

आयकर अपीलीय अधिकरण, विशाखापट्टणम पीठ, विशाखापट्टणम
IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गराव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A.No.147/Vizag/2017
(निर्धारण वर्ष / Assessment Year: 2013-14)

ACIT, Central Circle-2,
Visakhapatnam

(अपीलार्थी / Appellant)

M/s. Marvel Associates
Visakhapatnam
[PAN No.AASFM1917A]
(प्रत्यार्थी / Respondent)

C.O. No.44/Vizag/2017
(Arising out of I.T.A.No.147/Vizag/2017)
(निर्धारण वर्ष / Assessment Year: 2013-14)

M/s. Marvel Associates
Visakhapatnam

(अपीलार्थी / Appellant)

ACIT, Central Circle-2,
Visakhapatnam

(प्रत्यार्थी / Respondent)

अपीलार्थी की ओर से / Appellant by
प्रत्यार्थी की ओर से / Respondent by

: Shri T.Satyanandam, DR
: Shri G.V.N. Hari, AR

सुनवाई की तारीख / Date of hearing

: 08.03.2018

घोषणा की तारीख / Date of Pronouncement

: 16.03.2018

आदेश / O R D E R

PER D.S. SUNDER SINGH, Accountant Member:

This appeal filed by the revenue is directed against order of the Commissioner of Income Tax (Appeals)-3 {CIT(A)}, Visakhapatnam vide ITA No.70/2015-16/CIT(A)/VSP/2016-17 dated 6.1.2017 for the assessment year 2013-14.

2. All the grounds of appeal are related to the imposition of penalty u/s 271AAB of the Act. In this case, a search u/s 132 of the Act was carried out in the assessee's case on 20.12.2012. During the course of search, the assessee had admitted the additional income of Rs.4.80 crores as additional sales for the financial year 2012-13 onwards and the additional income admitted for the assessment year 2013-14 was Rs.1,48,84,142/-. Accordingly, the assessee filed the return of income and the assessment was completed making the disallowance u/s 40(a)(ia) of the Act for an amount of Rs.3,35,000/- and penalty u/s 271AAB of the Act were initiated separately.

During the penalty proceedings, the A.O. issued show cause notice as to why the penalty should not be levied u/s 271AAB of the Act. In reply, the assessee submitted that the assessee filed return of income on the basis of turnover and the books of accounts were regularly maintained. The said turnover was disclosed in the profit & loss account

and included the sum of Rs.1,48,84,142/- towards additional sale price offered sold/booked for sale on the date of search. The additional income was part of Rs.4.80 crores admitted by the assessee at the time of search. The above additional admission was given on the basis of additional sale price worked out at Rs.500/- per sq.ft. for 96000 Sq.ft. sold/booked up to the date of search. The assessee submitted before the A.O. that no incriminating material was found suggesting receipt of any additional sale price by the firm. The admission of additional income was only to buy peace and to avoid protracted litigation as stated by the assessee. The assessee had filed the return of income and paid the taxes. Since there was no incriminating material and there was no evidence found during the course of search relating to the undisclosed income or undisclosed expenditure, the assessee requested to drop the penalty proceedings initiated u/s 271AAB of the Act. Not being convinced with the explanation offered by the assessee, the A.O. imposed penalty @ 30% of the undisclosed income amounted to Rs.44,65,543/-.

3. Aggrieved by the order of the A.O., the assessee went on appeal before the CIT(A) and the Ld. CIT(A) scaled down the penalty to 10% instead of the penalty levied by the A.O. at 30%. The Ld.CIT(A) did not accept the contention of the assessee that there was no incriminating

material and observed that page No.107 of Annexure A/GS/MA/1 showed that the cost per sq.ft. at Rs.3571/- as against Rs.2200/- to Rs.2300/- per sq.ft. stated to have been incurred by the assessee. Only when the A.O. has pointed out the difference in cost per sq.ft., the assessee firm had admitted the additional income. CIT(A) further opined that had the AO did not raise this issue, the assessee would not have offered the additional income. The Ld CIT(A) observed that the department has found loose sheet bearing page No.107 of Annexure A/GS/MA/1, which is an incriminating material, hence, held that this is a clear case of concealment of income. Since the assessee has explained the modus operandi, CIT(A) held that the penalty falls under 10% category, accordingly confirmed the penalty at 10% instead of 30%.

4. Aggrieved by the order of the CIT(A), the assessee is in appeal before this Tribunal.

5. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. During the appeal hearing, the Ld. A.R. vehemently argued that the A.O. has levied the penalty under the impression that the levy of penalty in the case of admission of income u/s 132(4) is mandatory. The Ld. A.R. further stated that penalty u/s 271AAB of the Act is not mandatory but discretionary. The provisions of section 271AAB of the Act is parimateria

with that of section 158BFA of the Act relating to block assessment and accordingly argued that the levy of penalty under section 271AAB is not mandatory but discretionary. When there is reasonable cause, the penalty is not exigible. The Ld. A.R. taken us to the section 271AAB of the Act and also section 158BFA(2) of the Act and argued that the words used in section 271AAB of the Act and the words used in section 158BFA(2) of the Act are identical. Hence, argued that the penalty section 271AAB of the Act penalty is not automatic and it is on the merits of each case. For ready reference, we reproduce hereunder section 158BFA (2) of the Act and section 271AAB of the Act which reads as under;

271AAB [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 July, 2012, the assessee **shall pay** by way of penalty, in addition to tax, if any, payable by him--*

- (a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such assessee—*
 - (i) in the course of search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived.*
 - (ii) Substantiates the manner in which the undisclosed income was derived; and*
 - (iii) On or before the specified date—*
 - (A) pays the tax, together with interest, if any, in respect of the undisclosed income; and*
 - (B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;*
- (b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee--*
 - (i) in the course of the search, in a statement under sub-section (4_) of section 132, does not admit the undisclosed income; and*

- (ii) on or before the specified date—
- (A) declares such income in the return of income furnished for the specified previous year; and
 - (B) pays the tax, together with interest, if any, in respect of the undisclosed income;
- (c) a sum which shall not be less than thirty per cent but which shall not exceed ninety per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).
- (2) 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).

Section 158BFA(2):

(2) The Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Chapter, **may direct** that a person **shall pay** by way of penalty a sum which shall not be less than the amount of tax leviable but which shall not exceed three times the amount of tax so leviable in respect of the undisclosed income determined by the Assessing Officer under clause (c) of section 158BC:

Provided that no order imposing penalty shall be made in respect of a person if—

- (i) such person has furnished a return under clause (a) of section 158BC;
- (ii) the tax payable on the basis of such return has been paid or, if the assets seized consist of money, the assessee offers the money so seized to be adjusted against the tax payable.
- (iii) Evidence of tax paid is furnished along with the return; and
- (iv) An appeal is not filed against the assessment of that part of income which is shown in the return:

Provided further that the provisions of the preceding proviso shall not apply where the undisclosed income determined by the Assessing Officer is in excess of the income shown in the return and in such cases the penalty shall be imposed on that portion of undisclosed income determined which is in excess of the amount of undisclosed income shown in the return.

6. Careful reading of section 271AAB of the Act, the words used are 'AO may direct' and 'the assessee shall pay by way of penalty'. Similar words are used section 158BFA(2) of the Act. The word may direct indicates the discretion to the AO. Further, sub section (3) of section 271AAB of the Act, fortifies this view.

Sub section (3) of section 271AAB:

The provisions of section 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.

7. The legislature has included the provisions of section 274 and section 275 of the Act in 271AAB of the Act with clear intention to consider the imposition of penalty judicially. Section 274 deals with the procedure for levy of penalty, wherein, it directs that no order imposing penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. Therefore, from plain reading of section 271AAB of the Act, it is evident that the penalty cannot be imposed unless the assessee is given a reasonable opportunity and assessee is being heard. Once the opportunity is given to the assessee, the penalty cannot be mandatory and it is on the basis of the facts and merits placed before the A.O. Once the A.O. is bound by the Act to hear the assessee and to give reasonable opportunity to explain his case, there is no mandatory requirement of imposing penalty, because the opportunity of being heard and reasonable opportunity is not a mere formality but it is to adhere to the principles of natural justice. Hon'ble A.P. High Court in the case of Radhakrishna Vihar in ITTA No.740/2011 while dealing with the penalty u/s 158BFA held that 'we are of the opinion that while the words shall be liable

under sub section (1) of section 158BFA of the Act that are entitled to be mandatory, the words may direct in sub section 2 there of intended to directory'. In other words, while payment of interest is mandatory levy of penalty is discretionary. It is trite position of law that discretion is vested and authority has to be exercised in a reasonable and rational manner depending upon the facts and circumstances of the each case. Plain reading of section 271AAB and 274 of the Act indicates that the imposition of penalty u/s 271AAB of the Act is not mandatory but directory. Accordingly we hold that the penalty u/s 271AAB is not mandatory but to be imposed on merits of the each case.

