

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'B' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.472/Del./2016
(ASSESSMENT YEAR : 2012-13)**

ACIT, Central Circle 4, vs. M/s. ABAG Hi-Tech Education Pvt. Ltd.,
(erstwhile CC – 25) 106, Vishwadeep Tower, Plot No.4,
New Delhi. District Centre Janakpuri,
New Delhi – 110 058.

(PAN : AAHCA9880C)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Amit Singhania, Advocate
REVENUE BY : Ms. Ashima Neb, Senior DR

Date of Hearing : 18.04.2019

Date of Order : 14.05.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

The Appellant, ACIT, Central Circle – 4, New Delhi (hereinafter referred to as the 'Revenue') by filing the present appeal sought to set aside the impugned order dated 03.11.2015 passed by the Commissioner of Income-tax (Appeals)-23, New Delhi deleting the penalty levied vide order dated 11.09.2014 passed u/s 271AAA of the Income-tax Act, 1961 (for short 'the

Act'), qua the assessment year 2012-13 on the grounds inter alia that :-

“On the facts and in the circumstances of the case the Ld. CIT(A) has erred in:-

1. The order of the CIT(A) is not correct in law and facts.

2. On the facts and circumstances of the case, the CIT(A) has erred in law in deleting the penalty of Rs.2,18,10,000/- imposed by the AO u/s 271AAA of the Income Tax Act on account of surrendered amount of Rs.21,81,00,000/- during the course of search & seizure action.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : On the basis of completed assessment u/s 143 (3) of the Act at the income of Rs.20,82,66,620/-, penalty proceedings were initiated u/s 271AAA of the Act on account of surrendered amount of Rs.21,81,00,000/- and offered in the return of income. Declining the contentions raised by the assessee, AO proceeded to levy the penalty of Rs.2,18,10,000/- u/s 271AA @ 10% of the undisclosed income on the ground that the assessee has failed to specify the manner in which such income has been derived and that the return of income filed u/s 139(1) cannot be considered as voluntary return as the same was filed when assessee was subjected to search u/s 132 of the Act.

3. Assessee carried the matter by way of an appeal before the Id. CIT (A) who has deleted the penalty after accepting the appeal. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal.

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. Undisputedly, the assessee has accepted the quantum assessed by the AO and confirmed by the Id. CIT (A). Search and seizure operation was conducted at the premises of the assessee u/s 132 of the Act and incriminating documents/assets were seized and consequently assessee filed return at enhanced income u/s 139(1) of the Act. It is also not in dispute that the assessee has admitted impugned undisclosed income in his statement recorded u/s 132 (4) of the Act and had paid taxes along with interest. Ld. CIT (A) has deleted the penalty by relying upon the decisions rendered by the Tribunal and Hon'ble High Court mentioned in para 4.2.5 by drawing the conclusion that the AO has never questioned the assessee during the search or during the assessment proceedings as to the manner in which the undisclosed income was derived. Ld. CIT (A) also observed that the AO has not recorded his satisfaction

in the assessment order itself by recording the reasons on the basis of which he was satisfied that the penalty proceedings u/s 271AAA of the Act is liable to be initiated and levied.

6. Ld. DR for the Revenue challenging the impugned order contended that sub-section (2) of section 271AAA of the Act does not cast responsibility upon the AO to question the assessee to explain the manner in which the undisclosed income was derived/earned. Ld. DR for the Revenue further contended that in case, the assessee intends to avail of the immunity from the penalty u/s 271AAA then he is required to fulfill the requirement laid down under sub-section (2) of section 271AAA of the Act. Ld. DR for the Revenue also filed written submissions which have been made part of the record.

7. In the backdrop of the aforesaid facts and circumstances of the case, arguments addressed by the ld. Authorized Representatives of the parties to the appeal, case laws relied upon, the first question arises for determination in this case is :-

“as to whether AO is required to record his satisfaction as in the case of initiating the penalty u/s 271(1)(c) of the Act, before initiating penalty proceedings u/s 271AAA of the Act?”

8. Bare perusal of the provisions contained under sections 271(1)(c) and 271AAA go to show that u/s 271AAA, the

satisfaction of the AO for initiating the penalty is not the same as in the case of section 271(1)(c) because u/s 271AAA (2) escape route has been given to the assessee on fulfilling the three conditions viz.:-

- (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.*

9. The requirement for initiating the penalty proceedings u/s 271AAA is that search has been initiated u/s 132 on or after the first day of June 2007 but before 1st day of July 2012 and that undisclosed income of the specified previous year has been unearthed on which the assessee shall pay by way of penalty in addition to tax, if any, a sum computed @ 10% of the undisclosed income.

10. In view of the matter, we are of the considered view that the Id. CIT (A) has deleted the penalty on the wrong premise that the AO has not recorded his satisfaction in the assessment order itself

as to the reasons why he was satisfied that penalty u/s 271AAA should be initiated. Because in the assessment order AO sought to initiate the penalty proceedings u/s 271AAA qua the surrendered amount during search operation which is in accordance with the provisions contained in the section. Even otherwise, all the conditions laid down to initiate the penalty proceedings u/s 271AAA are complete as discussed in the preceding paras.

11. Now, the next question arises for determination in this case is :-

“as to whether assessee has failed to substantiate the manner in which the undisclosed income of Rs.21,81,00,000/- was derived and is liable to be penalized as required under sub-section (2) of section 271AAA of the Act as contended by the ld. DR for the Revenue.”

12. To proceed further, provisions contained under section 271AAA (2) are reproduced as under for ready perusal :-

“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”

13. Under section 271AAA(2)(i) of the Act, penalty @ 10% of the undisclosed income shall not be imposed if the assessee, “*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 and substantiates the manner in which the undisclosed income was derived,*” and pays the tax together with interest if any on the undisclosed income.

14. During the course of search proceedings, statement of Shri Amul Gabrani was recorded u/s 132 (4) of the Act on 03.05.2012 by confronting with the seized documents Annexure AA-1, the relevant portion of which is extracted for ready perusal as under :-

“Q.8 I am showing you page No. 20 of Annexure AA-1, please explain the transactions mentioned in this paper?”

A.8. ABAG Hi-tech Education Private Limited is a jointly promoted company by myself and Mr. A.K. Bishnoi. It has earned income amounting to Rs.21.81 crores (approx) which in turn was utilized by the

company in land development improvement & facilitation expenses.

Q.9 *Do you want, to say anything else?*

A.9. *In order to buy peace & avoid litigation with the Department and in the spirit of cooperation, I Amul Gabrani and Mr. A. K. Bishnoi offer a sum of Rs.19,77,06,696/- and Rs.20,34,15,254/- respectively as the additional income along with an amount of Rs.21.81 crore (approx.) as stated above, aggregating to Rs.61,92,41,340/- as the additional income for the F.Y. 2011-12 on account of some omission/commission papers or documents seized and or found in respect of group companies and or individuals during the course of search.*

The above surrender is made with the clear understanding that the necessary tax shall be paid by me and there will be no penal action by the Department whatsoever. The above disclosure is inclusive and comprises of the disclosure made on 06.03.2012. The same is being made to buy peace and avoid litigation with the Department in the spirit of cooperation.”

15. Ld. CIT (A) by relying upon the provisions contained u/s 271AAA (2) deleted the penalty by returning following findings :-

“4.2.4The AO has over-looked the provisions of sub-section (2) of section 271AAA of the Act which provides that penalty u/s 271AAA (1) shall not be applicable in certain conditions prescribed therein. The appellant had admitted the impugned undisclosed income in his statement u/s 132(4) of the Act and had paid taxes together with interest. As regards the manner in which the undisclosed income was derived, apparently the same was never asked from the appellant, either during the search or during the assessment proceedings.”

16. Bare perusal of aforesaid findings returned by Id. CIT (A) goes to prove that the Id. CIT (A) has misconceived the provisions

contained u/s 271AAA (2) because it was the duty of the assessee to specify the manner in which such income has been derived and to substantiate the manner in which the undisclosed income was derived. Assessee in this case has merely stated in his statement recorded u/s 132 (4) that the details written on the paper show the speculative income earned by the company during FY 2011-12 which in turn was utilized by the company in land development improvement and facilitation expenses. We are of the considered view that terming the surrendered income as “speculative income” does not specify the manner in which such income has been derived nor it amounts to substantiating the manner in which the undisclosed income was derived. No doubt, the assessee has admitted the undisclosed income, paid the tax together with interest thereon but has failed to comply with the other conditions laid down under sub-section (2) of section 271AAA of the Act to avail of the amnesty provided under the section.

17. The ld. CIT (A) deleted the penalty on the premise that if no specific question was put to assessee u/s 132(4), it cannot be concluded that the assessee has failed to reply or specify/ substantiate the manner of concealment. It is settled principle of law that assessee has to specify the manner in which income has been derived and substantiated the manner in which the

undisclosed income was derived at the time of search in its statement recorded u/s 132(4) and not thereafter.

18. Moreover, assessee during recording of statement u/s 132 (4) in the search proceedings instead of complying with the provisions contained under sub-section (2) of section 271AAA harped on his mercy petition that, *“In order to buy peace and avoid litigation with the Department and in the spirit of cooperation, surrender is being made as additional income for FY 2011-12 on account of some omission/commission in the papers or documents seized and the said surrender is made with a clear understanding that necessary tax shall be paid by him and there will be no penalty action by the Department.”*

19. Ld. AR for the assessee relied upon the decision rendered by coordinate Bench of the Tribunal in case of *Sita Ram Gupta vs. ACIT in ITA No.1835/Del/2013 order dated 30.06.2014* wherein the penalty has been deleted on fulfilling the conditions by the assessee laid down u/s 271AAA (2) but is not applicable to the facts and circumstances of the case.

20. Hon’ble High Court of Delhi in a case relied upon by the ld. CIT DR cited as *Pr.CIT vs. Smt. Ritu Singal – (2018) 92 taxmann.com 224 (Delhi)* after discussing the decisions relied upon by the ld. AR rendered by *Hon’ble Apex Court in ACIT vs.*

Gebilal Kanhaialal 348 ITR 561 (SC) and Mak Data (P.) Ltd. vs. CIT 358 ITR 539 (SC), Hon'ble High Court of Gujarat in CIT vs. Mahendra C. Shah – 299 ITR 305 (Guj.), Hon'ble Allahabad High Court in CIT vs. Radha Kishan Goel - 278 ITR 454 (All.), Hon'ble Delhi High Court in Mothers Pride Education Personnel (P.) Ltd. vs. DCIT ITA No.3372 (Delhi of 2011 dated 12.10.2012, reversed the decision rendered by the Tribunal setting aside the penalty on the ground that in the absence of the query raised by the authorized officer during the course of recording of statement u/s 132 (4) to specify and substantiate the manner in which the undisclosed income was derived by returning the following findings :-

“16. That the income which was ultimately brought to tax pursuant to the disclosure made, which was voluntary on the part of the assessee is stating the obvious. The assessee merely stated that the sums advanced were undisclosed income. However, she did not specify how she derived that income and what head it fell in (rent, capital gain, professional or business income out of money lending, source of the money etc). Unless such facts are mentioned with some specificity, it cannot be said that the assessee has fulfilled the requirement that she, in her statement (under Section 132 (4)) "substantiates the manner in which the undisclosed income was derived". Such being the case, this court is of opinion that the lower appellate authorities misdirected themselves in holding that the conditions in Section 271 AAA (2) were satisfied by the assessee.”

21. In the instant case, instead of complying with the provisions laid down u/s 271AAA (2) to specify the manner in which the surrendered income has been derived and to substantiate the

manner in which the undisclosed income was derived, assessee merely harped upon his statement that the surrender is being made to buy peace and to avoid litigation with the Department in the spirit of cooperation, to avail of the escape route from the penalty under sub-section (2) of section 271AAA. So, when the assessee has failed to specify the manner and substantiate the manner in which the undisclosed income was derived rather embark upon the mercy plea that he is making surrender to buy peace of mind and avoid litigation, he is not entitled for the benefit of section 271AAA(2) of the Act.

22. In view of what has been discussed above and following the decision rendered by Hon'ble Delhi High Court in case cited as *Pr.CIT vs. Smt. Ritu Singal* (supra), we are of the considered view that Id. CIT (A) has erred in deleting the penalty of Rs.2,18,10,000/- u/s 271AAA, hence appeal filed by the Revenue is hereby allowed and penalty order passed by the AO is restored.

Order pronounced in open court on this 14th day of May, 2019.

**Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 14th day of May, 2019
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-23, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.