

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

श्री वी. दुर्गा राव, न्यायिक सदस्य एवं श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A.No.273/Viz/2018 & 274/Viz/2018
(निर्धारण वर्ष/Assessment Year : 2013-2014 & 2014-15)**

Asst.Commissioner of
Income Tax
Central Circle-1
Visakhapatnam

Vs. M/s Sunray Green
Space Pvt. Ltd.
D.No.10-50-40
Excelsior Apartments
Ramnagar
Visakhapatnam
[PAN :AAQCS 8494M]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

**Cross Objection No.48/Viz/2018 & 49/VIZ/2018
(Arising out of I.T.A.No.273/Viz/2018 and 274/Viz/2018)
(निर्धारण वर्ष/Assessment Year : 2013-2014 & 2014-15)**

M/s Sunray Green
Space Pvt. Ltd.
D.No.10-50-40
Excelsior Apartments, Ramnagar
Visakhapatnam
[PAN :AAQCS 8494M]

Vs. Asst.Commissioner of
Income Tax
Central Circle-1
Visakhapatnam

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

राजस्व की ओर से /Revenue by : Shri D.K.Sonowal, CIT, DR
Shri B.Rama Krishna, DR
निर्धारिती की ओर से / Assessee by : Shri G.V.N.Hari, AR
सुनवाई की तारीख / Date of Hearing : 14.11.2019
घोषणा की तारीख/Date of Pronouncement : 11.12.2019

आदेश /ORDER

Per Shri D.S.Sunder Singh, Accountant Member :

These appeals are filed by the revenue against the order of the Commissioner of Income Tax (Appeals) [CIT(A)]-3, Visakhapatnam in I.T.A. No.123 & 124 /2016-17/CIT(A)-3/VSP/2017-18 dated 26.02.2018 for the Assessment Year (A.Y.2013-14 and 2014-15) and cross objections filed by the assessee in support of the order of the Ld.CIT(A) for the Assessment Year (A.Y.)2013-14 and 2014-15. Since common issues are involved in these appeals, these appeals are clubbed, heard together and a common order is being passed for the sake of convenience as under.

2. All the grounds of appeal are related to the levy of penalty u/s 271AAB(1)(a)(ii) of the Income Tax Act, 1961 (in short 'Act'). A search u/s 132 was carried out in this case on 27.04.2013 and consequent to the search action u/s 132, the assessment was completed u/s 153A of the Act vide order dated 17.03.2016. During the assessment proceedings, the Assessing Officer (AO) completed the assessment, accepting the income returned and initiated penalty proceedings u/s 271AAB of the Act. During the course of search, the Investigation team found incriminating material in the form of a note in I-pod with regard to rate quoted by the assessee for

sale of plots @Rs.4,600/- per square yard which was seized in the office and also in the residential premises of the partners / directors of the assessee firm. When the Income Tax department questioned the differences noticed in the seized material, Sri I.A.Raja Varma, Managing Partner of the assessee firm has given a statement on oath accepting to pay tax on the income in respect of the differences found during the course of search. Accordingly, the assessee filed a letter dated 21.05.2013 before the Asst.Director of Income Tax (Investigation) admitting the income of Rs.11.65 crores as undisclosed income for the A.Y. 2008-09 to 2013-14. The assessee also admitted a sum of Rs.2.00 crores as income for the financial year relating to A.Y.2014-15. The assessee further submitted in a letter that undisclosed income earned was stated to be utilized for payments made over and above the registered value of the lands purchased. The AO recorded the statement u/s 131 on 11.06.2013, wherein, the assessee had confirmed admission of additional income to the extent of Rs.14 crores. Year-wise admission of additional income is as under :

S.No.	F.Y.	Issue	Amount (in crores)
1	2007-08	Net sale consideration received outside the books of accounts	0.40
2.	2008-09	Net sale consideration received	0.57

		outside the books of accounts	
3.	2009-10	Net sale consideration received outside the books of accounts	0.20
4.	2010-11	Net sale consideration received outside the books of accounts	0.46
5.	2011-12	Net sale consideration received outside the books of accounts	4.79
6.	2012-13	Net sale consideration received outside the books of accounts	5.58
7	2013-14	Estimated additional profit	2.00
		Total	14.00

2.1. Accordingly, the assessee filed the returns of income for the A.Y. 2013-14, which the AO has accepted and completed the assessment and initiated the penalty proceedings u/s 271AAB of the Act. Subsequently, the AO has given an opportunity to the assessee and completed the penalty proceedings levying penalty of Rs.1,68,03,824/- being 30% of undisclosed income of Rs.5,60,12,746/-. In the penalty proceedings, the assessee filed explanation stating that the assessee has disclosed the net income of Rs.12 crores for six assessment years by estimating the income on gross receipts estimated on certain market rate per sq.yd to the investigation team as reasonable. Since the income was declared on estimation basis taking into consideration of higher rates of sale price per square yard and the rates at which the income was offered was not supported by the incriminating material found during the course of search, the additional income admitted

by the assessee does not come under the purview of undisclosed income as defined in sub section (ii) of section 271AAB of the Act, thus submitted that there is no case for concealment of income, hence requested to drop the penalty proceedings. The AO not being convinced with the explanation of the assessee viewed that the assessee has not admitted the income voluntarily and admitted the undisclosed income because of search and seizure action undertaken u/s 132 of the Act. The AO further held that the details of unaccounted sale consideration received outside the books of accounts would have never come to the notice of the Department had the Department not conducted the search action, hence viewed that the case clearly falls under undisclosed income as defined u/s 271AAB of the Act.

3. With regard to quantum levy of penalty, the AO viewed that the penalty leviable u/s 271AAB is 10% in case where the assessee admits the income u/s 132(4) and specifies the manner in which such income has been derived, substantiates the manner in which undisclosed income was derived and pay the tax together with interest in respect of undisclosed income and files the return of income declaring such undisclosed income. In the instant case, the AO observed that the assessee has admitted the income, paid the taxes and filed the return of income before the due date

and also paid the taxes along with the interest, but the assessee has failed to substantiate the manner in which the undisclosed income was derived, hence held that the case of the assessee falls within the ambit of levying penalty @30%. Accordingly levied penalty of 30% on the additional income.

4. Against the order of the AO, the assessee went on appeal before the CIT(A) and challenged the levy of penalty of Rs.1,68,03,824/-. The assessee also challenged the order of the AO imposing penalty @30% on the alleged undisclosed income. The Ld.CIT(A) considered the submissions made by the assessee and found that incriminating material found during the course of search evidencing the sale of plots @ Rs.4,600/- per sq.yd in respect of the land sold. Only after contesting the evidence found during the course of search, the managing partner of the assessee company had admitted the additional income of Rs.5,58,00,000/-. Therefore, the Ld.CIT(A) rejected the contention of the assessee that admission of income was only on estimation basis, but not with reference to any specific material. The Ld.CIT(A) held that the admission made by the assessee constitute undisclosed income within the of definition of 271AAB of the Act. The Ld.CIT(A) further observed that having admitted the additional income u/s

132(4) and paid the taxes, the levy of penalty is only 10% as per clause (a) of 271AAB of the Act. The objection of the AO that the assessee did not explain the manner in which the undisclosed income was earned was found to be incorrect. Accordingly, the Ld.CIT(A) confirmed the penalty of 10% and allowed the appeal partly.

5. Against which the revenue filed appeal challenging the order of the Ld.CIT(A) and the assessee filed the cross objection supporting the order of the Ld.CIT(A). During the appeal hearing, the Ld.DR argued that search u/s 132 was conducted in the case of the assessee and during the course of search, incriminating material was found in the form of note on I-pod as per which, it was found that the quoted rate for sale of land was Rs.4,600/- per sq.yd. On confronting the incriminating material found during the course of search, the assessee has admitted the additional income of Rs.12.00 crores for the A.Y.2008-09 to 2013-14 and Rs.2 crores for the A.Y. 2014-15 aggregating to Rs.14 crores. Therefore, the Ld.DR argued that the assessee had admitted the additional income only after conducting the search and finding the material during the course of search. Had the search was not conducted in the instant case, the assessee would not have disclosed the undisclosed income and it would not have come to the notice

of the department. Therefore, argued that it is a clear case of undisclosed income within the definition of 271AAB of the Act and concealment of income. Hence, argued that the Ld.CIT(A) has rightly held that the AO is justified in invoking the provisions of 271AAB of the Act. The Ld.DR further submitted that in the instant case, though the assessee had admitted the income, the assessee did not satisfy the conditions required for levying the penalty @10%, due to assessee's failure to explain the manner in which the undisclosed income was admitted. The Ld.DR argued that the Ld.CIT(A) erred in confirming the penalty @10% instead of 30%. The CIT(A) ought to have upheld the penalty levied by the AO. Accordingly, the Ld.DR requested to set aside the order of the Ld.CIT(A) and allow the appeal of the revenue.

6. On the other hand, the Ld.AR submitted that the search u/s 132 was conducted in the business premises of the assessee and a note was found in the I-Pod quoting rate at Rs.4600/- per sq.yd. for sale of plots, which was nothing but the projected sale rate, but no evidence was found by the department to establish that the assessee has sold the plots @ Rs.4600/- per square yard or registered and declared the lesser rates in the books of accounts. However, with an intention to purchase peace with the

department, the assessee has admitted the additional income estimating the sale rate at Rs.2700/-, Rs.3,700/- per sq.yd for Sunray Village and Sunray Beach Front respectively and admitted the income and paid the taxes voluntarily. There was no evidence to prove that the assessee had received the sum of Rs.2,700/- or Rs.3,700/- per sq.yd for sale of plots. The department has accepted the admission made by the assessee and completed the assessment accepting the income returned. For a query from the Bench, the assessee had explained that gross receipts estimated on estimated market rate per sq.yd acceptable to the investigation team as reasonable.

It was also stated in the letter dated 08.01.2016 that certain expenditure incidental to the additional sale amount was deducted from the sale rate. Accordingly, the assessee explained that the additional income was admitted on the estimation of market rate and deducted the expenditure instantly to additional sale amount. The assessee also requested not to make the addition of expenditure separately representing the additional sales, in it's letter. Therefore, the Ld.AR argued that the assessee had explained the manner in which the additional income was earned, stating that the plots were sold at higher rate than the sale price admitted in the books of accounts, thus stated that having explained the

manner in which the additional income was earned, the department did not bring any evidence to controvert the submission made by the assessee with regard to sale of plots. Therefore, argued that the Ld.CIT(A) has rightly confirmed the penalty of 10% and deleted the balance amount of penalty and no interference is called for in the order of the Ld.CIT(A).

7. We have heard both the parties and perused the material placed on record. In the instant case, a search u/s 132 was conducted and during the course of search, the income tax department found that the assessee has quoted the sale rate of plots @ Rs.4,600/- per sq.yd for sale of plots at Sunray Village and Sunray Beach Front. Though the assessee stated that Rs.4,600/- was estimated sale price, it has admitted the additional income of Rs.5,58,00,000/- for the impugned assessment year. Accordingly, the assessee filed the return of income admitting additional income and also paid the taxes. The AO levied the penalty @30% u/s 271AAB with an observation that the assessee has not explained the manner in which the undisclosed income was earned. On appeal, the Ld.CIT(A) restricted the penalty @10% finding that the assessee had satisfied the conditions for levying penalty @10%. The Ld.CIT(A) rejected the contention of the AO that the assessee had not disclosed the manner in which the undisclosed

income was earned. We have carefully gone through the orders of the lower authorities and submissions made by the assessee during the appeal hearing and find that though the incriminating material was found indicating sale of plots at Rs.4,600/- per sq.yd. the assessee admitted the income @3,700/- for Sunray Village and Rs.2,700/- for Sunray Beach Front after deducting the expenditure which was paid outside the books of accounts and the AO had accepted the admission made by the assessee and completed the assessment. From the assessment order and the penalty order, we find that the assessee had explained the manner in which the additional income was admitted stating that the plots were sold @2,700/- and Rs.3,700/- per sq.yd and the sale consideration was recorded at the rate lesser than the sale consideration accounted in the books of accounts. No evidence was brought on record by the revenue to show that the contention of the assessee was incorrect. In fact the revenue has accepted the submissions made by the assessee and completed the assessment on the disclosure made by the assessee. Therefore, we hold that the assessee has satisfied the conditions laid down u/s 271AAB for levying penalty @10% which the Ld.CIT(A) has upheld. Therefore, we do not find any reason to interfere with the order of the Ld.CIT(A) and the same is upheld. The appeal of the revenue is dismissed.

8. The cross objection of the assessee is in support of the order of the Ld.CIT(A). Since the appeal of the revenue is dismissed, cross objections becomes infructuous and hence, dismissed.

9. In the result, appeal of the revenue as well as the cross objections of the assessee are dismissed.

I.T.A 274/Viz/2018, A.Y.2014-15

10. In the instant case, the assessee admitted the additional income of Rs. 2.00 crores for the assessment year which was accepted by the department and completed the assessment estimating the income @18% on gross contract receipts before depreciation. The AO has initiated the penalty u/s 271AAB and 271F of the Act. Subsequently, the AO completed the penalty proceedings levying penalty of Rs.60,00,000/- @30% on undisclosed income of Rs.2,00,00,000/-.

11. Against which the assessee filed appeal before the CIT(A) and the Ld.CIT(A) cancelled the penalty holding that the additional income admitted by the assessee cannot fall within the scope of undisclosed income as defined in section 271AAB of the Act.

12. Against which the revenue has filed appeal before this Tribunal and the assessee filed cross objections supporting the order of the Ld.CIT(A).

13. During the appeal hearing, the Ld.DR argued that a search u/s 132 was conducted in this case on 27.04.2013 and the assessee had admitted the income of Rs.2,00,00,000/- for the A.Y.2014-15. The Ld.DR further submitted that the undisclosed income admitted by the assessee required to be considered as income which was brought forward from earlier years and crystallised during the period till the date of search in the impugned assessment year. Therefore, argued that the contention of the Ld.CIT(A) that the undisclosed income accounted on estimation basis is incorrect. The finding of the Ld.CIT(A) that it was purely on estimation basis is without any foundation. Once search is conducted and incriminating material was found, penalty is automatic and the AO has no discretion except to levy the penalty of 10% or 30% as provided in section 271AAB of the Act. Referring to page No.3 of the assessment order, the Ld.DR submitted that consequent to search conducted u/s 132 of the act, the assessee had admitted Rs.14 crores of additional income for the A.Y. 2008-09 to 2014-15. Referring to page No.11 of penalty order, the Ld.DR argued that once the search is conducted and admitted the undisclosed income, the

AO has no option except to levy the penalty at the rate specified in clause (a), (b) and (c) of section depending on the conditions mentioned therein. In the instant case, though the assessee had satisfied the conditions with regard to admission of income, payment of taxes and filing the return of income, the assessee did not satisfy the condition relating to the manner in which the undisclosed income was earned, thus argued that the AO has rightly levied the penalty @30% and accordingly, argued that the Ld.CIT(A) has committed an error in deleting the penalty, hence requested to set aside the order of the Ld.CIT(A) and restore the order of the AO.

14. Per contra, the Ld.AR argued that a search u/s 132 was conducted in this case on 27.04.2013 and the specified the period involved in this case is only 27 days. The Ld.AR argued that there cannot be material for future part of the period since the search was conducted on 27.04.2013, beginning of the year. The AO has not brought on record any evidence to show that the assessee had earned the income of Rs.2 crores during the period from 01.04.2013 to 27.04.2013. i.e in 27 days. Thus, argued that the assessee had admitted the additional income purely on estimation basis. Even the AO did not accept the admission of additional income and he has resorted to estimation of income rejecting the books of accounts. Once the income is

estimated on the gross receipts without having any incriminating material, there is no case for penalty u/s 271AAB and the Ld.AR argued that the AO should have initiated penalty u/s 271(1)(c), accordingly submitted that the Ld.CIT(A) has rightly cancelled the penalty and there is no reason for interfering with the order of the Ld.CIT(A).

15. We have heard both the parties, perused the material placed on record. In the instant case, the search was conducted on 27.04.2013 i.e. at the beginning of the year. The undisclosed income required to be computed for the period 01.04.2013 to 27.04.2013 and there is no material brought on record relating to sales made during the period from 01.04.2013 to 27.04.2013. The AO did not quantify the sales and the income derived by the assessee for the period from 01.04.2013 to 27.04.2013 i.e the date of search. In spite of no material was found, the assessee has admitted the additional income of Rs.2.00 crores which is nothing but purely on estimation basis for the whole year. The undisclosed income defined in section 271AAB is only with reference to specified period in the previous year. Specified year though includes the year of search, the income admitted for the period after the date of search cannot be termed as undisclosed income. In the instant case as discussed earlier,

there was no material available to the department to show that there was undisclosed income which comes to the ambit of 271AAB of the Act for the period from 01.04.2013 to 27.04.2013. Though in the earlier years, the assessee had admitted the additional income on the net consideration received, in the year under consideration the admission was only towards estimated profits for future period i.e. from 01.04.2013 to 31.04.2014. The AO also completed the assessment estimating the income @18% rejecting the books of accounts of the assessee company before depreciation. No material was also brought on record to support the estimation of income @18% on gross receipts. Though the AO completed the assessment on estimation of income, penalty was initiated u/s 271AAB instead of 271(1)(c). From the material gathered, submissions made by the assessee and from the records, we are of the considered view that no material was available with the department to hold that there was undisclosed income for the previous year ending 31.03.2014 till the date of search. Thus, there is no case for levying the penalty u/s 271AAB and we do not find any reason to interfere with the order of the Ld.CIT(A). Accordingly, the appeals of the revenue as well as the cross objections filed by the assessee are dismissed.

16. In the result, appeals of the revenue as well as the cross objections filed by the assessee are dismissed.

Order pronounced in the open court on 11th December, 2019.

Sd/-

(वी.दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/JUDICIAL MEMBER

विशाखापटणम /Visakhapatnam

दिनांक /Dated :11.12.2019

L.Rama, SPS

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

लेखा सदस्य/ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. राजस्व/The Revenue -Asst.Commissioner of Income Tax, Central Circle-1
Visakhapatnam
2. निर्धारिती/ The Assessee - M/s Sunray Green Space Pvt. Ltd. D.No.10-50-40
Excelsior Apartments, Ramnagar, Visakhapatnam
3. The Principal Commissioner of Income Tax (Central), Visakhapatnam
4. The Commissioner of Income Tax (Appeals)-3, Visakhapatnam
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
- 6.गार्ड फ़ाईल / Guard file

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आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam