

IN THE INCOME TAX APPELLATE TRIBUNAL,
NAGPUR BENCH, NAGPUR

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER..

I.T.A. No. 32/Nag/2013.
Assessment Year : 2009-10.

M/s Naval Kishore Agarwal,
Nagpur.

PAN AAKPA8834M.

Appellant.

Asstt. Commissioner of Income-tax,
Vs. Central Circle-1(1), Nagpur.

Respondent.

Appellant by : Shri K.P. Dewani.
Respondent by : Shri A.R. Ninawe.

Date of Hearing : 27-03-2017.
Date of Pronouncement : 29th March, 2017.

ORDER.

PER SHAMIM YAHYA, A.M. :

This appeal by the assessee is directed against the order of learned CIT(Appeals)-I, Nagpur dated 15-10-2012 and pertains to assessment year 2009-10. The grounds of appeal read as under :

1. The order imposing penalty u/s 271AAA is illegal, invalid and bad in law.
 2. That on the fact and circumstances of the case the Learned Commissioner of Income Tax (Appeals) -1 erred in confirming penalty imposed u/s 271AAA of Income Tax Act, 1961 by Assistant Commissioner of Income Tax, Central Circle-1(1), Nagpur.
 3. The penalty imposed u/s 271AAA is unjustified, unwarranted & excessive.
2. Brief facts of the case are as under :

A search and seizure operation u/s 132(1) of the Income-tax Act, 1961 was carried out on 28-01-2009 at the business premises of the assessee. Assessment u/s 143(3) has been completed on 24-12-2010 on the basis of seized

material and penalty initiated u/s 271AAA. During the course of assessment proceedings AO has observed that the assessee had disclosed total additional income of Rs.2,21,00,000/- on various accounts. Rs.1,21,00,000/- was disclosed on account of non-verifiable sundry creditors, Rs.50,00,000/- on account of introduction of share application money in his company Fueico Coal India Ltd., Rs.30,00,000/- on account of excess cash and Rs.20,00,000/- on account of cash sales. Notice of penalty requiring assessee to show cause why penalty u/s 271AAA should not be levied was issued on 28-12-2010. During the penalty proceedings AO has held that the assessee could not specify the manner in which the undisclosed income has been derived and further could not substantiate the manner in which such income was derived. Therefore AO has levied penalty u/s 271AAA of Rs.22,10,000/- being 10% of the undisclosed income of Rs.2,21,00,000/- for assessment year 2009-10.

3. Upon assessee's appeal learned CIT(Appeals) noted that in a statement recorded u/s 132(4) during the course of search on 30-01-2004 from Shri Nawal Kishore Agrawal specific queries were raised regarding certain transactions. Learned CIT(Appeals) noted that Shri Nawal Kishore Agrawal has stated that he would be giving all these details subsequently. Further learned CIT(Appeals) noted that vide letter dated 27-02-2009 the group concerns have offered all undisclosed income. Learned CIT(Appeals) observed that no disclosure has been made at the time of statement recorded u/s 132(4). That the letter submitted by the assessee on 27-02-2009 before the A.D.I. does not have same legal basis as a statement recorded u/s 132(4). Learned CIT(Appeals) further noted that in the said letter the mode of earning such unaccounted income has not been specified. Hence he upheld the penalty u/s 271AAA.

4. Against this order, the assessee is in appeal before us.

5. We have heard both the counsel and perused the records. Learned counsel of the assessee submitted that the assessee has duly admitted in the course of

search the undisclosed income and duly substantiated the manner in which the undisclosed income was derived in the statement before the A.D.I. on 27-02-2009. That the assessee has honoured the declaration and paid taxes along with interest. Learned counsel further referred to the assessment order where it is mentioned that the search commenced on 28-01-2009 and date of conclusion was mentioned on 26-03-2009. Hence learned counsel submitted that the disclosure by letter dated 27-02-2009 is very much within the period of search. Hence learned counsel submitted that adverse inference cannot be drawn against the assessee for levying penalty u/s 271AAA. Further learned counsel placed reliance upon several case laws in this regard as under :

1. (2008) 299 ITR 0305 (Guj.)
CIT vs. Mahendra C. Shah
2. ITAT order in ITA NO.5261/0e1/2013 in the case of
Brij Bhushan Singal vide order dated 09/03/2015
3. ITAT order in ITA NO.1835/0e1/2013 in the case
of Sita Ram Gupta vide order dated 30/06/2014
4. ITAT order in ITA NO.3372/0e1/2011 in the case
of Mothers Pride Education Personna P. Ltd.
vide order dated 12/10/2012
5. ITAT order in ITA NO.6763/Mum/2011 in the case
of M/s. Kanakia Spaces Pvt. Ltd. vide order
dated 10/07/2013
6. (2012) 149 TTJ 0033 (Ctk.)
Ashok Kumar Sharma vs. OCIT
7. (2015) 152 ITO 0453 (Chd.)
ACIT vs. Munish Kumar Goyal
8. (2015) 37 ITR (Trib.) 0576 (Chd.)
Sunil Kumar Bansal vs. OCIT
9. ITAT order in ITA NO.711 to 715/Mum/2011 in
the case of Shri Uday C. Tamhankar vide order
dated 11/09/2015

10. ITAT order in ITA No.1433 and 1432/Pn/2013
in the case of Shri Arun S. Agrawal vide order
dated 26/06/2015
11. Hon'ble Bombay High Court order in ITA No.
76 of 2009 in the case of Mukesh Oedutta Gupta
vide order dated 03/09/2010

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6. Per contra learned D.R. relied upon the orders of the authorities below.
7. Upon careful consideration we find that we may gainfully refer to the provisions of section 271AAA :

“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.’.”

A reading of the above makes it clear that penalty u/s 271AAA would not be attracted if the assessee in the course of search makes a statement regarding the admission of undisclosed income, specifies and substantiate the manner in which the income has been earned and has paid tax along with the interest thereon. In the present case we find that the search commenced on 28-01-2009 and the date of conclusion of the search has been mentioned as 26-03-2009. The assessee vide letter dated 27-02-2009 has given the admission and given details of undisclosed income to the Addl. Director of Income-tax. In our considered opinion this factual aspect clearly brings out the fact that during the course of period of search when the search was subsisting, the assessee vide letter to the Addl. Director of Investigation has given the details of undisclosed income. Hence in view of the aforesaid facts, inference by the authorities below that the assessee has not disclosed the impugned income at the time of search is not sustainable. It is also noted that there is no dispute that the assessee has duly paid the taxes thereon. Further the learned CIT(Appeals) has drawn adverse inference that the assessee has not substantiated the manner in which the undisclosed income was earned. In this regard we note that the assessee has duly disclosed in the letter regarding the income being offered for taxation as undisclosed income which is as under :

i)	Share application in Fuelco for FY 2008-09	Rs. 74,50,000
ii)	Cash Sales not recorded in Nawalkishor Agraqwal FY 2008-09	Rs. 20,00,000
iii)	Assets more than liabilities & capital of Shri Nawal Kishor Agrawal FY 2008-09	Rs. 30,00,000
iv)	Sundry Creditors not verifiable in Shri Shyam Coal Services	Rs.1,21,00,000

8. From the above we find that the nature and manner in which the undisclosed income is earned is amply exhibited. Further we note that there is no query whatsoever having been asked by the Revenue authorities at any stage of the search or assessment to further specify the manner of earning the undisclosed income or substantiation thereof. In this regard we note that the provisions of section 271AAA has enormous similarities to section 271(1)(c) read with Explanation 5. In this connection we may gainfully refer to decision of ITAT Delhi 'E' Bench in ITA No. 337/Del/20013 in the case of Neerat Singal vs. ACIT order dated 24-06-2013 wherein it was held as under :

The relevant operative part of this order reads thus:-

"11. When we compare Explanation 5 to section _271(l)© of the Act with the provisions laid down u/s 271AAA of the Act we find a lot of similarity therein under which penalty is not attracted in a case of search on the undisclosed income. As per Explanation 5 to section 271 (1)© of the Act if he assessee in the course of search makes a statement under sub section (4) of section 132 that any money, bullion, jewellery or other valuable article or things found in his possession or under his control has been acquired out of his income which has not been disclosed so far in his return of . icode to be furnished before the expiry of time specified in sub section (1) of section 139 and also

specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income, then the assessee for such income will not be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income to attract the penalty therein. Similarly under the provisions of section 271AAA of the Act penalty is not leviable where search has been initiated u/s 132 on or after 1.6.2007 but before 1.7.2012, and the assessee in the course of search, in a statement under the sub section 4 of section 132, (i), admits the undisclosed income (ii) specifies and substantiates the manner in which such income has been derived, and (iii) pays the tax together with interest, if any, in respect of the undisclosed income. From the reading of both these penal provisions we find that one requirement is common or non attraction of the penal provisions' under both the sections i.e. (f the assessee in his statements recorded u/s 132(4) of the Act admits the undisclosed income and specifies in the statement the manner in which such income has been derived and pays the tax together with interest, if any, in respect of such income. The only additional requirement in the case of section 271AAA in this regard is that the assessee will also have to substantiate the manner in which the undisclosed income was derived besides specification of the manner in which such income was derived. The other difference is in the application of the provisions under both the sections. The penal provision u/s 271 (1)© under Explanation 5 thereto is applicable in such cases where search u/s 132 was initiated before 1.6.2007 whereas u/s 271AAA, the provisions therein are applicable in a case where search u/s 132 of the Act has been initiated on or after 1.6.2007 but before 1.7.2012. Thus the intention of the legislature is clear to this extent that in a case wherein search was initiated before 1.6.2007, provisions u/s 271 (1)© will be applicable and in search initiated after 1.6.2007 (but before 1.7.2012) provisions u/s 271AAA of the Act will be applicable. These provisions are thus not applicable simultaneously but these are period specific. As discussed above, the only additional requirement for non [fraction of penal provision u/s 271AAA of the Act in comparison to this u/s 271 (1)© is that besides specifying the manner in which the admitted an undisclosed income has been derived, the assessee will also have to substantiate this manner. In view of this relative study of both the provisions when we go through the decisions relied upon by the Ld. AR, we find that in the case of ACIT vs. GEBILAL Kanhialal (HUF) (supra) before the Hon'ble Supreme Court the Karta of the assessee HUF had

made a statement u/s 132 (4) admitting ITA No.337/Del/2013 9 concealed income in the course of search and specified the manner in which such income stood derived. In this statement the Karta also surrendered an amount of Rs. 42,32,000/-. The Karta however neither filed return of income u/s 139 (1) on due date nor paid due tax on the surrendered income. Later on he also retracted from his statement recorded u/s 132(4) about surrender. The Hon' ble Supreme Court after deliberating in detail on different Explanations to section 271 (1)© has been pleased to hold that the assessee was entitled to immunity under clause (2) of Explanation 5 to section 271 (1)© of the Act. In that case failure to file return of income on 31 st July 1987 and failure to pay tax thereon was the mere reason relied upon by the department to deny to the assessee the benefit of immunity under clause (2) of Explanation 5 to section 271 (1)© of the Act. According to the department the assessee had complied with all the conditions of clause 2 of Explanation 5 except payment of tax in time. Hon'ble Supreme Court pleased to hold that no time limit has been prescribed for payment of tax under clause 2 of Explanation 5 and the assessee having paid tax upto the date of payment in respect of the undisclosed income surrendered by it in the course of search, all the three conditions laid down in clause 2 of Explanation 5 to section 271(1)© stood fulfilled and therefore the assessee is entitled to immunity under clause (2) of Explanation 5 to section 271(1)© of the Act. In the case of CIT vs. Radha Kishan Goel (supra) before the Hon 'ble Allahabad High Court the issue raised was as to whether mere non-statement of manner in which undisclosed income was derived would make Explanation 5 (2) of section 271(1)© inapplicable. The further question raised a as to whether in a case manner in which income has been derived has not been stated in the statement u/s 132(4) but is acted subsequently, that amounts to compliance with Explanation 5 (2) to section 271 (1)© and no penalty would be leviable under said section .. Both these questions have been replied in affirmative in the decision of the H on' ble Allahabad High Court. As per the decision mere non statement of manner which undisclosed was derived would not make Explanation to section 271(l)© inapplicable. Similarly in a case manner in which income has been ITA No-3371Del/2013 10 derivedd has not been stated in statement u/s 132(4) but is sta ted subsequently that amounts to compliance with Explanation 5 (2) to section 271(1)© and no penalty would be leviable. Similarly in the case of CIT vs. Mahendra G. Shah before the Hon' ble Gujarat High Court the basic requirement for immunity form the levy of penalty under Explanation 5 to section 271 (1) © of the Act has been discussed as per which the first requirement is disclosure in statement made u/s 132(4) and payment of

tax before the assessment was completed. Following ratio laid down in this decision of Hon'ble Gujarat High Court, Pune Bench of the Tribunal in the case of DCfT vs. Shri Inderchand Surajmal Bothra (supra) wherein penalty u/s 271(1)© was levied held that it is not required to specify the manner in which the income was earned in respect of the amount offered to tax in the return of income filed to search action by paying taxes thereon for adopting immunity from penalty under Explanation 5 of section 271(A) (C) of the Act. The Cuttack Bench of the Tribunal in the case of Shri Ashok Kumar Sharma (HUF) and others vs. DCIT (supra) wherein penalty u/s 271 AAA was levied the assessee had disclosed concealed income while giving statement u/s 132 of the Act during the course of search and had paid the tax thereon and showed the said undisclosed income filed under the head "income from business" and department had accepted these returns and accordingly passed the assessment order. Penalty u/s 271AAA was levied. It was held that undisputedly the assessee had shown the undisclosed income under the head "income from business" in the returns filed by them and that was accepted by the department by passing the assessment orders accordingly, therefore the case of the assessee falls exactly within the purview of sub section 2 of section 271AAA. Thus the impugned penalty levied contrary to the provisions contained in section 271AAA (2) is not sustainable. The penalty was accordingly deleted. In the case of Shri Pramod Kumar Jain and another vs. ICfT (supra) before the Cuttack Bench of the Tribunal, the assessee had disclosed the unaccounted income but had failed to specify the manner in which such income had been derived. The department accordingly levied penalty u/s 271AAA of the Act. The same ITA No-337/Del/2013 11 was upheld by the first appellate authority. The Tribunal has however deleted the penalty on the basis that there is no prescribed method to indicate the manner in which income was generated where the definition of "undisclosed income" has been defined in the Act itself when no income of the specified previous year represented "either wholly or partly" which onus lay upon the assessee stood discharged. The Delhi Bench of the Tribunal in a recent decision in the case of Mother Pride Education Personna Pvt. Ltd., vs. DCIT (supra) while placing reliance on an earlier decision in the case of Smt. Raj Rani Gupta (supra) and following the ratio of the decision of Hon'ble High Courts in the case of CIT vs. Radhi Kishan Goel (supra) (All) and CIT vs. Mahendra C. Shah (supra) (Guj) has deleted the penalty. The Hon'ble Allahabad High Court in the case of CIT vs.

Radha Kishan Goel (supra) has been pleased to hold that u/s 132(4) of the I. T. Act 1961 unless the authorized officer puts specific question with regard to the manner in which income has been derived, it is not expected from the person to make a statement in this regard and in case in the statement the manner in which income has been derived has not been stated but has been stated subsequently, that amounts to the compliance with Explanation 5 (2) to Section 271 (1) (C) of the Act. It was further held that in case there is nothing to the contrary in the statement recorded u/s 132(4) of the Act in the absence of any specific statement about the manner in which such income has been derived, it can be inferred that such undisclosed income was derived from the business which he was carrying on or from other sources. The object of the provision is achieved by making the statement admitting the non-disclosure of money, bullion, jewellery etc. It was thus held that much importance should not be attached to the statement about the manner in which such income has been derived. It can be inferred on the facts and circumstances of the case, in absence of anything to the contrary. Therefore, mere non statement of the manner in which such income was derived would not make Explanation 5 (2) inapplicable, held the Hon' ble High Court.

12. The Hon 'ble Gujarat High Court in the case of CIT vs. Mahendra C. Shah has been pleased to held as under :-

“In so far as the alleged failure on the part of the assessee to specify in the statement u/s 132(4) of the Income Tax Act 1961 regarding the manner in which such income has been derived, suffice it to state that when the statement is being recorded by the authorized officer it is incumbent upon the authorized officer to explain the provisions of Explanation 5 in its entirety of the assessee concerned and the Authorized Officer cannot stop short at a particular stage so as to permit the Revenue to take advantage of such a lapse in the statement. The reason is not far to seek. In the first instance, the statement is being recorded in the question and answer form and there would be no occasion of an assessee to stage and make averments in the exact format stipulated by the provisions considering the setting in which such statement is being recorded, as noted by the Allahabad High Court in the case of CIT Vs. Radha Kishan Goel (2005) 278 ITR 454. Secondly, considering the illiterate, to be specific and to the point regarding the conditions

stipulated by exception no.2 while making statement u/s 132(4) of the Income tax Act, 1961. The view taken by the Tribunal as well as the Allahabad High Court to the effect that even if the statement does not specify the manner in which the income is derived, if the income is declared and tax thereon paid, there would be substantial compliance not warranting any further denial of the benefit under exception no.2 in Explanation 5 is commendable. "

13. In the present case before us during the course of search at the residential premises of the assessee on 4.3.2010 certain documents relating to the transactions in properties undertaken by the assessee were found and seized as per page nos. 4 & 5 of Annexure A3 in SR4. As per such papers the assessee had an outstanding sum of Rs. 3 crore and Rs. 6 crore from various person which was duly disclosed as additional income for asstt. year 2010-11 while making statement u/s 132(4) of the Act. In addition, as per page No. 6 of Annexure A3 in SR4 the assessee had paid in cash a sum of Rs. 17,86,57,781/- for purchase of land by Bhushan Steel Limited (however at the time of statement recorded it was ITA no-337/Del/2013 13 inadvertently mentioned as Bhushan Energy Ltd.) which was also declared as additional income for the asstt. year 2010-11 while making a statement u/s 132(4) of the Act. As per the said statement the assessee had admitted that he had entered into various forward/speculative and property transaction during the period from 1.4.2009 to 4.3.2010. 2010. Keeping in view the same an income of Rs. 125 crores arising out of the said transactions was declared in the statement recorded during the course of search which included the said amount as undisclosed. Subsequently the taxes due thereon were also paid and the same income declared in the return¹ of income filed for the assessment year 2010-11 was also accepted by the Department.

14. On having gone through the query raised while recording statement of assessee u/s 132(4) of the Act, we find substance in the contention of the Ld. AR that nowhere the authorized officer has asked a specific question with regard to the manner in which the undisclosed income has been derived. The relevant questions are question Nos. 4,5,6 and 7. For a ready reference these questions and reply by the assessee thereto are being reproduced hereunder:-

4 For facility of reference and as in aid for further analysis and discussion the relevant part of the statement recorded during the course

of search is as follows:-

Q 4. I am drawing your attention to annexure A-3 at Page No-6. Please go through the same and explain the content thereof?

Ans. This paper depicts details regarding purchase of various lands on various dates by MIs Bhushan Energy Ltd in Kolkata. As mentioned in this paper in the entire transaction an amount of Rs. 1786577811- was paid in cash on 0210512009. This cash was paid out of my own unaccounted ITA No-3371De112013 14 funds which was never I disclosed for taxation purpose. I hereby accept the above amount to be my unaccounted income in the shape of investment in the current financial year and the same is offered for taxation.

Q5. I am drawing your attention towards annexure A-3 at Page NO-5 found from your residence, please explain to whom this paper belongs and under whose hand writing this has been written. Please go through the same and explain the content thereof?

Ans. Yes, I accept that this sheet of paper was found from my bed room at this premise, I own this paper and all the contents of this paper are written by me only. The notings on this paper depicts the fact that I have advanced certain amounts to some person on different dates. The details of which is furnished below:-

List of advances outstanding on 31.01.2010

Atma Ram	11.0 Cr
Shhiv Prakash	15.0 Cr
Devender Kumar	17.0 Cr
Prem Singh	6.0 Cr
Kundan Singh Negi	9.5 Cr
Prembir Singh	5.5 Cr
Sureinder Singh	5 Cr

69.0 Cr

This is the amount given by me to the above persons during the current financial year outstanding as on 31.01.2010.

Q.6 What is the source of this amount of R. 69 crores?

Ans. The above amount of Rs.69 crores is my unaccounted income for the current financial year generated from undisclosed sources. By means of ITA No.337/Del/2013 15 t his statement I hereby accepted the

above amount of Rs. 69 Cr to be my unaccounted income from the current F Y and offer it for taxation.

Q.7. I am drawing your attention towards annexure-A-3 at page NO-4 found from your residence. Please explain to whom this paper belongs and under whose hand writing this has been written. Please go through the same and explain the content thereof?

Ans. Yes, I accept that this sheet of paper belongs to me, I own this paper and all the contents of this paper have been written by me only. The notings on the paper depicts the fact that I had advanced an amount of Rs.3.0 cr on 9.6.2009 for the purpose of purchase of property at Q1- A, Hauz Khias Enclave, New Delhi. In respect of this amount I hereby state that this amount is my unaccounted income not offered for taxation for the current financial year.

On the basis of my reply to questions 5,6 and 7 I reiterate to have accepted a total amount of Rs. 90Cr (Rupees Ninety crores only to be my unaccounted income for the current financial year, which I hereby offer for taxation.

15. We find further that vide its reply dated 03.6.2010, addressed to the Asstt. Director of Income Tax (Investigation) and dated 25/7/2011 and 20/6/2012 to the Asstt. Commissioner of Income Tax the assessee has tried to explain the undisclosed income of Rs. 125 crores surrendered by the assessee in his statement recorded u/s 132(4) of the Act. The contents of para No.1 & 2 of the letter dated 25.7.2011 are being reproduced hereunder :-

(1) With regard to Your Honour's query regarding income of Rs.125 crores for F.Y. 2009-10 disclosed during the course of search u/s 132, it is submitted that during the course of the said search at the residential premises of the Assessee on 04 March 2010 certain documents relating to transactions in properties undertaken by him were found as per page Nos. 4 & - of Annexure A-3 in SR- 4. As per the said papers the Assessee had an outstanding of a sum of Rs. 3,00,00,000/- and Rs. 69,00,000/- from various persons which were declared as additional income of AY 2010- 1\2011 while making a statement u/s 132(4) of the Income-tax Act, 1961. In addition, as per page No-6 of Annexure A-3 in SR-4, the Assessee had paid in cash a sum of Rs. 17,86,57,7811- for purchase of land by M/s Bhushan Steel Limited however, at the time of statement recorded it was inadvertently mentioned as M/s Bhushan Energy Ltd, which was also declared as additional income for A. Y 2010-2011 while making a statement u/s 132(4) of the Income-tax-Act, 1961.

(2) As per the statement recorded during the course of search the Assessee himself had admitted that he had entered into various forward/speculative

transactions and also transactions related to properties during the period from 1/4/2009 to 4/3/2010 i.e. Financial Year 2009-2010 relevant to Assessment Year 2010-2011. The said transactions were carried out in an unorganized manner and neither any accounting records nor any documentary evidence/support in respect of transactions/activities carried out were maintained. The only documentary evidence in respect of the said transaction was as per the page Nos. 4, 5 & 6 of Annexure-A-3 in SR- 4 and no other detailed record of transactions were either maintained or preserved. Keeping in view the situation mentioned above, the income of ITA No-337/Del/2013 17 Rs.125,00,000/- arising out of the said transactions was declared in the statement recorded during the course of search u/s 132 which included the said amount as per page Nos. 4, 5 & 6 of Annexure A-3 in Sr-4. Subsequently, the taxes due thereon were also paid and the said income declared in the return of income filed for A.Y 2010-11.

16. In view of above facts of the present case wherefrom it is evident that during the course of search proceedings the authorized officer of the department had not raised any specific query regarding the manner in which the undisclosed income has been derived and on the contrary the assessee has tried to explain the earning of the undisclosed income in question in its reply during the course of recording of his statement u/s 132(4) of the Act and thereafter. We thus respectfully following the ratio of above cited decisions of Hon'ble Allahabad High Court and Hon'ble Gujarat High Court hold that in absence of query raised by the authorized officer during the course of recording of statement u/s 132 (4) about the manner in which the undisclosed income has been derived and about its substantiation, the AO was not justified in imposing penalty u/s 271AAA of the Act specially when the offered undisclosed income has been accepted and due tax thereon has been paid by the assessee. We thus while setting aside orders of the authorities below in this regard direct the AO to delete the penalty of Rs. 12,50,00,000/- levied u/s 271AAA of the Act. The ground is accordingly allowed. "

9. Further more we may also refer to the decision of Hon'ble Allahabad High Court in the case of Radha Kishan Goel 278 ITR 454 as under :

" Under Section 132(4) of the Income Tax Act, 1961, it is the authorized officer, who examines on oath any person, who is found to be in possession or control of any books of accounts, documents, money, bullion, jewellery or other valuable article or thing, therefore, it is for the authorized officer to record the statement in his own way. Therefore, it is not expected from the person to

state those things, which are not asked by the authorized officer.

It is a matter of common knowledge, which cannot be ignored that the search is being conducted with the complete team of the officers consisting of several officers with the police force. Usually telephone and all other connections are disconnected and all ingress and egress are blocked. During the course of search person is so tortured harassed and put to a mental agony that he loses his normal mental state of mind and at that stage it cannot be expected from a person to pre-empt the statement required to be given in law as a part of his defence.

In these circumstances, we are of the view that under Section 132(4) of the Income Tax Act, 1961 unless the authorized officer puts a specific question with regard to the manner in which income has been derived, it is not expected from the person to make a statement in this regard and in case in the statement the manner in which income has been derived has not been stated but has been stated subsequently, that amounts to the compliance with Explanation 5(2) of the Income Tax Act, 1961. We are also of the opinion that in case e there is nothing to the contrary in the statement recorded under Section 132(4) of the Income Tax Act, 1961, in the absence of any specific statement about the manner in which such income has been derived, it can be inferred that such undisclosed income was derived from the business which he was carrying on or from other sources. The object of the provision is achieved by making the statement admitting the non disclosure of money, bullion, jewellery etc.

Thus, we are of the opinion that much importance should not be attached to the statement about the manner in which such income has been derived. It can be inferred on the facts and circumstances of the case, in the absence of anything to the contrary. Therefore, mere non statement of the manner in which such income was derived would not make Explanation 5(2) inapplicable."

10. Again Hon'ble Gujarat High Court in the case of CIT vs.

Mahendra C. Shah 298 ITR 305 has held as under :

"In so far as the alleged failure on the part of the assessee to specify in the statement under Section 132(4) of the Income Tax Act, 1961 regarding the manner in which such income has been derived, suffice it to state that when the statement is being recorded by the authorized officer it is incumbent upon the authorized officer to explain the provisions of Explanation 5 in its entirety to the assessee concerned and the authorized officer

cannot stop short at a particular stage so as to permit the Revenue to take advantage of such a lapse in the statement. The reason is not far to seek. In the first instance, the statement is being recorded in the question and answer form and there would be no occasion for an assessee to stage and make averments in the exact format stipulated by the provisions considering the setting in which such statement is being recorded, as noted by the Allahabad High Court in the case of CfT vs. Radha Kishan Goel (2005) 278 ITR 454. Secondly, considering the illiterate, to be specific and to the point regarding the conditions stipulated by exception no. 2 while making statement under Section 132(4) of the Income Tax Act, 1961. The view taken by the Tribunal as well as the Allahabad High Court to the effect that even if the statement does not specify the manner in which the income is derived, if the income is declared and tax thereon paid, there would be substantial compliance not warranting any further denial of the benefit under exception no. 2 in Explanation 5 is commendable."

11. We may also refer to the decision of ITAT, Nagpur Bench in the case of M/s Nandini Realtors Pvt. Ltd. in ITA No. 415/Nag/2014 wherein vide order dated 05-05-2016 it was held as under :

" We have heard both the sides at some length The facts narrated herein above are not in dispute that a search *uls* 132 was conducted and thereupon it was found that the assessee has purchased a land as per the registered deed wherein the consideration money was Rs.2,75,65,000/- . A statement *uls* 132(4) was recorded and after confronting with the evidences an amount of Rs.2 crores was offered being cash consideration over and above the sale consideration mentioned in the registered deed. As a consequence a revised return was filed. The assessment was completed *u/s* 143(3) and the income was assessed at Rs.2,15,60,620/- . We have been informed that the surrendered amount *u/s* 132(4) was accepted as such by the AO. There is no dispute that the tax on the amount offered had also been paid by the assessee. In the light of the above mentioned admitted facts we have perused the provisions of section 271AAA which has provided that a penalty at the rate of 10% is to be levied on the amount of undisclosed income found as a consequence of search *uls* 132 of LT. Act. However, vide sub-section (2) an exception is also provided that in a situation when the offer is made of the undisclosed income *uls* 132(4) of LT. Act and it is specified the manner

in which the income was earned and duly substantiated the manner in which the undisclosed income was derived and that the tax with interest was paid then out of the ambits of penalty provisions. Further it has also been brought on record that the income offered was duly disclosed in the books of accounts of the assessee and the manner in which the investment was made has also been duly incorporated in the accounts, moreover the tax was paid Hence we hereby hold that the learned CIT(Appeals) has rightly held that the question of levy of penalty u/s 271AAA was out of the scope of sub-section (1) but within the ambits of the exception prescribed under sub-section (2) of the said section. Resultantly the view taken by the learned CIT(Appeals) is hereby confirmed.”

12. Now we examine the present case on the touch stone of above said case laws. We find that during the course of search the assessee has duly disclosed the undisclosed income. The nature thereof has been duly exhibited as mentioned above. No further query whatsoever has been asked by the Revenue regarding further clarifying the manner of earning of income or substantiating the source thereof. In these circumstances, the ratio from the above case laws is clearly applied. In the above cases the ratio clearly emanates that where the assessee was not asked about the manner in which the income was earned and when he was not asked to substantiate the manner in which undisclosed income was arrived, penal provisions of section 271AAA are not attracted. We find that the case of present assessee is even on a better footing as the detail of undisclosed income has been duly specified with the nature and amount thereof. No further question regarding the manner in which income was earned and no question was asked to further substantiate the manner in which the undisclosed income was arrived at. Hence following the above case laws we hold that the assessee in this case cannot be held liable for penalty u/s 271AAA. Accordingly we set aside the orders of the authorities below and delete the penalty.

13. In the result, this appeal by the assessee is allowed.

Order pronounced in the Open Court on this 29th day of March, 2017.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER.

Nagpur,
Dated: 29th March, 2017.

Copy forwarded to :
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2. AC.I.T., Central Circle-1(1), Nagpur.
3. CIT(Appeals)-(C), Nagpur.
4. C.I.T.-I, Nagpur.
5. D.R., ITAT, Nagpur.
6. Guard File

True Copy

By Order

Assistant Registrar,
Income Tax Appellate Tribunal,
Nagpur Bench, Nagpur.

Wakode.