

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD**

**BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
& SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. Nos. 2493 & 2494/Ahd/2018

(निर्धारण वर्ष / Assessment Years: 2013-14 & 2014-15)

Bharatkumar N. Parikh 1, Subhadra Park Society, Nr. Utkarsh Vidyalaya, Gadapura, Race Course, Baroda	बनाम/ Vs.	DCIT Income Tax, Central Circle-2, Vadodara
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AFS PS8 303 K		
(अपीलार्थी/Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/Appellant by :	Shri Milin Mohta, AR
प्रत्यर्थीकीओरसे / Respondent by:	Shri S. K. Dev, Sr. DR

सुनवाईकीतारीख/Date of Hearing	24/06/2019
घोषणाकीतारीख /Date of Pronouncement	23/09/2019

आदेश/ORDER

PER AMARJIT SINGH - AM:

These two appeals are filed by the Assessee for A.Ys. 2013-14 & 2014-15, arise from order of the CIT(A)-12, Ahmedabad dated 03.10.2018, in proceedings under section 153A r.w.s. 143(3) and under section 143(3) of the Income Tax Act, 1961; in short "the Act".

2. The assessee filed appeal against the decision of Ld. CIT(A) in confirming the levying of penalty u/s. 271AAB of the Act, amounting to Rs. 20,00,000/- for A.Y. 2013-14 and similarly in confirming penalty of Rs. 40,10,000/- for A.Y. 2014-15. As the facts and issues are similar in both the appeal filed by the

assessee, therefore, for the sake of convenience both are adjudicated together by this common order.

3. The fact in brief is that a search action was carried out u/s. 132 of the Act on the assessee and other member of the group on 30.08.2013. A notice u/s. 153A of the Act was issued to the assessee on 12.12.2013. In response to the notice u/s. 153A the assessee has filed return of income on 27.01.2014 for A.Y. 2013-14 declaring total income at Rs. 2,61,78,280/- which included the income of Rs. 2 crore declared during the search proceedings. The assessment u/s. 153A r.w.s. 143(3) was completed on 29.02.2016 assessing the total income at Rs. 2,64,09,280/-. The AO has initiated the penalty proceedings u/s. 271AAB and levied penalty of @10% on the undisclosed income of Rs. 2 crore vide order dated 22.08.2016 u/s. 271AAB of the Act.

During the course of penalty proceeding the assessee has contended that he has voluntarily made disclosure of Rs. 2,00,00,000/- and also explained the source of earning the said income to the AO vide letter dated 12.09.2013 and same was offered in the original return of income filed on 30.09.2013 u/s. 139(1) of the Act. In response to notice u/s. 153A the assessee has filed the return of income for A.Y. 2013-14 on 27.01.2014 declaring total income of Rs. 2,61,78,280/- which was also declared in the return filed u/s. 139(1) of the Act. The assessee has submitted that income was disclosed voluntarily therefore no penalty u/s. 271AAB be levied. However, the AO has not accepted the explanation of the assessee and levied the penalty on the ground that the income disclosed in the return filed by the assessee represents undisclosed income u/s. 271AAB of the Act. In respect of A.Y. 2014-15 the assessee had filed return on 29.09.2014 and declared total income of Rs. 4,02,55,190/- which also included the admitted undisclosed income of Rs. 4.01 crores. On the similar reason as cited above for A.Y. 2013-14 the AO has also levied penalty u/s. 271AAB to the amount of Rs. 40,10,000/-.

4. Aggrieved assessee has filed appeal before the Ld. CIT(A). The Ld. CIT(A) has dismissed the appeal of the assessee.

5. During the course of appellate proceeding before us the Ld. Counsel has filed Paper Book comprising details and copies of document furnished before AO and CIT(A) at the time of hearing. The Ld. Counsel has contended that during the course of search action the assessee on behalf of the group had voluntarily disclosed additional income of Rs. 10.51 crore and the income so disclosed was also bifurcated in the name of other assessee in the group and there was no reference to any material found during the course of search. Further no document found which showed additional income of Rs. 10.51 crores. It is also contended that the assessee has already made disclosure in the statement on 30.08.2013 and also in letter dated 12.09.2013 whereas the Annexure-B1 was found and seized on 28.10.2013. The Ld. Counsel has referred the following judicial pronouncements:

<i>Name of Decision</i>	<i>Citation/ITA No.</i>
1. <i>ACIT vs. Knawar Sain Gupta, ITAT Kolkata</i>	<i>ITA No. 538/Kol/2017</i>
2. <i>DCIT vs. Liadhar Agarwala, ITAT Kolkata</i>	<i>ITA No. 1605/Kol/2017</i>
3. <i>ACIT vs. Marvel Associates , ITAT Vishakhapatnam</i>	<i>[2018] 170 ITD 353 (Vishakhapatnam)</i>
4. <i>ACIT vs. Mothukuri Somabrahmam Vishakhapatnam, ITAT Vishakhapatnam</i>	<i>ITA No. 126/Vizag/2017</i>
5. <i>Suresh Chand Mittal vs. DCIT, ITAT Jaipur</i>	<i>ITA No. 931/JP/2017</i>

6. On the other hand, the Ld. DR has placed reliance on the order of the lower authorities.

7. We have heard both the sides and perused the material on record. A search action was carried out u/s. 132 of the Act on the assessee and other members of the group on 30.08.2013. During the course of search the assessee has made voluntarily disclosure of a sum of Rs. 2,00,00,000/- pertaining to A.Y. 2013-14 and disclosure of Rs. 4.01 crores pertaining to A.Y. 2014-15. The assessee has claimed that the income was voluntarily disclosed and offered the same for both

the assessment years in the return of income filed u/s. 139(1) of the Act on 30.09.2013 for A.Y. 2013-14. Similarly the voluntary disclosure was shown for A.Y. 2014-15 in the original return of income filed u/s. 139(1) of the Act on 29.09.2014. The relevant provision of Sec. 271AAB of the Act is reproduced as under:-

“(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 July, 2012 [but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President], the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,-

(a) a sum computed at the rate of ten percent of the undisclosed income of the specified previous year, if such 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) on or before the specified date-

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnished the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee-

(i) in the course of the search, in a statement under sub-section (4) of section 132, does not admit the undisclosed income; and

(ii) on or before the specified date-

(A) declares such income in the return of income furnished for the specified previous year; and

(B) pays the tax, together with interest, if any, in respect of the undisclosed income;

(c) a sum [computed at the rate of sixty per cent] of the undisclosed income of the specified previous year, it is not covered by the provisions of clause (a) and (b).”

The term undisclosed income is defined in Sec. 271AAB of the Act as under:-

“(C) “undisclosed income” means-

(i) any income of the specified previous year 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 transactions found 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 [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner before the date of search; or

(ii) any income of the specified previous year 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 relating 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.]”

In this regard, we have noticed that AO has not specified any document assets and entry during the course of search which indicate that assessee's additional undisclosed income, represents any money, bullion, jewellery or valuable article or any entry in the books or other documents therein. The assessee has made disclosure of Rs. 10.51 crore on account of the fact that certain income out of the real estate development and land related activities pertaining to F.Y. 2012-13 and F.Y. 2013-14 which were not recorded in the books of account as per statement u/s. 132(4) dated 30.08.2013. It is also noticed that there was no pin pointed question posed by the search team in regard to incriminating material/documents related to such undisclosed income. These facts were also affirmed by the Ld. CIT(A) in his findings in Para 5.8 of his order. However, the CIT(A) has confirmed the penalty u/s. 271AAB of the Act on the assumption bases by stating that admitted undisclosed income may be directly related to entries in loose papers and transactions not recorded in the books of accounts found subsequently during the course of search on 28.10.2013. In the light of the above facts and circumstances the lower authorities have failed to establish that assessee has disclosed the income with reference to any specific loose papers/asset etc. The AO has failed to substantiate that the disclosure made by the assessee u/s. 132(4)

was on the basis of incriminating material. In this regard we have also considered the decision of ITAT Vishakhapatnam (2018) 92 taxmann.com 109 wherein it is held that the AO must establish that there is undisclosed income on the basis of the incriminating material. In the case of ACIT Sri Kanwar Sain Gupta ITA No. 538/Kol/2017 the ITAT Kolkata has held that the statement of the assessee without any corroborating evidence cannot be the only basis for levying penalty.

In the light of the above facts and findings the lower authorities have failed to substantiate that disclosure for both the assessment year represent the undisclosed income of the assessee as per the incriminating material found in the course of search as laid in Sec. 271AAB of the Act. Therefore, we set aside the order of the lower authorities and cancel the penalty u/s. 271AAB of the Act.

8. In the result, both the appeals of the assessee are allowed.

This Order pronounced in Open Court on	23/09/2019
---	-------------------

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Ahmedabad: Dated 23/09/2019

TANMAY

TRUE COPY

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।