2011 dt.30.06.15

2-3) M/s Castala Extrusion Pvt. Ltd v. JCIT in ITA No. 1269/Kol/12 &

M/s Beco Inds. Pvt. Ltd. v. JCIT in ITA No. 1270/Kol/12 dated 24.09.15

4) Sh Naresh Ch. Agarawalla v. ACIT in ITA No. 1773-1774/Kol/12 dt.20.08.15

5-6) DCIT vs. Naresh Kr. Agarwal in ITA No. 1289-1290/Kol/12 dt.17.01.14

7-8) DCIT v. Bishnu Kr Agarwal in ITA No. 1291-1292 dated 17.01.2014

9-10) DCIT c. pradip Kr. Santhalia in ITA No.1293-1294/Kol/12 dt. 17.01.14

In view of the aforesaid facts and circumstances, we observe that the assessee has satisfied the conditions as laid down in section 271AAA(2) of the Act. Therefore the penalty order passed by Assessing Officer and subsequently confirmed by Ld. CIT(A) is quashed. Accordingly, ground raised by assessee is allowed.

5. In the result, assessee's appeal is allowed.

Order pronounced in the open court 27/11/2015

Sd/-
(Mahavir Singh)
(Judicial Member)
Kolkata,
*Dkp

Sd/-
(Waseem Ahmed)
(Accountant Member)

दिनांक:- 27/11/2015 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी / Appellant-Harish Kr. Sarawgi, Whatty Bazar, Giridhi -815301, Jharkhand
2. प्रत्यर्थी / Respondent-DCIT, C.C.-XI, Poddar Court, 18, Rabindra Sarani, Kol-01
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेषा सप

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।