

आयकर अपीलीय अधीकरण, न्यायपीठ – “B” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “B” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.2280-2281/Kol/2018
Assessment Years :2013-14 & 2014-15

ACIT, Central Circle-4(3), Aaykar Bhawan, Poorva, 5 th Floor, Room No.510, 110, Shanti Pally, Kolkata-107	V/s.	Smt. Tanuja Mantri Continental Chambers, 15A, Hemanta Basu Sarani, Kolkata-700 001 [PAN No.AFHPM 5418 C]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri Miraj D Shah, Advocate
राजस्व की ओर से/By Respondent	Shri Baij Nath Singh, JCIT-DR
सुनवाई की तारीख/Date of Hearing	14-11-2019
घोषणा की तारीख/Date of Pronouncement	15-11-2019

आदेश /ORDER

PER S.S.Godara, Judicial Member:-

These two Revenue's appeal for assessment year(s) 2013-14 & 2014-15 arise against the Commissioner of Income Tax (Appeals)-21 Kolkata's separate orders all dated 27.08.2018 passed in case No.10525,10537/DCIT,CC-4(3)/CIT(A)-21/KOL/2016-17 involving proceedings u/s 271AAB of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file(s) perused.

2. The Revenue's identical sole substantive grounds raised in the instant appeal(s) seek to reverse the CIT(A)'s action deleting sec.271AAB penalt(ies) in issue amounting to ₹59,86,235/- and ₹57,00,364/- imposed by the Assessing Officer in his separate order(s) dated 28.09.2016.

3. Both the learned representatives invite our attention to CIT(A)'s identical detailed discussion in these two assessment year(s) reading as under:-

"05. FINDINGS & DECISION:

1. I have carefully considered the submissions of the Ld.AR of the appellant and the observations and findings recorded by the Ld. AO and the factum of the case. In the facts involved in the present case, search action u/s 132 was conducted on 11.04.2013. In the course of search, certain loose papers & documents were seized which inter alia contained the details of commodity dealings by the appellant. With reference to these loose documents, the appellant admitted before the Investigating authorities that they represented his income aggregating to Rs.1,99,54,112/- for the relevant previous year and therefore offered the same to tax in the relevant AY 2013-14. In consonance with his statement so recorded u/s 132(4), the appellant disclosed the income derived from these transactions under the head '**Income from Other Sources**' in the return of income filed for the relevant AY 2013-14. The Ld. AO who framed the assessment u/s 143(3) assessed the income of the appellant as returned by him. The Ld. AO however initiated penalty proceedings u/s 271AAB of the Act with reference to such income. Before the Ld. AO the appellant argued that the penalty u/s 271AAB was not applicable since the income of Rs.1,99,54,112/- did not represent his "**undisclosed income**" within the meaning prescribed in Explanation (c) to Section 271AAB of the Act. The Ld. AO was however not agreeable to the contention put forth by the appellant and held that the appellant's case squarely fell within the ambit of Section 271AAB of the Act. According to Ld. AO since the appellant failed to substantiate the manner in which the income was derived by him, he levied penalty @ 30% on the undisclosed income of Rs.1,99,54,112/- under clause (c) of Section 271AAB of the Act.

2. In the appellate proceedings, the Ld. AR of the appellant assailed the impugned order of the Ld. AO on several grounds. It was submitted that the loose documents etc. found & seized in the course of search constituted '**other documents**' maintained the normal course of business and hence the entries contained therein did not represent his 'undisclosed income'. It was further submitted that no asset, jewellery, money, bullion or any other valuable asset was found corresponding to such income which further fortified that such income did not represent the appellant's undisclosed income. The Ld. AR further objected to the validity of the penalty proceedings since according to him the Ld. AO did not give proper notice in the manner prescribed. The Ld. AR further submitted in the alternate that the penalty, if any, leviable, ought to have been levied under clause (a) i.e. @ 10% instead of clause (c) i.e. 30% as levied by the Ld. AO.

3. After giving a thoughtful consideration to the facts involved in the present case, I find force in the submissions' of the appellant. The primary contention of the appellant is that the income of Rs.1,99,54,112/- assessed by way of profit derived from commodity dealings did not constitute '**undisclosed income**' defined in Explanation (c) to Section 271AAB of the Act. In this regard it would therefore be relevant to examine the term '**undisclosed**

income' as defined in Explanation (c) to Section 271AAB of the Act, which reads as follows:

"Explanation : For the purposes of this Section

(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 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 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.]

4. From the above definition it shall be noted that the Legislature has assigned specific meaning to the term "**undisclosed income**". The said meaning is not borrowed from Section 58 to 59D of the Act but the term has been specifically defined for the purposes of levy of penalty Section 271AAB of the Act.

5. The two sub-clauses (i) & (ii) contained in clause (c) of Explanation 271AAB which define '**undisclosed income**' can be further broken two parts; sub-clause (ii) of clause (c) of Section 271AAB which defines "**undisclosed income**" can be bifurcated as follows:

a) any income represented by any entry in respect of an expense recorded in the books of account which is found to be false, or

b) any other documents maintained in the normal course which is found to be false;

6. Undeniably the appellant's case is not covered by the above two limbs. Neither does the sum of Rs.1,99,54,112/- represents any entry in respect of expense which is found to be false nor has this sum been assessed with reference to any document which is otherwise found to be false.

7. I further noted that sub-clause (i) of clause (c) of Explanation 1 to Section 271AAB, also has two limbs, which are as follows:

- a) any income represented by money bullion, jewellery or other valuable article or thing;
- or
- b) any entry in the books of account or other documents or transactions found in the course of a search,

shall be treated "**undisclosed income**" if it was not found 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.

8. In the facts involved in the present case, it is evident that the sum of Rs.1,99,54,112/- assessed as appellant's income for the relevant year did not represent any "**unexplained money, bullion, jewellery, valuable article or any other asset**", for the simple reason that no such asset had been identified either by the Ld.AO and no undisclosed asset came to light as a result of the search conducted by the Investigation Authorities. Accordingly the first limb i.e. (a), is not applicable to the facts of the present case.

9. The next limb of Section 271AAB defines "**undisclosed income**" as, any entries found in the books of accounts or any documents seized in the course of search which was either not recorded in the (i) regular books on or before the date of search, "**or**" (ii) in the documents maintained in normal course of business. In this regard one would now need to understand and examine the meaning of the phrase "**documents maintained in normal course of business**". When any search operations are conducted at the premises of any appellant, it is possible that all transaction carried out by the assessee prior to the commencement of search may not necessarily be found recorded in the books to the very time & date of search. It is very common for assesseees to record and update their books of account at periodic intervals, which may be weekly, bi-weekly, monthly, quarterly etc. For instance the cash-book of an assessee is generally maintained on a day-to-day basis. However purchases & sales made in the regular course of business; are generally not recorded on the very date of receipt or dispatch of goods but on weekly/monthly basis, depending upon the volume. Further entries with regard to depreciation, interest provisions, valuation of closing stock etc. are generally passed at the end of the financial year and these entries may not be found in the books on the date of search. Similarly where income are derived from sources other than '**business**' or the assessee's '**regular sources**', such transactions & income/loss derived therefrom are generally accounted at the year-end or at the time of finalization of accounts / return of income. For the reasons set out in the foregoing it is very much possible that certain regular business documents which are available with the assessee on a particular date may not be recorded on the same date but is incorporated in the regular books at a future date; but in due course. Keeping in view the foregoing practicality of the matter, the Legislature therefore carefully worded the meaning of the term "**undisclosed income**" and included only those entries which are either not found in the books of accounts or the regular business documents maintained in normal course of business.

10. In the facts of the present case the Investigating Officers had found loose documents, which contained entries with regard to the commodity dealings of the appellant. The appellant is an individual, who derived income from other sources and other miscellaneous income. The appellant is required to maintain any books of account in terms of Section 44AA of the Act. In the relevant previous year the appellant had conducted non-systematic trades in commodities and therefore the income derived from such transactions was offered to tax in his return of income under the head "**Income from Other Sources**". The Ld. AO has also accepted that such income was assessable under the head 'Other Sources' and assessed it accordingly. In the circumstances when the assessee did not carry on business or profession and was therefore not required to maintain such books of accounts, then he was required to draw up his statement of income with reference to "**other documents**" maintained by him in regular course. I note that the transactions which yielded income, was maintained in the documents & records which was found & seized by the Investigating Officer and it is from these documents only the AO was able to deduce the true income and expenditure of the assessee. In view of the foregoing I agree with the Ld. AR that the documents with reference to which income of Rs.1,99,54,112/- was assessed in the appellant's hands could not be said to be "**incriminating**" in nature. The case of the appellant fell within in the second limb i.e. "**or other documents**" maintained in the normal course relating to the AY 2013-14 as stipulated u/s. 271AAB Explanation (c) (supra) which describes undisclosed income for the purposes of this section. In my considered view therefore the income of Rs.1,99,54,112/- offered by the appellant not fall in the ambit of "**undisclosed income**" as defined in Sec. 271AAB of the Act.

11. I find that the decision rendered by the jurisdictional Hon'ble ITAT, Kolkata in the case of DCIT vs. Pradeep Kumar Agarwal in **ITA no. 1478/Kol/2015** vide its order dated 25.05.2018 is squarely applicable to the facts involved in the appellant's case. In the said decision the Hon'ble Tribunal followed the decision earlier rendered by its another coordinate Bench in the case of Manish Agarwala in **ITA No. 1479/Kol/2015** for AY 2013-14 dated 09.02.2018. The relevant extracts of the decision is as follows:

"According to the Ld. AR, from the facts and circumstances described above, since the assessee is not engaged in business or profession, he does not require to maintain the books of account as per sec. 44AA or sec. 44AA(2) of the Act, therefore, the assessee's case falls in the second limb i.e. "**or other documents**" as stipulated u/s. 271AAB Explanation (c) (supra) which describes undisclosed income for the purposes of this section which is very important to adjudicate this issue. Therefore, the question is when the search took place, the assessee's transactions (**in this case, the speculative transaction**) has been found to be recorded in the "**other documents**" which is (retrieved from the assessee's accountant's drawer) and based on that the assessee declared Rs. 3 cr. during search and later returned income of Rs. 3 cr. as income under the head "**Income from Other Sources**" which was accepted by the AO in toto. We note that since the income under question (Rs. 3 cr.) was in fact entered in the "**other**

documents" maintained in the normal course relating to the AY 2013-14, which document was retrieved during search, hence, the amount of Rs. 3 cr. offered by the assessee does not fall in the ken of "**undisclosed income**" defined in Sec. 271AAB of the Act. So, Rs. 3 cr. which was commodity profit recorded in the other document maintained by the assessee which was retrieved during search cannot be termed as "**undisclosed income**" in the definition given u/s. 271AAB of the Act. Since Rs. 3 cr. cannot be termed as "**Undisclosed Income**" as per sec. 271AAB of the Act, no penalty can be levied against the assessee. Therefore, we uphold the order of the Ld. CIT(A) on the aforesaid reasoning rendered by us."

12. For the reasons set out above I therefore find sufficient merit in the contention of the Ld. AR that the entries with reference to sum of Rs.1,99,54,112/- was found in a regular document maintained in normal course of business and in that view of the matter the 'Sum of Rs.1,99,54,112/- does not come within the meaning of "**undisclosed income**" as mentioned in Section 271AAB of the Act. The penalty of Rs.59,86,234/- levied by the Ld. AO u/s 271AAB is hence cancelled.

13. Since I have held that the penalty of Rs.59,86,234/- was not leviable upon the appellant on the merits of the case, I do not deem fit to adjudicate the other alternate contentions raised by the appellant concerning validity of notice issued by the Ld. AO & etc., since these contentions are now of only academic interest and hence not adjudicated upon.

In the result, the appeal of the appellant is "**allowed**".

4. Mr. Singh reiterates the Revenue's pleadings that the Assessing Officer had rightly imposed the impugned penalt(ies) in assessee's cases on the ground that its corresponding undisclosed income(s) of ₹1,99,54,112/- 1,90,01,215/- admitted during the course of search on 12.04.2013 did not specify the manner of having derived the same followed by substantive thereof and therefore, the same deserves to be restored. The assessee's case on the other hand is that since the impugned amount of income stood assessed under the head "**income from other sources**" than income from commodities speculation business is not covered under the statutory definition of "**undisclosed income**" in Explanation (c) to sec. 271AAB of the Act, the CIT(A) has rightly deleted the impugned penalt(ies).

5. We proceed in this backdrop and notice that the CIT(A)'s detailed discussion has held that the assessee's admission of income(s) is not covered

in either clauses (i) & (ii) including the (A) and (B) under the former one of sec. 271AAB. There is no rebuttal coming from the Revenue side to the CIT(A)'s clinching finding of fact that the assessee's income in both the assessment year(s) forming subject-matter of the instant *lis* had been duly recorded in its books of account maintained in normal course of business. That being the case, we hold that the Assessing Officer's penal action fails to satisfy the threshold barrier of undisclosed income itself. The CIT(A)'s appeal has rightly proceeded to delete the impugned penalt(ies) in both the assessment year(s) therefore. The Revenue's identical sole grievances raised in the instant *lis* fails accordingly.

6. These two Revenue's appeals are dismissed.

Order pronounced in the open court 15/11/2019

Sd/-
(लेखा सदस्य)
(A.L.Saini)
(Accountant Member)
Kolkata,
*Dkp

दिनांक:- 15/11/2019 कोलकाता ।

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

1. आवेदक/Assessee-Smt. Tanuja Mantri, Continental Chambers, 15A, Hemanta Basu Sarani, Kolkata-700 001
2. राजस्व/Revenue-ACIT, Central Circle-4(3), Aaykar Bhawan, Poorva 5th Floor, Room No. 510, 110 Shanti Pally, Kolkata-107
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।