

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE SHRI S.S. GODARA, JUDICIAL MEMBER AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

ITA No.1785/PUN/2019
Assessment Year : 2007-08

Naresh Shamlal Thakur Flat No.601, B-Wing, Kshitij, S.No.87, Sahakarnagar No.2, Pune 411 009 PAN : AAHPT6096Q	Vs.	Income Tax Officer, Ward-5(2), Pune
Appellant		Respondent

Assessee by : None
Revenue by : Shri Ramnath P. Murkunde

Date of hearing : 18-10-2022
Date of pronouncement : 23-11-2022

आदेश / ORDER

PER S.S. GODARA, JM :

This assessee's appeal for AY 2007-08 arises against the CIT(A), Pune-8's order dated 11.09.2019, passed in case No. PN/CIT(A)-8/ITO Wd.5(2)/145/18-19/210, involving proceedings under 271AAA of the Income Tax Act, 1961 in short the Act.

Case called twice. None appears at assessee's behest. The very fact has existed on the previous two hearings i.e. 08th of June and 05th of September, 2022. The assessee is accordingly proceeded *ex-parte*.

2. It next emerges that the assessee's sole substantive grievance raised in the instant appeal challenges correctness of both the learned lower authorities' action imposing section 271AAA penalty of Rs.31,16,500/- in issue.

3. Mr. Murkude vehemently argued that both the learned lower authorities have rightly imposed the impugned penalty u/s 271AAA of the Act. We note in this factual background that the CIT(A)'s detail discussion affirming the impugned penalty reads as follows :-

“DECISION :-

6.3 The observations of the AO, submissions of the appellant and the material on record have been considered.

6.4 In this case, a search and seizure action u/s 132(4) was conducted on 15.10.2007. Later in response to notice 153A, the appellant filed ROI declaring total income at Rs. 4,13,08,012/-.

6.5 The documents found during the course of search indicated that the assessee was engaged in money lending. The evidence mainly contains three diaries/notebooks. Simultaneously search was conducted at premises of Shri Kishore Godse who along with the appellant admitted that they used to note down the advances after omitting zeros as stated in said diaries. The appellant also admitted that the entire money was outside of the business and offered no explanation regarding the sources of the money. The appellant himself offered Rs. 4,97,00,000/- as undisclosed income. The AO initiated penalty u/s 271AAA of the Act as the appellant declared undisclosed income after the search action only and did not admit the same in statement u/s 132(4) of the Act during the search and seizure operation and did not specify the manner in which such income was derived.

6.6. For sake of ready reference, Section 271 AAA of the Act reads as under :

“271AAA. Penalty where search has been initiated.

(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, 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.

(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 Chief Commissioner or Commissioner before the date of the 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.’.

As can be seen above, sub section (2) of 271 AAA of the Act, state three condition if fulfilled, penalty cannot be imposed:

- (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.

6.7 Further In the case of Asst. CIT Vs. Shailesh Gopal Mhaske, Honble ITAT Pune, 2242 (PUN) 2014, the Honb’le ITAT has laid down, 4 conditions for immunity from penalty u/s 271 AAA which are as under;

- (a) Assessee in the statement recorded under section 132(4) of the Act admits the undisclosed income;
- (b) Assessee satisfies the manner in which the income has been derived;
- (c) Assessee substantiate the manner in which the undisclosed income was derived; and
- (d) Pays the taxes together with interest, if any, in respect of undisclosed income.

If the appellant fulfills the above conditions laid down by the Hon’ble ITAT, Pune then, then no penalty need be imposed upon the appellant.

6.8 In the instant case, search under section 132 of the Act was conducted upon the assessee on 15.10.2007. During the course of proceedings, statement of assessee was recorded under section 132(4) of the Act, copy of which is placed on record. Three diaries were seized wherein the appellant admitted that lend money was wrote. The appellant also admitted that the money which was advanced was not in books of accounts and was outside of business. After search action only, the appellant offered Rs. 4,97,00,000/- as undisclosed income. It is qualified by the words for concealing income and furnishing inaccurate particulars of income. Thereafter, penalty was levied on the

‘undisclosed income’. The Assessing Officer observed that in the present case, the assessee had disclosed only a part of the income in the statement recorded under section 132(4) of the Act and the entire income declared in the return of income was not admitted in the statement recorded under section 132(4) of the Act. Thus, the assessee had not fulfilled the conditions as mentioned in clause (iii) of sub-section (2) of section 271 AAA of the Act and hence, he was held to have defaulted and penalty of Rs.31,16,500/- was levied under section 271AAA of the Act. Further the word “undisclosed” for the section 271AAA was explained in the Act as under:

“Undisclosed income means any income of 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 search under section 132 of the Act.”

6.9 As pointed out in paras hereinabove, during the course of search, diaries were found in which there was mention of transactions in white and black, and in view of the said position, the assessee made a declaration of income which admittedly, falls within the definition of ‘undisclosed income’.

6.10 The assessee claims that it has fulfilled all the conditions of said subsection (2) of section 271AAA of the Act and hence, there is no merit in the levy of penalty, the assessee in the course of search while statement under section 132(4) of the Act was recorded, had admitted the undisclosed income. However, he failed to specify the manner in which the income was derived. In the absence of assessee having satisfied the manner in which the income was derived and also specifying the manner, clause (i) (part) and clause (ii) under sub-section (2) of section 271AAA of the Act are not fulfilled. Therefore, in light of above, discussion the appellant has not fulfilled all the conditions specified in the section 271AAA of the Act and it is held that the AO has rightly levied the penalty. Ground No.1 is DISMISSED.”

4. Mr. Murkunde quotes hon’ble Delhi high court’s decision in PCIT vs., Smt. Ritu Singhal [2018] 403 ITR 97 (Del.) that it is nowhere mandatory for the authorized officers during search to put a specific query to the assessee regarding the unexplained income in issue followed by substantiation thereof. We note in this backdrop

that hon'ble Gujarat high court's decision in PCIT vs. Mukeshbhai Rmanlal Prajapati [2018] 99 taxmann.com 447 (Guj.) has taken a divergent view *qua* the very penalty provision that the authorized officer must raise a specific query before the searched assessee whose failure indeed attracts impugned penalty. Faced with this situation, we quote CIT vs., Vegetable Products Ltd., [1973] 88 ITR 192 (SC) and delete the impugned penalty thereby adopting the above view in assessee's favour for this precise reason alone. We further reiterate that the assessee has already paid his all due taxes as it is evident from a perusal of the Assessing Officer's penalty order dated 31.03.2015. This is thus an instance wherein the learned lower authorities have wrongly invoked section 271AAA of the Act. The assessee succeeds in his instant sole substantive grievance therefore.

5. This assessee's appeal is allowed in above terms.

Order pronounced in the Open Court on 23rd November, 2022.

Sd/-
(DIPAK P RIPOTE)
ACCOUNTANT MEMBER

Sd/-
(S.S. GODARA)
JUDICIAL MEMBER

पुणे Pune; दिनांक Dated : 23rd November, 2022
Sujeet

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The concerned CIT(A);
4. The CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "B" /
DR 'B', ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune