

आयकरअपीलीयअधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISA KHAPATNAM BENCH, VISA KHAPATNAM**

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.318/Viz/2017
(निर्धारण वर्ष/Assessment Year:2008-09)**

T.Saimatha
D.No.47-11-9
Dwarakanagar
Visakhapatnam
[PAN :ACDPT7788H]

Vs Asst.Commissioner of
Income Tax
Circle-1(1)
Visakhapatnam

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

**आयकर अपील सं./I.T.A.No.320/Viz/2017
(निर्धारण वर्ष/Assessment Year : 2008-09)**

T.Satyanarayana
D.No.47-11-9
Dwarakanagar
Visakhapatnam
[PAN :AAQPT9170N]

Vs Asst.Commissioner of
Income Tax
Circle-1(1)
Visakhapatnam

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से / Respondent by

: Shri G.V.N.Hari, AR
: Shri V.Rama Mohan, DR

सुनवाई की तारीख / Date of Hearing : 28.02.2020
घोषणा की तारीख/Date of Pronouncement : 04.03.2020

आदेश /ORDER

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

These appeals are filed by the assessee against the orders of the
Commissioner of Income Tax (Appeals) [CIT(A)]-1, Visakhapatnam in I.T.A.

No.218/2012-13/AC,C-1(1),Vsp/2017-18 and 221/2012-13/ITO,Wd-2, VZM/2017-18 dated 25.04.2017 for the Assessment Year (A.Y.)2008-09. Since the facts are identical, these appeals are clubbed, heard together and a common order is being passed for the sake of convenience as under. The facts are extracted from the case of T.Saimatha in I.T.A.No.318/Viz/2017.

2. In the instant case, search u/s 132 of the Income Tax Act, (in short 'Act') was conducted in the case of M/s Sai Ram Parlour on 30.01.2008 and simultaneous searches were conducted in the residential premises of the assessee also. During the course of search u/s 132 of the Act, certain incriminating material was found and seized marked as SRP/1 to 47 and the Assessing Officer (AO) made the addition of Rs.1,58,59,811/- as undisclosed profit and initiated penalty u/s 271(1)(c) of the Act.

2.1. Similarly, in the case of Sri T.Satyanarayana, addition was made on account of undisclosed profit for an amount of Rs.1,76,85,875/- and initiated the penalty u/s 271(1)(c) of the Act. Subsequently, the assessee went on appeal before the CIT(A), later on to ITAT and both the appellate authorities have allowed part relief to the assessee. The AO on receipt of Tribunal order, issued show cause notice dated 19.10.2012 and subsequently levied the penalty u/s 271AAA vide order dated 31.10.2012.

Against which the assessee went on appeal before the CIT(A) and the Ld.CIT(A) confirmed the order of the AO. The Ld.CIT(A) confirmed the penalty on the reason that the assessee has satisfied the condition for levy of penalty u/s 271AAA and observed that no penalty was levied by the AO u/s 271(1)(c) as provided in the Act.

3. Against the order of the Ld.CIT(A), the assessees have filed appeals before the Tribunal. During the appeal hearing, the Ld.AR raised the petition for admission of additional ground. The additional grounds reads as under :

“On the facts and in the circumstances of the case, whether the Assessing Officer erred in levying penalty u/s 271AAA of the Act while initiating the penalty u/s 271(1)(c) of the act at the time of conclusion of the assessment proceedings?”

3.1. The Ld.AR submitted that the assessee has already raised this ground before the Ld.CIT(A), however due to inadvertence, he has omitted to include the said ground in the appeal memo. The Ld.AR further submitted that all the facts and the information is available before the Ld.CIT(A) to adjudicate the additional ground. No fresh facts or enquiries are necessary to adjudicate the additional ground, therefore, requested to admit the additional ground.

4. On the other hand, the Ld.DR objected for admission of additional ground stating that at this stage, the admission of additional ground is not maintainable.

5. We have heard both the parties and perused the material placed on record. In the instant case, the assessee has already raised the additional ground before the CIT(A), therefore, no fresh ground is raised by the assessee. Since the ground raised by the assessee is a legal issue and all the material stated to have been available in the information placed before the lower authorities, we admit the additional ground.

6. During the appeal hearing, the Ld.AR submitted that the AO had initiated the penalty u/s 271(1)(c) and thereafter issued the show cause notice for levy of penalty u/s 271AAA without dropping the notice issued earlier u/s 271(1)(c) of the Act, hence, submitted that the AO having initiated the penalty u/s 271(1)(c), he is not permitted to impose penalty u/s 271AAA. The Ld.AR further submitted that in the assessment the addition made was only in respect of undisclosed profits for which the AO had initiated the penalty u/s 271(1)(c), therefore there is no case for initiation of proceedings u/s 271AAA again. Hence argued that it is to be

construed that the AO had initiated the penalty u/s 271(1)(c), but not the penalty u/s 271AAA.

6.1. The Ld.AR further submitted that the contention of the Ld.CIT(A) that there is no time limit for initiating penalty u/s 271AAA is incorrect and misinterpreting the provisions of law. The AO is required to apply his mind and initiate the penalty proceedings as applicable at the time of completion of assessment, but not after lapse of substantial time. Merely because the penalty u/s 271(1)(c) was not permissible, the AO cannot impose penalty u/s 271AAA. The AO is not permitted to initiate penalty at his pleasure and sweet will of time.

6.2. The Ld.AR further argued that while the proceedings u/s 271(1)(c) are pending, the AO had issued show cause notice for levy of penalty u/s 271AAA on the same addition and argued that two parallel proceedings cannot be conducted against the assessee for the same issue and for the same assessment year. Accordingly, the Ld.AR argued that the levy of penalty u/s 271AAA is bad in law, hence requested to set aside the order of the lower authorities and allow the appeals of the assessees. The Ld.AR relied on the decision of ITAT, Pune Bench in the case of DM Corporation Pvt. Ltd., Vs. ACIT in I.T.A.No.110/Pun/2016 dated 06.09.2018 for the

A.Y.2012-13, wherein the Coordinate Bench held that having initiated penalty proceedings in the manner of levying of penalty u/s 271(1)(c) for concealing the income, levy of penalty u/s 271AAA for undisclosed income is unsustainable. Similarly, the Ld.AR relied on the decision of ITAT Ahmedabad Bench in the case of Dr. Naman A. Shastri v. Assistant Commissioner of Income-tax, Central Circle 2 (3), Ahmedabad [2015] 63 taxmann.com 363 (Ahmedabad-Trib), wherein the coordinate bench held that initiation of penalty u/s 271AAA and levy of penalty u/s 271(1)(c) is not permissible.

7. Per contra, the Ld.DR submitted that though the AO had initiated the penalty u/s 271(1)(c), the AO has not levied the penalty u/s 271AAA, therefore, it is to be viewed that the penalty initiated u/s 271(1)(c) was dropped. As per the provisions of section 271AAA, in a case where the penalty is leviable under this section, the action u/s 271(1)(c) is not permissible. Since the AO has not levied the penalty u/s 271(1)(c), he has rightly initiated the penalty u/s 271AAA and imposed the penalty since search was conducted and the undisclosed income was assessed. Therefore, argued that the AO has rightly levied the penalty and there is no mistake in the order of the lower authorities. The Ld.DR further contended

that there is no time limit prescribed in the Act, to initiate penalty u/s 271AAA, therefore, argued that the AO is free to initiate penalty u/s 271AAA at an appropriate time. Therefore requested to dismiss the appeals of the assesseees and uphold the orders of the lower authorities.

8. We have heard both the parties and perused the material placed on record. In the instant case, the assessment was completed u/s 143(3) by an order dated 31.12.2009. In the assessment, the AO made one addition of undisclosed profit for an amount of Rs.1,58,59,811/- and initiated penalty u/s 271(1)(c) of the Act. Subsequently, the AO issued show cause notice calling for the explanation of the assessee as to why the penalty should not be imposed u/s 271AAA of the Act vide show cause notice dated 19.10.2012 after the receipt of second appeal order. For both the notices the assessee submitted her reply. In the instant case, the AO made the addition representing the undisclosed profits and no other addition was made. No other undisclosed income was also admitted by the assessee as observed from the assessment order. Therefore, it is evident that the AO had initiated the penalty duly applying his mind for the addition of undisclosed profits u/s 271(1)(c) of the Act and subsequently issued show cause notice for levying penalty u/s 271AAA of the Act pending finalization

of penalty u/s 271(1)(c) which is incorrect action. For a query from the bench both the parties have replied that the AO has not dropped the penalty proceedings u/s 271(1)(c) before issue of show cause letter calling for explanation of assessee for levy of penalty u/s 271AAA. Therefore, we are of the considered opinion that the AO has applied his mind and initiated penalty u/s 271(1)(c) and conducted the proceedings u/s 271AAA. Having conducted the search and assessed the undisclosed income, the AO ought to have initiated the penalty proceedings u/s 271AAA instead of initiating the penalty u/s 271(1)(c). Hence, we are of the view that initiating the penalty u/s 271(1)(c) and conducting the proceedings u/s 271AAA is bad in law. The penalties u/s 271(1)(c) and 271AAA are attracted in different situations and both are mutually exclusive. Having initiated the penalty u/s 271(1)(c), levy of penalty u/s 271AAA is not permissible. This view is supported by the decisions of coordinate benches of ITAT Pune in the case of DM Corporation Pvt. Ltd., Vs. ACIT (supra) and ITAT Ahmedabad in the case of Dr. Naman A. Shastri v. Assistant Commissioner of Income-tax, Central Circle 2 (3), Ahmedabad (supra), therefore, we set aside the orders of the lower authorities and cancel the penalty levied u/s 271AAA and allow the appeal of the assessee.

9. **ITA No.320/VIZ/2017, T.Satyanarayana** : The facts are identical to the case of Smt T. Saimatha and the decision taken in the case of T.Saimatha is squarely applicable in this case also. Therefore consistently following the view taken by us in the case of Smt. Saimatha we, hold the that issue of notice u/s 271(1)(c) and levy of penalty u/s 271AAA is bad in law and accordingly, we set aside the orders of the lower authorities and cancel the penalty levied and allow the appeal of the assessee.

10. In the result, appeals of the assessees are allowed.

Order pronounced in the open court on 4th March, 2020.

Sd/- (वी.दुर्गा राव) (V. DURGA RAO)	Sd/- (डि.एस. सुन्दर सिंह) (D.S. SUNDER SINGH)
न्यायिकसदस्य/JUDICIAL MEMBER	लेखा सदस्य/ACCOUNTANT MEMBER
विशाखापटणम /Visakhapatnam	
दिनांक /Dated : 04.03.2020	
L.Rama, SPS	

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

1. निर्धारिती/ The Assesseees– (i) T Saimatha and (ii) T.Satyanarayana, D.No.47-11-9, Dwarakanagar, Visakhapatnam
2. राजस्व/The Revenue –Asst.Commissioner of Income Tax, Circle-1(1), Visakhapatnam
3. The Pr.Commissioner of Income Tax-1, Visakhapatnam
4. The Commissioner of Income Tax (Appeals)-1, Visakhapatnam
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
- 6.गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, Visakhapatnam