

IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI

BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 4674/Mum/2018

(A.Y: 2010-11)

Ramesh Kumar Jain Flat No. 702, 7 th Floor, 13A, KAO Siddhi Vinayak Bldg, Adeshar Dada St, CP Tank Road, Mumbai.	Vs.	ACIT Cen Cir, 1(2) Old CGO Bldg, 7 th Floor, Mumbai – 20.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ADAPJ5347C		
Appellant	..	Respondent

Appellant by :	Shri V.K. Tulsian, AR
Respondent by :	Shri S.S. Iyengar DR

Date of Hearing	11.06.2021
Date of Pronouncement	28.06.2021

आदेश / O R D E R

PER PAVAN KUMAR GADALE.JM:

The assessee has filed the appeal against the order of the Commissioner of Income Tax (Appeals)-47, Mumbai, passed u/s 271AAA and 250 of the Income Tax Act, 1961. The assessee has raised the following grounds of appeal:

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“1. Whether the CIT(A) was justified by deciding the appeal without affording a reasonable opportunity of being heard.

2. Whether the CIT(A) was justified by upholding the Penalty order passed u/s 271AAA which is neither only contrary to law but also beyond the order / spirit of Hon'ble ITAT order dt. 22.04.15 on the quantum appeal, void ab initio because it was beyond the jurisdiction.

3. Whether the CIT(A) was justified by upholding the AO exercise of assumption of jurisdiction u/s 271AAA which all are based upon presumption of pretty commission income at Adhoc's basis.

4. Whether the CIT(A) was justified by upholding the penalty order despite the facts that decision on quantum by ITAT has clearly disregard the nature of additions made which is on surmises basis even without any adverse material contrary to evidence already filed before AO as well as without passing appeal effect order.

5. Whether the CIT(A) was justified by upholding the penalty order which is based on Adhocs basis commission income even without either collecting any evidence or examining the nature of evidence and its verification in terms of settled law.

6. The Ld. CIT(A) erred in confirming the penalty order without appreciating to that merits that the appellant had duly discharged his primary onus as called for.

2. The Brief facts of the case are that there was a search operations u/s 132 in the case of M/s ABG Shipyard Ltd. and the group concerns, where the assessee was also covered in search u/s 132 of the Act. Subsequently, notice u/s 142(1) of the act was

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issued and the summons were issued u/s 131 of the Act directing the assessee to attend the office and produce the books of accounts. The assessee has filed the return of income on 21.07.2011 declaring a total income of Rs. 79,98,258/-. Subsequently, the notice u/s 143(2) and 142(1) of the Act are issued. The assessee's main source of income being commission income and income from other source. and providing accommodation entries. During the search operation conducted on M/s. ABG Shipyard Ltd and its related concern. In the F.Y 2007-08 the assessee has provided bogus purchase bills to various persons by using the company Akruthi Metals & Allys Pvt Ltd. The assessee also provided accommodation entries to M/s ABG Shipyard Ltd. The A.O. made additions on account of commission income earned on accommodation entries as no books of accounts are maintained. Further, the A.O in the search operations found the jewellery and cash. The assessee in the return of income filed has declared the additional income on account of unexplained cash and jewellery. Finally, the A.O. considered the facts, details has observed that the

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assessee has accepted the addition of income towards the undisclosed cash and jewellery and has not made full disclosure of assets and the manner in which income was derived. The A.O. made other additions in respect of unexplained jewellery, insufficient drawings and unexplained investments and assessed the total income of Rs. 97,06,552/- and passed the order u/s 143(3) dated 26.12.2011. Subsequently, the A.O. has initiated penalty proceedings u/s 271AAA of the Act as the assessee has not provided the complete details of the undisclosed income. The A.O. relied on the findings of the assessee proceedings and the relief granted by the Honble ITAT and levied penalty @ 10% of undisclosed income which works out to Rs 6,61,686/- and passed order u/s 271AAA of the Act dt 31.12.2015.

3. Aggrieved by the penalty order, the assessee has filed an appeal with the CIT(A). Whereas, the CIT(A) considered the assessee's submissions and the declarations made by the assessee in the course of search and confirmed the action of the A.O. in laying

the penalty and dismissed the appeal of the assessee. Aggrieved by the order of the CIT(A) the assessee has filed an appeal with the Honble Tribunal.

4. At the time of hearing, the Ld. AR submitted that the CIT(A) erred in confirming the action of the A.O in levying the penalty. Whereas, the assessee against the quantum addition has filed an appeal with the Honble Tribunal and the relief was granted, as the additions made by the A.O are based on the surmises without any adverse material. The assessee has filed the complete information in the assessment proceedings and the penalty cannot be levied on the adhoc additions and prayed for deletion of penalty and supported his contentions with the written submissions and judicial decisions.

5. Contra, the Ld. DR submitted that the CIT(A) has considered the factual aspects and has confirmed the levy of penalty and relied on the lower authorities orders.

6. We heard the rival submissions and perused the material on record. The sole matrix of the disputed issue is with respect of levy of penalty u/s 271AAA of the Act. We find the penalty levied is based on the disclosure of undisclosed jewellery and cash. In the quantum appeal, the Honble Tribunal in assessee's own case ITA no 3512 to 3518/M/2013 dt 22-4-2015 at page 13 Para 22 to 24 has observed as under:

"22. The last issue relates to the addition of balance value of Jewellery/cash found at the time of search over and above that surrendered by the assessee. Though the search officials found cash of Rs.3,80,200/- and jewellery worth Rs.88,76,750/-, the assessee surrendered only a sum of Rs.78,47,730/-. Hence the assessing officer assessed to the extent of Rs.10,29,020/- towards jewellery and a sum of Rs.30,200/- towards cash as unexplained income of the assessee. The Ld CIT(A) also confirmed the same.

23. Before us, the Ld A.R submitted that the assessee is married and is having two daughters. He submitted that the tax authorities have not given any deduction towards the old jewellery, which is normally held by Indian families. He further submitted that the CBDT circular envisages a holding of 500 grams of gold by ladies and 250 grams of gold by male members. He submitted that the value of jewellery surrendered by the assessee was more, if credit for the above said limit is given. Accordingly he submitted that the assessment of balance amount of jewellery is not justified. With regard to the cash, the Ld A.R submitted that the addition of Rs.30,200/- is also not warranted, since the book balance was not considered by the assessing officer.

24. The Ld D.R strongly defended the order of Ld CIT(A). However, we find merit in the contentions of the Ld A.R. Though the entire value of jewellery has been assessed in AY 2010-11 in accordance with the provisions of the Act, however in practice, the jewellery is accumulated over the years. It is known to everyone that the rate of gold is rising consistently over the years. However, the value of jewellery has been assessed in AY 2010-11 by taking the rate prevailing in that year. Further, the Indian families normally own certain quantity of jewellery over the years. Considering all these facts, we are of the view that there is no justification in assessing the balance value of jewellery amounting to Rs.10,29,020/-. With regard to the cash also, the assessing officer has not given credit for book balance. Considering the smallness of the amount, we are of the view that the addition of Rs.30,200/- is also not warranted. Accordingly, we set aside the order of Ld CIT(A) on these two issues and direct the assessing officer to delete these additions.

6.1 The contentions of the Ld. AR that the jewellery has been accumulated over two decades. The old cumulative jewellery has been declared in the assessee's return of income tax for the A.Y 2010-11 and paid the taxes. Further, there is no evidence to suggest that the jewellery valued at the time of search was purchased in the relevant assessment year. It is admitted fact that there is no additions made on old traditional jewellery because the assessee has already taken in into account the value at the time of filling of return of income. Since there

is no sustainment of addition of jewellery on further appeal and therefore the levy of penalty is not tenable.

6.2 Further the Ld. AR supported his arguments relying on the decision of the Hon'ble Tribunal Patna Bench SMC At Kolkata in ITA No194/Pat/2019 dated 11-02-2021. The Hon'ble Tribunal has dealt on the provisions of Sec 274AAB and 274 of the Act.

7. We find that in the assesses case, the search was initiated u/s 132 of the Act on 07.10.2009 which was much before i.e 01.07.2012. At this juncture, it will be appropriate to refer to the provisions of Sec. 271AAA of the Act which are applicable for the cases where the search has been initiated or after 01.06.2007 but before 01.07.2012 and the provisions of Sec. 271AAA of the Act are read as under:

271AAA. (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 June, 2007 ¹⁵[but before the 1st day of July, 2012], the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.*

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(2) Nothing contained in sub-section (1) shall apply if the 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) pays the tax, together with interest, if any, in respect of the undisclosed income.

(3) No penalty under the provisions of clause (c) of sub-section (1) of [section 271](#) shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

(4) The provisions of [sections 274](#) and [275](#) shall, so far as may be, apply in relation to the penalty referred to in this section.

Explanation.—For the purposes of this section,—

(a) "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 [15a](#)[Principal Chief Commissioner or] Chief Commissioner or [15a](#)[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;

(b) "specified previous year" means the previous year—

(i) which has ended before the date of search, but the date of filing the return of income under sub-section (1) of [section 139](#) for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or

(ii) in which search was conducted.]

8 The contentions of the Ld. AR are realistic that there is no undisclosed income on which the penalty can be levied. We find the decisions relied by the Ld. AR though pertains to A.Y 2015-16 in relation to penalty levied u/s 271AAB of the Act and the only difference is that the assessee was levied penalty u/s 271AAA of the Act as the search was initiated u/s 132 of the Act on 7.10.2009 after 01.06.2007 but before 01.07.2012. We find the legislature has introduced the provisions of Sec. 271AAB of the Act in Finance Act 2012 effective from 01.07.2012 which are similar to provisions of Sec. 271AAA of the Act with further modifications on rates of levy of penalty.

We found in the case of Shiv Bhagawan Gupta Vs. ACIT Patna (supra), The Hon'ble Tribunal has dealt at page 8 to 10 Para 9, which is read as under:

“9. On a perusal of the provisions of section 271AAB, it is evident that the Section 271AAB is self-contained. There can be no doubt that there is no discretion with the AO as the parameters by which the AO or the tax authorities are bound in regard to the rate of penalty and the circumstances on the basis of which the penal provision can be attracted are self-explanatory. It can be noticed that the Co-ordinate Benches of the Tribunal have categorically held that the expression ‘undisclosed income’ is given a definite and specific meaning and the word has not been described in an inclusive manner so as to enable the tax authorities to give wider or elastic meaning which enables them to bring within its ambit the species of income not specifically covered by the definition. Moreover, such penal provisions are required to be interpreted in a strict, specific and restricted manner and not in an inclusive manner. If the surrendered income does not fall in the definition of “undisclosed income” as defined u/s 271AAB of the Act, the penalty is not warranted. It can be further noted that the penalty under section 271AAB can be initiated in respect of undisclosed income as defined in the section 271AAB itself found during the search action, independent of the assessment proceedings. Though, the fact in a case that the assessee has been able to explain the source of the alleged ‘undisclosed income’ may be relevant for final imposition of the penalty, however, for initiation of the penalty proceedings, the provisions of section 271AAB are self contained and are not dependent upon commencement or finalization of the assessment proceedings. It is further pertinent to note here it is not mandatory for the AO to invoke provisions of section 271AAB of the Act in each every case of levy of penalty pursuant to search action. There is no bar to the assessing Officer to initiate penalty proceedings u/s 271(1)(c) of the Act even in cases involving search actions if in

the facts and circumstances of the case, it is so warranted. The only bar is that no penalty under the provisions of section 270A or section 271(1)(c) of the Act shall be imposed in respect of the undisclosed income, as defined u/s 271AAB of the Act, unearthed during the search action carried out u/s 132 of the Act. It is to be noted that the provisions of section 271AAB and section 271(1)(c) of the Act simultaneously existed and were operational till the provisions of section 271AAC become effective from 01.04.2017.

The Assessing Officer has levied penalty @ 10% of the alleged undisclosed income, however, it is a matter of record in this case that the assessee has not made any surrender of any undisclosed income during the search action. The assessing officer has not initiated the penalty proceedings u/s 271AAB of the Act on the basis of or in consequence of the said search action, rather the assessing officer, has initiated the penalty proceedings during the assessment proceedings solely on the ground that the assessee has disclosed certain income from undisclosed sources in the return of income and paid due taxes thereupon. The relevant part of the assessment order in this respect is reproduced as under:

“The assessee has filed return u/s 139 showing income of Rs. 2808270/-The assessee has disclosed income of Rs.2179221/- during the year on account of undisclosed jewellery. Penalty u/s 271AAB is initiated.”

A perusal of the above reproduced relevant part of the assessment order reveals that the assessing officer has not mentioned about unearthing of any undisclosed income as defined u/s 271AAB of the Act during search action carried out at the premises of the assessee. In my view, the income declared by the assessee in the return of income or found or assessed by the Assessing officer in the assessment proceedings may be relevant for assessment of the income under section 68 /69 and other related provisions of the Act and also for the levy of penalty under section 271(1)(c) of the Act in view of the relevant provisions of section 68/69 and 271(1)(c) of the Act. However, for the levy of penalty

u/s.271AAB, the case must fall within the four corners of the definition of expression “undisclosed income” as defined u/s 271AAB itself. The assessee in this case is an individual and has earned income from partnership firm and interest income. The assessee has neither earned any business income nor earned any income exceeding Rs.50 lakhs so as to require mandatory filing of personal assets and liabilities or to maintain books of accounts; even the assessee is not required to otherwise disclose any such income to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of search; the alleged income is not any income 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. Assessee has neither made any surrender of any undisclosed income during the search action nor the penalty has been initiated on the basis of undisclosed income found during such search action. In view of the above factual position, the impugned order of the AO imposing the penalty on the assessee under section 271AAB of the Act does not pass the mandate of the provisions of section 271AAB of the Act, therefore, the same being bad in law is hereby quashed.

In the result, the appeal of the assessee stands allowed.

9. We find that the decision is applicable in principle to the present case. The levy of penalty is not automatic and not mandatory. In the quantum appeal, the Honble Tribunal has considered the accumulation of jewellery and the rate of jewellery is raising and the assessee has taken into account the value of jewellery in the A.Y.2010-11 and filed the return of income. Further there is no material to

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suggest that it was purchased in the relevant assessment year. Therefore, considering the facts circumstances, provisions and the ratio of the decision of the Hon'ble Tribunal. We set aside the order of the CIT(A) and direct the assessing officer to delete the penalty and allow the grounds of the appeal in favour of the assessee.

10. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 28.06.2021

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 28.06.2021

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai