

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

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| ITA Nos.2583 & 2584/Bang/2018 |
| Assessment Year: 2008-09 & 2009-10 |

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| Sri C. Aswathanarayana, S/o Chikkappaiah, 639, Sulebele Main Road, Devanahalli, Bangalore 562 110. PAN NO : ADZPC9837F | Vs. | ACIT, Central Circle-1(4), Bangalore. |
| APPELLANT | | RESPONDENT |

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|----------------------|---|-----------------------------|
| Appellant by | : | Shri S.V. Ravishankar, A.R. |
| Respondent by | : | Shri Sankar Ganesh K., D.R. |

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| Date of Hearing | : | 08.08.2022 |
| Date of Pronouncement | : | 30.08.2022 |

O R D E R

PER BEENA, PILLAI, JUDICIAL MEMBER:

Present appeals has been filed by the assessee against Consolidated order dated 04/12/2017 passed by the Ld. CIT(A) (a)-6, Bangalore for assessment years 2008-09 and 2009-10 on following grounds of appeal. It was noted that the assessee has raised identical grounds for both the assessment years under consideration with only the difference of the quantum of penalty levied. For sake of convenience

and brevity we reproduce the Grounds raised for assessment year 2008-09:

1. *The order of the learned Authorities below in so far as it is against the appellant is opposed to law, equity, facts, weight of evidence, probabilities and circumstances of the case.*

2. *The learned authorities below erred in levying a penalty of Rs. 10,99,990/- on the facts and circumstances of the case. The authorities below failed to appreciate that the returned income has been accepted and there is evidence of any concealment and as such the penalty levied deserves to be canceled.*

3. *The learned CIT (A) erred in rejecting the appeal on the ground that the AO as given a clear finding in the order that the twin conditions which will enable the appellant to be exempt from levy of penalty are not satisfied. The learned CIT (A) failed to appreciate that on the contrary the appellant had satisfied the twin condition required for exemption from the levy of penalty. Therefore, penalty levied in bad in law on both facts as well as the legal position. The Learned CIT (A) further failed to appreciate that the appellant has fulfilled the twin conditions to claim an immunity from imposition of penalty u/s 271AAA of the Income Tax Act, 1961.*

4. *The learned authorities erred in holding that, twin conditions not satisfied by the appellant. It is very clear from the assessment/penalty orders and the statement recorded u/s 132(4), the assessee was in the business of real estate, leasing quarries and the income earned therefrom has been disclosed and the same has been accepted by the department in the quantum proceedings. Therefore, the question of specifying the manner in which such income has been derived and not substantiating the undisclosed income does not arise in the case of appellant.*

5. *The authorities further failed to appreciate that the appellant has not only satisfied the twin conditions, he has also paid the entire tax and interest on the income offered to tax and thereby has satisfied all the*

conditions specified u/s 271 AAA to exempt himself from the rigor of this penalty.

6. The learned CIT(A) failed to appreciate that, the AO has not brought any evidence on record to prove that assessee had concealed the income except the statement recorded u/s 132(4) of the Income Tax Act, 1961: Hence, the levy of penalty u/s 271AAA of the Income Tax Act, 1961 is bad in law.

7. The appellant craves leave to add, alter, amend, substitute, change, delete any of the grounds of appeal.

8. For the above and other grounds that may be urged at the time of ' hearing of the appeal, the appellant prays that the appeals may be allowed and justice rendered.

2. The assessee also raised the following additional grounds which are identically worded for both the assessment years under consideration for sake of convenience we reproduce the additional ground raised by assessee vide application dated 24/06/2012 pertaining to assessment year 2008-09:

Additional grounds of appeal:

1. The notice issued u/s 271AAA of the Act is bad in law on the facts and circumstances of the case.

2. The authorities below failed to appreciate that the penalty under section 271AAA of the Act, could be levied only for a single year, going by the definition of "specified previous year" and no penalty could have been levied for the AY 2008-09, on the facts and circumstances of the case.

3. The learned Assessing Officer failed to appreciate that the penalty under section 271AAA of the Act was not automatic and that there was a discretion not to levy penalty and the assessing officer ought to have exercised the discretion and the penalty proceedings are not to be resorted to as a matter of procedure, on the facts and circumstance of the case.

4. Without prejudice to the above, the penalty levied is highly excessive and liable to be reduced substantially.

5. The appellant craves leave to add, alter, delete or substitute any of the grounds urged above.

6. In view of the above and other grounds that may be urged at the time of the hearing of the appeal, the appellant prays that the appeal may be allowed and appropriate relief be granted in the interest of justice and equity.

Admission of Additional Grounds:

3. We have considered the issue is alleged by the assessee in the additional grounds raised in both the years under consideration. The assessee is challenging the applicability of section 271 AAA of the act for the assessment year 2008-09. For assessment year 2009-10, the assessee is challenging that, penalty under section 271AAA is not automatic and only upon non-satisfaction of the conditions specified under the section penalty could have been levied. The Ld.AR submitted that, no new facts need to be considered for adjudicating these issues and prayed for admission relying on the decision of *Hon'ble Supreme Court* in case of *National Thermal Power Co Ltd vs. CIT* reported in 229 ITR 383.

4. On the contrary, the Ld.AR, though could not control the submissions of the Ld.AR, opposed the admission of the additional ground raised by the assessee

5. We note that this issue goes to the root cause of the levy and therefore deserves to be adjudicated before considering the other aspects and raised in the original ground of appeal. Respectfully

following the view taken by *Hon'ble Supreme Court* in case of *National thermal Power Co Ltd vs. CIT(supra)* the issue raised by the assessee for both years under consideration, being legal issue stands admitted.

Accordingly applications filed by assessee for the assessment year under consideration raising additional grounds stands allowed.

6. Brief facts of the case are as under:

6.1 The assessee is in the business of Real Estate, Leasing Quarries. Search u/s 132 of the Act was conducted at the assessee's premises on 26/08/2008. During the search proceedings, incriminating documents evidencing phenomenal land transactions and concealment of income were found, seized and impounded. While analyzing the materials seized/impounded at his residence and office premises it was seen that he has about 1200 acres of land in his possession.

6.2. The assessee was confronted with the seized material and the bank statement in account No.CA/01/000962 of Corporation Bank, Devanahalli Branch, showing huge cash and cheque credits as well as withdrawals obtained from search. The assessee based on such seized materials prepared his statement of affairs and with reference to the seized/impounded materials, bank account and arrived at the income from business at Rs.16,67,15,828/- and declared the same as income for the relevant assessment years in

his hands and statement was recorded from the assessee u/s 131 of the Act on 27.1.2009.

6.3 For the assessment year 2008-09, notice u/s 153A of the Act dated 24/7/2009 was issued to the assessee. The assessee filed a letter on 18/3/2010 stating that the return filed on 2/4/2009 may be treated as return in response to the said notice. The assessee had filed the return of income on 2/4/2009, declaring an income of Rs.3,24,72,389/- and agricultural income of Rs.4,30,400/- before the ACIT, Central Circle-2(1) Bangalore. The returned income consists of income from business amounting to Rs.3,24,69,345/- and income from other sources amounting to Rs.3.044/-.

6.4 For the assessment year 2009-10 being the searched year the assessment was completed under section 143 (3) of the act and assessee had filed the return of income declaring Rs.2,35,10,690/- that was filed as per notice dated 19/03/2010 issued under section 142 (1) of the Act requiring assessee to file the return of income for assessment year 2009-10 on or before 29/03/2010.

6.5 At the time of penalty proceedings the Ld.AR observed that, the assessee considering the liabilities and assets prepared the statement of affairs for the block period that was considered under 153 A proceedings. From the assessment order passed it is noted that a sissy adopted the net wealth creation method to arrive at the undisclosed income, the assessment year the details of which are as under:

| Assessment year | Declared as per return filed after the date of such |
|-----------------|---|
| 2003-04 | 11,51,837 |
| 2004-05 | 35,69,341 |
| 2005-06 | 1,64,27,758 |
| 2006-07 | 4,68,76,382 |
| 2007-08 | 4,69,13,969 |
| 2008-09 | 3,24,72,389 |
| 2009-10 | 2,35,10,690 |
| Total | 17,09,22,366 |

6.6 Ld.AO observed that, the assessee would not have surrendered monies for the years under consideration, had the search and seizure operation not taken place. The Ld.AO initiated proceeding for imposition of penalty under section 271AAA of the Act.

6.7 The Ld.AO issued show-cause-notice under section 274 r.w. 271AAA to the assessee on 31/12/2010 for years under consideration for inaccurate particulars. The assessee filed reply on 27/06/2011, which was not accepted by the Ld.AO. Ld.AO passed order levying penalty on order on 30-6-2015 imposing penalty under section 271AAA of the Act for an amount of Rs.10,99,990/- and Rs.7,90,740/- for assessment year 2008-09 and 2009-10 respectively.

Aggrieved by the penalty order of the Ld.AO, assessee preferred appeal before the Ld.CIT(A).

6.8 In course of proceeding before the Ld.CIT(A) confirmed the penalty imposed with the observation that the manner in which the

disclosure was made and that the twin condition that would enable the assessee to be exempted from levy of penalty does not get satisfied.

6.9 Aggrieved by the order of the Ld.CIT(A), assessee preferred appeal before this *Tribunal*.

7. The Ld.AR submitted that the notice issued under section 274 does not specify which limb the penalty was levied. He relied on the decision of following decisions:

- *Decision of Hon'ble Bombay High Court in case of CIT vs. Samson Perinchery reported in [2017] 88 taxmann.com 413*
- *Decision of Hon'ble Bombay High Court in case of Mohd. Farhan A. Shaikh vs. DCIT reported in [2021] 125 taxmann.com 253*
- *Decision of Hon'ble Karnataka High Court in case of CIT vs. Andhra Pradesh Yarn Combines (P.) Ltd. reported in [2006] 153 TAXMAN 121 (Kar.)*

8. On the contrary, the Ld.DR has relied on following decisions to support the levy of penalty:

- *Decision of Hon'ble Delhi High Court in case of Pr.CIT vs. Smt. Ritu Singal reported in [2018] 92 taxmann.com 224*

We have perused submissions advanced by both sides in light of records placed before us.

9. The issues challenged buses seen the application for admission of additional ground pertains to the challenge of levy of penalty under section 271AAA of the act for both the years under consideration.

10. For the assessment year 2008-09 it is the contention of facility that penalty under section 271AAA cannot be levied only for a single year going by the definition of specified previous year based on the facts and circumstances of the case.

11. Whereas for assessment year 2009-10 assessee is challenging the levy of penalty by submitting that the penalty could not have been automatically levied AND THAT THERE WAS A DISCRETION NOT TO LEVY THE PENALTY which ought to have been exercised by the Ld.AO.

12. We note that, while recording the statement under section 132(4) of the Act, the authorities concerned did not put any specific query regarding the mode and manner in which undisclosed income was derived, the assessee did not give any specific answer. However we know that during the penalty proceedings assessee had filed reply to the notice dated 27/07/2011 which the Ld.AO does not accept without assigning any reasons. From the assessment orders, we note that the statement recorded forms part of the same. We note that, the said amounts were offered for the relevant assessment years by the assessee as he was not having relevant documents to support the monies that was lying in his bank account and the details of investments made by assessee in various agricultural lands. We note that no cash has been seized from the premises during the course of search and the declaration made by SSA under section 132 (4) are all cash deposits into the bank and investments made by assessing in agricultural land. Further from

the assessment or do we know that assessee had prepared the statement of affairs for the relevant block period by computing the excess assets or liabilities for each assessment year. It is also undisputed that the amount that has been computed by assessee in such manner has been declared and due taxes have been paid in the return of fire income filed for the years under consideration.

For better appreciation, it is necessary to have a look at the provision contained under sub-section (2) of section 271AAA of the Act, which reads as under:

"Penalty where search has been initiated.

271AAA. (1)

(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."

13. A careful reading of the aforesaid provision makes it clear that the penalty under section 271AAA(1) cannot be imposed in a case where the assessee has offered the undisclosed income in the statement recorded under section 132(4) of the Act, specifying the manner in which such income has been derived and if the assessee pays the tax along with interest of such income. In the facts of the present case, undisputedly, the assessee has offered the cash found as income in the statement recorded under section 132(4) of the Act. It is also a fact that the assessee has paid the tax on such income.

14. Now coming to the issue of whether penalty under section 271AAA could be levied for the years under consideration, we note that for the assessment year 2009-10 being the search year, the said assessment year falls out of the block period and therefore the necessary criteria to levy penalty under section 271AAA is not applicable.

15. The only condition, according to the department, which has not been fulfilled is that the assessee has not specified the manner in which such income was derived. On a perusal of the statement recorded under section 132(4) of the Act, that forms part of the assessment order, we observe that, in response to a question asked by the authority concerned, the assessee came forward to offer the money found in the bank account as well as in cash as income. It is observed, the authority recording statement did not pose any specific query to the assessee to explain the mode and manner in which such undisclosed income was derived. Further during the penalty proceedings, we note that the reply filed by the assessee has not even been considered and has been rejected at the threshold.

16. Thus, in course of search and seizure operation when the assessee came forward and offered certain income to show his *bona fide* and ultimately followed it up by actually offering such income to tax, in our view, the assessee should be given the benefit of the exceptions provided under sub-section (2) of section 271AAA. In any case of the matter, it is a fact on record that the assessee is no more and has been substituted by his legal heir, in course of proceeding

before us. Thus, in our considered opinion, a liberal and compassionate view has to be taken *qua* the imposition of penalty under section 271AAA of the Act. Based on the above discussion we direct the Ld.AR you to delete the penalty levied for both the assessment years under consideration under section 271AAA of the act.

In the result, the appeal filed by assessee stands allowed on the additional grounds raised for assessment years 2008-09 and 2009-10.

Order pronounced in the open court on 30th August, 2022

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Bangalore,

Dated 30th August, 2022.

VG/SPS

Copy to:

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|---------------|------------------------|
| 1. Appellant | 4. CIT(A) |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore