

**IN THE INCOME TAX APPELLATE TRIBUNAL DELHI
BENCH 'F', NEW DELHI**

**BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND SH. KULDIP SINGH, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCING)

ITA No.2037/Del/2018 (for Assessment Year 2011-12)

Roop Kishore Madan A-9/4, Vasant Vihar, New Delhi PAN No. ABWPM 6914 G (APPELLANT)	Vs.	DCIT, Central Circle – 16, New Delhi (RESPONDENT)
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Assessee by	Shri Salil Aggarwal, Adv. Shri Shailesh Gupta, Adv. Shri Madhur Aggarwal, Adv.
Revenue by	Shri S. S. Negi, Sr. D.R.

Date of hearing:	09/11/2020
Date of Pronouncement:	23/11/2020

ORDER

PER ANIL CHATURVEDI, AM:

This appeal filed by the assessee is directed against the order dated 02.02.2018 of the Commissioner of Income Tax (A)-XXVI, New Delhi relating to Assessment Year 2011-12.

2. The relevant facts as culled from the material on records are as under :

3. Assessee is an individual stated to be engaged in insurance business and whole sale main stockiest of Cigarettes. Assessee is also stated to be deriving income from house property and income from other sources.

4. A search and seizure operation u/s 132 of the Act was conducted on 17.09.2010 in the case of Sanya Group of cases and assessee was also covered u/s 132(1) of the Act as he is reported to be the part of the group. During the course of search and seizure operation at the residence of the assessee, a diary of 'TATA Motors' was found and seized which contained the details of advances and cash received with regard to the property transactions done by the assessee during the relevant year 2011-12. Statement of the assessee was recorded u/s 132(4) of the Act wherein he admitted the transactions appearing in the diary to have not been accounted in the books of accounts. As per diary the aggregate profit that was earned by the assessee was of Rs.15.92 crores. During the course of search and seizure operation, assessee was also found in possession of cash aggregating to Rs.1,30,51,000/- (which included the cash found in the lockers). In the statement that was recorded, w.r.t cash found assessee *inter alia* stated that the cash was generated on account of transactions in properties which were unaccounted and were part of Rs.15.92 crore which were surrendered as additional income.

5. It was also noticed that Rs.70 lakh that was found from the locker maintained with the HDFC was relevant to A.Y. 2010-11 as the last operation of the locker was on 29.01.2010 and accordingly 70 lakh was treated as additional income of the assessee for A.Y. 2010-11. Rs. 70 lakh was offered by the assessee as additional income u/s 153A in A.Y. 2010-11 and assessee had also paid the tax thereon.

6. AO also noted that in the return of income that was filed for AY 2011-12, assessee had declared additional income of Rs 14,72,16,687/- as against the additional income of Rs 15.22 crores (Rs 15.92 crore – Rs 70 lacs declared in A.Y. 2010-11) declared u/s 132(4) of the Act. AO noted that the income of Rs 14.72 crores declared by the assessee as additional income in the return of income was after adjusting brought forward unabsorbed short term capital loss of Rs 49,83,312/-. According to AO, the non-declaration of additional income of Rs.15.22 crore amounted to retraction from the statement recorded u/s 132(4) of the Act of the income to the extent of Rs 49,83,312/-. AO therefore noted that since assessee had failed to deposit the tax on the difference of Rs.49,83,312/-, the assessee was liable for penalty within the meaning of Section 271AAA of the Act and accordingly, by order dated 21.03.2016 levied penalty u/s 271AAA of Rs.1,52,20,000/- (10% of Rs. 15,22,00,000/-).

7. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who vide order dated 02.02.2018 dismissed the appeal of the assessee and thereby confirmed the order of AO. Aggrieved by the order of CIT(A), assessee is now before us and has raised the following grounds:

- “1. *That Ld. Assessing Authority has grossly erred in imposing a penalty of Rs.1,52,00,000/- (Rs. One Crore Fifty Two Lacs Only) u/s 271AAA of the Income Tax Act 1961 and Ld CIT(A)-XXVI, New Delhi has erred in confirming the order of the AO.*
2. *That with our prejudice the impugned order is bad in law and deserves to be quashed as order having passed by Learned Assessing Officer in non compliance of the integral provision of section 274(1), 274(2) section 71 and section 74 of the Income Tax Act 1961.*
3. *The appellant craves leave to add, amend, delete or alter any one or more of the grounds of appeal before or at the time of hearing.”*

8. Before us, Learned AR submitted that during the course of statement that was recorded u/s 132 of the Act, assessee had duly accepted the undisclosed income and had also specified and substantiated the same to question No.18 & 19 put forward by the search team. He pointed to the question raised and the answer of the assessee. He submitted that since the assessee had offered the income accepted during the course of search and had also paid the taxes, the assessee was covered by exception as per Sub Section 2 of Section 271AAA and no penalty u/s 271AAA was leviable. As far as the AO's contention that the assessee had failed

to deposit the tax on the difference of Rs. 49,83,312/- (which represents the brought forward unabsorbed capital losses), he submitted that in the quantum appeal of the assessee for AY 2011-12, the Tribunal in ITA No.2789/Del/2015 order dated 29.07.2020 has held that the Revenue was not right in disallowing the set off of short term capital loss brought forward from earlier years which were incurred by the assessee in A.Y. 2007-08 and which has been allowed by the Revenue to be carried forward till A.Y. 2010-11. He pointed to the relevant findings of the Tribunal order which has been placed in the paper book. He therefore submitted that in the light of the aforesaid decision of the Tribunal in quantum appeal, the assessee was fully justified in adjusting the brought forward capital losses and since on the resultant income assessee has already paid the taxes, there was no shortfall in the payment of taxes and therefore, AO was not justified in levying penalty u/s 271AAA of the Act.

9. Learned DR on the other hand pointing to the findings of CIT(A) submitted that the assessee's claim of set off of undisclosed income with brought forward loss with contrary to the provisions of s. 271AAA of the Act and therefore the AO was fully justified in levying the penalty. He thus supported the order of lower authorities.

10. We have heard the rival submissions and perused all the relevant materials available on record. The issue in the present ground is with respect to levy of penalty u/s 271AAA of the Act. It is an undisputed fact that a search u/s 132 of the Act took place at the premises of the assessee on 17.09.2010 and during the course of search, in the statement recorded u/s 132(4) of the Act, assessee had surrendered Rs.15.92 crore as additional income. It is also an undisputed fact that out of the Rs 15.92 crore of additional income that was surrendered, income of Rs 70 lacs pertained to AY 2010-11 and the same was offered by the assessee as additional income in AY 2010-11 and the taxes due on such income was also paid by the assessee. In the return of income that was filed by the assessee for AY 2011-12, assessee had offered additional income of Rs 14,72,16,687/- (Rs 15.92 crore less Rs 70 lacs being additional income declared in AY 2010-11 less Rs 49,83,312/- being the brought forward of unabsorbed short term capital losses). On such resultant additional income of Rs 14.72 crores (rounded off), assessee had also paid the tax at applicable rates. It is the case of the Revenue that the adjustment of short term capital loss of Rs.49.83 lakh (rounded off) amounted to the retraction of income to that extent and since on such amount of Rs. 49,83,312/-, assessee had not paid the tax, assessee was liable for penalty u/s 271AAA of the Act. We find that against the order of AO in disallowing the claim of set off of brought forward capital loss of Rs. 49,83,312/- against the income declared, assessee had carried the matter

before the co-ordinate Bench of Tribunal. The Tribunal vide order dated 29.07.2020 in ITA No.2789/Del/2015 held that the assessee to be eligible for set off of brought forward loss against the income declared by the assessee. The relevant observations of the Tribunal read as under:

“7. The issue before us is whether or not, the brought forward short term capital loss which has been duly allowed by the department in the earlier years is eligible to be set off against the short term capital gains of the current year declared by the assessee ???

8. The relevant fact is that the assessment year in question has been framed consequent to a search action taken place at the premises of the assessee on 17.09.2010 and as such the assessment year under consideration is an assessment to be framed u/s 143(3) of the Act taking into consideration the relevant seized material, if any, being the assessment of the search year.

9. On going through the facts of the case, we do not find any merit in the contention of the Assessing Officer that the assessee has not claimed adjustment of brought forward loss in the statement recorded u/s 132(4). The Assessing Officer can neither expect the assessee to suo moto seek such set off against the brought forward losses nor expect the authorized officer recording the statement to pose a question regarding any brought forward losses, during the process of recording of the statement on oath during the search and seizure operation. Hence, we find that the rationale given by the Assessing Officer while disallowing the set off is not statutorily tenable.

10. The ld. CIT (A), having accepted the surrendered income which was offered under the short term capital gain as declared during the search proceedings u/s 132(4), failed to adhere to the provisions of computation of income as provided under the Income Tax Act. The computation of income of the assessee is as under:

i) <u>Business Income</u> Net Loss as per P&L A/c		(19,08,891.64)
ii) Short Term Capital Gain for the year Less: Unabsorbed Short Term Loss B/f from A.Y.2008-09	15,22,00,000.00 <u>49,83,312.64</u>	14,72,16,687.36
iii) Income from House Property		2,69,500.00
iv) Income from other sources		4,44,436.56
Gross Taxable Income		14,60,21,732.00
Less: Deduction u/s 80CCC	1,00,000.00	
: Deduction u/s 80G	2,350.00	1,02,350.00
Net Taxable Income		14,59,19,382.00

11. We find that the assessee has filed the computation of income correctly. The computation filed is as per the scheme of computation provided in the Income Tax Act. The provisions of Section 74 of the Income Tax Act, 1961 clearly provides for set off of short term capital losses which can be allowed to be carried forward and set off against income, if any, under the head "capital gains" assessable for the assessment year in respect of any other capital asset.

12. The statute confers carry forward and set off of losses hence the same cannot be denied in the absence of any specific provisions or conditions laid down in the same statute to disallow such benefits. It is a fact on record that the short term capital loss which has been incurred in the assessment year 2007-08 and the same has been allowed by the revenue to be carried forward till the assessment year 2010-11, hence, the same cannot be

disallowed to be set off against the short term capital gain earned by the assessee during the assessment year 2011-12.”

11. When the claim of the assessee of adjusting the brought forward capital loss against the income declared pursuant to the search has been upheld by the Co-ordinate Bench of Tribunal and since the order of the Tribunal in quantum proceedings has attained finality, then in such a situation, we are of the view that the assessee was fully justified in reducing the unabsorbed short term brought forward capital loss against the income and on the resultant income, he was justified in paying the tax. Thus we do not agree with the view of the Revenue that there was shortfall in the payment of taxes on the brought forward losses resulting into assessee being liable for penalty u/s 271AA of the Act. We, therefore, set aside the order of AO. **Thus the ground of the assessee is allowed.**

12. **In the result, appeal of the assessee is allowed.**

Order pronounced in the open court on 23.11.2020

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Priti Yadav, Sr.PS

Date:- 23.11.2020

Copy forwarded to:

1. Appellant
2. Respondent

Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI