आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE
SHRI RAMA KANTA PANDA, VICE PRESIDENT
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / **ITA No. 370/Hyd/2022**
(निर्धारण वर्ष / Assessment Year: 2019-20)

Asst. Commissioner of Income Tax, Central Circle-1(2), Hyderabad	Vs.	Sri Mahender Kumar Agarwal, Hyderabad [PAN No. ABQPA4124J]
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती द्वारा / Assessee by: Shri K.C. Devdas, AR
राजस्व द्वारा / Revenue by: Shri Kumar Aditya, DR

सुनवाई की तारीख/Date of hearing: 19/07/2023
घोषणा की तारीख/Pronouncement on: 22/09/2023

आदेश / **ORDER**

PER K. NARASIMHA CHARY, J.M:

Aggrieved by the order dated 30/06/2022 passed by the learned Commissioner of Income Tax (Appeals)-11, Hyderabad ("Ld. CIT(A)"), in the case of Mahender Kumar Agarwal ("the assessee") for the assessment year 2019-20, Revenue preferred this appeal.

2. Brief facts of the case are that the assessee is a Book Maker of Hyderabad Race Club, proprietor of Crow Gaming & Co and partner in M/s. AMR Constructions. On 04/03/2019, a search and seizure operation under

section 132 of the Income Tax Act, 1961 (for short "the Act") was carried out in the case of assessee and the assessee had admitted additional income of Rs. 1 crore for the year under consideration and filed his return of income for the assessment year 2019-20 on 16/03/2020 admitting total income of Rs. 1,70,72,540/-.

3. Learned Assessing Officer completed assessment under section 143(3) of the Act by assessing the total income of assessee at Rs. 1,84,16,540/-. During the assessment proceedings, the learned Assessing Officer did not assign any incriminating material to the undisclosed income. The assessee also did not capitalize this income in the books, but merely paid taxes.

4. Subsequently, learned Assessing Officer initiated penalty proceedings under section 271AAB of the Act on account of additional income of Rs. 1 crore admitted by the assessee and by order dated 26/03/2022, levied a penalty of Rs. 60 lakhs under section 271AAB of the Act.

5. In appeal, assessee contended before the learned CIT(A) that no incriminating material was found during the search and the additional income was admitted to buy peace and to avoid litigation and the same is not a tangible income as the said income has not been credited in its books nor has come out of any incriminating evidence seized during the course of search. It was further contended that the assessee has not taken any entry of the undisclosed income in his books nor the same is corroborated by any increase in the books or any incriminating material nor does the same pertains to any false expenditure claimed by the assessee, and therefore, the surrendered amount does not fall within the definition of "undisclosed income" within the meaning of clause (c) of explanation to section 271AAB of the Act.

6. Learned CIT(A), on examination of the entire material before him reached a conclusion that the learned Assessing Officer has not pointed out any specific discrepancies in the books of the assessee pertaining to the additional income of Rs. 1 crore nor did he highlight any seized material and, at the same time, there is no finding from any seized material indicating that there is any concealment of income unearthed in the course of search or post search proceedings. He further found that the undisclosed income admitted by the assessee does not fall in any of the categories of the definition of "undisclosed income" since the assessee has neither taken entry of the undisclosed income in its books nor the same is corroborated to any increase in the books or any incriminating material nor does the same pertains to any false expenditure claimed by the assessee. Learned CIT(A) further found that the learned Assessing Officer did not bring out anything on record to prove that the undisclosed income pertains to any entry in the books of assessee or to any false expenditure claimed by the assessee and that there is no finding whatsoever to any incriminating material based on which the assessee had admitted additional income. Learned CIT(A), consequently, held that the learned Assessing Officer merely levied the penalty based on the admission made by the assessee without there being any discrepancies or incriminating material found or any undisclosed income unearthed in search proceedings and, therefore, the penalty levied under section 271AAB(1A) of the Act cannot be sustained within the ambit of the definition of "undisclosed income" provided in section 271AAB of the Act.

7. Aggrieved by such a finding and the consequential direction to delete the penalty, Revenue preferred this appeal. Learned DR submitted that the assessee in the statement given under section 131 of the Act on 01/05/2019, admitted the additional income in order to cover up the unrecorded income emanating from the noting contained in the seized scribbling pad and other unrecorded items of income from betting

business and the additional income disclosed by the assessee under section 132(4) of the Act is covered by the definition of "undisclosed income" as per clause (c) of explanation to section 271AAB of the Act when such income was admitted on the basis of noting contained in the season scribbling pad and other unrecorded items of income.

8. Learned DR placed reliance on the decision reported in the case of PCIT vs. Sandeep Chandok (2018) 93 taxman.com 405 (Allahabad) against which the SLP was dismissed by the Hon'ble Apex Court, Kermex Micro Systems (India) Ltd vs. DCIT (2014) 47 taxmann.com 375 (Andhra Pradesh) and Union of India vs. Dharamendra Textile Processors (2008) 174 Taxman 571 (SC).

9. Per contra, learned AR submitted that the alleged noting on the scribbling pad, extracted by the learned CIT(A) at page No. 18 of the impugned order is not at all referred to by the learned Assessing Officer to make any addition nor does the penalty order makes any reference to the same and, therefore, the Revenue cannot say that the said noting on a paper is incriminatory in nature. Further according to him, as a matter of fact, learned CIT(A) admitted to this fact and observed that only a loss of Rs. 17,833/- was mentioned on such paper and learned Assessing Officer has connected this piece of paper to the addition of Rs. 1 crore on the basis of the voluntary surrender of the assessee at the time of search operations. Since the assessee did not refer to any entry of the undisclosed income in his books, such a paper cannot be connected to the voluntary disclosure made by the assessee only to buy peace. With reference to clause (c) of explanation to section 271AAB of the Act, he submitted that as rightly observed by the learned CIT(A), this particular amount surrendered by the assessee voluntarily to purchase piece, does not fall in any of the categories mentioned therein.

10. Learned AR placed reliance on the decisions of PCIT vs. Shri Ramdass Motor Transport 238 ITR 177, PCIT vs. M/s Sri Ramakrishna Vihar 312 ITR 112, Padam Chand Pungliya vs. ACIT (2020) 113 Taxmann.com 446 (Jaipur-Trib), CIT vs. S.Khader Khan Sons (2008) 300 ITR 157 (Madras), and CIT vs. Harjeev Agarwal (2016) 70 taxmann.com 95 (Delhi).

11. We have gone through the record in the light of the submissions made on either side. It is a fact that at the time of search, a paper was found wherein a loss of Rs. 17,833/- was noted and according to the assessee, such a document contains the notice of payments on receivables on account of betting by various punters and the net amount was only a loss of Rs. 17,833/- and no discrepancy in respect of it was found by any authorities in respect of the figures mentioned therein. It is also an undisputed fact that the learned Assessing Officer did not refer to this piece of paper as incriminating document nor did he base the addition on the basis of this paper. Absolutely there is no connection, made out by the authorities, between this document, voluntary surrender of Rs. 1 crore by the assessee or the addition made by the learned Assessing Officer.

12. Case of PCIT vs. Sandeep Chandok (supra) relates to the assessment year 2014-15 and in that case the addition arose on the basis of the incriminating material found during the search. This is not so in the present case. In case of Kermex Micro Systems (India) Ltd vs. DCIT (supra), the addition made by the learned Assessing Officer on the basis of the voluntary statement made by the Managing Director of the company that such an amount represented unexplained expenditure, was challenged and the Hon'ble High Court held that when the ground do not reveal that the assessee retracted the admission, no deletion of addition can take place merely on the basis of the arguments of the lawyer. It is also not so in the case on hand. The decision reported in the case of Union of India vs. Dharamendra Textile Processors (supra) has also no relevance to the facts

of the case, since it relates to the caution whether “mens rea” is an essential ingredient for levying penalty.

13. In this case, the learned CIT(A), as a matter of fact, found that the alleged noting on a scribbling paper has not been connected to the addition of Rs. 1 crore and even the said noting only records a loss, but not any investment or otherwise. The basis for initiation of the penalty proceedings is the inclusion of Rs. 1 crore by the assessee in the computation of total income (income offered to tax to cover up deficiency, if any) as stated in the course of search. Answer to Question No. 8 in the statement recorded on 15/04/2019, assessee stated that to cover up all the deficiencies in the books of account of his business, he voluntarily admits additional income of Rs. 1 crore over and above his regular income for the assessment year 2019-20 and would file the returns of income by paying the taxes accordingly. As on that date, except the statement of the assessee there was no incriminating material that was unearthed in the search. In the case of PCIT vs. Shri Ramdass Motor Transport (supra) it was held that, in the absence of any incriminating material, any statement made under section 132(4) of the Act does not have any evidentiary value.

14. In the case of Ravi Mathur vs. Dy.CIT [IT Appeal No. 969 (JP) of 2017, dated 13-6-2018, it was held that it is a pre-condition for invoking the provisions of section 271AAB that the assessee admitted the undisclosed income in the statement under section 132(4) of the Act. The definition of 'un-disclosed income' is provided in section 271AAB of the Act itself and, therefore, the learned Assessing Officer in the proceedings under section 271AAB of the Act has to examine all the facts of the case and then arrive to the conclusion that the income disclosed by the assessee falls in the definition of ‘un-disclosed income’ as stipulated in the explanation to said section. The first question arises is whether the levy of penalty under section 271AAB of the Act is mandatory and consequential to the

disclosure of income by the assessee under section 132(4) of the Act or the learned Assessing Officer has to take a decision whether the given case has satisfied the requirements for levy of penalty under section 271AAB of the Act, and after examining the provisions of law, held that the penalty under section 271AAB of the Act is not a consequential act, but the learned Assessing Officer has to first initiate proceedings by issuing a show cause notice and after considering the explanation and reply of the assessee has to take a decision. This requirement of giving an opportunity of hearing itself makes it clear that the penalty under section 271AAB of the Act is not mandatory but the learned Assessing Officer has to take a decision based on the facts and circumstances of the case otherwise there is no requirement of issuing any notice for initiation of proceedings, but the levy of penalty would be consequential and only computation of the quantum was to be done by the learned Assessing Officer as in the case of levy of interest and fee under section 234A to E of the Act .

15. In the case of Padam Chand Pungliya vs. ACIT (supra), while considering similar facts to the facts of the case on hand, a Co-ordinate Bench of the Tribunal while following the decision in the case of Ravi Mathur vs. Dy.CIT (supra) held that unless and until the income so disclosed by the assessee falls in the definition of 'un-disclosed income' defined in explanation to section 271AAB of the Act, mere disclosure of additional income in the statement recorded under section 132(4) of the Act itself is not sufficient to levy penalty.

16. Under clause (c) of explanation to section 271AAB of the Act, the un-disclosed income is defined as any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewelry or other valuable article or thing or any entry in the books of account or other document or a transaction found in the course of search under section 132 of the Act, which has 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 otherwise not been disclosed to the principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of search; or any income of the specified previous year represented, either wholly or partly, by any enquiry 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.

17. In this case, from the beginning the assessee has been claiming that only to purchase piece, he has been disclosing additional income. As rightly pointed out by the learned CIT(A), the income disclosed by the assessee is not represented by any of the categories mentioned in clause (c) of explanation to section 271AAB of the Act, inasmuch as the assessee has never taken any entry of the un-disclosed income in its books nor the same is corroborated to any entry in the books or any incriminating material nor does the same pertaining to any false expenditure claimed by the assessee; and also that the learned Assessing Officer did not bring out anything on record to prove that the surrendered income pertains to any entry in the books of the assessee or to any false expenditure claimed by the assessee. It is also not the case of the Revenue that the assessee admitted the additional income on account of any incriminating material that was unearthed during the course of search.

18. In the circumstances, respectfully following the view taken by a Co-ordinate Bench in the case of Padam Chand Pungliya vs. ACIT (supra), we hold that the disclosure of additional income in the statement recorded under section 132(4) of the Act itself is not sufficient to levy penalty under section 271AAB of the Act until and unless income so disclosed by the assessee falls in the definition of undisclosed income defined in

explanation to section 271AAB(1) of the Act and, therefore, the findings of the learned CIT(A) cannot be interfered with. With this view of the matter, we dismiss the grounds of appeal of the Revenue.

19. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on this the 22nd day of September, 2023.

Sd/-	Sd/-
(RAMA KANTA PANDA)	**(K. NARASIMHA CHARY)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Hyderabad,
Dated: 22/09/2023

TNMM

Copy forwarded to:

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3. Pr.CIT(Central)-Hyderabad.
4. DR, ITAT, Hyderabad.
5. GUARD FILE

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