

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

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

**ITA No.2886/Mum/2018
(Assessment Year: 2014-15)**

Dhirajmal S. Madhavani
22, Mansur Building,
1st Floor, 98, Princess Street.
Mumbai- 400 002

DCIT (CC)-2(2)
Mumbai

Vs.

PAN – AATPM6910E

(Appellant)

(Respondent)

Appellant by: Shri Nishit Gandhi, A.R

Respondent by: Shri D.G. Pansari, D.R

Date of Hearing: 18.07.2019

Date of Pronouncement: 26.07.2019

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-48, Mumbai, dated 28.03.2018, which in turn arises from the order passed by the A.O under Sec. 271AAB of the Income Tax Act, 1961 (for short ‘Act’), dated 03.02.2017 for A.Y. 2014-15. The assessee has assailed the impugned order before us on the following grounds of appeal:

“1.1 The Learned Commissioner of Income Tax (Appeals)-48, Mumbai [“the CIT(A)” for short] erred in upholding the order u/s 271AAB of the Income Tax Act, 1961 (“the Act”) passed by the Ld. Deputy Commissioner of Income Tax Officer (CC)-2 (2), Mumbai, [“the Id. AO”] without affording a fair and reasonable opportunity of being heard to the Appellant and in violation of the principles of natural Justice.

2.1 In the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the initiation and levy of penalty on the Appellant u/s 271AAB of the Act.

- 2.2 While doing so, she completely failed to appreciate that;
- (i) The order passed by her is based on irrelevant and immaterial considerations while ignoring the relevant material and submissions filed by the Appellant during the course of Appellate proceedings;
 - (ii) No search warrant was issued in the case of the Appellant and even all his assessments were framed u/s 153C of the Act and as such there was no valid search on the Appellant u/s 132 and consequently therefore, no penalty could have been imposed on him u/s 271AAB; and;
 - (iii) In any case and without prejudice to the above, no penalty could have been levied on the Appellant u/s 271AAB of the Act since the addition has been made by the AO relying upon the statement of the Appellant and as per that very statement the said income has been earned over a period of years and is not income of the specified previous year on which penalty could be levied;
- 2.3 The Appellant submits that the order so passed without jurisdiction bequashed being bad in law.
- 3.1 The Id. CIT(A) erred in confirming the penalty of Rs.18,15,000/- in the case of the Appellant without appreciating the facts and evidences brought on record by the Appellant.
- 3.2 The Ld. CIT(A) while confirming the penalty grossly erred in;
- (i) Simply relying on the orders passed by the Ld. AO and the Ld. CIT(A) in quantum proceedings without considering the explanations furnished by the Appellant;
 - (ii) not appreciating the fact that the appellant had given true and bonafide explanation as regards the seized cash during the course of assessment that the cash did not belong to the Appellant and in respect of which adequate evidences and materials were furnished by the Appellant as well the parties who owned up the cash;
 - (iii) Affirming the penalty despite the fact that the addition in respect of the seized cash was entirely based on a statement recorded from the Appellant which was subsequently retracted and even at the time of search the cash was recorded and inventorised in the hands of Essem Capital Markets Ltd. and not the appellant; and;
 - (iv) Not appreciating that the penalty u/s 271AAB is discretionary and not mandatory and considering the above evidences and submissions the A.O erred in not exercising his discretion fairly and in an objective and judicious manner.
- 3.3 Without prejudice to the above, and in any case the explanation as furnished by the Appellant was at the most unproved but not disproved and as such no penalty could have been imposed by the Ld. AO in such a case as regards such an explanation.
- 3.4 The Appellant therefore submits that the penalty so imposed deserves to be deleted.
- 3.4 The Appellant craves leave to add, amend, alter, delete or modify all or any the above grounds at the time of hearing.”

2. Briefly stated, search and seizure proceedings were conducted under Sec.132 of the Act in the case of Essem Capital Markets Ltd. (which is one of the group company of Ajmera group of companies) at 22, Mansur building, 1st Floor, 98 Princess Street, Mumbai, which happened to be the office of Mr. Dhirajlal S. Madhavani, Chartered accountant i.e the assessee before us. During the course of the search proceedings the statement of the assessee was recorded under Sec.132(4) of the Act. In the course of the search proceedings cash of Rs. 62 lac was found from the aforesaid premises. In his statement recorded under Sec. 132(4) the assessee admitted that the cash amounting to Rs.62,00,000/- that was found in the course of the search proceedings belonged to him. As an amount of Rs.1.50 lacs was accounted for in the 'cash book' of the assessee, therefore, the balance amount of Rs.60,50,000/- was disclosed by him as his unaccounted income for the year under consideration. Subsequently, the assessee filed his return of income for A.Y. 2014-15 on 30.09.2014, declaring his total income at Rs.10,57,040/-. However, the assessee did not offer the amount of Rs.60,50,000/- that was declared by him as his unaccounted income in his statement that was recorded under Sec.132(4) of the Act, in his aforesaid return of income. In fact, on being queried as to why the admitted unaccounted income of Rs.60,50,000/- was not offered for tax by him, the assessee distanced himself from the ownership of the said amount, which was stated by him to be belonging to the aforementioned Ajmera Group. It was further submitted by him, that in the course of the search proceedings he was coerced to admit that the cash amounting to Rs.60,50,000/- (out of Rs. 62 lac) found from his office premises, as his undisclosed income. In order to fortify his aforesaid claim, the assessee also took support of an "affidavit", dated 06.08.2013 which

was filed by him with the DDIT, Unit-III (3), Mumbai, along with a letter dated 16.09.2013, wherein the aforesaid facts were stated by him. However, the A.O who was not inclined to accept the aforesaid claim of the assessee rejected his explanation and added the amount of Rs.60,50,000/- as the unexplained income of the assessee for the year under consideration. At the time of framing of the assessment the A.O also initiated penalty proceedings under Sec. 271AAB(1)(c) of the Act.

3. The A.O after framing the assessment imposed penalty under Sec. 271AAB(1)(c) of Rs.18,15,000/-, vide his order dated 03.02.2016.

4. Aggrieved, the assessee assailed the penalty imposed on him under Sec. 271AAB by the A.O in appeal before the CIT(A). However, the CIT(A) not being persuaded to accept the explanation of the assessee confirmed the penalty imposed by the A.O and dismissed the appeal.

5. 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 at the very outset of the hearing of the appeal submitted, that the assessment framed by the AO under Sec. 143(3), dated 17.02.2016 had been quashed by the Tribunal on account of a jurisdictional defect, vide its order passed in Mr. Dhirajmal S. Madhavani Vs. DCIT, Central Circle-2(2), Mumbai, in ITA No.487/Mum/2017; dated 23.04.2019 (copy placed on record). Accordingly, it was submitted by the ld. A.R that now when the quantum assessment had been quashed, therefore, the aforesaid penalty imposed by the A.O under Sec.,271AAB(1)(c) cannot survive on a standalone basis. Alternatively, it was submitted by the ld. A.R that as no search proceedings were conducted on the assessee, therefore, no penalty under Sec. 271AAB of the Act could have been

imposed on him. The ld. A.R in order to fortify his aforesaid contention took us through the mandate of law as envisaged in the aforesaid statutory provision.

6. Per contra, the ld. Departmental Representative (for short 'D.R') did not controvert the fact that the assessment framed by the A.O under Sec. 143(3), dated 17.02.2016 had been quashed by the Tribunal, vide its order dated 23.04.2019 in ITA No. 487/Mum/2017.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that the assessment framed by the A.O under Sec. 143(3), dated 17.02.0216, in the course of which the aforesaid penalty proceedings under Sec. 271AAB(1)(c) of the Act were initiated by the A.O, had been quashed by the Tribunal vide its order passed in Mr. Dhirajmal S. Madhavani Vs. Dy. CIT, Central Circle-2(2), Mumbai, in ITA No. 487/Mum/2017, dated 23.04.2019. The Tribunal while quashing the assessment had observed as under :

"8. We have heard the rival contentions and arguments and also perused the records as placed before us including the decisions cited by ld AR. The undisputed facts are that the order has been passed u/s 143(3) r.w.s. 153C of the Act as is clear from the note in the assessment order that prior approval u/s 153D was obtained to pass the assessment order. Now the only issue we are dealing with at this stage is whether the assessment framed by the A.O is valid or not. In this case, the office of the assessee was searched on basis of warrant in the name of M.S Essem Capital Markets Ltd as the registered office of the said company was shown in the professional office of the assessee. This has happened because at the time of incorporation of the company, the registered office was shown in the office of the assessee and not changed till date while no business activities were being run from the said office which was confirmed in the search. In the search, Rs. 60.50 lacs was found which was initially admitted by the assessee to be owned by him but after three months retracted the statement recorded u/s 132(4) of the Act and simultaneously another group company M/S Adam Hospitality Pvt. Ltd. of Ajmera group owning up the cash found in the assessee's premises which was rejected by the A.O to be an afterthought. Now the issue before us whether order passed without recording satisfaction by the A.O of the searched person is valid or not. After considering the arguments of the both the sides we observe that no satisfaction was ever recorded which his not disputed by the revenue during the hearing. In our opinion the recording of satisfaction is must as a precondition to framing of assessment order u/s 143(3) r.w.s. 153C of the Act. We find merits in the arguments of the ld AR that even if the A.O of the searched person and other person is same even then the mandatory requirement recording the satisfaction is there even for the year of search. The case of the assessee is squarely covered by the ratio laid by the

jurisdictional high court in the case of CIT Vs Lavanya Land Ltd (supra) and Madhya Pradesh High Court in the case of CIT Vs Mechmen LLC(Supra) wherein it have been held that satisfaction has to be recorded by the A.O of the searched person even if the A.O the searched person and other person is same. We observe that in the case of the assessee no satisfaction has been recorded by the A.O and consequently the assessment framed u/s 143(3) r.w.s. 153A of the Act is not valid and cannot be sustained. We therefore respectfully following the decisions of the Bombay High Court and Madhya Pradesh High court, quash the assessment order framed u/s 143(3) r.w.s. 153A of the Act on the ground that no satisfaction has been recorded. The ground no. 1 is allowed.”

As the assessment framed in the case of the assessee under Sec. 143(3), dated 17.02.2016 had been quashed by the coordinate bench of the Tribunal, therefore, the penalty imposed under Sec.271AAB(1)(c) of the Act amounting to Rs.18,15,000/- cannot survive on a standalone basis and thus is liable to be vacated. Accordingly, the order of the CIT(A) sustaining the penalty imposed by the A.O under Sec. 271AAB(1)(c) of Rs.18,15,000/- is set aside and the aforesaid penalty is deleted.

8. As we have in terms of our aforesaid observations vacated the penalty imposed on the assessee under Sec. 271AAB(1)(c), therefore, we refrain from adverting to and therein adjudicating the other contention advanced by the ld. A.R, wherein he had assailed the levy of penalty on the ground that the same was were not in conformity with the mandate of law as envisaged in the said statutory provision, which thus is left open.

9. The appeal filed by the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 26.07.2019

Sd/-
(N.K. Pradhan)
ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक 26.07.2019
***P.S Rohit

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/
DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

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आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt. Registrar)

आयकरअपीलीयअधिकरण, मुंबई / **ITAT,**
Mumbai