

IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI SAKTIJIT DEY, JM

ITA No.2059/Mum/2014
(Assessment Year :2010-11)

DCIT CEN CIR 12, Mumbai – 400020	V s .	M/s. Rajnandini Foods Pvt. Ltd., 1540 C Ward Pan Galli Laxmipuri Kolhapur - 422001
PAN/GIR No. AAECR3494E		
Appellant)	..	Respondent)

ITA No.2060/Mum/2014
(Assessment Year :2010-11)

DCIT CEN CIR 12, Mumbai – 400020	Vs.	Shri Arun M.Joshi, 101A Devidarshan Complex Tembhi Naka, Thane (W) Thane – 400 601
PAN/GIR No. ACOPJ9865E		
Appellant)	..	Respondent)

Revenue by	Shri O.P. Meena
Assessee by	Shri K. Gopal Jitendra Singh
Date of Hearing	07/07/2017
Date of Pronouncement	06/10/2017

आदेश / O R D E R

PER R.C.SHARMA (A.M):

These are the appeals filed by Revenue against the order of CIT(A)-37, Mumbai dated 24/01/2014 for the A.Y.2010-11 in respect of two family members, in the matter of penalty imposed u/s.271AAA of the IT Act.

ITA No.2059/Mum/2014

2. Rival contentions have been heard and record perused.

3. Facts in brief are that the assessee company is engaged in the business of manufacturing of Panmasala and tobacco products. Search and seizure action u/s.132 of the Act was carried out on 10/03/2010. Consequent to search action assessee offered an amount of Rs.1.50 crores (for excess cash seized of Rs.28 lakhs from residence of Shri Gyanchand Narsingani who explained it as belonging to assessee company, discrepancy in stock of Rs.80,50,907/- at factory premises at Belgaum & balance of Rs.41,49,093/- to cover any other discrepancy – as additional income) as income from other sources for A.Y. 2010-11, the return for which was e-filed on 13/10/2010.

4. The assessment was completed u/s.143(3) of the IT Act on 27/12/2011 determining total income of Rs.1,12,86,780/- the same as the returned income. Ld. AO initiated penalty proceedings u/s. 271AAA and show cause notice u/s.271AAA r.w.s. 274 of the IT Act was issued. Assessee vide its letter dated 18/06/2012 stated that Rs.1.50 crores was declared as additional income and out of that, declaration of Rs.41,49,096/- was made without any proof of concealment. The return of income was filed by adding separately the above additional declared income and effective tax liability as per law was also paid. Ld. AO was of the opinion that the assessee had not been able to prove all the facts and material relevant to the computation of total income and had concealed its income. Hence, he imposed penalty u/s.271AAA of the IT Act.

5. By the impugned order, CIT(A) deleted the penalty after observing as under:-

5.1. I have given my careful consideration to the rival submissions, perused the material on record and duly considered the factual matrix of the case as also the applicable legal position.

5.2. In this case, the additional income of Rs. 1.50 cr. was offered which included the following:

Rs.28,00,000/ -: Excess cash found during the search

Rs.80,50,907/--: On stock discrepancy

Rs.41,49,093/-: Additional income offered to cover any discrepancy

The excess cash found was explained as arising out of cash sales made by the appellant. As regards the discrepancy in respect of stock, the appellant submitted that it had filed a reply pointing out to the fact that there was a error in the calculation at the time search wherein total number of pouches as per RGI register was wrongly taken as 278091714 pouches. This was explained vide its letter to the AO dated 22/05/10 to DDIT (Inv) and 14/06/12 to AO. It was accordingly contended that there was no difference in the stock found vis-a-vis books. However, the appellant has not made any retraction or correction and offered the amount in the return of Income filed. Similarly it had offered an additional income of Rs. 41,40,093/- voluntarily without there being any evidence to show that there is any undisclosed income.' It had honoured its statement and paid the 'taxes along with' interest thereon. In the light of the above facts when the appellant had not made a retraction and offered the income in the return of income filed, there could be no basis for holding that the appellant did not substantiate the manner of earning of undisclosed income. AO has accepted the return of income and the offer of additional income as business income. In the letter dated 22105/10 to the DDIT(Inv.), the appellant had brought to the attention that there was no discrepancy in stock and the conclusion at the time of search was erroneous. However, the appellant still offered additional income of Rs. 1.50 crores only to buy peace of mind and to avoid penalty and litigation. It was reiterated that it was given to understand that the offer of additional income was on the understanding that the appellant will be entitled to immunity from penalty and prosecution. It was clearly mentioned that the offer is conditional. If there was any doubt as regards satisfaction of conditions prescribed u/s. 271AAA the

appellant should be given an opportunity to fulfill the same. in the letter dated 14/06/12 to the AO, this fact was specifically brought to his attention and the copy of the letter filed before the DDIT(inv.) was enclosed.

5.3. The AO has not found any error such as late filing of return, non payment of taxes within due dates. The sole ground on which penalty has been levied is that the manner of earning the additional income has not been substantiated.

The search took place on 10103/10 and the financial year had not ended and return of income for A.Y. 10-11 had not fallen due.

5.4. Section 271AAA reads as follows:

271 AAA(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case here search has been initiated under Section 132 on or after the 1 st day of June, 2007 [but before the 1st day of [July 12], 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 of the specified previous year.

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

. (/) 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;

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

(iil) 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 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

(if) in which search was conducted."

5.5. Careful reading of the above section reveals that there are two key phrases to be understood viz. "specified previous year" and "undisclosed income". The specified previous year has been defined as per clause (b) to the explanation u/s.271AAA to mean – (a) the year in which search is conducted (b) immediately preceding year, due date of filing of return of income of which has not expired and return has not been filed.

5.6. It is also noted that this section 271AAA applies to person on whom search u/s 132 was conducted, between 1-6-2007 to 30-6-2012.- It applies to "specified. previous years" and is in respect' of "undisclosed income", In such cases penalty under section 271AAA is leviable and may be levied if deemed fit by assessing officer. However, if conditions mentioned in sub clause 2 of section 271AAA is complied with, no penalty under this section will be levied.

5.7. In the present case the assessing officer has considered that since search was conducted on 10/03/2010, hence prima facie, this section applies in case of the appellant, since search is after 1-6-2007 and before 30-6-2012. Further since search was conducted on 10/03/2010, the due date for filing of return u/s. 139(1) for AY 2009-10 would be 31/09/09. As such, as far as assessment years upto AY 2009-10 are concerned, section 271AAA would not apply, since due date for filing return u/s 139(1) expired before the date of search and therefore are not falling under the definition of "specified previous years". However AY 2010-11 in the case of the appellant falls under the definition of "specified previous years".

5.8. For application of section 271AAA, it has to be therefore, seen what is the "undisclosed income" in respect of which penalty is leviable. Clause (a) to explanation to section 271AAA defines "undisclosed income" to mean - any income of the specified previous year represented by (i) undisclosed assets (ii) unrecorded transactions representing undisclosed income (iii) false or bogus expenses claim.

5.9. Clause (a) to Explanation to section 271AAA defines "undisclosed income" to mean-

(i) Any income of the specified previous year represented, either wholly, or partly, by any money, bullion, jewellery or other valuable article or thing has not been recorded before the date of search in the books of account or other documents maintained in the normal course or otherwise not disclosed to the CCIT or CIT before the date of search, meaning thereby any kind of undisclosed assets.

(ii) Any income of the specified previous year represented, either wholly or partly, by any entry in the books of account, other documents, loose papers, diaries etc or any other transactions found in the course of search which have not been recorded before the date of search in the books of account or other documents maintained in the normal course or otherwise not disclosed to the CCIT or CIT before the date of search.

(iii) 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 which is found to be false and detected as a result of search.

5.10. In brief, it can be said that "undisclosed income" means any income of the "specified previous year" represented by-

- (i) *Undisclosed assets*
- (ii) *Unrecorded transactions representing undisclosed income*
- (iii) *False or bogus expenses claimed.*

In the present case no additions have been made to the response to notice u/s 153A for AY 2010-11, which was filed subsequently after the search but within due date.

5.11. Legislative history

In case of search conducted before 01/07/1995, general provisions of penalty as contained u/s. 271 (1) (c) read with explanation 5 was applicable. Thereafter, in the case of block assessment regime, applicable to cases where search was initiated on or after 01/07/1995 till 31/05/2003, special procedure for assessment of search cases is stipulated for the block, period as per Chapter XIV B. Penalty provision for concealment of income u/s. 271 (1) (c) was not applicable with respect to undisclosed income for the block period, as there was a specific provision of penalty specified u/s. 1588FA(2) of the Income tax Act. In case of search initiated on or after 01/06/2003 but before 01/06/2007, wherein assessments were made-in accordance with provisions of section 153A, penalty provision applicable in respect of concealment of income are 'governed by section 271(1)(c) read with Explanation 5. As mentioned earlier, provision of sec. 271AAA has been inserted by the Finance Act 2007 and is applicable along with explanation 5A of sec. 271 (1) (c) with respect to search initiated u/s. 132 on or after 01/06/2007 and before 01/07/2012. For search initiated on or after 01/07/12 the newly introduced section 271AAB instead of sec. 271 AAA, introduced by Finance Act 2012 is applicable.

5.12. Section 271AAA applies to assessment years for which return are due after the date of search and returns have not been filed. In such assessment years, normally if the return is filed in time as per section 139, and if it includes the undisclosed income found during search, no penalty will be leviable. This is so because concealment can be only with respect to income offered in the return filed in time. However, as per section 271AAA, penalty @ 10% will be attracted to the income falling under the definition of "undisclosed income", even when due date of filing of return of income falls after the date of search, and return is filed in time as per section 139. It may be noted that Finance Act 2007, by which the section 271AAA was introduced, also introduced Explanation 5A to section 271 (1) (c), which clearly specifies that in respect of such "undisclosed 'assets or income" in a

case where search u/s 132 has been carried out, it will be deemed that the assessee has concealed the particulars of income or furnished inaccurate particulars of income. However, as per subsection (2) of section 271 AAA, such penalty @ 10% of undisclosed income will not be levied if the assessee searched admits the undisclosed income and specifies the manner in which such undisclosed income was derived in the statement u/s 132(4) at the time of search; substantiates the manner in which the undisclosed income was derive? and pays the tax, with interest in respect of such undisclosed income. To my mind, the section 271AAA is intended to reduce litigation, and to encourage tax payers to arrive at a quick settlement in respect of determining and admitting the "undisclosed, income".

5.13. The entries in the undisclosed bank accounts cannot be held to be entries in regular books of accounts maintained by the appellant. This has been so held by the, Bombay High Court in the case of Sheraton Apparels vs. ACIT~2002) 256 IT'R 20.' In. the present' case, it is seen that income 'added/assessed in assessment for AY 2007-08 and AY 2008-09 falls under the definition of undisclosed income as per Section 271AAA. Sec. 271 AAA provides for immunity from penalty only in respect of undisclosed income relevant to the "specified previous year defined u/s.271AAA when the declaration of undisclosed income is made in the statement recorded u/s.132(4) during the course of search and the appellant specifies the manner of earning such undisclosed income and substantiates it, and the tax payer pays the tax and interests thereon.

5.14. It is the appellant's case that cash found at residence of its directors was in excess of cash as per books of accounts. Thus, it definitely forms part of undisclosed income. The same is from the regular business run by the appellant and has been offered as business income. The same has been accepted by the assessing officer. The excess cash has been explained as arising from cash sales made by the appellant. As regards excess stock of inventory, a reconciliation has been submitted that shows there is no excess stock. The same has not been discussed by AO in his order nor proved to be false. If there is no excess stock the disclosure and offer of income is de-hors any incriminating material found in search. As regards the balance amount of Rs 41,49,093/- there is no incriminating material and thus, cannot be said to covered under the definition of "undisclosed income" under section 271 AAA. Perusal of the assessment order and the penalty order does indicate that the appellant's contention that no incriminating material was found during search is true, else there would be some discussion of the same

in the orders of AO regarding this amount. The question is whether this amount offered in the return of income falls under the definition of "undisclosed income" under section 271AAA. In the absence of any incriminating material or documents found in search. The income offered in current return of income within due date would not fall under the definition of undisclosed income and the penalty u/s 271AAA is not attracted. In my view, the facts in the appellant's case do not fall under any of the clauses defining "undisclosed income" under section 271AAA.

5.15 As regards excess cash, the same is explained' as arising out of, cash' sales. The stock is explained, and if the explanation is not accepted, the same is still business income. The question is whether the manner of earning has been explained and substantiated in respect of amount offered in the return of income of "undisclosed income" under section 271AAA.

5.16. It is not the AO's case that the appellant did not file return of income in time or did not pay the taxes along with the return of income. The sole ground on which the penalty has been levied is that the manner of earning has not been explained and substantiated. The AO has accepted the offer of the appellant and has assessed it as business income.

5.17. It is also seen from the submissions filed by the appellant before the AO and his statement recorded that he has reiterated that there is no incriminating material found and that additional income had been offered just to buy peace of mind and to end litigation. The appellant has honoured his offer during the search filed return and paid the taxes accordingly. In the letter filed before the DDIT(lnv.), the appellant had clearly mentioned that the offer of additional income is conditional and that there will be no penalty or prosecution. In this letter dated 22/05/10, wherein rectification arising out 'of stock reconciliation has been given, the appellant clearly mentioned that if the DDIT(lnv.) was not satisfied as regards the conditions prescribed by sec.271AAA it must be given opportunity to fulfill the same, There is nothing on record to indicate that DDIT(lnv.) found any reason to hold that the appellant was not entitled to immunity from penalty and prosecution, The disclosure made was rounded off to Rs 150 lakhs as against excess cash found of Rs 28 lakhs and excess stock of Rs 80,50,907/- (which was later reconciled as zero discrepancy). Thus, there is no material to support the balance amount, other than excess cash, on which taxes were paid. In its reply-to assessing officer vide letter

dated, 20/06/2012, the same facts were reiterated and copy of letter before DDIT(lnv) was filed.

5.18. The condition ,regarding', substantiating, the manner in which undisclosed income was derived' by assessee is difficult to comply in a strict sense. Where assessee has earned income not recorded in books of accounts, it will be difficult to specify and to substantiate the manner in which the undisclosed income was derived and may be impractical. If a narrow and very strict view is taken, it may defeat the purpose of enacting section 271AAA of leading to early settlement with assessee so that declaration of undisclosed income and collection of taxes is not prolonged due to litigation.

5.19. In the present case, the appellant has honoured the declaration and filed return and paid taxes in time. The return is for a current year and has been filed within due date. The manner of earning business income has been explained which has resulted in excess cash found. The only reason cited by assessing officer is that the manner of earning income is not substantiated. I find that the various benches of Tribunal have considered this aspect and have decided in favour of assessee on similar facts as in the present case.

In the case of Concrete Developers v. ACIT [2013] 34 taxmann.com 62 (Nagpur -- Trib.) on similar facts it Was held that penalty u/s. 2 IAAA is not leviable. Similar is the view of the hon'ble ITAT in the case of Ashok Kumar Sharma v. DCIT [2012] 149 TT J 33 (Cuttack-Tribunal.) and in the case of Pramod Kumar Jain v. DCIT [2012] 149 TTJ 36 (Cuttack-Tribunal.). I also find similar view has been expressed in DCIT vs Rajendra Prasad Dokania (2012) 32 CCH 260 (Ahd.). Section 271AAA also states that the assessing officer may levy penalty can contrast to expression shall levy penalty. Thus, discretion is given to assessing Officer to decide whether he facts of the case justify levy of penalty.

5.20. In my view, in the facts and circumstances of this case and discussion above and also bearing in mind the ratio of decisions of Hon'ble ITAT in cases considered above, I hold that penalty is not leviable in the case of the appellant and accordingly I direct the AO to cancel .the penalty imposed by him at Rs.16,99,500/-u/s 271AAA' ..

In the result, appeal for A.Y. 2010-11 is allowed.

6. Against the above order of CIT(A), revenue is in further appeal before us.

7. We have considered rival contentions and carefully gone through the orders of the authorities below. The CIT(A) has deleted the penalty after recording a finding to the effect that there is no incriminating material found and the additional income had been offered just to buy peace of mind and to end litigation. The CIT(A) further observed that assessee has honoured his offer during the search and filed return and paid the taxes accordingly. In the offer letter itself the assessee has clearly mentioned that the offer of additional income was conditional and there will be no penalty or prosecution. The CIT(A) also observed that there was reconciliation of stock by the assessee and it was also mentioned by assessee in its letter dated 22/05/2010 that if the DDIT(Inv.) was not satisfied as regards the conditions prescribed by sec.271AAA it must be given opportunity to fulfill the same. The CIT(A) further observed that there was nothing on record to indicate that DDIT(Inv.) found any reason to hold that the assessee was not entitled to immunity from penalty and prosecution. The CIT(A) further found that disclosure of income was more than excess cash found during course of search. The CIT(A) further observed that manner of earning of business income has been explained by the assessee which has resulted in excess cash found. Thereafter, relying on the various decisions of the Coordinate Bench as mentioned in para 5.19, the CIT(A) reached to the conclusion that it is not a fit case for levy of penalty U/S.271AAA. We do not find any reason to interfere in the findings so recorded by CIT(A).

8. The facts and circumstances in the case of Shri Arun M Joshi are similar to the facts discussed above in case of Shri Rajnandini Foods Pvt. Ltd., therefore, following the reasoning given hereinabove, we do not find any infirmity in the order of CIT(A).

9. In the result, appeals of Revenue are dismissed.

Order pronounced in the open court on this 06/10/2017

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 06/10/2017

Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai