

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'G': NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND  
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA Nos.1840/Del/2015 & 1841/Del/2015  
Assessment Years : 2011-12 & 2012-13

M/s Sam India Builtwell (P)  
Ltd.,  
435, Jagriti Enclave,  
Delhi – 110 092.  
PAN : AABCS7627K.  
(Appellant)

Vs. Deputy Commissioner of  
Income Tax,  
Central Circle-3,  
New Delhi.  
(Respondent)

Appellant by : Shri C.S. Anand, Advocate.  
Respondent by : Shri S.S. Rana, CIT-DR.

Date of hearing : 24.04.2019  
Date of pronouncement : 07.05.2019

**ORDER**

**PER G.D. AGRAWAL, VICE PRESIDENT :-**

These two appeals by the assessee for the assessment years 2011-12 and 2012-13 are directed against the order of learned CIT(A)-25, New Delhi dated 9<sup>th</sup> February, 2015.

2. At the time of hearing before us, both the parties agreed that the facts in both the appeals are similar. Therefore, we proceed to decide them together.

3. The only ground raised in these appeals is against the levy of penalty of ₹11,41,259/- and ₹1,20,000/-. At the time of hearing before us, the learned counsel for the assessee has referred to the assessment order and pointed out that the Assessing Officer has initiated penalty for explaining the manner in which undisclosed

income was derived. In this regard, he referred to concluding portion of paragraph 4. He further referred to penalty order and pointed out that the Assessing Officer has levied the penalty for assessee's failure to substantiate the manner in which such unaccounted income was earned. Thus, the penalty has been levied on the ground other than on which it was initiated. He relied upon the decision of Hon'ble Jurisdictional High Court in the case of Principal Commissioner of Income Tax, Central-3 Vs. Bhavi Chand Jindal in Income Tax Appeal No.973/2018, order dated 13<sup>th</sup> September, 2018, wherein Hon'ble Jurisdictional High Court has held that the two aspects i.e., the disclosure of manner in which undisclosed income was earned and substantiating the manner in which the undisclosed income was earned are two different things. These two different aspects are repeated by clauses (i) and (ii) of Section 271AAA(2). He, therefore, stated that on the facts of the case, the decision of Hon'ble Jurisdictional High Court would be squarely applicable.

4. Learned DR, on the other hand, filed written submission, which reads as under :-

*"In the above case, it is humbly submitted as follows:*

*1. In para 4 on page 5 of the assessment order, the AO has stated as follows:*

*" assessee company has not specified and substantiated the manner in which such unaccounted income has been derived by it during the search & seizure operation."*  
*It is further stated :*

*"the assessee company has failed to explain the manner in which undisclosed income was derived"*

*2. In para 4.1 on page 3 of Penalty order, AO has stated as follows:*

*“the assessee is also required to substantiate the manner in which undisclosed income was derived. Further, the assessee company has not specified and substantiated the manner in which unaccounted income has been derived by it during the search and seizure operation.”*

*In this regard, section 271AAA is reproduced below:*

***“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 46[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.”*

*As per the above provision, penalty u/s 271AAA is required to be levied if either of the above condition is violated. The assessee has not fulfilled conditions mentioned at (i) & (ii). The charge for levy of penalty is clearly specified in the assessment order and on that vary charge penalty has been levied. Hence, decision of Delhi High Court in the case of PCIT Vs Bhavi Chand Jindal is not applicable.*

*Reliance is placed upon the following judgements which clearly state that even if charge is not clearly specified, it is a question of fact which cannot be raised in an additional ground:*

**1. Sundaram Finance Ltd. Vs CIT [2018] 99 taxmann.com 152 (SC)**

*SLP dismissed against High Court ruling that where assessee claimed depreciation on non-existent assets, penalty under section 271(1)(c) was to be levied for filing inaccurate particulars of income*

**2. Sundaram Finance Ltd. Vs CIT [2018] 93 taxmann.com 250 (Madras)/[2018] 403 ITR 407 (Madras)**

*where Hon'ble Madras High Court held that where notice did not show nature of default, it was a question of fact. The assessee had understood purport and import of notice, and hence, no prejudice was caused to the assessee. It considered decision of Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565/218 Taxman 423/35 taxmann.com 250 (Kar.).*

**Relevant part of the order is reproduced below:**

*"15. Before us, the assessee seeks to contend that the notices issued under Section 274 r/w. Section 271 of the Act are vitiated since it did not specifically state the grounds mentioned in Section 271(1)(c) of the Act.*

*16. We have perused the notices and we find that the relevant columns have been marked, more particularly, when the case against the assessee is that they have concealed particulars of income and furnished inaccurate particulars of income. Therefore, the contention raised by the assessee is liable to be rejected on facts. That apart, this issue can never be a question of law in the assessee's case, as it is purely a question of fact. Apart from that, the assessee had at no earlier point of time raised the plea that on account of a defect in the notice, they were put to prejudice. All violations will not result in nullifying the orders passed by statutory authorities. If the case of the assessee is that they have been put to prejudice and principles of natural justice were violated on account of not being able to submit an effective reply, it would be a different matter. This was never the plea of the assessee either before the Assessing Officer or before the first Appellate Authority or before the Tribunal or before this*

*Court when the Tax Case Appeals were filed and it was only after 10 years, when the appeals were listed for final hearing, this issue is sought to be raised. Thus on facts, we could safely conclude that even assuming that there was defect in the notice, it had caused no prejudice to the assessee and the assessee clearly understood what was the purport and import of notice issued under Section 274 r/w, Section 271 of the Act. Therefore, principles of natural justice cannot be read in abstract and the assessee, being a limited company, having wide network in various financial services, should definitely be precluded from raising such a plea at this belated stage.*

*17. Thus, for the above reasons, Substantial Questions of law Nos. 1 and 2 are answered against the assessee and in favour of the revenue. The additional substantial question of law, which was framed is rejected on the ground that on facts the said question does not arise for consideration as well as for the reasons set out by us in the preceding paragraphs.*

*In the result, Tax Case Appeals are dismissed. No costs."*

*In the above case, it is humbly submitted the assessee has filed additional ground of appeal which deserves not to be admitted in view of the following decisions:*

**1. Ultratech Cement Ltd Vs Addl.CIT [2017-TIOL-785-HC-MUM-IT] (Copy Enclosed)**

*where Hon'ble Mumbai High Court held that an additional ground for claiming deduction u/s 80IA cannot be allowed by the Tribunal, when no claim was made before the original authority and there is nothing on record to indicate as to what prevented the assessee from raising such a claim before lower authorities.*

**2. Addl. CIT Vs Gurjargravures (P.) Ltd [1978] 111 ITR 1 (SC) (Copy Enclosed)**

*where Hon'ble Supreme Court held that the High Court was not justified in holding that if an item of income was taxed, the question of its non-taxability should be taken to have been considered by the ITO though no such claim had been made before him by the assessee."*

5. He specifically pointed out that in the middle of paragraph 4, the Assessing Officer has mentioned that the assessee has not specified and substantiated the manner in which such undisclosed income has

been derived by it. Thus, the Assessing Officer has initiated penalty on both the counts and he levied the penalty for non-substantiation of such income and therefore, it cannot be said that the penalty has been levied on ground other than the ground for which it was initiated.

6. We have carefully considered the submissions of both the sides and perused the material placed before us. We find that Hon'ble Jurisdictional High Court has considered similar issue in the case of Bhavi Chand Jindal (supra), wherein their Lordships in paragraph 9 held as under :-

*“9. Plea and contention of the Revenue in the present appeal is to be effect that the statement made under Section 132(4) did not indicate and state the manner in which the undisclosed income was derived. This is different from the ground and reason given by the Assessing Officer to impose penalty of Rs.3 crores under Section 271AAA of the Act, which was that the respondent-assessee had not been able to substantiate the manner in which the undisclosed income of Rs.30 crores had been derived. The two aspects are different as is clear from clauses (i) and (ii) to sub-section (2) to Section 271AAA of the Act. The Assessing Officer had not relied upon or claimed that there was violation of clause (i) to sub-section (2) to Section 271AAA, but had imposed penalty on account of the fact that there was violation and non-compliance of clause (ii) to sub-section (2) to Section 271AAA of the Act, i.e., assessee was not able to substantiate the manner in which the undisclosed income was derived.”*

7. In the case under appeal before us, the Assessing Officer in paragraph 4 at page 5 of the assessment order has recorded the finding relating to initiation of penalty under Section 271AAA twice. In the beginning of page 5, he recorded the following finding :-

*“As Sh. Arvind Goel himself has accepted, on behalf of assessee company, that amount of Rs.114,12,598/- is its unaccounted income for A.Y. 2011-12. Further, here it is worth to clarify that assessee company has not specified and substantiated the manner in which such unaccounted income has been derived by it during the search and seizure operation. Therefore, penalty provisions of Section 271AAA of the I.T. Act are attracted and applicable in the case of assessee company for A.Y. 2011-12. Relevant portion of Section 271AAA of the I.T. Act is reproduced below for ready reference:”*

8. Then, he referred to Section 271AAA and thereafter, he recorded the following finding :-

*“Clearly, from the statement of Sh. Arvind Goel, recorded during the post-search proceedings, it is clear that the assessee company has failed to explain the manner in which the undisclosed income was derived during the year under consideration. Therefore, I have reason to believe that it is a fit case for initiating penalty proceeding u/s 271AAA of the I.T. Act. Accordingly penalty u/s 271AAA of the I.T. Act is being separately initiated.”*

9. Thus, initially the Assessing Officer recorded the finding “that assessee company has not specified and substantiated the manner in which such unaccounted income has been derived by it”. But, subsequently, he recorded the finding “that the assessee company has failed to explain the manner in which the undisclosed income was derived”. We further find that in the notice issued under Section 271AAA, the penalty proceedings have been initiated on altogether different charges. We reproduce the notice herein below for ready reference :-

*“Notice Under Section 271AAA of the I.T. Act, 1961  
(PAN : AABCS7627K)*

*To,*

*The Principal Officer,  
M/s Sam (India) Builtwell P Ltd  
435, Jagriti Enclave,  
Delhi – 110092.*

*Sir,*

*Where as in the course of proceedings before me for the assessment year 2011-12, appears to me that you :-*

*\*have undisclosed income of the specified previous year, as noted above, 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 transaction 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 search; or*

*(C)*

*\*have undisclosed income of the specified previous year, as noted above, 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 relation 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.*

*You are hereby requested to appear before me at 11.30 A.M. on 25.04.2014 and show cause why an order imposing penalty on you should not be made under section 271AAA of the Income Tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271AAA.*

*SEAL*

*Sd/-  
(Jai Nath Verma)  
Dy. Commissioner of Income Tax,*

*Central Circle-03, New Delhi*

10. Thus, we find that there is no clarity in the stand of the Revenue for initiation of penalty under Section 271AAA, whether it is for failure of the assessee to explain the manner in which undisclosed income was derived or it is the failure of the assessee to substantiate the manner of earning of income or for not recording of such income in the books of account. In the above circumstances, the decision of Hon'ble Jurisdictional High Court relied upon by the learned counsel in the case of Bhavi Chand Jindal (supra) would be squarely applicable. All the decisions relied upon by the learned DR are on altogether different grounds and therefore, would not be applicable for adjudicating the issue under appeal before us. We, therefore, respectfully following the above decision of Hon'ble Jurisdictional High Court, cancel the penalty levied under Section 271AAA of the Act.

11. In the result, both the appeals of the assessee are allowed.  
Decision pronounced in the open Court on 07.05.2019.

Sd/-  
**(SUCHITRA KAMBLE)**  
**JUDICIAL MEMBER**

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

VK.

Copy forwarded to: -

1. Appellant : **M/s Sam India Builtwell (P) Ltd.,  
435, Jagriti Enclave, Delhi – 110 092.**
2. Respondent : **Deputy Commissioner of Income Tax,  
Central Circle-3, New Delhi.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar