

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्रीमती दिवा सिंह, न्यायिक सदस्य एवं श्री भागचंद, लेखा सदस्य के समक्ष
BEFORE: SMT. DIVA SINGH, JM & SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 773/JP/2016
निर्धारण वर्ष / Assessment Year : 2008-09

Murarilal Mittal, B-18, Sardar Patel Marg, Chomu House, Jaipur.	बनाम Vs.	A.C.I.T., Central Circle-3, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACCPM 1182 D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Vijay Goyal (CA)
राजस्व की ओर से / Revenue by : Shri R.A. Verma (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 15/03/2017
उदघोषणा की तारीख / Date of Pronouncement : 12/05/2017

आदेश / ORDER

PER: BHAGCHAND, A.M.

This is an appeal filed by the assessee emanates from the order of the Id. CIT(A)-4, Jaipur dated 15/6/2016 for the assessment year 2008-09. The only issue involved in this appeal is against confirming the penalty U/s 271AAA of the Income Tax Act, 1961 (hereinafter referred as the Act) amounting to Rs. 4,05,000/-.

2. Brief facts of the case are that the assessee belongs to Mittal group, whose premises were searched on 27/8/2008. In response to

notice U/s 153A of the Act, the assessee filed return of income declaring total income of Rs. 55,44,392/- for the assessment year 2008-09 on 31/3/2009. The assessment was completed U/s 143(3) read with Section 153A of the Act at an income of Rs. 70,92,010/-. The Assessing Officer made addition of Rs. 14,29,652/- by not allowing the benefit of telescoping/realization from debtors/advances stating that no nexus has been established, Rs. 1,15,765/- by making disallowance part of expenses debited under various heads stating that the expenses have not been wholly and exclusively for the purpose of business and Rs. 2,199/- on account of difference in account of pharmaceutical companies.

3. The Id CIT(A) dismissed the appeal of the assessee. The assessee preferred appeal before the ITAT, Jaipur Benches, Jaipur and after the order of the ITAT, the addition of Rs. 1,17,964/- (1,15,765 + 2199) made by making disallowance out of various expenses and difference in account of Pharmaceutical companies was remained and the balance addition of Rs. 14,29,652/- was deleted. The Assessing Officer imposed the penalty of Rs. 4,05,000/- being 10% of additional income of Rs. 40,47,535/- declared by the assessee in the return of income.

4. While pleading on behalf of the assessee, the Id AR of the assessee has submitted as under:-

The Ld CIT(A) confirmed the penalty u/s 271AAA of I.Tax by holding that the assessee has not clarified and thus has not substantiated the manner in which assessee derived undisclosed income. The lower authorities failed to appreciate the statement of the assessee under section 132(4) of Income Tax Act, wherein he categorically stated that he derived undisclosed income by inflating the expenses recorded in books. The assessee has specified the manner and substantiated the source of undisclosed income. The assessee has stated that he derived undisclosed income by inflating the expenses and this income is represented by investment in house, jewelry, and expenses in marriage. The Id AO has accepted this in assessment which means that the assessee has substantiated the manner also. Thus, the assessee's case is fully covered by sub-section (2) of section 271AAA of Income Tax Act.

The Finance Act, 2007, inserted s. 271AAA w.e.f. 1st April, 2007, reads as under:

“271AAA. Penalty where search has been initiated.-(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, 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).

(4) The provisions of sections 274 and 275 shall, so far as may be, apply in relation to the penalty referred to in this section.

Explanation.-For the purposes of this section,-

(a) "undisclosed income" means-

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has-

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or

(B) otherwise not been disclosed to the Chief Commissioner or Commissioner before the date of the search; or

(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted;

(b) "specified previous year" means the previous year-

(i) which has ended before the date of search, but the date of filing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or

(ii) in which search was conducted.'.

Since in the case of the assessee: -

- a) the additional income was duly surrendered at the time of search, (The copy of statements is enclosed herewith)
- b) the manner in which the additional income was earned was also substantiate (as explained in statements that the same was earned by inflating the expenses recorded in books of accounts. In this regard kindly refer Q. No. 5 and 8 of the statement of the assessee and
- c) the additional income was included in return filed and due taxes were paid thereon,

Therefore by virtue of provisions of sub- section (2) of Section 271AAA no penalty can be imposed on additional income of Rs. 40,47,535/- disclosed in return filed for this year. As regard to addition of Rs. 2,199/- made in assessment order this is to submit that the same income was not shown in return for the *bonafide* reasons which has been explained during assessment proceedings.

He further submitted that, even if it is taken that the assessee has not substantiated the manner of undisclosed income, we submit that the neither search party nor assessing officer asked the assessee to substantiate the manner of undisclosed income. Therefore, the penalty u/s 271AAA cannot be levied.

Section 271AAA of Income Tax Act, 1961 has been inserted by Finance Bill 2007 and is applicable in a case where search has been initiated on or after 1.6.2007 but before 1.7.2012. Expl 5 to section 271(1)(c) was also amended by the Finance Bill 2007 and stood applicable on search initiated before 1.6.2007. In Memorandum explaining the provisions, it is made clear that by in introduction of section 271AAA, expl 5 is not relevant. Both sections granted immunity from concealment proceedings in case certain conditions are satisfied. Conditions are also similar if conditions are not satisfied then penalty u/s 271AAA is 10% of undisclosed income while penalty u/s 271(1)(c) is to be quantified as per 271(1)(iii) in case conditions are not satisfied. Hence case laws decided in respect of Expl 5 to 271 (1)(c) are relevant for sub-section 2 of section 271AAA. While recording statement u/s 132(4), it is the duty of the authorized officer to apprise the assessee about provisions of law and if no question asked about the manner in which income has been derived, then on this ground, immunity cannot be denied. He relied on the following decisions:-

- (i) Gujarat High Court in the case of CIT V Mahender C. Shah 299 ITR 305
- (ii) Similar finding has been recorded by Hon'ble All. High Court in the case of CIT V Radha Kishan Goel 278 ITR 454.

- (iii) Gujarat High Court PR Commissioner of Income Tax-1 Versus M/s Geeta Prints Pvt. Ltd. Tax Appeal No. 565 of 2015 Dated: - 14 September 2015.

He further relied on the following decisions:

- (i) ITAT Jaipur Bench in case of Late Smt Sudha Patni Vs ACIT ITA No 963/JP/2015 order dated 09/08/2016.
- (ii) SPS STEEL & POWER LTD. vs. ASSISTANT COMMISSIONER OF INCOME TAX ITAT, KOLKATA TRIBUNAL (B) (2015) 44 CCH 0286 Kol Trib.
- (iii) 2016 (7) TMI 506 - ITAT Delhi in case of Sh. Vinod Chander Sinha Versus ACIT, Circle-2, New Delhi ITA No.3699/Del/2014 Dated: - 13 June 2016
- (iv) 2016 (4) TMI 949 - ITAT Visakhapatnam in case of ACIT, Circle-1 (1) , Visakhapatnam Versus M/s. Sai Ram Builders and Vica-versa I.T.A.No.738/Vizag/2013, C.O. No.12/Vizag/2014 Dated: - 18 March 2016
- (v) Sunil Kumar Bansal Vs. Deputy Commissioner of Income Tax ITAT, Chandigarh Tribunal (A) (2015) 37 ITR (Trib) 0576 (Chandigarh).

5. On the contrary, the Id SR. DR has vehemently supported the orders of the authorities below.

6. We have heard both the sides on this issue. The Id. CIT(A) has confirmed the penalty by holding that the assessee has not clarified and not substantiated the manner in which the assessee derived undisclosed income. In the statement recorded U/s 132(4) of the Act when the assessee categorically stated that he has derived undisclosed income by way of inflating expenses recorded in the books of account. In view of this, the Id. CIT(A) was not justified in holding that the assessee has not

clarified and not substantiated the manner in which the assessee derived undisclosed income. The assessee has categorically stated in answer to questions No. 5 to 7 in the statement recorded U/s 132(5) of the Act, which is placed at page Nos. 2 and 3 of the paper book. The Coordinate Bench in the case of Late Smt Sudha Patni Vs ACIT, while deciding ITA No 963/JP/2015 order dated 09/08/2016 held as under:-

4.6. We have heard rival contentions, perused the material available on record and gone through the orders of the authorities below. There is no dispute with regard to the fact that the assessee has offered in his return of income the undisclosed income of Rs. 2,71,91,880/-. The same are duly recorded by the AO at para 4 of the assessment order. Nowhere in the assessment order, the AO recorded that the assessee was asked to specify or substantiate the manner in which the income has been derived and the assessee has failed to do so. The AO has merely recorded that the total income declared in the return of income for the specified year included the undisclosed income of Rs. 2,71,91,880/- which represented the unexplained money. In accordance with sub section (2) of Section 271AAA of the Act, the penalty provisions under sub-section (1) of Section 271AAA will not 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.

In this regard, AR has submitted that the assessee satisfies all the above three conditions as is evident from facts of the case and

documents submitted. Further, the assessee, in course of search in the sworn statement recorded under section 132(4) of the Act, has admitted the undisclosed income, and clearly stated the manner in which the undisclosed income (within the meaning of Explanation (a)(i) of Section 271AAA) was derived and substantiated in statement recorded in course of search. Subsequently, the assessee paid tax, together with interest in respect of the undisclosed income and filed return of income, which stand accepted in assessment u/s 143(3) of the Act. On perusal of the above, it is seen that assessee has offered for tax his undisclosed income (Rs. 2,71,91,880/-) including jewellery as under :-

Jewellery Rs. 2,25,69,380/-

Cash Rs. 46,22,500/-

*-----
Rs. 2,71,91,880/-*

We find that the case of the assessee is squarely covered by the decision of the coordinate bench of the Jaipur Tribunal rendered in the case of DCIT vs. Shri Rahul Mangal & Others in ITA No. 1026/JP/2015 & Ors. wherein on similar facts the claim of the assessee was allowed by deleting the addition made by the AO, thereby dismissed the appeals of the of the revenue. We also find support from the decision of the Coordinate Bench rendered in the case of ACIT (OSD) vs. M/s. Kanakia Spaces Pvt. Ltd. ITA No. 6763/Mum/2011 A.Y. 2007-08, wherein the Hon'ble Tribunal has held as under :-

“ 3.1. Ld. CIT (A) after considering the submission deleted the penalty by stating as under:-

“I have carefully considered the submissions made by the appellant in respect of the penalty levied by the ld. AO. It is seen that the ld. AO has written two sentences at para-8 to conclude that the appellant has not been able to substantiate the source of acquisition of the movable assets. The fact of the matter is that the requirement on the part of an assessee to substantiate the source of income cannot be taken to mean that all evidences in the respect has to be produced. The very fact that the disclosure is made in respect of undisclosed income, all that can be required of an assessee is that the proximate nature of acquisition can be mentioned by him. It cannot be the case that

very minute detail thereof would be preserve with evidence which is possible only for the regular income being disclosed by him. The requirement as per Section (2) of Section 271AAA is only that the manner of earning income should be specified so that undue advantage of telescoping or some other income being brought within the total ambit of undisclosed income surrendered does not happen. From the order of the Ld. A.O also, it is apparent that the penalty is not levied by him on account of some conviction but has been just levied to complete the proceedings. In fact there are no material facts warranting the levy of penalty and, accordingly, the penalty of Rs.55,00,000/- levied under section 271AAA is directed to be deleted.”

4. After considering the rival submissions, we do not see any reason to interfere with the order of CIT(A). The order is in tune with the principles laid down by various co-ordinate Benches and High Courts particularly with reference to disclosure made under section 132(4). In the case of CIT Vs. Mahendra C. Shah (299 ITR 305) the Hon’ble Gujarat High Court considered similar statement under section 132(4) to grant immunity under section 271(1)(c). The Hon’ble High Court held as under:-

“When the statement is being recorded by the authorized officer it is incumbent upon the authorized officer to explain the provisions of Explanation 5 in entirety to the assessee concerned and the authorized officer cannot stop short at a particular stage so as to permit the Revenue to take advantage of such a lapse in the statement. The reason is not far to seek.

In the first instance, the statement is being recorded in the question and answer form and there would be no occasion for an assessee to state and make averments in the exact format stipulated by the provisions considering the setting in which such statement is being recorded. Secondly, considering the social environment it is not possible to expect from an assessee, whether literate or illiterate, to be specific and to the point regarding the conditions stipulated in the second exception while making statement under section 132(4). Even if the statement does not specify the manner in which the income is derived, if the income is declared and tax thereon paid, there would be

substantial compliance not warranting any further denial of the benefit.”

4.1 In this case, the assessee was asked to explain the entries in the ‘work-in-progress sheet’ and assessee in the course of statement offered the income with a plea not to initiate penalty proceedings. The assessee was not asked about the manner in which such income was earned and also to substantiate the manner in which undisclosed income was derived. The provision of clause-2 of Explanation-V appended to section 271(1)(c) are similar to section 271AAA(2). The scope and meaning has been lucidly explained by the Hon’ble Allahabad High Court in the case of CIT Vs. Radha Kishan Goel (2005) 278 ITR 454 (All.), which was followed by the Hon’ble Gujarat High Court in the above referred case. In view of the above principles laid down, we are of the opinion that immunity provided under s/s. (2) of section 271AAA is applicable and accordingly, the order of CIT(A) does not require any modification. Revenue’s grounds are rejected. ”

Respectfully following the decision of the coordinate benches, we set aside the orders of the authorities below. The AO is directed to delete the addition. The appeal of the assessee is allowed.

The Hon’ble Gujarat High Court in the case of CIT Vs. Mahender C. Shah (supra) has held as under:

When the statement is being recorded by the authorised officer it is incumbent upon the authorised officer to explain the provisions of Explanation 5 in entirety to the assessee concerned and the authorised officer cannot stop short at a particular stage so as to permit the Revenue to take advantage of such a lapse in the statement. The reason is not far to seek. In the first instance, the statement is being recorded in the question and answer form and there would be no occasion for an assessee to state and make averments in the exact format stipulated by the provisions considering the setting in which such statement is being recorded. Secondly, considering the social environment it is not possible to expect from an assessee, whether literate or illiterate, to be specific and to the point regarding the conditions stipulated by the second exception while making statement under section 132(4). Even if the statement does not specify the manner in

which the income is derived, if the income is declared and tax thereon paid, there would be substantial compliance not warranting any further denial of the benefit.

Considering all these facts and circumstances of the case and the case laws relied upon, we are hereby direct to delete the penalty made U/s 271AAA of the Act.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 12/05/2017.

Sd/-
(दिवा सिंह)
(Diva Singh)
न्यायिक सदस्य / Judicial Member

Sd/-
(भागचंद)
(BHAGCHAND)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 12th May, 2017.

*Ranjan

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

1. अपीलार्थी / The Appellant- Shri Murarilal Mittal, Jaipur.
2. प्रत्यर्थी / The Respondent- The A.C.I.T., Central Circle-3, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 773/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar