

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH öCö, KOLKATA  
[Before Shri Mahavir Singh, JM & Shri M.Balaganesh, AM]

**ITA No.1269/Kol/2012**  
Assessment Year : **2010-11**

(APPELLANT )	(RESPONDENT)
J.C.I.T., (OSD), Central Circle-XIII,-versus- Kolkata	M/s. Castal Extrusion Pvt.Ltd., Kolkata (PAN:AABCC 0160 B)

**ITA No.1270/Kol/2012**  
Assessment Year : **2010-11**

(APPELLANT )	(RESPONDENT)
J.C.I.T., (OSD), Central Circle-XIII,-versus- Kolkata	M/s. Beco Industries Pvt. Ltd., Kolkata (PAN:AABCB 3271 A)

For the Appellant : Shri Sanjay Mukherjee, JCIT  
For the Respondent : Shri Manish Tiwari, FCA

Date of Hearing : 22.09.2015.  
Date of Pronouncement : 24.09.2015.

**ORDER**

**Per Shri M.Balaganesh, AM**

These appeals of the revenue arise out of the order of the Learned CITA in Appeal No. 285/CC-XIII/CIT(A)C-II/11-12 dated 18.06.2012 passed against the order of assessment for the Asst Year 2010-11 in the case of Castal Extrusion Pvt Ltd and Appeal No. 286/CC-XIII/CIT(A)C-II/11-12 dated 18.06.2012 passed against the order of assessment for the Asst Year 2010-11 framed by the Learned AO u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the "Act"). As the issues involved are identical in both the years , they are disposed off together by a common order for the sake of convenience.

2. Shri.Manish Tiwari, FCA, the Learned AR argued on behalf of the assessee and Shri.Sanjay Mukherjee, JCIT, the Learned DR argued on behalf of the revenue.

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3. The only issue to be decided in these appeals are that whether in the facts and circumstances of the assessee the Learned CIT(A) is justified in deleting the penalty levied u/s 271AAA of the Act.

4. The brief facts of the case are that a search was conducted on 17.3.2010 at the premises of 96, Narkeldanga Main Road, Kolkata ó 700054. During the course of post search proceedings, Tania Construction Group made a total disclosure of Rs 31 crores in the disclosure petition dated 13.5.2010 made u/s 132(4) of the Act. The break up of undisclosed income is clearly mentioned in page 1 and 2 of the order of penalty levied u/s 271AAA of the Act wherein at Sl.No. 8 in the case of Beco Industries Ltd for the Asst Year 2010-11, a disclosure of Rs. 6.50 crores was made and at Sl. No. 9 in the case of Castal Extrusions Pvt Ltd for the Asst Year 2010-11, a disclosure of Rs. 5.25 crores was made. In the said disclosure, the manner of deriving the undisclosed income also has been duly stated as profit derived on commodity transactions and improper recording of accounts and expenses for both the concerns with concerned reference to seized documents. The Learned AO had clearly pointed out the contents of the said seized documents in Ref. TCLC/11 Pages 357 to 362 in the case of Beco Industries Ltd and pages 363 to 365 in the case of Castol Extrusions Pvt Ltd in pages 2 to 4 of the penalty order. The Learned AO levied penalty u/s 271AAA of the Act in the case of Castal Extrusions Pvt Ltd to the tune of Rs. 52,50,000/- and in the case of Beco Industries Pvt Ltd to the tune of Rs. 60,00,000/- being 10% of amount disclosed u/s 132(4) and subsequently in the return filed u/s 139(1) of the Act being the year of search. On first appeal, the Learned CITA deleted the penalty levied u/s 271AAA of the Act by holding that the assessee is entitled for immunity u/s 271AAA(2) of the Act as all the three conditions stipulated therein have been duly complied with by the assessee. Aggrieved, the revenue is in appeal before us on the following grounds:-

Castal Extrusion Pvt Ltd ó ITA No. 1269/2012

*“1. That on the facts and circumstances in the case, the Ld. CIT(A) has erred in law in deleting penalty of Rs.52,50,000/- imposed u/s 271AAA without considering that the assessee had failed to substantiate the manner in which the undisclosed income was*

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*derived and thereby had failed to fulfil all the conditions stipulated u/s 271AAA(2) of the Act.*

*2. That on the facts and in the circumstances in the case, the Ld. CIT(A) has erred in law in holding that the notings on the seized documents was enough to substantiate the manner in which the undisclosed income was derived as stipulated u/s 271AAA of the Act, without considering that neither the name of the broker through whom the transaction was arranged nor the details of payment received pursuant to these transaction and earning of income was recorded in the documents and the assessee has failed to substantiate the manner of deriving of the undisclosed income by furnishing any independent evidence.*

*3. That the Department craves leave to add, modify or alter any of the ground (s) of appeal and/or adduce additional evidence at the time of hearing of the case.”*

**Beco Industries Ltd ó ITA No. 1270/2012**

*“1. That on the facts and circumstances in the case, the Ld. CIT(A) has erred in law in deleting penalty of Rs.65,00,000/- imposed u/s 271AAA without considering that the assessee had failed to substantiate the manner in which the undisclosed income was derived and thereby had failed to fulfil all the conditions stipulated u/s 271AAA(2) of the Act.*

*2. That on the facts and in the circumstances in the case, the Ld. CIT(A) has erred in law in holding that the notings on the seized documents was enough to substantiate the manner in which the undisclosed income was derived as stipulated u/s 271AAA of the Act, without considering that neither the name of the broker through whom the transaction was arranged nor the details of payment received pursuant to these transaction and earning of income was recorded in the documents and the assessee has failed to substantiate the manner of deriving of the undisclosed income by furnishing any independent evidence.*

*3. That the Department craves leave to add, modify or alter any of the ground (s) of appeal and/or adduce additional evidence at the time of hearing of the case.”*

5. The Learned DR argued that though the assessee had complied with two conditions in section 271AAA(2) of the Act but had not complied with one of the conditions viz substantiating the manner in which undisclosed income was derived. Accordingly, he argued that the assessee is not entitled for immunity u/s 271AAA(2) of the Act. In response to this, the Learned AR argued that subsequent to the search operations, Tania Construction Group had made a total disclosure of Rs 31 crores u/s 132(4) of the Act comprising of 10 parties, the details of which have been duly stated in pages 1 & 2 of the penalty order u/s 271AAA. He stated that the assesses before this tribunal are mentioned in Serial Numbers 8 & 9. He further stated orally that in respect of other parties namely parties mentioned in serial numbers 1 -7 and serial number 10, on identical set of facts, the Learned AO had initiated penalty proceedings

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u/s 271AAA of the Act and dropped the same subsequently. He further argued that the assessee had duly substantiated the manner in which the undisclosed income was derived with specific reference to the seized documents which are elaborately detailed in pages 2 to 4 of the penalty order u/s 271AAA of the Act by the Learned AO. In the said disclosure statement, it is found that the manner in which the undisclosed income was derived has been stated as "profit on commodity transactions and improper recording of accounts and expenses" and from the seized documents reference in TCLC / 11 pages 357 to 365 for both the concerns, the details of commodity trading in metals i.e Aluminium which were not accounted in the books of the company has been duly linked. Thus it is clear that the manner of deriving the undisclosed income has been substantiated as derived from speculation of aluminium in commodity exchange as could be evident from the seized documents itself. We also find that the disclosure amount made by the assesses have been accepted as such by the Learned AO without making any addition thereon. Had the Learned AO not been satisfied with the assessee of not substantiating the manner of deriving the undisclosed income, nothing prevented him from making any addition to the said disclosure. The very fact that the disclosure figure has been accepted as such by the Learned AO goes to prove that the assessee had substantiated the manner in which the undisclosed income has been derived. Moreover, the assessee had made a conditional disclosure u/s 132(4) of the Act to purchase peace from the department and to avoid litigation on the premise that no penalty shall be levied on the assessee and its group. This disclosure was further supplemented by the assessee by declaring the same in the regular return filed u/s 139(1) of the Act for the Asst Year 2010-11, being the year of search. Reliance in this regard is placed on the decision of *CIT vs Careers Education and Infotech P Ltd (2011) 336 ITR 257 (P&H)*.

*"PENALTY – CONCEALMENT OF INCOME – SURRENDER OF INCOME DURING SURVEY – FINDING BY TRIBUNAL THAT THERE WAS NO MATERIAL FORM WHICH CONCEALMENT OF INCOME COULD BE INFERRED – PENALTY COULD NOT BE IMPOSED – INCOME-TAX ACT, 1961, s.271(1)(c).*

*In every case where surrender is made an inference of concealment of income cannot be drawn under section 58 of the Indian Evidence Act, 1872.*

*Where the assessee surrendered additional income during the course of an income-tax survey to buy peace with the Department and filed a revised return accordingly, and the*

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*Tribunal recorded a categorical finding that there was no material to infer concealment of income or furnishing of inaccurate particulars :  
Held accordingly, that penalty could not be imposed under section 271(1)(c) of the Income-tax Act, 1961.”*

It is also held by the Honøble Apex Court in the case of *CIT vs Suresh Chandra Mittal (2001) 251 ITR 9 (SC)* wherein their Lordships have observed that :

*“where the assessee has filed a revised return showing higher income and the assessee has surrendered the income after persistent queries by the Assessing Officer and where the revised return has been regularized by the Revenue, the explanation of the assessee that he has declared the additional income to buy peace of mind and to come out of vexed litigation could be treated as bona fide, accordingly the levy of penalty u/s 271(1)(c) was held to be not justified.”*

We find that there was no malafide intention on the part of the assessee to conceal the figures from the department while giving the disclosure statement u/s 132(4) of the Act. Now it is to be seen that whether the assessee had satisfied the cumulative conditions contemplated in section 271AAA(2) of the Act. For the sake of clarity, the provisions of section 271AAA(2) are reproduced here in below:-

- “271 AAA (2) Nothing contained in sub-section 91) 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 pays the tax, together with interest, if any, in respect of the undisclosed income”*

In our opinion, the assessee had duly complied with the cumulative conditions stipulated in section 271AAA(2) of the Act so as to get the immunity from levy of penalty thereon. We find that the levy of penalty u/s 271AAA of the Act cannot be made automatic pursuant to the search. We also find that the decision of the Honøble Apex Court rendered in the case of *MAK Data P Ltd vs CIT* reported in 358 ITR 593 (SC) is also distinguishable in the facts and circumstances of the case as in the case before the Honøble Supreme Court the immunity clause provided in section 271AAA(2) of the Act had not been discussed and moreover, the apex court was only dealing with the penalty u/s 271(1)(c) of the Act.

