

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E' : NEW DELHI)**

**BEFORE HON'BLE PRESIDENT, SHRI G.D. AGRAWAL
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.2730/Del./2014
(ASSESSMENT YEAR : 2008-09)**

**ITA No.2731/Del./2014
(ASSESSMENT YEAR : 2009-10)**

**ITA No.2732/Del./2014
(ASSESSMENT YEAR : 2010-11)**

**ITA No.2733/Del./2014
(ASSESSMENT YEAR : 2011-12)**

DCIT, Central Circle 18,
New Delhi.

vs. M/s. NKG Infrastructure Ltd.,
124, Ground Floor,
World Trade Centre,
Connaught Place,
New Delhi – 110 001.

(PAN : AAACN4109N)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : S/Shri Adesh Kumar Jain,
Rajat Jain and Akshant Jain, CAs
REVENUE BY : Ms. Shefali Swroop, CIT DR

Date of Hearing : 08.11.2017

Date of Order : 16.11.2017

ORDER

PER BENCH :

Since common questions of facts and law have been raised in the aforesaid appeals, the same are being disposed off by way of consolidated order to avoid repetition of discussion.

2. The Appellant, Deputy Commissioner of Income-tax, Central Circle 18, New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeals bearing ITA Nos.2730/Del/2014, 2731/Del/2014 and 2732/Del/2014 sought to set aside the impugned order dated 19.02.2014, 19.02.2014 & 26.02.2014 passed by the Commissioner of Income-tax (Appeals)-III, New Delhi qua the assessment years 2008-09, 2009-10 & 2010-11 respectively deleting the penalty levied under section 271(1)(c) of the Income-tax Act, 1961 (for short 'the Act') on the ground that :-

“On the facts and in the circumstances of the case, the ld. CIT (A) has erred in cancelling the penalty of Rs.30,14,473/-, Rs.46,07,976/- and Rs.84,95,360/- for assessment years 2008-09, 2009-10 & 2010-11 respectively levied by the AO under section 271(1)(c) of the Income Tax Act, 1961.”

3. The Appellant, Deputy Commissioner of Income-tax, Central Circle 18, New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeal bearing ITA Nos.2733/Del/2014 sought to set aside the impugned order dated 28.02.2014 passed by the Commissioner of Income-tax (Appeals)-

III, New Delhi qua the assessment year 2010-11 deleting the penalty levied under section 271AAA of the Income-tax Act, 1961 (for short 'the Act') on the ground that :-

“On the facts and in the circumstances of the case, the CIT (A) has erred in cancelling the penalty of Rs.2,60,63,900/- levied by the AO under section 271AAA of the Income Tax Act, 1961.”

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AND ITA NO.2732/DEL/2014
(PENALTY U/S 271 (1)(c))

4. Since all the aforesaid appeals in which penalties deleted by Id. CIT (A) levied by the AO u/s 271(1)(c) have emanated from similar set of facts, the facts of appeal in ITA No.2730/Del/2014 are taken to adjudicate controversy at hand for the sake of brevity.

5. Briefly stated the facts necessary for adjudication of the controversy at hand are : On the basis of assessment completed u/s 153A read with section 143 (3) of the Act, penalty proceedings were initiated u/s 271(1)(c) of the Act on account of addition of Rs.88,66,705/-, Rs.1,35,56,857/- and Rs.2,49,93,708/- for assessment years 2008-09, 2009-10 & 2010-11 respectively by making addition @ 0.25% of the total turnover declared by the assessee company.

6. AO proceeded to levy the penalty on the ground that when the account books were test checked and discrepancies were

pointed out to the assessee company and only then, the assessee company had offered additional surrender during the assessment proceedings which is a clear case of concealment on the part of the assessee company and thereby imposed a penalty of Rs.30,14,473/- , Rs.46,07,976/- and Rs.84,95,360/- for assessment years 2008-09, 2009-10 & 2010-11 respectively.

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7. AO initiated the penalty proceedings u/s 271AAA for AY 2010-11 on the basis of assessment order dated 30.12.2011 passed u/s 143 (3) and imposed the penalty of Rs.2,60,63,900/- on the ground that the assessee company has neither specified the manner in which the disclosure of amount of Rs.2,60,63,900/- was derived nor he has substantiated the manner in which such income was derived.

8. Assessee carried the matter by way of filing appeals before the Id. CIT (A) who has deleted the additions made by the AO by allowing the appeals. Feeling aggrieved, the Revenue has come up before the Tribunal by way of challenging the impugned order passed by Id. CIT (A).

9. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and

orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

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AND ITA NO.2732/DEL/2014
(PENALTY U/S 271 (1)(c))

10. Undisputedly, during the search and seizure operation conducted at the premises of the assessee company on 05.11.2009 which is into the construction line, the assessee company has surrendered Rs.20,00,000/-, Rs.25,00,000/- and Rs.30,00,000/- for AYs 2008-09, 2009-10 and 2010-11 respectively and filed the return u/s 153A. It is also not in dispute that the assessee company offered income, paid tax and interest thereon. However, AO after perusing the books of account rejected the surrender and proceeded to assessed the addition income @ 0.25% of the total turnover declared and thereby made an addition of Rs.88,66,705/-, Rs.1,35,56,857/- and Rs.2,49,93,708/- for assessment years 2008-09, 2009-10 & 2010-11 respectively. The Id. CIT (A) deleted the penalty by relying upon his own order passed for AY 2004-05 which was passed by relying upon the decision rendered by *Hon'ble Supreme Court in Reliance Petro Products Private Limited - 322 ITR 158 (S.C.)*.

11. Hon'ble Supreme Court in a case cited as **Reliance Petro Products Pvt. Ltd.** (supra) decided the identical issue in favour of the assessee. Operative part of which is reproduced for ready reference as under :-

“A glance at the provisions of section 271(1)(c) of the I.T. Act, 1961 suggests that in order to be covered by it, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The meaning of the word “particulars” used in section 271(1)(c) would embrace the detail of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the assessee, because that is the only document where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, not according to the truth or erroneous.

Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271(1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars.”

12. Hon'ble Delhi High Court in case of *CIT vs. Aero Traders (P.) Ltd. – (2010) 322 ITR 316 (Delhi)* decided the identical issue in favour of the assessee company by returning the following findings :-

“The Assessing Officer, observing that the profit was estimated after rejection of the books of account due to certain discrepancies, imposed a penalty on the assessee, on the ground that it was a clear case of furnishing of inaccurate particulars of income. The Tribunal held that as substantial quantum relief was given by the Commissioner (Appeals) which had been confirmed by the Tribunal and the balance pertained to estimated rate of profit applied on the turnover of the assessee, it did not amount to concealment or furnishing of inaccurate particulars. The Tribunal, therefore, deleted the penalty.

Held that, the finding arrived at by the Tribunal did not warrant interference from this court as it was purely a finding of fact. No perversity had been pointed in such a finding. Consequently, no substantial question of law arose for consideration.”

13. We are of the considered view that AO made the addition merely on the ground that the surrender was not to his satisfaction rather proceeded to estimate the disallowance @ 0.25%. When the assessee company has produced account books before the AO during assessment proceedings, AO was required to compute the income on the basis of documentary evidence and not on the basis of estimation. But the AO proceeded to guesswork the additional income on the basis of some defects in the account books and on

the ground that the income offered is not adequate. In the given circumstances, we are of the considered view that there is no question of furnishing of inaccurate particulars to attract the provisions contained u/s 271(1)(c) of the Act.

14. So, finding no illegality or perversity in the impugned orders passed by Id. CIT (A), appeals bearing nos. ITA NO.2730/DEL/2014, ITA NO.2731/DEL/2014 and ITA NO.2732/DEL/2014 for AY 2008-09, 2009-10 and 2010-11 respectively are dismissed being without any merit.

ITA NO.2733/DEL/2014 (PENALTY U/S 271AAA)

15. On the basis of disclosure made during search and seizure operation and post-search enquiry amount of Rs.26,06,38,986/- was assessed as the income of the assessee for AY 2010-11. AO imposed penalty by taking a view that the assessee company has neither specified the manner in which such income was derived nor has substantiated the manner in which such income was derived and imposed penalty of Rs.2,60,63,900/-.

16. Undisputedly, the assessee company has surrendered an amount of Rs.26,06,38,986/- during search and seizure operation, but shown his inability to produce purchase bills of the various parties who have allegedly supplied mitti and grit (raw material)

recorded in the ledger. It is also not in dispute that the assessee company by filing return u/s 139 deposited the tax along with interest.

17. Under section 271AAA (2), no penalty shall be levied u/s 271AAA qua the undisputed income in case the assessee company furnished declaration of the undisclosed income in the following manner :-

“(a) There is deeming fiction of "undisclosed income" relating to "specified previous year" as defined under Section 271AAA.

(b) With respect to "undisclosed income" relating to "specified previous year", penalty is leviable at the rate of ten percent of "undisclosed income".

(c) Sub-section (2) of section 271AAA provides that no penalty under section 271AAA shall be levied with respect to the "undisclosed income" of the "specified previous year", in case assessee makes declaration of the undisclosed income in the following manner :-

(i) In the statement recorded under Section 132(4) during the course of search, assessee 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.

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

For getting immunity from penalty under Section 271AAA, the above three conditions are required to be fulfilled cumulatively.

18. When we apply the provisions contained under sub-section (2) of section 271AAA to the instant case, undisputedly the assessee company has surrendered income of Rs.26,06,38,986/- u/s 132 (4), paid taxes along with interest which the assessee company has disclosed in profit & loss account under the head 'other income' and consequently shown the gross profit and net profit and made necessary adjustment in the taxable income at Rs.71,95,64,719/-, so all the conditions required under sub-section (2) of section 271AAA have been complied with.

19. Moreover, the AO has not put any specific query to the assessee to further specify the manner in which such income was derived and to substantiate the manner in which such income was derived. Furthermore AO has nowhere recorded any finding in the assessment order that it is undisclosed income of the assessee sufficient to attract the provisions contained u/s 271AAA.

20. Coordinate Bench while dealing with the identical issue in case cited as *Neerat Singal vs. ACIT – (2013) 37 taxmann.com 189 (Delhi – Trib.)* also held that the AO was not justified in imposing penalty u/s 271AAA when authorized officer has not raised any query during course of recording of statement u/s 132 (4) about the manner in which the undisclosed income has been derived and about its substantiation.

21. In view of what has been discussed above, we are of the considered view that there is no illegality or perversity in the findings returned by Id. CIT (A) in deleting the penalty imposed u/s 271AAA, hence appeal in ITA No.2733/Del/2014 is dismissed.

22. In view of what has been discussed above, all the aforesaid appeals filed by the Revenue stand dismissed being without any merit.

Order pronounced in open court on this 16th day of November, 2017.

**Sd/-
(G.D. AGRAWAL)
PRESIDENT**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 16th day of November, 2017
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-III, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**