

**IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM**
(Through web-based video conferencing platform)

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

**I.T.A.No.572/VIZ/2019
(Asst. Year: 2016-17)**

The ACIT, Central Circle-2, vs. M/s. Deccan Jewellers Pvt.
Guntur. Ltd., D.No. 27-16-65,
Besant Road, Governorpet,
Vijayawada.

PAN No. AACCD 1524 H (Appellant) (Respondent)

**I.T.A. No. 663/VIZ/2019
(Asst. Year : 2016-17)**

M/s. Deccan Jewellers Pvt. vs. The ACIT, Central Circle-2,
Ltd., D.No. 27-16-65, Guntur.
Besant Road, Governorpet,
Vijayawada.

PAN No. AACCD 1524 H (Appellant) (Respondent)

Assessee by : Shri M.V. Prasad, CA.
Department By : Shri D.K. Sonawal, CIT DR

Date of hearing : 21/09/2020.
Date of pronouncement : 23/09/2020.

ORDER

PER D.S. SUNDER SINGH, ACCOUNTANT MEMBER

These cross appeals by the Revenue and the assessee are directed against the order of Commissioner of Income Tax

(Appeals)-3, Visakhapatnam, dated 19/07/2019 for the Assessment Year 2016-17.

ITA No. 572/VIZ/2019

2. All the grounds raised are relating to cancellation of penalty levied u/sec. 271AAB of the Income Tax Act, 1961 (hereinafter referred to as 'Act'). A search u/sec. 132 was conducted in the case of the assessee on 20/09/2016. During the course of search from the books of accounts seized by the department found that the assessee has claimed the purification loss of 20% - 21% on conversion of gold purchased from their customers. A statement u/sec. 132(4) was recorded on 22/09/2016 and on questioning the purification loss claimed by the assessee, the assessee has admitted the additional income of Rs. 2,62,62,954/-in aggregate for the F.Y. 2015-16& 2016-17. For the assessment year under consideration i.e. A.Y. 2016-17 the assessee had admitted the additional income of Rs. 1,75,95,335/- and filed its return of income as declared in Sec. 132(4) of the Act. The Assessing Officer had initiated penalty proceedings u/sec. 271AAB and issued show cause notice to the assessee calling for its explanation as to why the penalty should not be levied u/sec. 271AAB of the Act. In response to the notice issued u/sec. 271AAB, the assessee submitted its explanation stating that no

undisclosed income was found during the course of search. The additional income admitted was purely to purchase peace with the department on estimation basis though there was no evidence was found indicating the additional income during the course of search. The assessee further stated that no incriminating material or undisclosed stock, money bullion, jewellery was found during the course of search within the definition of undisclosed income as envisaged in sec. 271AAB of the Act and hence, requested to drop the penalty proceedings. The Assessing Officer considered the explanation and viewed that since, the assessee had admitted the additional income and accepted the same, penalty is leviable and Sec. 271AAB and it does not give any scope to the Assessing Officer to drop the penalty proceedings on the reason of reasonable cause. Thus, according to the Assessing Officer once the additional income is admitted irrespective of the fact whether the same represented undisclosed income or not, penalty is leviable. Accordingly, the Assessing Officer levied the penalty of Rs.52,78,600/- u/sec. 271AAB of the Act.

3. Aggrieved by the order of the Assessing Officer, the assessee went on appeal before the Id. CIT(A) and the Id. CIT(A) viewed that the addition was purely made on estimation and there was no excess stock found during the course of search, no incriminating

material relating to earning of undisclosed income was found by the department. Therefore, viewed that the excess purification loss admitted by the assessee was derived figures and not on the basis of entries in the books of account of the assessee. Accordingly, held that the additional income admitted by the assessee does not fall under the definition of 'undisclosed income'. Accordingly, cancelled the penalty levied by the Assessing Officer and allowed the appeal of the assessee. Against which, the department is in appeal before us.

4. During the appeal hearing, Id.DR argued that in the instant case, the assessee had claimed the excess purification loss of around 21% against the industry average of 13% and excess loss claimed by the assessee was admitted in the statement recorded u/sec. 132(4), therefore argued that additional income admitted by the assessee falls under the definition u/sec. 271AAB of the Act. Thus, argued that AO rightly levied the penalty and requested to set aside the order of Id. CIT(A) and allow the appeal of the Revenue.

5. On the other hand, Id.AR argued that the assessee has admitted the additional income only to purchase peace from the department and there was no excess stock, money, bullion, jewellery or any other valuable article or things or any entries in

the books of account were found. Thus, there is no case for undisclosed income, hence, requested to uphold the order of the Id. CIT(A) and dismiss the appeal of the Revenue.

6. We have heard both the parties and perused the material placed on record. In the instant case, the Id. CIT(A) has given a finding that additional income admitted by the assessee does not represent any undisclosed asset, excess stock or money, bullion, jewellery or any other valuable article or thing which found during the course of search. The Id. CIT(A) also observed that the same was not represented by any entry in the books of account, documents or transaction that was found during the course of search. Therefore held that there was no undisclosed income and hence cancelled the penalty. For the sake of clarity and convenience the relevant part of the order of the Id. CIT(A) in para 6 is extracted which reads as under:-

"6.0 I have carefully considered the facts of the case and submissions of the appellant. The main contention of the assessee is that there is no "Undisclosed Income" as defined u/s271AAB of the Act assessed on which penalty could be levied. The addition of Rs.1,75,96,335/- was made on account of excess stock found during the course of search which was admitted by the assessee as additional income in the statement recorded u/s.132(4). But it is seen from the copy of statement filed before me that the disclosure of Rs.1,75,96,335/- was made as under:

"Q6. During the Search a Seizure operation conducted at the business premises of M/s, Khan Mohammed Diamond& Jewellers Pvt.Ltd. On 20.09.2016 the regular books of accounts maintained have been seized. From the books, it is noticed that the company has purchased

huge quantity of old gold from its customers during the F.Y.2015-16 a 201617 (till date of search). The company has shown purification loss varies from 13 to 20% for converting the old gold into new one which is quite higher when compare to industry average Hence the excess purification toss shown may be arrived as under:

Sl No	F.Y.	Old gold purchases in gms	Purification loss shown as per books of a/c in gms	Standard purification loss @13% in gms	Difference in gms	Value in Rs.
1	2015-16	55597.960	11552.124	7227.735	4324.389	12886690
2	2016-17	22924.320	3087.927	2980.162	107.765	321141
Total						13207821

Please explain the reason for adopting high purification toss when compare to Industry average.

Ans. Due to ignorance the company was adopting high percentage of loss of purification of old gold. In view of the same, I voluntarily admit the excess purification loss of Rs.1,32,07,821/- as undisclosed income in the hands of M/s.Khan Mohammed Diamonds a Jewellers Pvt. Limited for the Financial Year 2015-16 & 2016-17 respectively as mentioned In the table above.

From the above, It is seen that the disclosure of Rs. 1,75,96,335/- was not made on account of excess stock .as mentioned in the assessment order and the penalty order.

6.1 It is to be seen whether the amount of R. 1,75,96,335/- which was added on account of disclosure made during the search by the AO, satisfies the definition of "undisclosed Income" as per section 271AAB. The "Undisclosed Income" for the purpose of levying penalty for the purpose of section 271AAS is 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 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 chief 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".

On examination of factual position w.r.t. the definition as above, It Is seen that the addition made is not represented by money, bullion, jewellery or other article or thing. Further, the same is not represented by any entry In the books of account or other documents or transaction found during the course of search. The disclosure made was on account of estimated excess purification loss suffered by the appellant. The same is derived figures and not as per entries in the books of account maintained by the appellant. There is no incriminating evidence brought on record by the AO either during the assessment proceedings or during the penalty proceedings.

As there is no finding/evidence to show that the above income falls under, the n of "undisclosed Income" for the purpose of section 271AA8 no penalty is in the facts of the case. Accordingly, the penalty levied is cancelled."

7. We find from the orders of the lower authorities that the basis for additional income was only estimation but not supported by any evidence. Even the department failed to substantiate the industry average of purification loss with authenticated documentary evidences. The assessee submitted that the additional income was admitted only to purchase peace and to avoid litigation with the department even though there was no evidence. The claim of loss was found from regular books of accounts maintained by the assessee which were duly accounted. If the department contention is accepted, the income generated out of excess loss claimed by the assessee should be available in

the form of undisclosed assets or money, bullion, jewellery or any other valuable article or thing. Though search u/sec. 132 was conducted, no such evidence was found by the department in the hands of the assessee. Thus, it is established that the additional income admitted by the assessee was purely on estimation and not supported by any evidence. For the purpose of undisclosed income as provided in section 271AAB there must be money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions which required to be found during the course of search. In the instant case there was no such evidences were found evidencing undisclosed income. We are unable accept the contention of the AO that the penalty is liveable irrespective of unearthing any evidence of earning undisclosed income which fits in to the definition of undisclosed income. Since, the undisclosed is defined in the act for the purpose of penalty u/s 271AAB, it is incumbent up on the department to show that the impugned addition falls under the definition of undisclosed income. In the instant case the department failed to establish that the additional income admitted represents the undisclosed income. Therefore, as rightly held by the Id. CIT(A), the additional income admitted by the assessee

does not fall under the definition of undisclosed income hence, there is no case for levy of penalty u/sec. 271AAB of the Act. Accordingly, we uphold the order of the Id. CIT(A) and dismiss the appeal of the Revenue.

ITA No. 663/VIZ/2019

8. The assessee filed the cross appeal challenging the validity of initiation of penalty proceedings for not recording the satisfaction note and specifying the grounds for issuing show cause notice. During the appeal hearing, Id.AR could not show any defects in the notice issued by the department and did not press the grounds raised by the assessee in the cross appeal. Therefore the appeal of the assessee also stands dismissed.

9. In the result, appeals filed by the Revenue as well as assessee are dismissed.

Order Pronounced in open Court on this 23rd day of Sep., 2020.

Sd/-
(V. DURGA RAO)
Judicial Member

sd/-
(D.S. SUNDER SINGH)
Accountant Member

Dated: 23rd September, 2020.

vr/-

Copy to:

1. *The Assessee -M/s. Deccan Jewellers Pvt. Ltd., D.No. 27-16-65, Besant Road, Governorpet, Vijayawada.*
2. *The Revenue -The ACIT, Central Circle-2, Guntur.*
3. *The Pr.CIT (Central), Visakhapatnam.*
4. *The CIT(A)-3, Visakhapatnam.*
5. *The D.R., Visakhapatnam.*
6. *Guard file.*

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.