

**IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT**
**BEFORE MRS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER**

(through web-based video conferencing platform)

ITA No. 100/Rjt/2023

निर्धारणवर्ष/Assessment Year: 2013-14

Shri Dileshkumar Gordhanbhai Patel Venus Plaster Industries, Plot No.89, Ward-2B, Adipur (Kutch) PAN : AAOPP 4484 D	Vs.	The DCIT, Gandhidham Circle, Gandhidham (Kutch)
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
Assessee by :		Shri Mehul Ranpura, AR
Revenue by :		Shri Shramdeep Sinha, CIT-DR

सुनवाई की तारीख/Date of Hearing : 17.07.2023
घोषणा की तारीख /Date of Pronouncement: 11.10.2023

आदेश/ORDER

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER:

Present appeal has been filed by the assessee against the order of the Ld. Commissioner of Income-Tax (Appeals)-11, Ahmedabad [hereinafter referred to as "CIT(A)" for short] confirming the action of the Assessing Officer in levying penalty of Rs. 5,04,500/- under Section 271AAB of the Income Tax Act, 1961 [hereinafter referred to as "the Act" for short] for the Assessment Year 2013-14.

2. The ground raised by the assessee is as under:-

"The learned Commissioner of Income-tax (Appeals)-11, Ahmedabad [CIT(A)] erred on facts as also in law in confirming the penalty of Rs.5,04,500/- levied u/s 271AAB of the Act on the ad-hoc disclosure of Rs.50,45,000/-. The penalty confirmed u/s 271AAB of the Act is totally unjustified on facts as also in law, may kindly be deleted."

3. The primary argument of the learned Counsel for the assessee against the levy of penalty was that the income surrendered by the assessee during

search did not qualify as “undisclosed income” on which the penalty is leviable under Section 271AAB of the Act. The argument of the Id. Counsel for the assessee was that the undisclosed income as defined in Section 271AAB of the Act refers to tangible material found during search, and mere admission of the assessee dehors any material found during search would not qualify as undisclosed income for the purposes of levying penalty under Section 271AAB of the Act.

4. Having stated so, our attention was drawn to the brief facts of the case pointing out that consequent to search action on the assessee, under Section 132 of the Act, carried out on 17.01.2013, proceedings under Section 153A of the Act were initiated assessing the total income of the assessee at Rs.58,58,380/-. This included the admission of unaccounted income of Rs.50,45,000/- made by the assessee in the statement recorded during search. As per the Assessing Officer, since this was unearthed due to search and the assessee had made admission of unaccounted income, it qualified as undisclosed income as defined under Section 271AAB of the Act and accordingly penalty @ 10% thereon was levied amounting to Rs.5,04,500/-. The Id. CIT(A) confirmed this levy of penalty.

5. The argument of the Id. Counsel for the assessee that the amount surrendered did not qualify as undisclosed income rested on the fact that in the statement recorded of Shri Jitendra T. Aghara under Section 132(4) of the Act, he had voluntarily admitted the additional income of Rs.10.80 crores on ad-hoc basis on behalf of the family members and group concern as a whole, and out of this total disclosure of Rs.10.80 crores, Rs.50,45,000/- had been considered in the hands of the assessee for the year under consideration, to buy peace of mind. Ld. Counsel for the assessee pointed out that no incriminating material in the form of cash, gold, valuable or any document

or data evidencing the undisclosed income or asset was found. As far as the disclosure of Rs.50,45,000/- was concerned, he stated that the same was made to buy peace of mind and he pointed out that even the assessment order revealed that there was no basis to supplement this disclosure of the assessee. Not a single document was referred by the Assessing Officer in his assessment order nor any defects pointed out in the books of the assessee to substantiate the disclosure. He pointed out that Section 271AAB of the Act defined "undisclosed income" to mean any income represented by any money, bullion, jewellery or other valuable article/thing, entry in the books of accounts/documents or transactions found during the course of search under Section 132 of the Act which was not recorded in the books of accounts. Our attention was drawn to Section 271AAB, particularly *Explanation (c)* to section 271AAB of the Act, defining "undisclosed income" as under:-

271AAB.....

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(c) "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 Principal Chief Commissioner or Chief Commissioner or 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.

6. The Id. Counsel for the assessee further contended that in view of the facts as pointed by him above relating to the income disclosed by the assessee amounting to Rs.50,45,000/-, it was clear that it did not qualify as 'undisclosed income' for the purposes of levying any penalty thereon under Section 271AAB of the Act.

7. He further pointed out that the ITAT, Ahmedabad Bench, in the case of Mansukhbhai R. Sorathia Vs. JCIT (OSD) in ITA No. 46/Rjt/2012, had categorically held that the mere statement of the assessee making disclosure cannot lead to inference of availability of money, billion or assets. He pointed out that the ITAT had categorically held that these items or documents or transactions as mentioned in the definition of "undisclosed income" should have been found in physical form and only then the deeming fiction of concealment under Section 271AAB of the Act would be triggered for levy of penalty. He further pointed out that this proposition was reiterated by the ITAT, Rajkot Bench in another decision in the case of Shri Jitendra T. Aghara and others in IT(SS)A Nos. 01, 02 and 03/Rjt/2017 dated 01.06.2018, wherein, he stated that, for the said case also for the purposes of levy of penalty under Section 271AAA of the Act, wherein identical penalty in search cases on undisclosed income found, was levied. The Hon'ble ITAT, he pointed out, held that in the absence of any reference to tangible material, mere act of acquiesce of ad-hoc income under Section 132(4) of the Act cannot be covered within the sweep of "undisclosed income" for the purposes of imposition of penalty under Section 271AAA of the Act.

8. Resting his case on the facts and proposition of law as above, he contended that the confirmation of penalty under Section 271AAB of the Act by the Id. CIT(A), therefore, was contrary to law and needed to be deleted.

9. The ld. DR, however, supported the order of the ld. CIT(A) pointing out that ld. CIT(A) had passed a speaking order analyzing the provisions of Section 271AAB of the Act and further derived authority from two decisions of Hon'ble Supreme Court in the case of MAK Data Pvt. Ltd. Vs. CIT, [2014] 1 SCC 674 and in the case of Sandeep Chandak Vs. PCIT, [2018] 93 taxmann.com 406 (SC), wherein the Hon'ble Supreme Court had held that *"where assessee in the course of search admits undisclosed income and manner in which such income has been derived, then the provisions of Section 271AAB would automatically attract."* He further contended that as per the provisions of Section 271AAB of the Act, there was only an option to levy penalty either @ 10%, 20% or 30% with the Assessing Officer. He contended that there was no provision not to levy penalty; and as for the admission of the assessee qualifying as undisclosed income, he stated that, in terms of accounting, the provisions of Section 271AAB(3)(c)(a)(A) are satisfied as far as the definition of undisclosed income is concerned. As for the decision relied upon by the ld. Counsel for the assessee, he contended that while the decision in the case of Mansukhbhai Sorathia (supra) was referred in the context of Section 271(1)(c) of the Act, the decision in the case of Jitendra Aghara (supra) was sub-silentio on the decisions of Hon'ble Supreme Court in the case of MAK Data Pvt. Ltd. (supra) and Sandeep Chandak (supra). He, therefore, heavily supported the order of the ld. CIT(A) at paragraph No.7.1 to 7.7 of the order as under:-

"7.1 I have perused the Penalty order and the written submission filed by the appellant. On perusal of the grounds of appeal as well as written submission, it is seen that in this case, a search action u/s.132 of the Act was conducted on 17.01.2013 in the case of appellant and thus, the year under consideration i.e. A.Y 2013-14 was search year. Consequent to search u/s 132 of the Act carried out on 17.01.2013 the appellant had filed return of income on 30.09.2013 disclosing the total income at Rs.58,58,380/- which included admission of undisclosed income of Rs.50,45,500/-. Since, the additional income was unearthed due to search, penalty proceedings were initiated u/s

271AAB of the Act. The appellant has before the AO explained its views that since the admission being on ad-hoc basis penalty does not attract as no valuable in the form of money, jewellery or other valuable was found. The AO held that since the income disclosed was due to search penalty u/s 271AAB is leviable @ 10% of undisclosed income of the specified year and levied the same.

7.2 During the course of appellate proceedings, the appellant has filed written submission. In the submission, the appellant has contended that during the course of search action, the statement of the Shri Jitendra T. Aghara was recorded u/s. 132(4) of the Act, wherein, he has voluntarily admitted the additional income of Rs. 10.80 crores on ad-hoc basis on the behalf of the family members and group concern as a whole. Out of total disclosure of Rs.10.80 crores, Rs.50,45,000/- has been considered in the hands of the appellant for the year under consideration to buy peace of mind. The appellant has also stated that the AO has not discussed any issue on the basis of which disclosure of additional income made by the appellant is justified. The appellant has also relied on some case law.

7.3 In this regard, it is stated that on plain reading of section 271AAB of the Act, it is seen that the legislature has clearly written as "in a case where search has been initiated under section 132 on or after the 1st day of July, 2012 [but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President), the assessee shall pay by way of penalty, in addition to tax, if any, payable by him". In the instant case, search was carried out on 17.01.2013 and the appellant had admitted undisclosed income in statement recorded us.132(4) of the Act, assessee has substantiated the manner in which undisclosed income is derived and has paid taxes along with interest on or before specified date, therefore, penalty u/s 271AAB(1)(a) of the Act was rightly levied by the AO.

7.4 Further, the appellant's claim for levy of penalty u/s 271AAB, the assets must fall within the definition of 'undisclosed income' as defined u/s 271AAB of the Act, it is further stated that hon'ble courts have also held that the penalty can very well be levied on the undisclosed income, on or before specified date mentioned in the provisions of clauses (a) and (b) of 271AAB(1) of the I.T. Act. It is observed that decisions relied upon by appellant are pertaining to provisions of section 271(1)(c) of the Act whereas present penalty has been levied u/s 271AAB of the Act. Thus, ratios of such decisions are not applicable to appellant's case. Therefore, the claim of the appellant is not correct.

7.5 With regards to buy peace of mind, reliance is placed on the decision of the Hon'ble Supreme Court of India in the case of MAK Data Pvt. Ltd. vs. Commissioner of Income tax [2014] 1 SCC 674 wherein Hon'ble court

observed that "the AO, in our view, shall not be carried away by the plea of the assessee like 'voluntary disclosure', 'buy peace', 'avoid litigation', 'amicable settlement' etc, to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income."

7.6 Reliance is also place on the Hon'ble Supreme Court decision in the case of Sandeep Chandak vs. Principal Commissioner of Income-tax, Kanpur [2018] 93 taxmann.com 406 (SC)/[2018] 255 Taxman 367 (SC) where Hon'ble Supreme Court held that "Where assessee in course of search admits undisclosed income and manner in which such income has been derived, than provisions of section 271AAB would automatically attract". The head note of the said judgement is as under:-

"Penalty where search had been initiated (Applicability of) - Assessment year 2014-15 - A search was carried out in case of assessee in course of which he made a statement admitting certain undisclosed income - Assessing Officer added said amount to assessee's taxable income - Thereupon, Assessing Officer issued a notice for initiating penalty proceedings to which assessee submitted his reply- Assessing Officer having rejected assessee's explanation, passed a penalty order under section 271AAB Tribunal proceeding on presumption that penalty proceedings had been initiated under section 271(1)(c), set aside penalty order - High Court took a view that where assessee in course of search admits undisclosed income and manner in which such income has been derived, than provisions of section 271AAB would automatically attract - High Court further opined that since opportunity of hearing as prescribed under section 271AAB had been given to assessee, penalty order passed by Assessing Officer was to be restored - Whether on facts, there was no ground to interfere with impugned order passed by High Court and, therefore, instant petition was to be dismissed-Held, yes [Para 2] [In favour of revenue]."

7.6.1 It is important to mention here that the appellant group had admitted undisclosed income amounting to Rs. 10.80 crores on the basis of the documents found and seized during the course of search proceedings and even given statement u/s. 132(4) of the Act that he will pay the taxes on it on or before the specified date mentioned in the provision of section 271AAB. Thereafter, out of the total disclosure, the appellant has partly offered additional income of Rs.50,45,000/-in his return of income and paid tax on it before the specified date mentioned in the provision of section 271AAB. Therefore, provisions of section 271AAB would automatically attract in the case of appellant as held by Hon'ble courts cited supra.

7.7 In view of above discussion and factual matrix of the case, penalty levied by AO u/s.271AAB for Rs.5,04,500/- on undisclosed income of Rs.50,45,000/- is confirmed. Thus, the grounds of appeal no. 3 is dismissed."

10. We have heard the contentions of both the parties. The issue in the present case relates to levy of penalty under Section 271AAB of the Act. This penalty was levied on the income voluntarily surrendered by the assessee amounting to Rs.50,45,000/-. It is a fact on record that other than the surrender made by the assessee there was no tangible material or document or any entry found during search on the assessee substantiating the admission of the assessee.

11. For adjudicating the issue it is relevant to reproduce the provisions of Section 271AAB of the Act, which read as under:-

271AAB. (1) The Assessing Officer [or the Commissioner (Appeals)] 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 July, 2012 but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

- (a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such 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) on or before the specified date—
 - (A) pays the tax, together with interest, if any, in respect of the undisclosed income; and
 - (B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;
- (b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—
 - (i) in the course of the search, in a statement under sub-section (4) of [section 132](#), does not admit the undisclosed income; and
 - (ii) on or before the specified date—
 - (A) declares such income in the return of income furnished for the specified previous year; and

(B) pays the tax, together with interest, if any, in respect of the undisclosed income;

(c) a sum computed at the rate of sixty per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).

(1A) The Assessing Officer [or the Commissioner (Appeals)] 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 date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

(a) a sum computed at the rate of thirty per cent of the undisclosed income of the specified previous year, 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) on or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of sixty per cent of the undisclosed income of the specified previous year, if it is not covered under the provisions of clause (a).

(2) No penalty under the provisions of [section 270A](#) or 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) or sub-section (1A).

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

Explanation.—For the purposes of this section,—

(a) "specified date" means the due date of furnishing of return of income under sub-section (1) of [section 139](#) or the date on which the period specified in the notice issued ⁴²[under [section 148](#) or under [section 153A](#), as the case may be,] for furnishing of return of income expires, as the case may be;

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

(i) which has ended before the date of search, but the date of furnishing 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 date of search; or

(ii) in which search was conducted;

(c) "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 Principal Chief Commissioner or Chief Commissioner or 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.

12. A bare perusal of the above would reveal that penalty under Section 271AAB of the Act is levied on undisclosed income found during search, which has been defined in the Explanation (c), as relating to 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 of the Act. The term "undisclosed income" has been defined likewise in Explanation (a) to Section 271AAA of the Act also, which also provides for levy of penalty in searches conducted after 01-06-2007 and pertaining to years where returns are pending to be filed. *Explanation 5A* to Section 271(1)© of the Act also provides for levy of penalty on such material/things and documents found during searches conducted after 01-06-2007 but in relation to years where assessee has failed to disclose such incomes in returns already filed. Penalty under both these sections is levied in identical facts and circumstances of undisclosed income by way of any asset or any such tangible material or document or entry discovered during search. We have noted that the scope of levy of penalty has been repeatedly interpreted by the ITAT to include only tangible material found during the search. The ITAT, Rajkot Bench in the two cases cited by the assessee above has categorically held that mere admission of the assessee dehors any material found during search would not qualify as undisclosed income for the purposes of levying penalty thereon. Therefore, in the facts

of the present case, where admittedly the assessee had voluntarily surrendered income dehors any tangible material/ thing otherwise found during search, the ratio laid down in the two decisions of the ITAT, Rajkot Bench will squarely apply to the present case. The surrender made by the assessee, therefore, we hold does not qualify as undisclosed income. We completely agree with the Id. Counsel for the assessee on this count and hold, therefore, that the penalty levied in the present case u/s 271AAB of the Act is not sustainable in law.

13. The arguments of the Id. DR do not address this specific requirement of the undisclosed income being found during the search in tangible form. Therefore all his arguments merit no consideration at our end. The decision of Hon'ble Supreme Court cited by him in the case of MAK Data Pvt Ltd (supra) has not been rendered in the context of levy of penalty under Section 271AAB of the Act, but on levy of penalty under Section 271(1)(c) of the Act on income found during survey. The decision in the case of Sandeep Chandak (supra) addresses the aspect of penalty under Section 271AAB being leviable on fulfillment of all conditions specified under the said section, i.e. where incriminating material is found during search, the assessee admits undisclosed income and specifies the manner in which such income has been derived, even if no satisfaction is recorded by the Assessing Officer during assessment proceedings. The said decision does not deal with the issue as to what would qualify as undisclosed income in terms of its definition in the *Explanation (c)* to Section 271AAB of the Act. Therefore, this decision of the Hon'ble Apex Court, we hold, is of no assistance to the Revenue. The other arguments of the Id. DR that the levy of penalty is automatic is also of no consequence since it does not address the primary issue as to whether the admission of the assessee qualified as undisclosed income for the levy of penalty under Section 271AAB of the Act. There is no dispute with the fact

that Section 271AAB of the Act proposes three different rates for levy of penalty i.e. 10%, 20% and 30%, but all subject to fulfillment of certain conditions mentioned, which includes the undisclosed income being found with the assessee. In the absence of fulfillment of the basic conditions, there cannot be any case of automatic levy of penalty under Section 271AAB of the Act as contended by the Id. DR. Therefore, we do not find any merit in the arguments made by the Id. DR before us and the same are all rejected.

14. In view of the above, we hold that, in the absence of undisclosed income found in the present case, the disclosure of Rs.50,45,000/- made by the assessee dehors any incriminating material found, was not amenable for levy of penalty under Section 271AAB of the Act. The penalty so levied of Rs.5,04,500/- is, therefore, directed to be deleted.

15. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 11/10/2023 at Ahmedabad.

Sd/-

(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

Ahmedabad; Dated 11/10/2023

**/

Sd/-

(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/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 प्रतिनिधिअधिकरण अपीलीय आयकर , /DR,ITAT, Rajkot,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,

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सहायक पंजीकार (Asstt. Registrar)
 आयकर अपीलीय अधिकरण
 ITAT, Rajkot