8. In this case, a search u/s 132 of the Act was carried out in the assessee's premises but no evidence was found during the course of search except a loose sheet which was marked as Page No.107 of Annexure A/GS/MA/1. Careful verification of the loose sheet found during the course of search shows the projections and profitability but not the actual expenditure incurred by the assessee. As submitted by the assessee before the A.O. as well as Ld. CIT(A), no other material was found during the search proceedings. Section 271AAB sub clause (c) of the Act defines undisclosed income as under:

- (c) "undisclosed income" means—
 - (i) Any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account

or other documents or transactions found in the course of a search under section 132, which has—

(A) Not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or

(B) Otherwise not been disclosed to the [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner before the date of search; or

(ii) Any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted]

9. Penalty u/s 271AAB attracts on undisclosed income but not on admission made by the assessee u/s 132(4). The AO must establish that there is undisclosed income on the basis of incriminating material. In the instant case a loose sheet was found according to the A.O., it was incriminating material evidencing the undisclosed income. In the penalty order the AO observed that loose sheet shows the cost per square feet is Rs.3571/- per sft and assessee stated to have submitted in sworn statement cost per sq.feet at Rs.2200/- to Rs.2300/- per sq.feet. However neither the AO nor the Ld.CIT(A) has verified the cost of construction with the books and projections found at the time of search. The counsel argued that it was mere projection but not the actuals. The write up heading also mentioned that summary of the projected profitability statement. There is no evidence to establish that projections reflected in the loose sheet is real. No other material was

found during the course of search indicating the undisclosed income. There was no money, bullion, jewellery or valuable article or thing or entry in the books of accounts or documents transactions were found during the course of search indicating the assets not recorded in the books of accounts or other documents maintained in the normal course, wholly or partly. The revenue did not find any undisclosed asset, any other undisclosed income or the inflation of expenditure during the search/ assessment proceedings. Though a loose sheet of page No.107 of Annexure A/GS/MA/1 was found that does not indicate any suppression of income but it is only projection of profit statement. The amount of Rs.3571/- mentioned in the projections refers to cost and profit which is approximate sale price but not the cost as stated by the AO in the penalty order. The cost of construction in the projections projected at Rs.2177/- which is in synch with the statement given by the assessee. The AO was happy with the disclosure given by the assessee and did not verify the factual position with the books of accounts and projections and bring the evidence to unearth the undisclosed income. Neither the A.O. nor the investigation wing linked the cost of profit or cost of asset to the entries in the books of accounts or to the sales conducted by the assessee to the sale deeds. Therefore, we are unable to accept the contention of the revenue that the loose sheet found

during the course of search indicates any undisclosed income or asset or inflation of expenditure. The Hon'ble ITAT Delhi Bench in the case of Ajay Sharma Vs. DCIT (2012) 32 CCH 334 held that with respect to the addition on account of alleged receivables as per seized paper, there is no direct material which leads and establishes that any income received by the assessee has not been declared by the assessee. An addition has been made on the basis of loose document, which did not closely prove any concealment or furnishing of inaccurate particulars by the assessee. Hence penalty u/s 158BFA (2) of the Act is not leviable.

The facts of the assessee's case shows that there was no undisclosed income found during the course of search and no incriminating material was found, hence we hold that there is no case for imposing penalty u/s 271AAB of the Act, accordingly, we set aside the order of the lower authorities and cancel the penalty u/s 271AAB of the Act.

10. In the result, the appeal filed by the revenue is dismissed.

Cross Objection No.44/Vizag/2017:

11. The assessee filed C.O. against the order passed by the Ld. CIT(A) by partly sustaining the penalty levied by the A.O. u/s 271AAB of the Act and requested to cancel the entire penalty of ₹ 44,65,543/- levied u/s 271AAB of the Act.

12. In view of our findings in the preceding paragraphs, the penalty levied by the lower authorities u/s 271AAB of the Act on bank deposit as well as the gold and jewellery was set aside and dismissed the appeal of the revenue, hence, the cross objection filed by the assessee is allowed.

13. In the result, appeal filed by the revenue is dismissed and the C.O. filed by the assessee is allowed.

The above order was pronounced in the open court on 16th Mar'18.

Sd/- (वी. दुर्गराव) (V. DURGA RAO) न्यायिक सदस्य/JUDICIAL MEMBER	Sd/- (डि.एस. सुन्दर सिंह) (D.S. SUNDER SINGH) लेखा सदस्य/ACCOUNTANT MEMBER
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विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 16.03.2018

VG/SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant – The ACIT, Central Circle-2, Visakhapatnam
2. प्रत्यार्थी / The Respondent – M/s. Marvel Associates, Flat No.201, Sarada Towers, FACOR Layout, Ramnagar, Visakhapatnam
3. आयकर आयुक्त / The Pr. CIT (Central), Visakhapatnam
4. आयकर आयुक्त (अपील) / The CIT (A)-3, Visakhapatnam
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम / DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, VISAKHAPATNAM