

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI K. N. CHARY, JUDICIAL MEMBER

ITA No. 2969/Del/2015
(Assessment Year: 2011-12)

Avtar Singh Kochar, C/o. S. K. Bansal, CA, 101, First Floor, Kochar Market, Jhajjar Road, Rohtak PAN: AEOPK4447F	Vs.	DCIT, Central Circle-25, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri S. K. Bansal, CA
Revenue by:	Shri S. S. Rana, CIT DR
Date of Hearing	28/02/2019
Date of pronouncement	25/03/2019

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the Id CIT(A)-29, New Delhi dated 03.03.2015 for the Assessment Year 2011-12 wherein the penalty u/s 271 AAA levied by the learned Deputy Commissioner Of Income Tax, central circle – 25, New Delhi (the learned AO) vide order dated 30/9/2013 INR 20,000,000 is confirmed by the order dated 3/3/2015.
2. The assessee has raised the following grounds of appeal:-
 1. *That the Ld. A.O. has erred in law as well as on facts in initiating Penalty Proceedings u/s 271 AAA of the Income Tax Act without exercising his discretionary power judiciously particularly where the appellant had made disclosure/surrender u/s 132(4) just to buy peace of mind and subject to no penalty and prosecution that too when the appellant was virtually given a tacit assurance of immunity from penalty by Sh. Gaurav Dudeja, the then DDIT while recording the appellant's statement u/s 132(4).*
 2. *That the Ld. A.O. has further erred in law as well as on facts in initiating and imposing penalty u/s 271 AAA of the I.T. Act when the appellant has fulfilled all the three conditions as contained in section 271AAA(2) of the Income tax Act, 1961 as under:*
 - (i) *in the course of the search the assessee has made a statement under section 132(4), admitted the undisclosed income and*

specified the manner in which such income has been derived and has declared undisclosed income of Rs.20 crores.

- (ii) That the assessee has substantiated the manner in which the undisclosed income was derived.*
 - (iii) That the assessee has paid the tax, together with interest, in respect of the undisclosed income.*
- 3. That the Ld. A.O. has erred in law as well as on facts in imposing Penalty of Rs. 2,00,00,000 u/s 271 AAA and the Ld. CIT(A) further erred in law as well as on facts in dismissing the appeal based on incomplete and wrong information that total payment of taxes in respect of A.Y. 2011-12 is Rs. 34249900 against the net amount of tax payable at Rs. 82011070. Calculation of Section 143(1) is wrong & incorrect. Further during the course of search on 18-01-2011, a sum of Rs. 1,21,00,000/- was seized by the income tax officials for making payment of income-tax for the Assessment Year 2011-12 but Assessing Officer deposited the said amount against tax liability of the assessee on 10-06-2013 almost after two years five months. That due to delay in deposit the assessee was not given credit of the said sum as advance tax and consequently interest u/s 234A, B & C were overcharged.*
 - 4. That the Ld. A.O. has erred in law as well as on facts in imposing Penalty without considering the fact that the appellant was facing acute shortage of funds and consequently it was beyond his control to deposit the whole tax along with return of income and further without appreciating the fact that balance tax was deposited without any litigation.*
 - 5. That the Ld A.O. has further erred in law as well as on facts to declare assessee as "assessee in default" without giving any reason and reasonable time whereas assessee was making all the outstanding payments voluntarily and as on date there is no outstanding pending towards the assessee.*
 - 6. That the Ld. Additional CIT, Central Range-5, New Delhi has further erred in law as well as on facts in according approval u/s 274(2) for imposing penalty u/s 271 AAA in a mechanical manner and without applying his mind. The penalty levied u/s 271AAA is bad in law and is liable to be cancelled."*
3. The brief facts show that search operation u/s 132 of the income tax act was carried out on 18/1/2011 in case of the assessee. As per result of research, INR 187000000 advanced by the assessee to different persons and unaccounted cash of INR 12,100,000 were found. This was admitted by the assessee to be his unaccounted income for financial year 2010 – 11 relevant to assessment year 2011 – 12. Therefore the assessee admitted INR 200,000,000 as undisclosed income for assessment year 2011 – 12. Assessee owned the above sum in return of income filed and therefore the

assessee showing income from salary, house property, business and other sources, the returned income was accepted which was filed by the assessee on 20/9/2012. Accordingly assessment under section 143 (3) of the income tax act, 1961 was passed on 25/3/2013. Penalty proceedings u/s 271AAA was also initiated.

4. The assessee was issued notice on 25/3/2013 requiring him to explain why penalty should not be imposed. The assessee did not file any reply. Therefore further opportunity was granted, assessee submitted written reply on 3/9/2013 stating that in the course of search in the statement u/s 132 (4) assessee admitted the undisclosed income and specified the manner in which such income has been derived. It is also substantiated the manner in which the undisclosed income was derived. The assessee has also paid the tax altogether with interest in respect of the undisclosed income before assessment. Further the returned income has been accepted without making any addition and assessee has fully cooperated during the search and after the search, therefore, no penalty should be levied. The learned assessing officer rejected the explanation of the assessee and stated that during the course of search the undisclosed income to the tune of INR 200,000,000 was found which was disclosed by the assessee in the statement recorded u/s 132 (4) of the act but has not paid the full tax together with interest in respect of such undisclosed income till the due date of filing the return, therefore, the assessee is liable for levy of penalty u/s 271AAA of the income tax act. Accordingly the learned AO levied a penalty of INR 20,000,000 vide order dated 30/9/2013.
5. The assessee aggrieved with the order of the learned AO preferred an appeal before the learned CIT – A – 29, New Delhi who passed an order dated 3/3/2015 dismissing the appeal of the assessee noting that there is an admitted fact that the appellant filed its return of income for INR 2 01825050/- on 20/9/2012 which included the undisclosed income of INR 200,000,000 but the tax on the returned income to the extent of INR 3 4862630/- were not paid under section 140 A (3) of the income tax act and therefore the assessee is liable to pay the penalty. He further noted that the appellant's contention that during the course of assessment proceedings on 12/10/2012 the learned assessing officer did not approach the assessee

and requested to pay tax in instalment which was granted by the AO therefore the penalty should not be levied. He stated that this contention of the appellant is far from truth as per the evidences available on record vide letter dated 22/10/2012 AO informed the appellant that the request made by the he vide letter dated 12/10/2012 is not acceptable. He further rejected the explanation of the appellant that there is no time limit for paying the taxes on undisclosed income as they have paid the full tax installment till 12/12/2014 on the undisclosed income therefore penalty cannot be levied. The learned CIT – A noted that if the taxes are not paid along with interest with the return of income the appellant, penalty a u/s 271AAA has to be levied. The learned CIT appeal further noted that the assessment year involved in the present case is assessment year 2011 – 12 and declaration was made before the due date for payment of installment for payment of advance tax for assessment year 2011 – 12. Therefore, he held that if the appellant's Plea is admitted that there is no time limit for payment of taxes and that in that case though the assessment was framed on 25/3/2013 and that they have made payment of taxes in installments by 12/12/2014, as they have made full payment on undisclosed income, thus no penalty is levied, is devoid of any merit. He further relied upon the decision of the honourable Punjab and Haryana High Court in 287 ITR 376 wherein it has been held that immunity from penalty is to be availed of the assessee and the tax on the surrendered income along with the interest is required to be paid immediately and in any case, before the due date of filing of return. Therefore he confirmed the penalty levied by the learned AO as in the present case the due taxes along with the interest has not been paid by the appellant up to the date of filing of return of income and hence the assessee cannot avail the immunity. The assessee aggrieved with the order of the learned CIT – A has preferred an appeal before us.

6. The learned authorised representative submitted that penalty of INR 20,000,000 has been levied wrongly on the assessee. He submitted that on 25/4/2017 an order under section 154 of the income tax act 1961 was passed by the learned assessing officer wherein it was stated that the cash seized of INR 12,100,000 was adjusted on 10/6/2013 and therefore the

interest u/s 234B and other consequential interest should be reduced to that extent. Such mistake was rectified and according to that net tax payable was a refund of INR 4739869/-. He therefore submitted that it is apparent that the whole tax has been paid by the assessee before the levy of the penalty. He also stated that in the assessment order u/s 143 (3) it is also been confirmed that there is no demand outstanding against the disclosure made by the assessee. He therefore submitted that the whole tax was paid before levy of penalty. He further referred to para number 8 of the assessment order dated 25/3/2013 wherein it has been stated that the NIL taxes payable by the assessee. In view of this, he submitted that the penalty should not be levied on the assessee. He also relied on the several judicial precedents.

7. The learned departmental representative vehemently submitted that the penalty of INR 20,000,000 is rightly levied by the assessing officer as the assessee has disclosed the sum but has not paid the tax before the due date of the filing of the return of income. In view of this, the penalty has been levied. He submitted that all the judicial precedent relied upon by the learned authorised representative does not apply to the facts of the case as the penalty has been levied on this ground that the assessee has not paid the due tax before the due date of filing of the return of income.
8. We have carefully considered the rival contention and perused the orders of the lower authorities. The fact shows that the assessee has disclosed the sum of INR 200,000,000 in his statement made u/s 132 (4) of the income tax act made on 18/1/2011. According to the statement in answer to question number 12 the assessee has stated that arrangement for the payment of tax on the additional income of INR 200,000,000 surrendered is made accordingly. He stated that cash of INR 12,100,000 seized during the course of search may be adjusted towards the tax. He further issued five cheques of (1) Rs 1,19,00,000 up to 30/01/2011,(2) a cheque of INR 11,000,000 up to 28/2/2011,(3) a cheque of INR 11,000,000 of 28/3/2011, (4) a cheque of INR 11,000,000 up to INR 28/04/2011 and (5) a cheque of INR 11,000,000 up to 28/5/2011. Therefore it is apparent that a total amount of tax of INR 68,000,000 was supposed to be discharged by the assessee by adjustment of case seized of 1,21,00,000 and subsequently

5 different cheques of different amounts on different dates. The due date for the filing of the return of income for the impugned assessment year was 30/9/2011 whereas the assessee has filed his return of income on 20/9/2012. In nutshell, assessee disclosed INR 200,000,000 for assessment year 2011 – 12, return for which was required to be filed on or before 30/9/2011, assessee filed its return of income on 20/9/2012 and the assessment u/s 143 (3) of the act was passed on 25/3/2013. Up to 30/09/2011, i.e. due date for filing of the return of income, as stated by the learned CIT – A, assessee did not deposit the cheques of the tax. Therefore on the disclosure, the tax was not paid before the due date of filing of the return, hence, penalty was levied. Here the total disclosure of INR 200,000,000 was made and the penalty levied is also of INR 20,000,000 being 10% of the total disclosure.

9. The provisions of section 271AAA provides that where the search has been initiated u/s 1324 after 01/06/2007 but before 01/07/2012, assessee shall pay by way of a penalty in addition to tax payable by him a sum computed at the rate of 10% of the undisclosed income of the specified previous year. In the present case the search has been initiated on 18/1/2011 therefore the provisions of this section are applicable. Assessee gets immunity from payment of the above penalty if it satisfies all the following conditions as contained in subsection (2),
 - a. he admits the undisclosed income and specify the manner of earning such income in the statement recorded u/s 132 (4) in the course of search
 - b. he substantiate the manner in which the undisclosed income was derived
 - c. and pays the tax together with interest if any in respect of the undisclosed income

10. There is no dispute with respect to the conditions specified at (a) and (b). The only dispute is that if assessee has not paid the tax together with interest in respect of the undisclosed income, before the due date of filing of return of income but certainly before the assessment is made, would he get the immunity from penalty u/s 271 AAA or not . This issue has

already been settled by Hon Jurisdictional high court in PCIT V Ritu Singhal [2018] 92 taxmann.com 224 (Delhi)/[2018] 403 ITR 97 (Delhi) where in para no 10 and 11 it has been held as under :-

10. One of the conditions that results in the inapplicability of Section 271AA is payment of tax. Since the assessability and quantification of the amount of undisclosed income can be legitimately computed only at the stage of assessment, it was held by the Tribunal concurring with the first appellate authority, that the outer time limit for payment of tax is not prior to the conclusion of assessment proceedings. Where there was a short payment by way of self-assessment tax but made good in response to the notice of demand on completion of the assessment it was held that there was no scope for penalty under section 271AAA as was held in Mahendra C. Shah (supra) while interpreting Explanation 5 to Section 271(1)(c).

11. Explanation 5(2) of Section 271(1)(c) was considered by the Supreme Court in Asstt. CIT v. Gebilal Kanhaialal [2012] 25 taxmann.com 214/210 Taxman 244/348 ITR 561. It was held that Explanation 5 (2) to Section 271 (1) (c) provides, where, in the course of search under Section 132, the assessee, found to be owner of unaccounted assets, claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed particulars of his income for the purpose of imposition of penalty, but there are exceptions to such deeming provision or to such a presumption of concealment. The Court then said:

"It provides that where, in the course of search under Section 132, the assessee is found to be the owner of unaccounted assets and the assessee claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income for the purposes of imposition of penalty under Section 271(1)(c). The only exceptions to such a deeming provision or to such a presumption of concealment are given in Sub-Clauses (1) and (2) of Expln. 5. In this case, we are concerned with interpretation of Clause (2) of Expln. 5, which has been quoted above. Three conditions have got to be satisfied by the assessee for claiming immunity from payment of penalty under Clause (2) of Expln. 5 to Section 271(1)(c). The first condition was that the assessee must make a statement under Section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in Section 139(1). Such statement was made by the Karta during the search which concluded on 1-8-1987. It is not in dispute that condition No. 1 was fulfilled. The second condition for availing of the immunity from penalty under Section 271(1)(c) was that the assessee should specify, in his statement under Section 132(4), the manner in which such income stood derived.

Admittedly, the second condition, in the present case also stood satisfied. According to the Department, the assessee was not entitled to immunity under clause (2) as he did not satisfy the third condition for availing the benefit of waiver of penalty under Section 271(1)(c) as the assessee failed to file his return of income on July 31, 1987, and pay tax thereon particularly when the assessee conceded on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. However, no time limit for payment of such tax stood prescribed under clause (2). The only requirement stipulated in the third condition was for the assessee to "pay tax together with interest". In the present case, the third condition also stood fulfilled. The assessee has paid tax with interest up to the date of payment. The only condition which was required to be fulfilled for getting the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income up to the date of payment. Clause (2) did not prescribe the time limit within which the assessee should pay tax on income disclosed in the statement under Section 132(4). For the above reasons, we hold that the assessee was entitled to immunity under Clause (2) of Explan. 5 to Section 271 (1)(c)."

12. Like in that case, the first condition under Section 271AAA is that the assessee must make a statement under Section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in Section 139(1). The second condition for availing of the immunity from penalty under Section 271(1)(c) is that the assessee should specify, in his statement under Section 132(4), the manner in which such income stood derived. The revenue contended Gebilal Kanhaiyalal's case (supra) that though the second condition stood satisfied, the third condition was not sought. It urged that the assessee was not entitled to immunity under Clause (2) as he did not satisfy the third condition for availing the benefit of waiver of penalty under Section 271(1)(c) as he failed to file his return of income on 31st July, 1987 and pay tax thereon particularly when the assessee conceded on 1st Aug., 1987 that there was concealment of income. The third condition under Clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. The court held that no time-limit for payment of such tax stood prescribed under Clause (2) and that the only requirement stipulated in the third condition was for the assessee to "pay tax together with interest". It was held in Gebilal Kanhaiyalal's case (supra) that the third condition was also fulfilled as the assessee paid tax with interest upto the date of payment. The only condition which was required to be fulfilled for securing the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income upto the date of payment. Explanation 5 (2) did not prescribe the time-limit within which the assessee should pay tax on income disclosed in the statement under Section 132(4).

11. The contention of the assessee is that there is no time limit prescribed for getting the immunity and the contention of the revenue is that such tax should have been paid before at least due date of the filing of the return of

income. As per information available on record it is apparent that assessee has not paid the tax together with the interest in respect of the undisclosed income before the due date of filing of the return of income except, case seized of INR 12,100,000 during the course of search. Admittedly on such cash seized which is adjusted by the AO later on under section 154 of the income tax act the assessee should get benefit of the sum at least.

12. However with respect to the balance sum, the assessee has not paid tax before the due date of the filing of the return for that impugned assessment year i.e. on or before 30/9/2011. Admittedly such tax has not been paid before the due date of filing of return of income but only later on. Reading of the provisions of section 271AAA of the act, we also do not find that there is any time limit for payment of the tax, despite the necessary condition. It is rather surprising that the legislator has made a condition precedent for immunity from levy of the penalty of payment of taxes along with interest on undisclosed income, but has not prescribed the time limit for the payment of such tax. It is necessary that whenever there is a condition precedent from seeking immunity from penalty of payment of tax, naturally there should also be a timeline by which it should have been paid. The legislature has not put such timeline. The honourable courts have interpreted such timeline up to the date of assessment because that is the time when the taxes are computed on the undisclosed income.
13. Further the ld CIT A has held that assessee has not paid tax alongwith the return of income, however there is another provision for consequences of for non payment of self assessment tax u/s 140A (3) of the Act but not 271 AAA of the act.
14. In view of the above judicial precedents and respectfully following the decision of Honourable Delhi high court, we hold that when assessee has deposited complete tax before the assessment is made, the penalty u/s 271AAA of the act to that extent cannot be levied. However, on reading the orders of the lower authorities as well as the information furnished by the ld AR, it is not certain about what is amount of tax paid before making the assessment u/s 143(3) of the act. Hence, we set aside the whole issue back to the file of the ld AO with a direction to levy penalty only on the proportionate sum for which tax and interest has not been paid on or

before the passing of the assessment order u/s 143 (3) of the act. Accordingly, we reverse the order of the lower authorities and direct the learned assessing officer to recompute penalty u/s 271AAA of the act only on the tax along with interest on undisclosed sum remaining outstanding up to the date of assessment.

15. Accordingly, appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 25/03/2019.

-Sd/-

(K.N.CHARY)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated:25/03/2019

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi