

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” Bench, Mumbai**

**Before Shri Ravish Sood, Judicial Member
and Shri N.K. Pradhan, Accountant Member**

**ITA No. 663/Mum/2018
(Assessment Year: 2009-10)**

Ramesh Nakrani
Flat No.1, Plot No. 16,
Sector-8A, C.B.D.
Navi Mumbai – 400614

DCIT, Central Circle-39,
[New: Central Circle-6(4)]
Vs. AIR building, Nariman Point
Mumbai

PAN – AAXPN2385E

(Appellant)

(Respondent)

Appellant by: Ms. Hiral D. Sejpal, A.R

Respondent by: Shri Rajesh Ojha, D.R

Date of Hearing: 24.07.2019

Date of Pronouncement: 07.08.2019

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-54, Mumbai, dated 16.10.2017, which in turn arises from the penalty order passed by the A.O under Sec. 271AAA r.w.s 274 of the Income Tax Act, 1961 (for short ‘Act’), dated 29.06.2011. The assessee has assailed the impugned order on the following grounds of appeal:

“GROUND I:

1. On the facts and circumstances of the case and in law, the learned Commissioner of Income tax (Appeal) - 54, Mumbai [“the CIT(A)“] erred in confirming the penalty levied by the Deputy Commissioner of Income Tax, Central Circle - 39 (‘the AO’) u/s 271AAA of the Income Tax Act, 1961 (‘the Act’) amounting to Rs. 10,00,000.
2. The Appellant prays that penalty be deleted.

GROUND II:

The Appellant craves leave to add, amend, alter and/or delete any/all of the above grounds of appeal.”

2. Briefly stated, search and seizure action under Sec.132 was carried out on 18.02.2009 in the case of “Pathik construction group”, and the assessee was covered in the said proceedings. The assessee filed his return of income for A.Y. 2009-10 on 13.01.2010, declaring his total income at Rs. 2,97,062/-. Subsequently, the assessee filed a revised return of income on 25.01.2010 declaring his total income at Rs. 1,02,97,062/-. Assessment under Sec. 143(3) was completed on 29.12.2010 determining the assessee's total income at Rs.1,04,44,892/-. The A.O in the assessment order also initiated penalty proceedings under Sec. 271AAA of the Act in respect of the undisclosed income of Rs.1,00,00,000/- which was declared by the assessee in his statement recorded under Sec. 132(4) during the course of the search proceedings.

3. The A.O after the culmination of the assessment proceedings issued a ‘Show cause’ notice (for short ‘SCN’) under Sec. 271AAA, dated 29.12.2010, and called upon the assessee to explain as to why penalty under the said statutory provision may not be imposed on him in respect of the undisclosed income of Rs.1 crore that was admitted by him in his statement recorded under Sec. 132(4) of the Act. The reply filed by the assessee did not find favour with the A.O and a penalty of Rs. 10,00,000/- was imposed by him under Sec.271AAA.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) vide his order, dated 29.06.2011 was persuaded to accept the claim of the assessee and deleted the penalty imposed by the A.O under Sec. 271AAA.

5. The revenue being aggrieved with the order of the CIT(A) carried the matter in appeal before the Tribunal. The Tribunal vide its order

passed in the case of the assessee i.e DCIT, Central Circle-39, Mumbai Vs. Shri Ramesh K. Makrani (ITA No.5907/Mum/2012, dated 23.09.2015) did not find favour with the view taken by the CIT(A) that as no specific question about the manner in which the undisclosed income was derived by the assessee was asked at the time of recording of his statement under Sec.132(4), therefore, no penalty under Sec. 271AAA could have been imposed. In fact, the Tribunal held a conviction that the view taken by the CIT(A) clearly militated against the provisions of Sec. 271AAA. It was observed by the Tribunal, that the initial burden to show that all the three conditions prescribed in Sec. 271AAA(2) were complied with was cast upon the assessee. Accordingly, it was observed by the Tribunal that the assessee remained under an obligation to disclose the manner in which the undisclosed income that was declared in his statement recorded under Sec. 132(4) was derived by him. Further, it was observed by the Tribunal that as the assessee had also not filed the copy of his return of income before them, therefore, the head under which the undisclosed income was disclosed by the assessee also could not be gathered. On the basis of its aforesaid observations, it was concluded by the Tribunal that one more opportunity should be afforded to the assessee to explain his case before the lower authorities. Accordingly, the Tribunal in all fairness acceded to the request of the assessee and restored the matter to the file of the CIT(A), with a direction that an opportunity be afforded to him to explain the manner in which the undisclosed income that was declared in his statement recorded under Sec. 132(4) was derived by him.

6. We find that the assessee in the course of the 'set aside' proceedings before the CIT(A) had submitted that as he was dealing in land, therefore, the cash balance available with him was generated from various purchase and sale transactions in land conducted by

him. Also, the assessee in respect of his aforesaid claim had filed an “affidavit” stating that the undisclosed cash declared by him in his statement recorded under Sec. 132(4) was in respect of the land transactions. However, the CIT(A) was of the view that the assessee had failed to discharge the ‘onus’ as regards explaining the source of his undisclosed income both at the time of the search proceedings and also in the course of the penalty proceedings. Further, it was observed by the CIT(A) that even in the return of income filed by the assessee the undisclosed income was not shown by him under any specific head. Accordingly, the CIT(A) was of the view that as the assessee had failed to comply with the conditions laid down in Sec. 271AAA(2)(ii), therefore, he was liable for penalty under Sec. 271AAA of the Act.

7. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short ‘A.R’) for the assessee took us through the facts of the case. It was submitted by the ld. A.R that it was the second round of appeal of the assessee before the Tribunal. The ld. A.R took us through the observations of the Tribunal while restoring the matter to the file of the CIT(A), vide its order passed in ITA No.5907/Mum/2012, dated 23.09.2015 (copy placed on record). It was submitted by the ld. A.R that as directed by the Tribunal the assessee had submitted the requisite explanation as regards the source of the undisclosed income that was declared by him in his statement recorded under Sec.132(4). It was averred by the ld. A.R that despite the fact that the assessee had duly complied with directions of the Tribunal and satisfied the conditions contemplated in sub-section (2) of Sec.271AAA, the CIT(A) had erred in upholding the penalty imposed on the assessee under the said statutory provision.

8. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the ld. D.R that the assessee had failed to substantiate the manner in which the undisclosed income was derived in the course of the statement recorded under Sec.132(4). It was submitted by the ld. D.R, that despite the fact that the Tribunal had in all fairness restored the matter to the file of the CIT(A) and afforded another opportunity to the assessee to explain the manner in which the undisclosed income of Rs. 1 crore declared in his statement recorded under Sec. 132(4) was derived by him, however, he had failed to do the needful. Apart there from, it was submitted by the ld. D.R that even a perusal of the return of income filed by the assessee revealed that the assessee had merely shown the undisclosed income of Rs.1 crore as his 'business income', and that too by wrongly stating that the same had been declared during survey. It was submitted by the ld. D.R that as the assessee had failed to comply with the directions of the Tribunal and could not explain the manner in which the undisclosed income was derived by him, therefore, the CIT(A) had rightly upheld the penalty that was imposed by the A.O under Sec. 271AAA of the Act.

9. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. As observed by us hereinabove, it is the second round of appeal of the assessee before us. Succinctly stated, the assessee in his statement recorded under Sec.132(4) on 18/19.02.2009 had admitted of having made an unexplained investment in a land deal of the firm M/s R.R Construction (in which he is a partner) viz. Plot No. 98, Sector 20 (admeasuring 1100 Sq. mtrs) at Ulwe. However, the assessee in his statement recorded under Sec. 132(4) had not explained the manner in which the undisclosed income so declared was derived by him. On the basis of the aforesaid

facts, we find that the A.O being of the view the assessee had failed to satisfy the conditions envisaged in sub-section (2) of Sec. 271AAA, therein imposed a penalty of Rs.10,00,000/- i.e @ 10% of Rs.1 crore on him. On appeal, the CIT(A) vide his order dated 10.07.2012 observing that no question relating to the manner in which the undisclosed income was derived was asked from the assessee at the time of recording of his statement under Sec. 132(4), thus vacated the penalty imposed by the A.O under Sec.271AAA. Apart there from, it was observed by him that even otherwise the assessee in his statement recorded under Sec. 132(4) had in his reply to Question No. 3 specifically mentioned that the undisclosed income was derived from the business of sale/purchase of property. As observed by us hereinabove, the Tribunal was not impressed with the view taken by the CIT(A). It was noticed by the Tribunal that the burden to show that all the three conditions provided in sub-section (2) of Sec.271AAA were duly complied with was cast upon the assessee. At the same time, the Tribunal taking cognizance of the fact that no specific question about the manner in which the undisclosed income was derived was asked from the assessee in the course of recording of his statement under Sec. 132(4), had thus in all fairness acceded to his request and had restored the matter to the file of the CIT(A), with a direction to afford an opportunity to him to explain his case. We may herein observe that the Tribunal while restoring the matter to the file of the CIT(A) had categorically recorded certain material aspects viz. (i) that, the initial burden to show that all the three conditions prescribed in Sec. 271AAA(2) are complied with is placed upon the assessee; (ii) that, the assessee should disclose the manner in which the undisclosed income declared in the statement recorded u/s 132(4) was derived; (iii) that, the head under which the undisclosed income was disclosed by the assessee in his return of income would show the manner in which the

said income was derived by him. It is in the backdrop of the aforesaid observations that the Tribunal had restored the matter to the file of the CIT(A).

10. We shall in the backdrop of the aforesaid facts now advert to the issue as to whether the assessee in the course of the 'set aside' proceedings before the CIT(A) had explained the manner in which the undisclosed income that was declared in his statement recorded under Sec.132(4), was derived by him. As is discernible from the order of the CIT(A), the assessee in the course of the 'set aside' proceedings before him had merely stated that as he was mainly dealing in land, therefore, the cash balance available with him was generated due to various purchase and sale transactions in land conducted by him. In his attempt to fortify his aforesaid contention the assessee had also filed an "affidavit", dated 22.01.2015 stating that the cash was in respect of the land transactions. A perusal of the 'affidavit', dated 22.01.2015 filed by the assessee reveals as under (relevant extract):

"9. I say that after considering the reply of the respondent, the A.O held that the appellant has not specified the manner in which the unaccounted income was derived though it was clearly submitted that the cash payment was in respect of land transactions which itself prove that the income was earned from the sale/purchase of land and such cash transactions which was not originally declared in the books of accounts was declared in the statement recorded u/s132(4) and also thereafter declared in the revised return."

11. We have given a thoughtful consideration and are of the considered view that the assessee even in the course of the 'set aside' proceedings before the CIT(A) had failed to explain the manner in which the undisclosed income of Rs. 1 crore declared in his statement recorded under Sec. 132(4), was derived by him. As observed by us hereinabove, the Tribunal in the course of the first round of appeal had after taking cognizance of the fact that no specific question was asked from the assessee about the manner in which the undisclosed income was derived while recording his statement under Sec. 132(4),

had thus, at the request of the assessee in all fairness restored the matter to the file of the CIT(A) for affording him one more opportunity to explain his case. In sum and substance, the matter had been restored to the file of the CIT(A) for affording an opportunity to the assessee to specify and substantiate the manner in which the undisclosed income which was declared in his statement recorded under Sec.132(4), was derived by him. We find that despite having been afforded another opportunity, the assessee had failed to substantiate the manner in which the undisclosed income of Rs.1 crore that was declared in his statement recorded under Sec.132(4), was derived by him. In fact, the assessee in the course of the 'set aside' proceedings had chosen to sit tight lipped and not divulge the manner in which the undisclosed income of Rs. 1 crore that was declared in his statement recorded under Sec. 132(4), was derived by him. As is discernible from the order of the CIT(A), the assessee had merely stated before him that as he was mainly dealing in land, therefore, the cash balance available with him was generated from various purchase and sale transactions in land conducted by him. Apart there from, a similar claim also finds mentioned in the "affidavit", dated 22.01.2015 that was filed by the assessee before the CIT(A). We are of the considered view that the aforesaid explanation of the assessee which is nothing better than a general statement can by no means be construed as specifying and therein substantiating the manner in which undisclosed income of Rs. 1 crore declared in his statement recorded under Sec. 132(4), was derived by him. In fact, a careful perusal of sub-section (2) of Sec. 271AAA reveals that an assessee in order to bring its case within the realm of the exception to the levy of penalty under Sec.271AAA is obligated to carry out cumulative satisfaction of the three conditions therein envisaged, which reads as under:

“271AAA. (1).....

(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 is discernible from a cursory glance of the aforesaid conditions, it can safely be gathered that it is obligatory for an assessee to not only furnish an explanation about the manner in which the undisclosed income was derived, but rather, as per the mandate of law he is obligated to substantiate the same. In fact, we find that while for clause (i) of sub-section (2) of Sec.271AAA mandates that the assessee shall specify the manner in which the undisclosed income admitted by him in his statement recorded under sub-section (4) of Sec.132 had been derived, while for clause (ii) of sub-section (2) of Sec.271AAA envisages a heavier burden, as per which the assessee is further required to substantiate the manner in which the said undisclosed income was derived by him. We find that in the case before us, as the assessee had failed to specify and also substantiate the manner in which the undisclosed income of Rs.1 crore that was admitted in his statement recorded under sub-section (4) of Sec.132, was derived by him, therefore, the conditions envisaged in clause (i) and clause (ii) of sub-section (2) of Sec.271AAA, had not been satisfied. We are afraid that the general statement of the assessee that as he was mainly dealing in land, therefore, the cash balance available with him was generated due to various purchase and sale transactions can by no means be comprehended to have satisfied the aforesaid statutory requirement contemplated in sub-section (2) of Sec. 271AAA.

Accordingly, the 'affidavit', dated 22.01.2015 filed by the assessee merely making a mention of the aforesaid facts would also not come to the rescue of the assessee insofar satisfaction of the conditions envisaged in clause (i) and clause (ii) of sub-section (2) of Sec.271AAA is concerned. Apart there from, we find that even in the return of income filed by the assessee the undisclosed income of Rs.1 crore that was declared by him in his statement recorded under Sec. 132(4) had been merely put under the head "business income", which also does neither specify nor substantiates the manner in which the undisclosed income that was declared in his statement recorded under Sec.132(4) of the Act, was derived by him. Accordingly, in terms of our aforesaid observations, we are of the considered view that as the assessee had failed to both specify and substantiate the manner in which the undisclosed income of Rs. 1 crore declared in his statement recorded under Sec. 132(4) was derived by him, therefore, the CIT(A) vide his order dated 16.10.2017 had rightly upheld the penalty under Sec. 271AAA of Rs.10,00,000/- imposed by the A.O. We thus not finding any infirmity in the order of the CIT(A), uphold his order. The **Ground of appeal No. 1** is dismissed.

12. The **Ground of appeal No 2** being general in nature is dismissed as not pressed.

13. The appeal of the assessee is dismissed.

Order pronounced in the open court on 07.08.2019

Sd/-

(N.K. Pradhan)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 07.08.2019

Ps. Rohit

Sd/-

(Ravish Sood)
JUDICIAL MEMBER

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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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

आयकर अपीलीय अधिकरण, मुंबई / ITAT,

Mumbai