

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "B", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष  
**BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM**

**आयकर अपील सं. / ITA Nos.137 to 141/PUN/2016**  
**निर्धारण वर्ष / Assessment Years : 2006-07 to 2010-11**

The Asst. Commissioner of Income Tax,  
Central Circle, Kolhapur

.... अपीलार्थी/Appellant

Vs.

D.M. Corporation Pvt. Ltd.,  
240/B, Mohite House,  
Gen. Thorat Marg,  
Tarabai Park, Kolhapur

.... प्रत्यर्थी / Respondent

PAN: AADCM6281H

अपीलार्थी की ओर से / Appellant by : Shri Hitendra Ninawe  
प्रत्यर्थी की ओर से / Respondent by : S/Shri Nikhil Pathak /  
Sushant Phadnis

सुनवाई की तारीख / <b>Date of Hearing : 05.02.2018</b>	घोषणा की तारीख / <b>Date of Pronouncement: 09.02.2018</b>
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**आदेश / ORDER**

**PER SUSHMA CHOWLA, JM:**

This bunch of five appeals filed by the Revenue are against consolidated order of CIT(A), Pune-11, dated 27.11.2015 relating to assessment years 2006-07 to 2010-11 against deletion of penalty under section 271AAA of the Income-tax Act, 1961 (in short 'the Act').

2. This bunch of five appeals relating to the same assessee for different assessment years on similar issue were heard together and are being disposed

of by this consolidated order for the sake of convenience. However, reference is being made to the facts and issues in ITA No.137/PUN/2016, relating to assessment year 2006-07 to adjudicate the issues.

3. The Revenue in ITA No.137/PUN/2016, relating to assessment year 2006-07 has raised the following grounds of appeal:-

- 1) *On the facts and the circumstances of the case and in law, the Ld. CIT(A) was not justified in deleting the penalty under section 271AAA and not initiating penalty under section 271(1)(c) where the intention for initiating penalty by the AO was for concealment.*
- 2) *On the facts and the circumstances of the case and in law, the Ld. CIT(A) failed to exercise his coterminous powers with the AO and initiate the correct penalty and levy the same or give directions accordingly.*
- 3) *The order of the Ld. CIT(A) may be vacated and the Assessing Officer be restored.*

4. The issue raised in the present appeal is against order of CIT(A) in deleting penalty levied under section 271AAA of the Act. Revenue is aggrieved by the order of CIT(A) in deleting the penalty and also for not initiating penalty under section 271(1)(c) of the Act on the ground that intention for initiating penalty by the Assessing Officer was for concealment of income.

5. Briefly, in the facts of the case, the assessee for the year under consideration had furnished the return of income declaring total income of ₹1,83,83,761/-. Search action under section 132 of the Act was carried out in the case of Shri Ramchandra Maruti Mohite on 25.08.2011. The assessee was one of the group members and was also covered under the search. The Assessing Officer issued notice under section 153A(a) of the Act, in response to which the assessee filed the return of income declaring Nil income. The assessee declared the gross total income of ₹ 3,83,83,761/-, on which it claimed deduction under Chapter VI-A under section 80IA(4) of the Act at ₹ 3.83 crores and furnished the return of income at Nil. The Assessing Officer

in the assessment order passed under section 143(3) r.w.s. 153A(b) of the Act denied deduction under section 80IA of the Act holding the assessee to be a contractor and not developer and hence, assessed income in the hands of assessee at ₹ 3.83 crores. The Assessing Officer in the assessment order directed that penalty under sections 271AAA and 271(1)(c) of the Act be initiated separately. Thereafter, the Assessing Officer passed an order under section 271AAA of the Act, dated 02.03.2015 holding the assessee to be eligible for levy of penalty under section 271AAA of the Act on the disclosure amounting to ₹ 2 crores on account of unaccounted payment of wages, which was treated as undisclosed income found because of the search operations carried out under section 132 of the Act. The Assessing Officer levied penalty of ₹ 22,44,000/- being 10% of taxes under section 271AAA of the Act.

6. The CIT(A) vide consolidated order for assessment years 2006-07 to 2012-13, first dealt with the penalty leviable for assessment years 2006-07 to 2011-12. He noted that the assessee's total income after the order of CIT(A) in the quantum proceedings had been reduced to the returned income on which taxes had been paid by the assessee. Hence, he held that the assessee was entitled to immunity from the penalty leviable under section 271AAA of the Act. This was the order passed by the CIT(A) against penalty levied under section 271AAA of the Act for assessment years 2006-07 to 2011-12. However, in respect of assessment year 2012-13, the CIT(A) confirmed levy of penalty under section 271AAA of the Act.

7. The Revenue is in appeal against the order of CIT(A) relating to assessment years 2006-07 to 2010-11.

8. The learned Authorized Representative for the assessee at the outset raised a legal plea that penalty for the aforesaid assessment years is not

leviable as these are not specified previous years. He referred to the definition of 'specified previous year' under Explanation clause (b) to section 271AAA of the Act. He fairly pointed out that this was new legal plea raised by the assessee and he also pointed out that the CIT(A) had deleted penalty on the ground that the additions made in the hands of assessee have been deleted.

9. The learned Departmental Representative for the Revenue first placed reliance on the order of Assessing Officer. He stressed that where the powers of CIT(A) were coterminous with the powers of Assessing Officer, then he could have in alternate impose penalty under section 271(1)(c) of the Act.

10. We have heard the rival contentions and perused the record. The limited issue which has been raised in this bunch of appeals is against levy of penalty under section 271AAA of the Act. The learned Authorized Representative for the assessee has raised a legal plea in support of the order passed by the CIT(A) deleting penalty levied under section 271AAA of the Act. The case of assessee before us is that under Income-tax (Appellate Tribunal) Rules, 1963 (in short 'Rules'), the assessee is at liberty to support the order of CIT(A) on a ground which is purely legal but which was not raised before the CIT(A). Rule 27 of Rules gives such liberty to the respondent to raise a plea on a ground other than the one on which relief has been granted by the CIT(A). The plea raised by the assessee is purely a legal plea and hence, we admit the same for adjudication.

11. Section 271AAA of the Act 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 1<sup>st</sup> 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."

12. Analysing the above said provisions of section 271AAA of the Act, it provides empowerment to the Assessing Officer to impose penalty in addition to tax, if any, payable by the assessee which would be equivalent to sum computed @ 10% of "undisclosed income" of the "specified previous year". Hence, the said penalty is leviable in cases where search had been initiated

under section 132 of the Act on or after 1<sup>st</sup> day of June, 2007 but before 1<sup>st</sup> July, 2012. Search in the case of assessee was carried out on 25.08.2011, hence it was within range provided in section. Sub-section (2) to section 271AAA of the Act provides certain conditions to be fulfilled, on the fulfillment of which the assessee shall not be liable to levy of penalty under section 271AAA of the Act. Sub-section (3) provides that no penalty under section 271(1)(c) of the Act shall be imposed upon the assessee in respect of undisclosed income which is referred to in sub-section (1). Explanation thereunder explains the term 'undisclosed income' under clause (a) and 'specified previous year' under clause (b). The basic condition which attracts the provisions of section 271AAA of the Act is search carried out at the premises of assessee, during which undisclosed income has been detected for the 'specified previous year'. The assessee in the present case had during the course of search declared certain additional income on account of various incriminating material found, the same is not in dispute. However, the question is that where under the provisions of section 153A of the Act, six years preceding the assessment year in which search had taken place, are reopened, can the penalty under section 271AAA of the Act be attracted for the said six assessment years preceding the year of search and also for the year of search. We are concerned with the years which are preceding the year of search, hence we limit our discussion in this regard. Clause (b) of Explanation to section 271AAA of the Act clearly provides the meaning of term 'specified previous year'. Sub-clause (i) talks of the previous year which had ended before the date of search but the date of filing the return of income under section 139(1) of the Act for such year had not expired before the date of search and the assessee had not furnished the return of income for the said previous year; or clause (ii) in which search has conducted. In other words vis-à-vis eligibility of levy of penalty under section 271AAA of the Act, there is limited window to the Assessing Officer to levy the aforesaid penalty in

respect of 'specified previous year' which is clearly defined in Explanation (b) which in other words means that aforesaid penalty can be levied for a previous year in which search was conducted [clause (ii)] or for a previous year which had ended before the date of search, but the date of filing the return of income for such year under section 139(1) of the Act had not expired before the date of search and the assessee had not furnished the return of income for the said year before the said date. Hence, we hold that penalty under section 271AAA of the Act can be levied only for the 'specified previous year' which is clearly defined by Explanation (b) to section and is limited to the said assessment years only.

13. Now, coming to the facts of the present case, search on the premises of assessee was carried out on 25.08.2011 and hence, the year of search is assessment year 2012-13. The years which are in appeal before us are relate to assessment years 2006-07 to 2010-11. Admittedly, none of the assessment years are the years of search. Secondly, the second condition of the due date for filing the return of income having not expired under section 139(1) of the Act is not applicable to assessment years 2006-07 to 2010-11 where the assessee was due to file the return of income us 139(1) of the Act much before the date of search. The assessee claims that it had furnished the said returns of income for the respective years before the date of search and the time limit prescribed under section 139(1) of the Act had already expired. In such circumstances and in view of the clear-cut provisions of the Act, we hold that where the assessee though during the course of search had offered additional income, which was declared in the return of income in response to notice under section 153A of the Act; however, in view of specific definition of 'specified previous year', the rigours of section 271AAA of the Act are not attracted for assessment years 2006-07 to 2010-11. Accordingly, we hold so. Thus, the assessee is not

liable for levy of penalty under section 271AAA of the Act for the said assessment years. Accordingly, we uphold the order of CIT(A) in deleting penalty levied under section 271AAA of the Act, though on different grounds.

14. The learned Departmental Representative for Revenue has also relying on the grounds of appeal pointed out that CIT(A) had failed to exercise his coterminous powers with Assessing Officer and had erred in not initiating the penalty under section 271(1)(c) of the Act, after deleting penalty levied under section 271AAA of the Act. According to him, intention of Revenue was to initiate penalty for concealment of income. We find no merit in the plea of learned Departmental Representative for Revenue since before initiating penalty proceedings under section 271AAA and / or 271(1)(c) of the Act, clear satisfaction has to be recorded by Assessing Officer as to which section is attracted in the facts of case. Sub-section (3) to section 271AAA of the Act very clearly provides that no penalty under the provisions of section 271(1)(c) of the Act shall be imposed upon assessee, in respect of undisclosed income which is referred to in sub-section (1) to section 271AAA of the Act. In other words, the Assessing Officer has to record satisfaction in respect of concealed income as to whether the case of assessee is to be taken up under the provisions of section 271AAA or 271(1)(c) of the Act. The said satisfaction is the step before levying penalty under either of sections. Once the Assessing Officer has taken the step of initiating penalty under section 271AAA of the Act in respect of additional income offered consequent to search, then the Assessing Officer or any of the authorities below are precluded by provisions of the Act itself to initiate any action for levy of penalty under section 271(1)(c) of the Act. Accordingly, we hold so. Since we have decided the preliminary issue in favour of assessee and upheld deletion of levied penalty under section 271AAA of the Act though on different grounds, we are not addressing the

issue decided by the CIT(A) while deleting penalty levied under section 271AAA of the Act i.e. on merits of additions made in the hands of assessee. Accordingly, the plea raised by the assessee under Rule 27 of Rules is allowed and the grounds of appeal raised by Revenue are dismissed.

15. The facts and issues raised in ITA Nos.138/PUN/2016 to 141/PUN/2016 are identical to the facts and issues in ITA No.137/PUN/2016 and our decision in ITA No.137/PUN/2016 shall apply *mutatis mutandis* to ITA Nos.138/PUN/2016 to 141/PUN/2016.

16. In the result, all the appeals of Revenue are dismissed.

Order pronounced on this 9<sup>th</sup> day of February, 2018.

<b>Sd/-</b> <b>(D.KARUNAKARA RAO)</b>	<b>Sd/-</b> <b>(SUSHMA CHOWLA)</b>
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 9<sup>th</sup> February, 2018.

GCVSR

**आदेश की प्रतिलिपि अद्येषित/Copy of the Order is forwarded to :**

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A), Pune-11;
4. आयकर आयुक्त / The CIT (Central), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune