

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH : KOLKATA

[Before Hon’ble Shri S.S. Godara, JM & Shri A.L. Saini, AM]

I.T.A. No. 1471/Kol/2017

Assessment Year : 2013-14

DCIT, CC-2(2), Kolkata.

-vs-

M/s. Rajgaria Timbers Pvt. Ltd.

[PAN: AABCR 8486 M]

(Appellant)

(Respondent)

For the Appellant : Shri A.K. Singh, CIT(DR)

For the Respondent : None

Date of Hearing : 9.8.2019

Date of Pronouncement : 9.08.2019

ORDER

Shri S.S. Godara, JM:

1. This Revenue’s appeal for assessment year 2013-14 arises against the CIT(A), 20, Kolkata’s order dated 08-03-2017 passed in case no. 1088/CIT(A)-20/CC-2(2)/15-16 involving penalty proceedings u/s 271AAB of the Income-tax Act, 1961 (in short ‘Act’).

Heard both the parties. None appears at the assessee’s behest. The registry’s RPAD notice also has been returned back unserved. We thus proceed *ex parte* against the assessee.

3. It transpires at the outset that the Revenue’s instant appeal suffers from 8 days’ delay in filing. Its condonation petition attributes various reasons on account circumstances beyond its control due to procedural approval. We accept these condonaton averments to condone the impugned delay. The main case is now taken up for adjudication on merits.

4. The Revenue's sole substantive grievance canvassed in the instant appeal challenges correctness of the learned CIT(A)'s action reversing the Assessing Officer's imposed penalty amounting to Rs.31,77,804/- in his order dated 30-09-2015. Mr. Singh invites our attention to the CIT(A)'s detailed discussion on the issue as under:-

5. Appeal on ground no 2 is against imposition of penalty u/s 271AAB on the commodity profit of Rs.37178040j-. In the penalty order the AO has brought it on record as under:

"During the course of post-search operation, the assessee had admitted vide a disclosure petition addressed to the DDIT (Inv), undisclosed income of Rs.3,17,78,040/-for the assessment year 2013-14 the source of which was disclosed as income from commodity profit. Profit and loss account of the assessee for the relevant year reveals that a sum of Rs.174,75,24,584/- has been shown as revenue from sale and other income. Ledger copy of sales account reveals that sale and other income of Rs.174,75,24,584/- includes the disclosed commodity profit amounting to Rs.3,17,78,040/ -. This fact is also confirmed by the audit report vide note no 25 of Notes on financial Statements for the year ended 31st March, 2013".

6. During the appellate proceedings the AR has filed a written submission on this issue which is as under:

This ground of appeal is in respect of assessment order passed by Learned Assessing officer is bad in law as well as on the facts of the case.

Sir the provisions of Section 271AAB states that:-

"The Assessing officer may, notwithstanding anything contained in any other provisions of this act, direct that, in 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 percent 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, 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;'

Sir, we would like to submit that the section begins with the word 'may' and not 'shall'. The words "may direct" in section 271AAB do indicate that a discretion is available with the Assessing officer and Commissioner of Income Tax (Appeals) not to levy penalty, having regard to the bona fide conduct of the assessee, co-operation shown in the completion of the assessment in search cases and general conduct of the assessee in the course of assessment proceedings and such other relevant factors even if the assessee had not strictly complied with the conditions imposed by clause (1a) (1b) and 1(C) of the Section.

Sir, in our case the conduct of the appellant is bona fide. The appellant has undoubtedly offered the income in its return of income filed us 139(1) of the Income Tax Act, 1961 and extended co-operation at the stage of assessment.

Sir, we are placing reliance on the case laws in the context of penalty proceedings in block assessment cases under Section 158BFA (2) of the Income Tax Act, 1961.

Sir, reliance is placed on Ch. Suresh Reddy Vs. Asst. CIT, (2009) 120TTJ (Chennai) 523, 529-30,530,531 and Deputy CIT Vs. Koatex Infrastructure Ltd., (2006) 100ITD 510,521 (Mum)=102 TTJ 737 where the Hon'ble ITAT, Mumbai held that the expression employed 'may direct that a person shall pay' ... clearly indicate the discretionary nature of the penalty. The expression 'may' employed

in this section specifically postulate that discretion lies on the Assessing officer or Commissioner (Appeals), as the case may be, to apply their mind before directing a party to pay the penalty. The expression 'shall' coming in the second proviso, in fact, is to restrict the applicability of the penalty only to the difference in the income and not to the entire income, the operative force of the word 'shall' is directed towards the quantum and not on basic consideration as to whether penalty is to be levied or not.

Sir, reliance is also to be placed in the case of Deputy CIT Vs. Suresh Kumar, (2005) 97 ITD 527,539 (kol)= 95TT J 926, where the Hon'ble IT AT, Kolkata held that the power to impose penalty has to be applied judicially with due regard to all the facts and circumstances of each case

and cannot be exercised mechanically. Since the provisions of section 271(1)(C) are similar to the provision of section 158BFA(2), the same will apply mutatis mutandis and the ratio as laid down by various court while dealing with the penalty relating to concealment of income will also apply. Therefore, there was no merit in the plea of the Revenue that the penalty under section 158BFA(2) is mandatory and not discretionary.

Sir, reliance is also placed on the case of Nemichand V. Asst. CIT (2005) 93TTJ (Bang) 564, 573 where Hon'ble ITAT, Bangalore state that one should not forget that the words used in sub-section (2) are that the Assessing officer may direct the imposition of penalty. It means that the penalty is not automatic and de hors the committal of the offence or the offence for which the legislature has prescribed the penalty.

Sir, we would further like to submit that sub-section (1) includes the words "shall pay by way of penalty, in addition to tax, if any, payable" and Sub-Clause (iiiA) of Clause 1(a) of Sub-Section (1) of Section 271AAB states that penalty @10% of undisclosed income shall be payable if the assessee "on or before the specified date Pays the tax, together with interest, if any, in respect of the undisclosed income and also complied with the other conditions as stipulated under clause 1(a), otherwise the assessee shall fall in category 1(b) or 1(c) as the case may be.

Sir, from the plain reading of the above provisions of the act it appears that there is contradiction between provisions of the Act itself. Sub-section (1) states that penalty is payable irrespective of tax payable, however for determination of rate of penalty, tax payment on undisclosed income is a pre-condition under Clause (iiiA) of Clause 1(a) of Sub-Section (1) of Section 271AAB. Payment of tax on undisclosed income before the specified date is a precondition in addition to other conditions, so that minimum rate of

penalty i.e 10% shall be imposed. Sir, from that it can be inferred that in absence of tax payable and payment thereof even minimum penalty shall not be leviable.

Sir, in our case the assessment has been completed at assessed loss of Rs. 2,67,16,231/-. Therefore, we are not liable to pay tax on the undisclosed income for which penalty has been imposed by the Learned Assessing Officer.

Sir, the Learned Assessing Officer has stated in the order passed U/S 271AAB that from the submission filed by the assessee there is no dispute regarding .the fact that the assessee has in addition to other conditions as stipulated u/s 271AAB also furnishes the 'return of income for the

specified previous year declaring' such undisclosed income therein and pays the tax together with interest, if any, in respect of the undisclosed income Rs. 3,17,78,040/-, hence the assessee satisfies the conditions contained in Section 271AAB (1)(a) of the Income Tax Act, 1961 for imposition of penalty in respect of the undisclosed income of Rs. 3,17,78,040/-.

Sir, your appellant has never submitted before the Learned Assessing Officer that he had paid the tax on undisclosed income. This is factually incorrect, In support of our contention; we are enclosing copy of our submission filed before the Learned Assessing Officer for your ready reference.

Sir, as our income has been assessed at loss of Rs. 2,67,16,2311- and we are not liable to pay tax, we are unable to satisfy Sub-Clause (iiiA) of Clause 1(a) of Sub-Section (1) of Section 271AAB which requires payment of tax on undisclosed income on or before the specified date to fall in Clause 1(a) where 10 percent penalty is leviable.

Sir, the taxing statue cannot compel to an assessee to comply with such condition which is impossible to be complied with for him.

Sir, the trite position of law is that the provision dealing with penalty must be strictly construed. These provisions have to be interpreted in its natural meaning and in case of any doubt; the view favorable to the taxpayer has to be adopted. In view of the above, the very assumption of jurisdiction under section 271AAB was void ab initio.

Therefore, under the facts and circumstances of the case and in the light of the above judgements we would like to pray before your honour to quash the order passed by the Learned Assessing Officer under section 271AAB of the Income Tax Act, 1961.

Ground No. 2 :

This ground of appeal is in respect of imposing penalty under section 271 AAB of the Income Tax Act, 1961 on commodity profit of Rs. 3,17,78,040/- @ 10% ..

The appellant has filed its Return of Income for the Assessment Year 2013-2014 on 29/09/2013 declaring total income of Rs. Nil.

A search and seizure operation U/S 132 of the Income Tax Act, 1961 was conducted on the appellant on 12/10/2012. During course of search the appellant had admitted before the DDIT (Inv.) vide disclosure petition under section 132(4) of the Income Tax Act, 1961 commodity profit of Rs. 3,17,78,040/- earned during the current financial year and included the same in its return of income filed u/s 139(1) of the Income Tax Act, 1961.

The Learned Assessing officer has completed the Assessment under section 143(3) of the Income Tax Act, 1961 on 30/03/2015 at assessed loss of Rs.2,67,16,231/-.

In the said assessment order the Learned Assessing officer has accepted the above mentioned commodity profit of Rs. 3,17,78,040/- as it is. However, the Learned Assessing officer has initiated penalty proceedings under section 271AAB of the Income Tax Act, 1961 for the same.

During penalty proceedings it has been contended before the Learned Assessing officer that the commodity profit of Rs. 3,17,78,040/- is already recorded in the books of accounts/ documents of the appellant before the date of search. Therefore, it is not tantamount to undisclosed income for the purpose of Section 271AAB of the Income Tax Act, 1961. This fact itself has been established from the assessment order passed by the Learned Assessing officer. The Learned Assessing officer has stated in para 4.1 of the assessment order passed u/s 143(3) of the Income Tax Act, 1961 for the assessment year 2013-14 that Ledger copy of sales Account reveals that the sale and other income of Rs. 1,74,75,24,584/- includes the disclosed commodity profit amounting to Rs. 3,17,78,040/-. The Learned Assessing Officer has also stated that this fact is also confirmed by the audit report vide note no. 25 of Notes to Financial Statements for the year ended 31 March, 2013.

However, in-spite of the above facts the Learned Assessing officer has passed order under section 271AAB of the Income Tax Act, 1961 imposing penalty of Rs. 31,77,804/- under section 271 AAB on the disclosed commodity profit of Rs. 3,17,78,040/-.

In this connection we would like to submit that Explanation (c) to section 271AAB states 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;*

Sir, appellant has recorded the said income in its books of accounts/documents before the date of search which is also established from the assessment order itself.

Therefore under the above facts and circumstances of the case we would like to pray before your honour to delete the penalty of Rs, 31,77,804/- in toto.

7. I have considered the finding of the AO in the assessment order and the written submission filed by the AR during the appellate proceedings. I find that the assessee has made disclosure u/s 132(4) on its income in the current year. The assessee has also contended that the commodity profit of Rs.31778040 / - is already recorded in the books of accounts of the assessee before the date of search. From the assessment order it is clear that the AO had also accepted the audit report in which vide note no 25 of the notes to financial statements for the year ended 31-03-2013. In case the income was recorded in the books of accounts before the date of search is accepted by the AO then how it will attract penalty u/s 271AAB. Section 271AAB pre-supposes existence of undisclosed income. In this case since the income was already recorded in the books of accounts before the date of search so it cannot be termed as undisclosed income. Keeping this fact in mind, I think the imposition of penalty u/s. 271AAB on this issue is not justified. Accordingly, assessee's appeal on ground no.2 is allowed."

6. Mr. Singh vehemently contends that the Assessing Officer had rightly imposed the impugned penalty, which has been wrongly deleted in the lower appellate proceedings. He has also taken lot of pains to file written submissions averring that the assessee nowhere clarifies as to whether it had recorded the income in question in the books of account or not. We find no merit in the Revenue's instant argument. The fact remains that the assessee has duly recorded its note no. 25 in the audit report in its

financial statement for the year ending 31-03-2013. The same negates the Revenue's case seeking to revive the impugned penalty. It was imperative for the department to place on record the assessee's books before us which have formed part of assessment records throughout. The CIT(A) findings therefore stand upheld.

7. This Revenue's appeal is dismissed.

Order pronounced in the Court on 9 -08-2019

Sd/-

[Arjun Lal Saini]
Accountant Member

Sd/-

[S.S.Godara]
Judicial Member

Dated : 9 -08-2019

**PRADIP, Sr. PS

Copy of the order forwarded to:

1. Appellant/Department: DCIT, CC-2(2), Aaykar Bhawan, Poorva, 110 Shantipally Kolkata-107.
2. Respondent/Assessee: M/s. Rajgaria ITimbers P.Ltd 67/27 Strand Road, Kolkata-6.
- 3..C.I.T(A).- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar
H.O.O/D.D.O Kolkata