

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, AHMEDABAD
[CONDUCTED THROUGH VIRTUAL AT AHMEDABAD]**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

I.T.A. Nos. 1548 & 1549/Ahd/2018
(Assessment Years: 2012-13 to 2013-14)

Rajkumar Luhana 1, Kalal Darwaja, Godhra-389001	Vs.	ACIT Central Circle-1, Baroda
[PAN No. AASPL8912C]		
(Appellant)	..	(Respondent)

Assessee by :	Shri Viranch Modi, CA
Revenue by :	Shri V. K. Singh, Sr. DR
Date of Hearing	16.03.2022
Date of Pronouncement	30.03.2022

ORDER

PER Ms. MADHUMITA ROY - JM:

Both the appeals filed by the assessee are directed against the orders all dated 26.04.2018 passed by the Commissioner of Income Tax (Appeals)-12, Ahmedabad arising out of the penalty order all dated 20.08.2015 passed by the DCIT, Central Circle-1, Baroda under Section 271AAB of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for A.Ys. 2012-13 and 2013-14 respectively. Since all the appeals relate to the same issues and all are filed by the same assessee, these are heard analogously and are being disposed of by a common order.

ITA No. 1548/Ahd/2018 (A.Y. 2012-13):-

2. A search under Section 132 of the Act was conducted in the Dhanjimama Group of cases including the case of the assessee on

03.07.2012. The assessee disclosed an amount of Rs. 5,04,650/-. Proceeding under Section 153A of the Act were initiated by the Ld. AO and notice whereupon under Section 153A dated 06.09.2013 was served on and in compliance thereto the assessee filed its return of income on 21.10.2014 declaring total income at Rs. 9,57,100/-. The said assessment was finalized upon assessing the income of the assessee at Rs. 9,57,100/- as per the return filed in compliance with the notice under Section 153A of the Act. However, on the basis of the disclosure of additional income made during the search proceeding to the tune of Rs. 5,04,650/- for the specified year penalty proceeding under Section 271AAB was initiated which was finalized on 20.08.2015 upon making addition @ 10% of the said “undisclosed income” of Rs. 5,04,650/- of the “specified previous year” to the tune of Rs. 50,465/- which was further confirmed by the Ld. CIT(A). Hence, the instant appeal before us.

3. None appeared at the time of call on behalf of the assessee. Hence, we do not get any assistance from the assessee’s side and on the contrary the Ld. DR relied upon the order passed by the authorities below.

4. It is the case of the assessee, as it appears from the records, that there was no incriminating material found during the course of search on the basis which the addition could at all sustain. No incriminating material was found suggesting receipt of any additional sale. Rather the admission of additional income was only to buy peace and to avoid protracted litigation as stated by the assessee. The assessee, therefore, filed the return of income and paid taxes thereon.

5. It is the further case of the assessee that Section 271AAB contemplates that the AO may initiate and impose penalty. Thus, penalty under Section 271AAB is not mandatory but discretionary. On this aspect before the Ld. CIT(A) he has relied upon the judgment passed by the Coordinate Bench in the case of Marvel Associates, reported in 170 ITD 353.

6. We have, therefore, considered the judgment passed by the Coordinate Bench in the case of Marvel Associates (supra). Wherein it was held as under:

“9. Penalty u/s 271AAB attracts on undisclosed income but not on admission made by the assessee u/s 132(4). The AO must establish that there is undisclosed income on the basis incriminating material. In the instant case a loose sheet was found according to the A.O., it was, incriminating material evidencing the undisclosed income. In the penalty order the AO observed that loose sheet shows the cost per square feet is Rs.3571/- per sq. ft. and assessee stated to have submitted in sworn statement cost per sq. feet at Rs.2200/- to Rs.2300/- per sq. feet. However neither the AO nor the Ld. CIT(A) has verified the cost of construction with the books and projections found at the time of search. The counsel argued that it was mere projection bill not the actuals. The write up leading also mentioned that summary of the projected profitability statement. There is no evidence to establish that projections reflected in the loose sheet is real. No other material was found during the course of search indicating the undisclosed income. There was no money, bullion, jewellery or valuable article or thing or entry in the books of accounts or documents transactions were found during the course of search indicating the assets not recorded in the books of accounts or other documents maintained in the normal course, wholly or partly. The revenue did not find any undisclosed asset, any other undisclosed income or the inflation of expenditure during the search/ assessment proceedings. Though a loose sheet of page No.107 of Annexure A/GS/MA/1 was found that does not indicate any suppression of income but it is only projection of profit statement. The amount of Rs.3571/- mentioned in the projections refers to cost and profit which is approximate sale price but not the cost as slated by the AO in the penalty order. The cost of construction in the projections projected at Rs.2177/- which is in synch with the statement given by the assessee. The AO was happy with the disclosure given by the assessee and did not verify the factual position with the books of accounts and projections and bring the evidence to unearth the undisclosed income. Neither the A.O. nor the investigation wing linked the cost of profit or cost of asset to the entries in the books of accounts or to the sales conducted by the assessee

to the sale deeds. Therefore, we are unable to accept the contention of the revenue that the loose sheet found during the course of search indicates any undisclosed income or asset or inflation of expenditure. The Hon'ble ITAT Delhi Bench in the case of Ajay Sharma v. Dy. CIT [2013] 30 taxmann.com 109 held that with respect to the addition on account of alleged receivables as per seized paper, there is no direct material which leads and establishes that any income received by the assessee has not been declared by the assessee. An addition has been made on the basis of loose document, which did not closely prove any concealment or furnishing of inaccurate particulars by the assessee. Hence penalty u/s 158BFA (2) of the Act is not leviable.

The facts of the assessee's case shows that there was no undisclosed income found during the course of search and no incriminating material was found, hence we hold that there is no case for imposing penalty u/s 271AAB of the Act, accordingly, we set aside the order of the lower authorities and cancel the penalty u/s 271AAB of the Act.”

7. There is no whisper of any incriminating material found during the course of search in the case in hand before us. Neither mentioning of undisclosed income found during the search proceeding. Thus, if the ratio laid down in the judgment referred above is applied to the instant case we do not find any justification of imposing penalty under Section 271AAB of the Act. The power of imposing penalty under Section 271AAB has been conferred upon the Assessing Officer under Section 271AAB though exercising of this power is not mandatory but discretionary. However, it is expected that the same is exercised by the Revenue authorities on rational basis taking into consideration the guiding factors embedded in the statute and not at his whims and fancies.

8. The impugned order of penalty is, therefore, found to be unjustified and hence, deleted. Assessee's appeal is, therefore, allowed.

ITA Nos. 1549/Ahd/2018 (A.Y. 2013-14):-

9. The identical issue involved in the case has already been dealt with by us in ITA No. 1548/Ahd/2018 for A.Y. 2012-13 and in the absence of any changed circumstances the same shall apply mutatis mutandis. Hence, the appeal preferred by the assessee is allowed.

10. In the combined result, the appeals preferred by the assessee are allowed.

This Order pronounced in Open Court on	30/03/2022
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Sd/-

(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 30/03/2022

TANMAY, Sr. PS

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

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

Sd/-

(Ms. MADHUMITA ROY)
JUDICIAL MEMBER

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad