

आयकर अपीलिय अधिकरण “ई” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM

आयकर अपील सं./I.T.A. No. 5576/Mum/2015
(निर्धारण वर्ष / Assessment Year: 2009-10)

The DCIT, Central Circle-5(1), Room No. 32(3), Aayakar Bhawan, M.K. Road, Churchgate, Mumbai – 400 020	बनाम/ Vs.	Mr. Saleem Mohd. Nazir Shaikh Flat No. 1501, 15 th Floor, Libra Tower, Hill Road, Bandra (W), Mumbai-400 050
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AMBPS 4606 D		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Ms. Pooja Swarup
प्रत्यर्थी की ओर से/Respondent by	:	None

सुनवाई की तारीख / Date of Hearing	:	05.02.2018
घोषणा की तारीख / Date of Pronouncement	:	13.04.2018

आदेश / ORDER

Per Shamim Yahya, A. M.:

This appeal by the Revenue is directed against order of the Id. Commissioner of Income Tax (Appeals) dated 28.08.2015 and pertains to assessment year 2009-10.

2. The grounds of appeal read as under:

1. “Whether on the facts and in the circumstances of the case and in law, the Ld, CIT(A) was justified in allowing the appeal of the appellant on the ground that the authorized Officer did not specifically ask the appellant to specify and substantiate the manner in which the undisclosed income had been derived and for

this relied upon the judgment of Allahabad High Court in the case of RadhaKishanGoel, in spite of the fact that Authorized Officer specifically asked the appellant on this issue while recording appellant's statement u/s 132 (4) of the Act on oath and to that extent, facts of the case relied upon by the Ld. CIT(A) are not identical?"

2. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in observing that no question was put to the appellant by the authorized officer explaining the provisions of Section 271AAA(2) and requiring him to specify as well as substantiate the manner in which such undisclosed income had been derived whereas a perusal of the statement recorded clearly shows that on a specific query the appellant was not even able to show any supporting evidence conforming to this claim and he also failed to furnish any evidence within a week as committed by him in his statement?"

3. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) was justified in allowing the appeal of the appellant after relying on the decision of Hon'ble Nagpur Tribunal in the case of M/s Concretes Developers which has not been accepted by the Revenue and appeal u/s 260 A has already been filed and admitted vide ITL 85/2013?"

4. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in attempting to bring out the difference between the provisions of Section 271(I)(c) & those of Section 271AAA when only the latter provisions were applicable and the conditions thereunder remained unfulfilled."

5. The appellant prays that the order of the Commissioner of Income Tax (Appeals) on the above ground be set aside and that of the ITO / AC / DC be restored. The appellant craves leave to amend or alter any grounds or to add a new ground, which may be necessary.

3. Brief facts of the case leading the levy of penalty in this case reads as under:

A search and seizure operation u/s. 132 of the Act was carried out at Hicons & Pranay Group of cases including the assessee on 24.02.2009. During the course of search and seizure action, the assessee had voluntarily declared the following amounts as his undisclosed income.

Sr.No.	Description	Amount (Rs.)
1.	Jewellery	54,85,465
2.	Wrist watches	7,37,400
3.	Household appliances	3,47,000
4.	Foreign travelling	3,53,660
5.	Foreign currency	80,000
	TOTAL	70,03,525

This income was offered to tax as Income from Other Sources during the A.Y. under consideration. The assessee had filed his return of income for A.Y. under consideration on 31.03.2010 declaring total income at Rs.90,65,390/-. Assessment order u/s.143(3) of the Act was passed by the Assessing Officer on 30.12.2010 determining total income of the assessee at Rs.1,11,28,815/-. Penalty proceedings u/s.271AAA was initiated for disclosure of additional income of Rs.70,03,525/- vide notice u/s.271AAA r.w.s.274 of the Act dated 30.12.2010.

4. During the course of penalty proceedings, a fresh penalty notice U/S.271AAA was issued to the assessee on 28.02.2013. The Id. Ld. Counsel of the assessee filed his reply vide letter dated 15.03.2013 which is reproduced on pages 3-5 of the impugned order. The Assessing Officer considered the submissions of the assessee but did not find these to be tenable. In the opinion of the Assessing Officer, though the assessee had admitted undisclosed income of Rs.7,00,353/- in his statement recorded u/s.132(4) of the Act, he had failed to specify as well as substantiate the manner in which the undisclosed income was derived. In view of the above, the Assessing Officer found that the assessee's case was fit for imposition of penalty u/s.271AAA. Therefore, the Assessing Officer vide his

order dated 22.03.2013 imposed penalty of Rs.7,00,353/- (being 10% of the undisclosed income) on the appellant U/S.271AAA of the Act.

5. Upon assessee submission placing reliance upon several honourable High Court decisions, the Id. Commissioner of Income Tax (Appeals) deleted the levy of penalty. In this regard we may gainfully refer to the adjudication by the Id. Commissioner of Income Tax (Appeals) as under:

4.3. I have considered the submissions of the appellant and perused the materials available on record including copies of the judicial decisions relied upon by him. A perusal of the provisions of Section 271AAA reveals that these provisions are brought in place of Section 271(l)(c) of the Act. In sub-section (2), it has been provided that penalty u/s.271AAA will not get attracted, if in the statement under Section 132(4), the assessee admits the undisclosed income and specifies the manner in which such income has been derived and also substantiates the manner in which the undisclosed income was derived and pays the tax, together with interest, if any, in respect of the undisclosed income. Let us now examine whether the appellant satisfies the conditions laid down in sub-section (2) of Section 271AAA so as to escape the mischief of the main penal provision. In the instant case, it is observed from the record that the appellant admitted income of Rs.70,03,525/- in the statement recorded u/s.132(4) in the course of search on account of investment in gold and diamond jewellery, wrist watches, household appliances and expenditure on foreign travel during the A.Y. under consideration. The said income is stated to have been offered to tax in his return under the head 'Income from Other Sources'. The A.O. is found to have accepted this position and assessed the said income as 'Income from Other Sources'. There is no dispute that the appellant has paid due tax in respect of the amount disclosed during the course of search. It is a matter of record that in his statement recorded during the course of search, the appellant had explained that since he was not able to substantiate the acquisition of gold and diamond jewellery etc. with documentary evidences, he was making disclosure of the same as his income for the A.Y. under consideration. As held by the Hon'ble Tribunal in the cases cited in para 4.2 above, where the assessee disclosed the unaccounted income while giving statement under Section 132(4) during the course of search and paid the tax thereon and the income from business had been accepted by the Department, penalty u/s.271AAA is not leviable. In the present case too, the appellant has disclosed the amount of Rs.70,03,525/- during the course of search, paid tax thereon and filed return showing the said income as 'Income from Other Sources' which has been accepted

by the A.O. under the head 'Income from Other Sources'. Therefore, under these circumstances, penalty u/s.271AAA is not leviable on this amount.

4.3.2 It also deserves to be noted that an exception is provided in clause (2) of Explanation 5 to Section 271(1)(c) where the deeming provision of Explanation 5 does not apply if during the course of search, the assessee-makes the statement under sub-section (4) of Section 132 that the money, bullion, jewellery etc. found in his possession has been acquired out of his income which has not been disclosed so far in his return of income and also specifies in the statement the manner in which income has been derived and pays the tax together with interest, if any, in respect such income. The effect of Explanation 5 to Section 271(1)(c) came up for consideration of the Hon'ble Allahabad High Court in the case of *Radha Kishan Goel (supra)* wherein it has been held that the exception under clause (2) of Explanation 5 to Section 271(1)(c) appears to be to provide an opportunity to the assessee to make a clean and fair confession and to surrender Ms income and also to deposit the tax and interest thereon which may result in an agreed assessment. While elaborating the true import of Explanation 5{2) below Section 271(1)(c), it has been held that under Section 132(4) of the Act, unless the Authorized Officer puts a specific question with regard to the manner in which income has been derived, it is not expected from the person to make a statement in this regard. It has also been held that if there is nothing to the contrary in the statement recorded under Section 132(4) of the Act, in the absence of any specific statement about the manner in which such income has been derived, it can be inferred that such undisclosed income was derived from the business which he was carrying on. Therefore, according to the Hon'ble High Court, mere non-statement of the manner in which such income was derived would not make Explanation 5(2) inapplicable. The ratio of the said decision will apply with equal force in the context of sub-section (2) of Section 271AAA.

4.3.3 The aforesaid view has also found favour with the Hon'ble Gujarat High Court in the case of *Mahendra C Shah (supra)* wherein it has been held that when the statement u/S. 132(4) is recorded by the authorized officer, it is incumbent upon the authorized officer to explain the provisions of Explanation 5 in its 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. It has also been held that even if the statement u/s.132(4) 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 under clause (2) of Explanation 5 to Section 271 {1)(c). In the instant case, it is noted that while recording statement of the appellant u/s.132 {4) in the course of search, no question was put to the appellant by the authorized officer explaining the provisions of Section 271AAA{2) and requiring him to specify as well as substantiate the manner in which such undisclosed income had

been derived. Under these circumstances, the appellant cannot be put into a disadvantageous position owing to a lapse or omission on part of the authorized officer who recorded the statement of the appellant. There is no specific procedure/format prescribed in the Act for specifying and substantiating the manner of earning undisclosed income. In view of the above discussion, it is held that the appellant had satisfied the conditions laid down u/s.271AAA(2) and will be deemed to have discharged his onus of specifying and substantiating the manner of earning the said income of Rs.70,03,525/-. Therefore, it is held that the A.O. was not justified in imposing penalty of Rs.7,00,353/- on the appellant u/s.271AAA of the Act and, hence, the same is deleted.

6. Against above order assessee is in appeal before us.
7. We have heard the learned departmental representative. None appeared on behalf of the assessee. Accordingly, we proceed to adjudicate the issue by hearing the learned DR and perusing the records. We find that penalty in this case has been levied under section 271AAA. The assessee has duly made the disclosure in the course of search of for the undisclosed income and showed the same in return of income, paid taxes thereon and the assessing officer has accepted the income returned and the source of income disclosed. The Id. Commissioner of Income Tax (Appeals) has elaborately considered the issue and passed a reasonable order deleting the levy of penalty. In coming to the said conclusion the Id. Commissioner of Income Tax (Appeals) has also placed reliance upon honourable Allahabad High Court and honourable Gujarat High Court decision. The ratio emanating out of those decisions was that if the search party doesn't put question to the assessee about the source of income, any adverse inference for the levy of penalty under section 271AAA, cannot be taken. No contrary decision by the Revenue has been shown to us. As referred by the Revenue itself in the grounds of appeal number 3 hereinabove, there is a decision of the tribunal in favour of assessee, which has not been

accepted by the Revenue and the Department is in appeal before the High Court. It is not the case that honourable High Court has reversed the decision.

8. In view of the aforesaid discussion and precedent we do not find any infirmity in the order of the Id. Commissioner of Income Tax (Appeals). Accordingly we uphold the same.

9. In the result, this appeal by the Revenue stands dismissed.

परिणामतः राजस्व की अपील खारिज की जाती है ।

Order pronounced in the open court on 13.04.2018

Sd/-

Sd/-

(Ram Lal Negi)

(Shamim Yahya)

न्यायिक सदस्य / Judicial Member

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 13.04.2018

व.नि.स./Roshani, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai