

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 1967/MUM/2014
Assessment Year: 2010-11**

Mr. Ravi Kiran Aggarwal
901, The Angel, 2 Krishna Sanghi
Path, Gamdevi
Mumbai – 400 007

Vs. ACIT Central Circle 47
Mumbai

PAN No. AABPA7797H

(Appellant)

(Respondent)

Assessee by: Shri Rishabh Shah, AR
Revenue by: Shri Arun Shenoy, DR

Date of Hearing : 06/02/2017
Date of pronouncement: 05/05/2017

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2010-11. The appeal is directed against the order of the Commissioner (Appeals) – 38, Mumbai and arises out of the order u/s 271AAA of the Income Tax Act, 1961 (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

- i. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in levying a penalty of Rs. 2,20,00,000/- u/s 271AAA of the Income Tax Act, 1961 being 10% of the additional income of Rs. 22,00,00,000/- without considering the facts & circumstances of the case.
- ii. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in levying a penalty on the additional income of Rs. 22,00,00,000/- without appreciating the fact that the appellant had

admitted the additional income during the search proceedings and offered the said income in the return of income and paid taxes along with interest only to buy peace of mind and avoid protected litigation.

3. In a nutshell, the facts of the case are that a search u/s 132 of the Act was conducted on 11.02.2010 at the premises of M/s. Orbit Corporation Ltd. (OCL) and its group concerns. The residence and business premises of the assessee were also covered during the course of search operation. The Assessing Officer (A.O.) issued notice u/s 153A to the assessee. In response to it, the assessee filed his return of income on 31.07.2010 declaring total income of Rs. 22,70,21,590/- which included a sum of Rs. 22,00,00,000/- declared as undisclosed income. The A.O. completed the assessment u/s 143(3) of the Act on 27.12.2011 by accepting the returned of income at Rs. 22,70,21,590/-. Then the A.O. levied penalty of Rs. 2,20,00,000/- being 10% of additional income of Rs. 22,00,00,000/- on the ground that the assessee had concealed income of Rs. 22,00,00,000/-. The reason given by the A.O. are (i) the search took place on 11.02.2010 and the assessee failed to specify the manner in which the undisclosed income was derived, the assessee also failed to substantiate the same, (ii) the profit on sale of flat at Ashok Tower amounting to Rs. 98,00,000/- has been offered in the hands of Shri Dinesh Agarwal on the date of search, which is based on the seized material found from the residence of Shri Dinesh Agarwal, (iii) the assessee has offered Rs. 22,00,00,000/- over and above his income pursuant to the incriminating documents / cash seized during search on 11.02.2010 and had no action taken place, the income of Rs. 22,00,00,000/- would have been concealed, (iv) only on 29.03.2010 in the statement recorded u/s 131 the assessee has stated that the undisclosed income is out of his betting income and sale of flat of

Ashok Tower, this statement is giving u/s 131 and not u/s 132(4) of the Act.

4. Aggrieved by the order of the A.O., the assessee filed an appeal before the learned CIT(A). The learned CIT(A) held that (i) the admission of undisclosed income of Rs. 22,00,00,000/- was on account of unexplained cash of Rs. 12,48,85,000/- found at the time of search and balance additional income was on account of incriminating document found during the course of search ; the admission of additional income based on the evidence unearthed during the course of search cannot be said to be a voluntary compliance (ii) since the assessee himself offered the additional income of Rs. 22,00,00,000/- on account of unexplained cash of Rs. 12,48,85,000/- and also on account of incriminating document found during the search, it is evident that he had concealed the particulars of income.

Therefore, the learned CIT(A) confirmed the penalty of Rs. 2,20,00,000/- levied by the A.O.

5. Before us, the learned counsel of the assessee relied on the decision in the case of *CIT vs. Mahendra C. Shah* (2008) 299 ITR 305 (Guj), *Sita Ram Gupta vs. ACIT* (2014) 151 ITD 449 (Del), *DCIT vs. Rajendra Prasad Dokania* (2012) 32 CCH 260 (Ahd-Trib), *DCIT vs. Tapadia & Kasliwal Associates* (2015) 44 CCH 518 (Pune-Trib), *Concrete Developers vs. ACIT* (2013) 34 taxman.com 62 (Nagpur-Trib), *AC – CC vs. M/s. Phoenix Mills Ltd.* (ITA No. 6190/Mum/2013 (Mum-Trib) and *ACIT vs. Gebilal Kanhaialal HUF* (2012) 348 ITR 561 (SC).

The learned counsel also relied on the order of the ITAT 'D' Bench, Mumbai in the case of Shri Dinesh Kiran Aggarwal for the A.Y. 2010-11 (ITA No. 2634/Mum/2013).

6. The learned DR relied on the order of the learned CIT(A) confirming the penalty of Rs. 2,20,00,000/- imposed by the A.O. u/s 271AAA.

7. We have heard the rival submissions and perused the relevant material on record. Now we discuss the decisions relied on by the learned counsel of the assessee.

In the case of *Mahendra C. Shah* (supra), search operation took place at the premises of one M/s. Dinal Gems, Bombay u/s 132 of the Act on 3rd July, 1987. Admittedly, the respondent assessee i.e. Mahendra C. Shah (MCS) was also present at that point of time at the said premises. A personal search of the assessee was undertaken and diamonds worth Rs. 5,06,712/- were found from the person of the assessee and seized. On 25.02.1991 the A.O. completed the assessment u/s 143(3) on a total income of Rs. 5,77,600/-, including the value of diamonds found from the possession of the assessee i.e. worth Rs. 5,06,712/-. The A.O. initiated penalty proceedings u/s 271(1)(c) of the Act and levied a penalty of Rs. 5,61,464/-. The penalty levied by the A.O. was confirmed in first appeal by the learned CIT(A). The assessee carried the matter in second appeal before the Tribunal, who deleted the penalty. The Hon'ble High Court held 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*'.

In *Sita Ram Gupta* (supra), the assessee filed the return of income for the A.Y. 2009-10 declaring income of Rs. 6,46,60,000/-. An amount of Rs. 6.40 crore was surrendered. The income was assessed at Rs. 6,49,39,700/-. The Tribunal allowed the appeal of the assessee stating that 'here undisputedly, the assessee has paid due tax on the admitted undisclosed income. The question of specifying the manner in which the undisclosed income was derived, stood duly answered by the assessee before the authorities. The same was accepted by the A.O., without variation, this fact itself evidencing the assessee having passed the test of section 271AAA of the Act. Then, there is no specific format/procedure prescribed in the Act for specifying and substantiating an undisclosed income.'

In *Rajendra Prasad Dokania* (supra), during the course of search the assessee had disclosed Rs. 50,00,000/- on unaccounted income. The assessee filed return of income of Rs. 62,80,280/- which included Rs. 50,00,000/- disclosed during the course of search. This was accepted by the A.O. in assessment order passed u/s 143(3). The A.O. then initiated penalty proceedings u/s 271AAA and imposed a penalty of Rs. 5,00,000/-. The Tribunal held that no penalty u/s 271AAA can be imposed where assessee has fulfilled all the conditions as laid down therein.

In *Tapadia & Kasliwal Associates* (supra), it is held that 'while payment of taxes, along with interest, by assessee is one of conditions precedent for availing immunity u/s 271AAA(2) , there is no time limit set out for such payments by assessee'.

In *Concrete Developers* (supra), a search and seizure operation u/s 132 of the Act was carried out by the Department in the business premises of the assessee-firm and residential premises of the

partners of the firm. A statement u/s 132(4) of 'N', partner of the assessee-firm was recorded by which the assessee offered for taxation an amount of Rs. 67 lakhs as unexplained cash and additional income of Rs. 1.53 crore in the hands of the firm. The A.O. completed the assessment u/s 143(3) and initiated penalty u/s 271AAA. The A.O. held that the assessee could not specify the manner in which the undisclosed income has been derived and therefore, levied a penalty of Rs. 22,10,000/- u/s 271AAA being 10% of the undisclosed income of Rs. 2,21,00,000/-. The Tribunal held that 'where assessee had disclosed certain amount during course of search and had paid tax thereon, filed return showing said income as business income and same had been accepted by A.O. under head business income, penalty under section 271AAA was not leviable'.

In *M/s. Phoenix Mills Ltd.* (supra), a search and seizure action u/s 132 was carried out at the business premises of the Phoenix Group on 20.02.2008. During the course of search, the Director of assessee-company disclosed an amount of Rs. 3,85,00,000/- in the statement recorded on oath u/s 132(4) on account of transactions with Runit Creations & Paridhi Udyog for purchase of tenancy rights. The A.O. imposed a penalty of Rs. 38,50,000/- u/s 271AAA on the ground that though the assessee had made the disclosure of income but it failed to specify the manner in which the income was earned and substantiate the manner in which undisclosed income was derived. In appeal the learned CIT(A) deleted the penalty which was upheld by the ITAT.

In *Gebilal Kanhaialal HUF* (supra), the Hon'ble Supreme Court held as under:

“6. *Explanation 5* is a deeming provision. It provides that where, in the course of search under Section 132, the assessee is found to be the owner of unaccounted assets and the assessee claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income for the purposes of imposition of penalty under Section 271(1)(c). The only exceptions to such a deeming provision or to such a presumption of concealment are given in sub-clauses (1) and (2) of *Explanation 5*. In this case, we are concerned with interpretation of clause (2) of *Explanation 5*, which has been quoted above. Three conditions have got to be satisfied by the assessee for claiming immunity from payment of penalty under clause (2) of *Explanation 5* to Section 271(1)(c). The first condition was that the assessee must make a statement under Section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in Section 139(1). Such statement was made by the Karta during the search which concluded on August 1, 1987. It is not in dispute that condition No.1 was fulfilled. The second condition for availing of the immunity from penalty under Section 271(1)(c) was that the assessee should specify, in his statement under Section 132(4), the manner in which such income stood derived. Admittedly, the second condition, in the present case also stood satisfied. According to the Department, the assessee was not entitled to immunity under clause (2) as he did not satisfy the third condition for availing the benefit of waiver of penalty under Section 271(1)(c) as the assessee failed to file his return of income on 31st July, 1987 and pay tax thereon particularly when the assessee conceded on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. However, no time limit for payment of such tax stood prescribed under clause (2). The only requirement stipulated in the third condition was for the assessee to "pay tax together with interest". In the present case, the third condition also stood fulfilled. The assessee has paid tax with interest upto the date of payment. The only condition which was required to be fulfilled for getting the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income upto the date of payment. Clause (2) did not prescribe the time limit within which the

assessee should pay tax on income disclosed in the statement under Section 132(4).”

7.1 We may clarify that the order of the Tribunal in the case of Shri Dinesh Kiran Aggarwal for the A.Y. 2010-11 has no implication in the context of penalty u/s 271AAA in the case of the present assessee as the only dispute therein is whether the addition of Rs. 98,36,000/- as income on account of profit earned on sale of flat at Ashok Tower ought to be in the hands of Shri Ravi Kiran Aggarwal (the assessee) or Shri Dinesh Kiran Aggarwal and the Tribunal has restored the issue to the file of the A.O. to examine the same.

7.2 At this juncture let us refer to the relevant statutory provisions. We find that section 271AAA is applicable if (a) a search is initiated u/s 132 on or after June 1, 2007, but before July 1, 2012 (b) there is some “undisclosed income” and (c) undisclosed income pertains to a “specified previous year”. What is the quantum of concealment penalty? If the above conditions are satisfied, 10% of “undisclosed income” of the “specified previous year” is concealment penalty which can be imposed by the A.O. in addition to tax. The aforesaid penalty of 10% of “undisclosed income” of the “specified previous year” can be avoided if the following conditions are satisfied:

- (i) If the assessee in a statement u/s 132(4) in the course of the search, admits the undisclosed income. Further, he specifies the manner in which such income has been derived.
- (ii) He substantiates the manner in which the undisclosed income was derived.
- (iii) He pays the tax, together with interest, if any, in respect of the undisclosed income.

If the above three conditions are satisfied penalty u/s 271AAA (i.e. 10% of “undisclosed income” of the “specified previous year”) can be avoided.

For the purposes of section 271AAA, “undisclosed income” has been defined so as to mean-

- a. Any income of the “specified previous years” 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 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 which has otherwise not been disclosed to the Commissioner before the date of the search.
- b. Any income of the “specified previous years” 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.

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 u/s 139(1) 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.

7.3 Now we discuss the statement on oath of the assessee recorded by the Dy. Director of Income Tax (Inv.), Unit VIII (3), Mumbai u/s

132 of the Act during the course of search on 11.02.2010. The relevant question and answer are extracted below.

Q. 16 During the course of search action the search party found cash of Rs. 12,69,85,000/-, kindly explain the source for the same.

Ans. I am not in a position to explain the source of said cash of Rs. 12,69,85,000/-. My cash balance as per my books of account is around 21 lacs. Thus, I accept that the amount found in my house is in excess of my cash balance and has not been properly reflected in the books of accounts. Thus I offer the above income of Rs. 12,48,85,000/- for adding up to my total income for the current financial year.

7.4 The above statement is substantiated by Shri Pujit Aggarwal, Managing Director of M/s. OCL and also the son of the assessee. Shri Aggarwal in his statement recorded on 12.02.2010 offered the cash of Rs. 12,48,00,000/- for taxation in the hands of his father i.e. Shri Ravi Kiran Aggarwal (the assessee). The relevant question and answer of the statement are extracted below:

Q. 10 During the course of search and seizure action u/s 132 at the residence of Shri Ravi Kiran Agarwal resident of Villa Orb 18th floor, Napeansea Road, Mumbai total cash amounting to Rs. 12,69,85,000/- was found from his premises, as per the book balance as on date in his individual capacity the cash balance reflects Rs. 23,16,000/-. You are requested to kindly reconcile the difference?

Ans. I would like to state that as a day to day practise the cash is handled/kept/utilised from either from my residence 9th Floor, The Angel, 2 Krishna Sanghi Path, Gamdevi, Mumbai – 400 007 or in my office 101, 1st Floor, The View, A.B. Road, Worli, Mumbai. Apart from these two addresses, I don't keep/store/utilise/cash from any other premise. As for the amount of Rs. 12,69,85,000/- found from the premise of my father, Mr. Ravi Kiran Agarwal I state with assurance that the entire sum found (Rs. 12,69,85,000/-)/seized (Rs. 12,45,00,000/-) from his premise during the course of action u/s 132 belongs to him and only him in his personal capacity. Not a single rupee found during the action, from my father's premise belongs to any of my other companies or me or to any of my other family members.

Q 12 Do you want to say anything more?

Ans. Yes. As mentioned in the answers of the above referred questions, I hereby summarise and state/confirm to declare a total amount to the tune of Rs. 58,35,05,065/- in the hands of the company M/s. Orbit Corporation

Ltd. I would be paying due taxes on the above mentioned additional income declared on or before 28th February, 2010. Further my father has also declared an additional income to the tune of Rs. 12.48 crores over and above his regular income. The cash seized may be adjusted against the demand of Shri Ravi Kiran Aggarwal as well as M/s. Orbit Corporation Ltd.

7.5 Thus the assessee has admitted undisclosed income of Rs. 12,48,85,000/- in his statement recorded u/s 132(4) of the Act on 12.02.2010. This is also substantiated by Shri Pujit Aggarwal, Managing Director of M/s. OCL. and the son of the assessee in his statement recorded during the course of search u/s 132(4) on 12.02.2010. A perusal of the statement extracted above indicates that the assessee has specified and substantiated the manner in which the above income was derived. As per the return of income filed on 31.07.2010, the assessee has paid advance tax of Rs. 4,00,00,000/- and TDS of Rs. 24,52,871/-

7.6 On a scrutiny of the factual score, it is noticeable that the assessee filed his return of income for the impugned assessment years on 31.07.2010 and offered Rs. 22,00,00,000/- over and above his income pursuant to the search dated 11.02.2010. The distillation of the decisions at para 7 here-in-above must now be applied to the facts of the case. The dispute then boils down to Rs. 9,51,15,000/- (Rs. 22,00,00,000/- minus Rs. 12,48,85,000/-).

7.7 In *STC vs. Modi Sugar Mills*, AIR 1961 SC 1047, p. 1051, his Lordship Shah, J. has said thus : "In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly

expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency”.

7.8 The ratio laid down in the decisions relied on by the learned counsel of the assessee mentioned at para 7 here-in-above is that penalty u/s 271AAA is not leviable if an assessee, in his statement recorded during the search u/s 132 of the Act, admits the undisclosed income, specifies and substantiates the manner in which it has been derived and pays the taxes due thereon, together with interest. We are guided by the ratio laid down in the above decisions. The search took place on 11.02.2010. The assessee offered income of Rs. 12,48,85,000/- in his statement recorded u/s 132(4) during the course of search on 12.02.2010. The assessee filed his original return of income for the A.Y. 2010-11 on 31.07.2010 offering income of Rs. 22,00,00,000/- for taxation. The break- up of it is as under:

AY 2010-11	Other Income	Rs.105,886,680
AY 2010-11	Ashok Tower Flat Income	Rs.14,113,320
AY 2010-11	Income from Horse Racing	Rs.100,000,000
		Rs.220000,000

7.9 In the upshot, as the assessee admitted the undisclosed income of Rs. 12,48,85,000/- during the course of search on 12.02.2010, he is liable to penalty u/s 271AAA @ 10% on the balance amount of Rs. Rs. 9,51,15,000/- only (Rs. 22,00,00,000/- minus Rs. 12,48,85,000/-). The A.O. is directed to impose penalty u/s 271AAA @ 10% on the balance amount of Rs. 9,51,15,000/- in place of Rs. 2,20,00,000/- computed by him.

8. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 05/05/2017

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-

(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai:

Dated: 05/05/2017

*Biswajit, Sr. P.S.***Copy of the Order forwarded to :**

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai