

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,  
*IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH “B” KOLKATA*

Before **Shri Aby.T Varkey, Judicial Member** and  
**Shri Waseem Ahmed, Accountant Member**

**ITA No.289/Kol/2015**  
Assessment Year :2011-12

Sri Bhaskar Ghosh P-169, Arpan, Regent Estate, Kolkata-92 [ <b>PAN No.AGJPG 5536 A</b> ]	<b>V/s.</b>	DCIT, Central Circle-2(4), Aayakar Bhawan, Poorva, 110, Shanti Pally, Bye Pass, Near Ruby Hospital, Kolkata-107
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri S.M. Surana, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri G.H. Seema, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	05-07-2017
घोषणा की तारीख/Date of Pronouncement	01-09-2017

**आदेश /O R D E R**

**PER Waseem Ahmed, Accountant Member:-**

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-20, Kolkata dated 30.01.2015. Assessment was framed by DCIT, Central Circle-XXIV, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 31.03.2013 for assessment year 2011-12. Grounds raised by assessee pre its appeal as under:-

- “1. For that the order of the Ld. CIT(A) is arbitrary, illegal and bad in law.*
- 2. For that the Ld. CIT(A) erred in confirming the penalty imposed under sec. 271AAA simply on the ground that the assessee did not disclose the income in the return of income which was duly disclosed by him in the course of search u/s. 132(4), and as such penalty was imposable*

*when the fulfillment of the three conditions laid down in sec. 271AAA were not disputed.*

*3. For that the Ld. CIT(A) erred in confirming the penalty on the ground that the income was not voluntarily surrendered by the assessee when the voluntary surrender is not the condition for waiver of penalty at per sec. 271AAA which contain specific provisions the fulfillment of which was not disputed.*

*4. For that even otherwise there is no word in section 271AAA that income disclosed in the course of search is to be included in the return and such income can even be included in the return filed subsequent to the filing of the original return.*

*5. For that on the facts and circumstances of the case the penalty imposed u/s. 271AAA was neither justified nor in accordance with law.*

*6. For that on the facts and circumstances of the case the order of the CIT(A) be modified and the assessee be given the relief prayed for.*

*7. For that the assessee craves leave to add, alter or amend any ground before or at the time of hearing.”*

Shri S.M. Surana, Ld. Advocate appeared on behalf of assessee and Shri G.H. Seema, Ld. Departmental Representative represented on behalf of Revenue.

2. Ground No. 2 to 5 are inter-related and therefore being taken up together. The issue raised is that Ld. CIT(A) erred in confirming the order of Assessing Officer by levying penalty u/s. 271AAA of the Act.

3. Briefly stated facts are that assessee is an individual and deriving his income from business and other sources. A search and seizure operation was conducted at the residence of assessee on 12.07.2010. The assessee filed his return of income for the year under consideration u/s. 139 of the Act dated 31.03.2012 and the same was revised dated 21.03.2013. The assessee in the original return declared income of ₹9,06,202/- whereas in the revised return the income was declared at ₹58,72,890/-.

4. During the course of search operation a cash amounting to ₹35,10,400/- was found and out of which cash amounting to ₹ 35 lakh was seized. The assessee in his initial statement u/s 132(4) of the Act stated that the cash amount belonged to M/s K.P.C Medical College & Hospital but assessee subsequently changed its stand and submitted before the DDIT(Inv.) that the cash belonged to him. Besides assessee also admitted that there was one

undisclosed bank account and its transaction has not been disclosed in his income tax return.

5. Finally, the assessee offered a sum of ₹ 1.75 crores as additional income to the Revenue for the years covered under search as detailed under:-

FY	Amount
2006-07	15,71,724
2007-08	21,22,681
2008-09	39,79,971
2009-10	48,58,936
2010-11	<u>49,66,688</u>
TOTAL	1,75,00,000

As the year under consideration is the specified year, therefore AO initiated penalty proceedings u/s.271AAA of the Act. Subsequently, the AO issued a penalty notice which was served upon the assessee on 10.04.2013 but assessee did not appear before AO in spite of the fact that several notices for hearing were served upon the assessee. Finally, AO held the assessee guilty for concealing the particular of income and levied penalty @ 10% of the undisclosed income.

6. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that additional income was voluntarily disclosed in the statement furnished u/s. 132(4) of the Act. There was no additional income. The income was disclosed on estimated basis and not on the basis of any document unearthed during the course of search. However, Ld. CIT(A) confirmed the action of AO by observing as under:-

*“5. I have considered the facts of the case and perused the material on record. I find that search u/s 132 was conducted on 12-07-2010 at the residential premise of the assessee thereby resulting in the recovery of unaccounted cash of Rs.35 lakhs and undisclosed bank account held by the assessee in the IDBI Bank. The assessee had filed his original return for the relevant year on 31-03-2012 at total income of Rs.9,06,202/-. The assessee however filed revised return on 21-03-2013 thereby including the undisclosed income of Rs.49,66,688j-. The assessee had earlier made disclosure of Rs.49,66,688/- for the relevant assessment year 2011-12 on account of unaccounted cash and undisclosed bank account before the DDIT(Inv) but did not include the same in his original return filed on 31-03-2012. The assessee vide notice u/s 142(1) issued on 03-10-2012 by the AO was inquired about his bank account with the IDBI Bank. The assessee then admitted before the AO*

that the bank account with the IDBI Bank was not disclosed in his' returns and offered additional income of Rs.1,38,35,413j- for the financial years 2006-07 to 2010-11. The assessee filed revised return on 21-03-2013 thereby including the unaccounted income of Rs.49 ,66,688 j - embedded in the unaccounted cash and undisclosed bank account related to the relevant assessment year 2011-12. I therefore find merit in the finding of the AO that the surrender of undisclosed income of Rs.49,66,688/- by the assessee was not voluntary. I agree with the AO that it was only after the assessee was inquired about the nature of his bank account with the IDBI Bank that he eventually surrendered the undisclosed income by filing the revised return. I also find merit in the finding of the AO that the revised return filed by the assessee was legally invalid. As the original return was filed beyond the due date, the assessee was not lawfully competent to file the revised return. I uphold the finding of the AO that the revised return filed by the assessee on 21-03-2013 was not valid in law. The assessee therefore cannot be permitted to argue that he had declared the undisclosed income of Rs.49,66,688/- in his return. The Ld AR has argued before me that the assessee voluntarily admitted the undisclosed income and so there was no lawful case for levy of penalty u/s 271AAA. I however having considered the facts of the case do not find merit or substance in the arguments of the Ld AR. The conduct of the assessee does not suggest or indicate that the undisclosed income was voluntarily surrendered by him. The assessee on the contrary chose to take his chances and deferred till the last moment the declaration of the undisclosed income in his return. I find from the assessment order that the search at the residential premise yielded recovery of cash of Rs.35 lakhs but the assessee instead of admitting its ownership initially tried to shift onus by claiming that the money belonged to the KPC Medical College.& Hospital. I find that no disclosure of undisclosed income was made by the assessee at the time of the search. The assessee admitted before the DDIT (Inv) undisclosed income of Rs.175 lakhs for the assessment years 2007-08 to 2011-12 but later did not honour his commitment while furnishing his returns for those years in as much as the undisclosed income admitted before .the .DDIT (Inv) was not included in such returns. However, when the incriminating material found m the search was confronted by the AO at the assessment stage, the assessee turned around and offered the undisclosed income for taxation. The assessee still deferred the declaration of such undisclosed income in his return which he eventually did on 21-03-2013 just before the limitation for assessment was due to expire on 31-03-2013. The series of events clearly lead to only one possible conclusion that the assessee consciously and deliberately made all attempts to conceal the particulars of his income with the sole objective of evading tax. I note that the assessee did so even when incriminating material was recovered in the search and undisclosed income embedded therein had been unearthed by the income tax department. I therefore reject the argument of the assessee that the surrender of undisclosed income was voluntarily made by him. I find on the contrary that the series of events and incriminating material found in the search left the assessee with no option but to eventually declare the undisclosed income by furnishing the revised return which he was anyway not lawfully entitled to furnish. I also find that the provisions contained in section 271AAA were clearly applicable in the present case for the search u/s 132 was conducted after the 1st June, 2007 and the assessee was found

*to be the owner of unaccounted cash and. undisclosed bank account which represented undisclosed income of Rs.49,66,688/- for the specified previous year 2010-11. The assessee did not comply with the provisions of sub-section (2) and is therefore not entitled to immunity from section 271AAA. The judicial decisions cited by the Ld AR are not relevant to the facts of the case, In view of the above, I uphold the finding of the AO that the assessee was liable to penalty u/s 271AAA. The impugned penalty order is upheld. The grounds raised by the assessee are dismissed.”*

Being aggrieved by this order of Ld. CIT(A) assessee came in second appeal before us.

7. Ld. AR before us submitted that all the conditions specified under the provision of Section 271AAA of the Act were complied with and therefore there is no question of levying penalty. He also submitted full amount of tax and interest up-to-date of payment was duly paid by assessee to the government exchequer.

On the other hand, Ld. DR submitted that income was not disclosed in the return of income and additional income was offered in the revised return of income. He vehemently relied on the order of Authorities Below.

8. We have heard the rival contentions of both the parties and perused the material available on record. In the case before us AO imposed the penalty on the ground that assessee concealed the inaccurate particulars of income. The AO formed the opinion for the concealment of income on the ground that additional income was offered by assessee in his revised return of income. The view taken by AO was subsequently confirmed by Ld. CIT(A). At this juncture, we would like to reproduce the Sec. 271AAA below:-

***“[Penalty where search has been initiated.***

***271AAA.(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 1<sup>st</sup> day of June, 2007 [but before the 1<sup>st</sup> day of July, 2012], 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, admit 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 of 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;*

*(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 search 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 plain look at the above statutory provision makes it clear that assessee has complied with all the conditions. None of the Authorities Below has raised any doubts about the manner in which undisclosed income was earned by assessee. As the assessee has made no default in complying of the above statutory provision, we are not inclined to uphold the order of Authorities Below. In holding so, we also find support and guidance from the judgment of

Hon'ble Supreme 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.”*

Similarly, we also find support and guidance from the judgment of Hon'ble Supreme Court in the case of *ACIT vs. M/s Gebilal Kanhailal (HUF)* reported in (2012) 348 ITR 561 (SC) where the lordships have held as below:-

*“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 waive of penalty under section 271(1)(c) as the assessee failed to file his return of income on 31<sup>st</sup> 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 prescribed the time limit within which the assessee should pay tax on income disclosed in the statement under section 132(4).”*

In view of the above, we hold that all the required conditions as specified u/s. 271AAA of the Act have been duly complied with by the assessee. Therefore we reverse the order of lower authorities. In this regard we direct the AO to delete the penalty. Hence, ground of assessee is allowed.

**9. In the result, assessee's appeal stands allowed.**

Order pronounced in the open court 01/09/2017

Sd/-  
(Aby. T. Varkey)  
(Judicial Member)  
Kolkata,

Sd/-  
(Waseem Ahmed)  
(Accountant Member)

\*Dkp

दिनांक:- 01/09/2017 कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. अपीलार्थी/Appellant-Sri Bhaskar Ghosh, P-169, Arpan, Regent Estate, Kolkata-92
2. प्रत्यर्थी/Respondent-DCIT, CC-2(4), Aayakar Bhawan, Poorva, 110, Shanti Pally, Bye Pa, Nr. Ruby Hospital, Kolkata-107
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of  
Office/DDO  
आयकर अपीलीय अधिकरण,  
कोलकाता ।