

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

Before Shri Kul Bharat, Hon'ble Judicial Member and
Shri Manish Borad, Hon'ble Accountant Member

ITA Nos. 518 to 520/Ind/2016

A.Ys. 2007-08, 2009-10 & 2010-11

Akshay Shakti Shiksha Avam
Samaj Kalyan Samiti, Bhopal
PAN – AAAAAA-7213N
Vs

::: Appellant

ACIT 1(1) Bhopal

::: Respondent

Appellant by	Shri Hitesh Chimnani
Respondent by	Shri K.G. Goyal
Date of hearing	27.4.2018
Date of pronouncement	11.5.2018

O R D E R

PER SHRI MANISH BORAD, AM

These appeals of the assessee relating to the assessment years 2007-08, 2009-10 and 2010-11 are directed against different orders of the Commissioner of Income Tax (Appeals)-II, Bhopal, dated 25.2.2013 which are arising out of different orders u/ss 271AAA and

271(1)(c) of Income Tax Act (in short referred as 'Act') Act framed by the ACIT 1(1), Bhopal.

2. In ITA No. 518/Ind/2016 the assessee has taken the following grounds :-

“(i) That on the facts and in the circumstances of the case, in law, the ld. CIT(A) erred in confirming the penalty as levied by the A.O. u/s 271(1)(c) of the Income tax Act even when on the facts of the present case the same is not justified.

(ii) That on the facts and in the circumstances of the case, and in law, the ld. CIT(A) erred in confirming the penalty as levied by the A.O. u/s 271(1)(c) of the Income tax Act of Rs. 4,77,000/- without appreciating the facts of the case and submission made before him.”

In ITA No. 519/Ind/2016 the assessee has taken the following grounds :-

“(i) That on the facts and in the circumstances of the case, in law, the ld. CIT(A) erred in confirming the penalty as levied by the A.O. u/s 271AAA of the Income tax Act even when on the facts of the present case the same is not justified.

(ii) That on the facts and in the circumstances of the case, and in law, the ld. CIT(A) erred in confirming the penalty as levied by the A.O. u/s 271AAA of the Income tax Act of Rs. 5,58,840/- without appreciating the facts of the case and submission made before him.”

In ITA No. 520/Ind/2016 the assessee has taken the following grounds :-

“(i) That on the facts and in the circumstances of the case, in law, the ld. CIT(A) erred in confirming the penalty as levied by the A.O. u/s 271AAA of the Income tax Act even

when on the facts of the present case the same is not justified.

(ii) That on the facts and in the circumstances of the case, and in law, the ld. CIT(A) erred in confirming the penalty as levied by the A.O. u/s 271AAA of the Income tax Act of Rs. 5,79,465/- without appreciating the facts of the case and submission made before him.”

3. Briefly stated, the facts, as culled out from record, are that the assessee is a registered society running Vivekanand College of Science & Technology. It was registered on 3rd September, 2005 and engaged in providing education. The search and seizure operation u/s 132 of the Act was carried out at various premises of the group/members of the society on 23.7.2009. Various incriminating documents were seized. Specially in the case of the assessee documents numbering LPS-1 to 50 were seized from the office premises located at C110, Nehru

Nagar, Bhopal. Subsequently on 23rd November, 2009 the society vide letter dated nil submitted to ITO, Inv. Bhopal under the signature of President and the Secretary, that the assessee wants to make voluntary disclosure of Rs. 74,83,000/- relating to various items appearing in the balance sheet as on 31.3.2008 mentioning as follows :-

1. Amounts credited in corpus fund account

And unsecured loan Rs.33,31,000/-

2. Amount for other omissions and errors Rs.24,52,000/-

3. Amount for other omissions and errors Rs.17,00,000/-

Total = Rs.74,83,000/-

4. The assessee society filed its regular return of income for the assessment years 2007-08, 2009-10 and 2010-11 on 31.10.2007, 31.3.2011 and 16.9.2001 declaring total income at (-) Rs.5,31,945/-, Rs.2,12,910/- and Rs. 5,51,140/-, respectively. However, in the return of income filed subsequent to search the assessee did not

declare the surrendered income. In reply to the notices under section 143(2) read with section 153A of the Act requiring the assessee to file return of income, the assessee opted for treating the regular return of income filed as return of income filed in compliance with notice u/s 153A of the Act. During the course of assessment proceedings when the assessee was questioned that why it has not declared the undisclosed income as accepted in the letter submitted on 23.11.2009 it was pleaded that the management of the society completely changed after the search and that the old membership pattern continued up till January 11 but thereafter from 19.1.2011 there was a major change in the management committee, which was not aware of the alleged disclosure. However, during the course of assessment proceedings the new committee members accepted the surrender made by the previous committee. The Assessing Officer accordingly concluded

the assessment after making various additions on account of the alleged surrender as well as other additions emanating out of the documents seized in the case of office bearers, viz. K.K. Sharma, K.P. Dwivedi, Pushpandra Sharma and Lokendra Sharma. The income was accordingly assessed at Rs.10,56,684/-, Rs. 58,01,313/- and Rs. 63,45,792/- for the assessment years 2007-08, 2009-10 and 2010-11, respectively. Against the impugned additions, the assessee did not prefer any appeal before the learned Commissioner of Income Tax (Appeals) and accepted to pay due taxes on the assessee income.

5. Subsequent thereto, penalty proceedings u/s 271(1)(c) of the Act(1)(c) of the Act were initiated for the assessment year 2007-08 and penalty proceedings u/s 271AAA of the Act were initiated for the assessment years 2009-10 and 2010-11. The assessee submissions during the penalty proceedings were not sufficient to convince the

Assessing Officer and he, accordingly, levied the penalty of Rs.4,77,000/- u/s 271(1)(c) of the Act(1)(c) of the Act for the assessment year 2007-08 and penalty u/s 271AAA of the Act at Rs. 5,58,840/- and Rs. 5,79,465/- for the assessment years 2009-10 and 2010-11, respectively. Aggrieved, the assessee went in appeal before the learned Commissioner of Income Tax (Appeals) against the penalties levied u/s 271(1)(c) of the Act(1)(c) and 271AAA of the Act but failed to succeed. Now the assessee is in appeal before the Tribunal.

6. We shall first take up the appeal for the assessment year 2007-08 wherein the assessee aggrieved with the levy of penalty u/s 271(1)(c) of the Act(1)(c) of the Act at Rs. 4,77,000/-.

7. The learned counsel for the assessee referring to the written submissions as well as cases relied upon in its favour submitted that the impugned addition was made on

account of corpus funds and no incriminating documents regarding corpus funds were found. The addition was made solely on the basis of disclosure made by the assessee. It was also contended that the assessee made due disclosure through a letter dated 23.11.2009 and the revenue has only acted solely on the basis of the said letter without conducting further corroborative inquiries.

8. On the other hand, the learned DR vehemently argued supporting the orders of the lower authorities.

9. We have heard the rival contentions and perused the record placed before us. The sole issue raised in the assessment year 2007-08 relates to levy of penalty u/s 271(1)(c) of the Act(1)(c) of the Act. This fact is not disputed that the addition was made on account of corpus fund which the assessee accepted of not being able to explain its source. The surrender was made through a letter two months after the date of search but there was no such

mention of the alleged surrender in the return of income filed by the assessee.

10. We observe that the learned Commissioner of Income Tax (Appeals) confirmed the impugned penalty by dealing extensively with the facts of the case along with applying the judgment of the Hon'ble Apex Court in the case of MAK Data P. Ltd. vs. CIT; 358 ITR 593 observing as follows :-

“4.5(a) I have carefully considered the facts of the case and the written submissions filed by ld. AR. The facts of the case and the date-line in brief are as under :-

- The search took place on 23.07.2009.*
- No surrender of undisclosed income was made during the course of the search.*
- After the seizure and analysis of seized documents by the Investigation Wing, a declaration was made by*

the then President and Secretary of the society declaring an undisclosed income of Rs. 74,83,000 through a letter filed before ITO (Investigation) on 23.11.2009. The following items of income as per Balance sheet as on 31.03.2008 were offered to tax. However, no specific years for which the undisclosed income was being disclosed were mentioned in this letter :

<i>(i) Amount credited in Corpus</i>		
<i>Fund A/c and unsecured loans</i>		<i>Rs.33,31,000</i>
<i>(ii) Amount credited in sundry creditors</i>		
<i>. Imratilal/ Munnalal</i>	<i>Rs.5,25,000</i>	
<i>. Sundry Payable</i>	<i>Rs. 1,45,000</i>	
<i>. Creditors for Raw</i>		
<i>Material</i>	<i>Rs.17,82,000</i>	<i>Rs.24,52,000</i>
<i>(iii) Amount for other errors & omissions</i>	<i>Rs.17,00,000</i>	
	<i>Total</i>	<i><u>Rs.74,83,000</u></i>

Notice u/s 153A was issued on 30.6.2011 calling for returns of income for A.Y. 2004-05 to 2009-10 to be filed within 30 days. No returns of income were filed in response to notice u/s 153A. It was stated vide letter dt. 25.07.2011 that the returns filed u/s 139 may be treated as filed in response to notice u/s 153A. The return for A.Y. 2007-08 had been filed on 31.10.2007 declaring a loss of Rs.5,31,945/-.

Thus, even after the above declaration dated 23.11.2009, the surrendered income was not declared in the return of income u/s 153A on 25.07.2011.

4.5(b) The main argument of ld. learned AR in appeal is that the declaration dated 23.11.2009 was made before the ITO (Investigation) voluntarily and almost 2 years prior to the issuance of the statutory notice u/s 153A.

The argument of the appellant is not acceptable as the additional income has been offered by the assessee only after search u/s 132 which is one of the modes of investigation. A disclosure made after search cannot be called a voluntary disclosure. Further, more the assessee did not file return of income declaring the income surrendered on 23.11.2009 post-search and instead filed letter that the original returns already filed may be treated as returns filed in response to notice u/s 153A. The regular returns u/s 139(1) were filed as under :-

<i>A.Y.</i>	<i>Date of filing return</i>	<i>Returned income (Rs.)</i>
<i>2006-07</i>	<i>02-11-2006</i>	<i>13,736</i>
<i>2007-08</i>	<i>31.10.2007</i>	<i>(5,31,945)</i>
<i>2008-09</i>	<i>01.01.2009</i>	<i>NIL</i>
<i>2009-10</i>	<i>31.03.2011</i>	<i>2,12,910</i>

2010-11	16.09.2011	5,51,140
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Thus, it is clear that the additional income assessed to tax is only the result of search and seizure operation and the assessment proceedings and is not voluntary in any way. It was not shown in the return of income.

4.5(c) The second argument is that due to the ongoing infighting, quarrels and complaints amongst the members of the founder Governing Body and other members of the Society, a consensus could not be arrived at during the course of search action on 23.07.2009, which prevented the appellant from making a statement u/s 132(4). There was a change in the governing body of the society w.e.f. 10.01.2011 and the new Managing Committee/Office bearers decided to voluntarily disclose Rs.74,83,000 before the ITO

(Investigation) in order to put an end to litigation regarding tax matters.

This contention of the appellant is also not tenable. If the assessee had no intention to conceal income and evade tax on the same, it could have immediately after search on 23.07.2009 and subsequent surrender on 23.11.2009 filed revised return of income for A.Y. 2008-09 or filed return of income for A.Y. 2009-10 u/s 139 declaring additional income. The return for A.Y. 2009-10 was filed much beyond the due date, i.e. on 31.03.2011. Similarly the regular return for A.Y. 2010-11 was filed only on 16.09.2011. When asked why the amount of Rs. 74,83,000 claimed to have been voluntarily surrendered was not disclosed even in the return u/s 153A, the only explanation given is that due to change in management, the present Management of

the society is unable to say anything about the matter which pertains to the period of the earlier Management.

It is thus held that the assessee has no explanation for not showing the surrendered income in its return.

4.5(d) Regarding the quantum addition of Rs.15,88,629 on account of Corpus Fund, it has been submitted that the addition has been made only on the basis of the disclosure made by the appellant itself on 23.11.2009 which has been accepted as such for purposes of assessment. No factum of concealment and mensrea has been proved or established in the penalty order. The Assessing Officer has simply rested its conclusion on the act of voluntary surrender made by the assessee in good faith to purchase peace and to avoid litigation. In such a situation, the ratio of the decision in the case of CIT vs. Suresh Chandra Mittal as spelt out by the Hon'ble Supreme Court 251 UTR 9(S.C.)

comes to the rescue of the assessee and accordingly no penalty under section 271(1)(c) is attracted in the case.

I have considered the above argument. It is seen that the issue is duly covered in favour of Revenue by the decision of the Hon'ble Supreme Court in MAK Data P. Ltd. vs. CIT; 358 ITR 593 (SC) wherein the Hon'ble Supreme Court has held as under :-

“Voluntary disclosure does not release the assessee from the mischief of penal proceedings.....The Assessing Officer shall not be carried away by the plea of the assessee such as “voluntary disclosure”, “buy peace”, “avoid litigation”, amicable settlement”, to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to section

271(1)(c) of the Act(1) raises a presumption of concealment when a different is notice by the A.O. between the reported and assessed income.....

Assessee has only stated that he had surrendered the additional sum with a view to avoid litigation, buy peace and to channelise the energy and resources towards productive work and to make amicable settlement with the income tax department. '1Statute does not recognise those types of defences under the Explanation 1 to section 271(1)(c) of the Act(1)©. It is trite law that the voluntary disclosure does not release the assessee from the mischief of penal proceedings under section 271(1)(c) of the Act(1)(c). The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he has to be absolved from penalty.

The surrender of income on this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the A.O. in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary.”

Upon careful consideration of the explanation offered by the assessee, it is seen that the assessee has not provided that it has not furnished inaccurate particulars of income or concealed particulars of its income in the return filed by it u/s 153A. As held by various courts, the foundational fact here depends upon the return filed by the assessee because that is the only document where the assessee can furnish the particulars of income. When such particulars are found to be inaccurate, the liability u/s 271(1)(c) of the Act would arise. Penalty u/s 271(1)(c) of the Act is a civil

liability and wilful concealment is, therefore, not an essential ingredient for attracting penalty under this section. It is evident in the case of the assessee that it did not disclose its correct and true income in the return filed by it u/s 153A. In response to the notice u/s 153A, the assessee only stated that the return under section 139 may be treated as return filed in response to notice u/s 153A. This reply was furnished after the assessee had already filed surrender letter to ITO (Inv.). The appellant thus failed to disclose all facts material to the computation of its total income in its return of income and failed to substantiate its explanation at the time of search as well as assessment and penalty proceedings.

4.5(e) In view of the above facts, the penalty levied by the A.O. u/s 271(1)(c) is upheld.”

We further note that the search in the case of the assessee was conducted on 23.7.2009 and this date falls after the first day of June, 2007 as provided in Explanation 5A to section 271(1)(c) of the Act(1)(c) of the Act. For better understanding we reproduce Explanation 5A to section 271(1)(c) of the Act :-

“Explanation 5A.- Where, in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of –

- (i) Any money, bullion, jewellery or other valuable article or thing (hereinafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income for any previous year; or*

(ii) Any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of accounts or other documents or transactions represents his income (wholly or in part) for any previous year, which has ended before the date of search and,-

(a) Where the return of income for such previous year has been furnished before the said date but such income has not been declared therein; or

(b) The due date for filing the return of income for such previous year has expired but the assessee has not filed the return.

Then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purpose of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.”

11. The assessee's contentions need to be examined within the four corners as provided in Explanation 5A of the Act which contemplates that in case the return of income for such previous year ended before the date of search, has been furnished before the last date, but such income has not been declared therein then notwithstanding that such income is declared by him in any return of income furnished on or after the date of search then for the purpose of imposition of penalty u/s 271(1)(c) of the

Act(1)(c) of the Act it would be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

12. Examining the facts of the instant case, we find that the return for the assessment year 2007-08 was filed on 31.10.2007 declaring loss of Rs. 5,31,945/-. Search was conducted on 23.7.2009 i.e. after the first day of June, 2007. The assessee accepted the unexplained income on account of corpus fund relating to its source. The alleged undisclosed income was not offered to tax in the regular return of income and was finally admitted for paying tax in the course of assessment proceedings. In view of these facts, the assessee is directly hit by the provisions of Explanation 5A to section 271(1)(c) of the Act(1)(c) of the Act. Therefore, in our considered view, the learned Commissioner of Income Tax (Appeals) has rightly confirmed the penalty of Rs.4,77,000/- u/s 271(1)(c) of the

Act(1)(c) of the Act. No interference is, therefore, called for in the findings of the learned Commissioner of Income Tax (Appeals) and accordingly we confirm the same.

13. In the result, the assessee's appeal for assessment year 2007-08 is dismissed.

14. Now we shall take up the assessee's appeal for the assessment years 2009-10 and 2010-11 in which the assessee is aggrieved with the levy of penalty u/s 271AAA of the Act of Rs. 5,58,840/- and Rs.5,79,465/- respectively.

15. The facts of the case remain the same as we have discussed above while adjudicating the appeal for the assessment year 2007-08.

16. Before us, the learned counsel for the assessee submitted that the additions were made on the ground that the assessee had made various payments to various persons and the alleged additions were made on the basis

of documents found during the course of search at the premises of third parties. The learned Commissioner of Income Tax (Appeals) upheld the penalty on the ground that the assessee was not able to prove that it has not concealed the particulars of income or has furnished inaccurate particulars of income. Further the learned Commissioner of Income Tax (Appeals) failed to appreciate that the assessee has disowned of having made such payments which have been duly noted by the Assessing Officer in the assessment order. Further, the learned counsel for the assessee also submitted that search was conducted at the premises of K.K. Sharma and it needs to be ascertained whether the tax has also been levied and recovered from K.K. Sharma on the same amount and if it is found correct, it would amount to recovering taxes twice and, therefore, the levy of penalty on the same count would be grossly prejudicial to the assessee.

17. On the other hand, the learned DR vehemently argued supporting the orders of the authorities below and further submitted that the provisions of section 271AAA of the Act are very clear and the assessee, if fulfils the three conditions mentioned therein, no such penalty is leviable which has not so happened in the case of the assessee and, therefore, the learned Commissioner of Income Tax (Appeals) has rightly confirmed the penalty.

18. We have heard the rival contentions and perused the record placed before us. In these two appeals the assessee is aggrieved with the levy of penalty u/s 271AAA of the Act. As far as the contention of the assessee that the income might have been taxed twice is concerned, we refrain from dealing with this issue as it relates to quantum addition for which the assessee has not come up in second appeal and, therefore, it has attained finality. We are

confined to deal with the issue of penalty u/s 271AAA of the Act. Section 271AAA of the Act reads as under :-

“Penalty where search has been initiated.

271AAA. (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 but before the 1st day of July, 2012, 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 Principal Chief Commissioner or Chief Commissioner or Principal 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
 - (ii) in which search was conducted.”

19. The above provision is applicable in the case of the assessee wherein search u/s 132 of the Act has been initiated on or after 1st day of July, 2012. In the case of the assessee search was conducted on 23.7.2009. This date falls in the aboveresferred date bracket. The assessee in order to get immunity from paying penalty @ 10% of the undisclosed income shall have to fulfil three conditions as mentioned in the above section.

20. As far as the first condition is concerned as to whether the assessee has admitted the undisclosed income during the course of search with specific manner in which it has been derived, we find that the search was conducted on 23.7.2009. The assessee did not make any disclosure during the course of search. It was two months thereafter on 23.11.2009 that the assessee submitted a letter before the ITO, Investigation, Bhopal. In our view, the statement given on 23.11.2009 cannot be considered as a

statement given during the course of search because it was an afterthought and given two months after the date of search.

21. As far as the second condition is concerned, the assessee has duly substantiated the manner in which the undisclosed income was taxed.

22. As far as the third condition is concerned, as to whether the assessee has paid the taxes together with interest, we find that the assessee has not offered the undisclosed income voluntarily in the return of income filed in compliance with the notice u/s 153A of the Act and it was only during the course of assessment proceedings that when it was confronted with the seized material as well as the disclosure made on 23.11.2009 then it accepted to pay taxes. Therefore, the assessee has not paid the taxes voluntarily on the income surrendered.

23. In our view, the assessee has been unable to fulfill two out of the three conditions provided in section 271AAA of the Act for getting immunity from paying penalty @ 10% of the undisclosed amount. We, therefore, find no reason to interfere with the findings

of the learned Commissioner of Income Tax (Appeals) and confirm the penalty imposed u/s 271AAA of the Act.

24. In the result, the assessee's appeals for assessment years 2009-10 and 2010-11 stand dismissed.

25. Finally, all the appeals of assessee are dismissed.

Order pronounced in open Court on 11.5.2018.

Sd/-

as/-

(KUL BHARAT)
JUDICIAL MEMBER

(MANISH BORAD)
ACCOUNTANT MEMBER

दिनांक /**Dated** : **11 May, 2018**

Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/
DR, ITAT, Indore/Guard file.

By order

Private Secretary/DDO, Indore

1. Date of dictation : .2018
2. Date on which the typed draft is placed before the Dictating Member : .2018
3. Date on which approved draft comes to the Sr.P.S./P.S:
4. Date on which the fair order is placed before the dictating Member for pronouncement:
5. Date on which the fair order comes back to the Sr.P.S./P.S.:
6. Date on which the file goes to the Bench Clerk:
7. Date on which the file goes to the Head Clerk:

8. The date on which the file goes to the Assisstant Registrar for signature of the order.

9. Date of Despatch of the Order:

