

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'A': NEW DELHI  
(Through Video Conferencing)**

**BEFORE,  
SHRI G.S. PANNU, VICE PRESIDENT  
AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**I.T.A No.5431/Del/2016  
(ASSESSMENT YEAR 2010-11)**

M/s Ace Steel Fab (P) Ltd. Kashyap & Co. Chartered Accountants 214, Citi Center, Begum Bridge Road, Meerut (U.P) 250001. PAN-AAECA 6938N	Vs.	Dy.CIT Central Circle-1, Faridabad.
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant By	<b>Sh. P.S. Kashyap, Adv.</b>
Respondent by	<b>Sh. Satpal Gulati, CIT- DR</b>
Date of Hearing	<b>13.01.2021</b>
Date of Pronouncement	<b>12.04.2021</b>

**ORDER**

**PER SUDHANSHU SRIVASTAVA, JM:**

This appeal is preferred by the assessee against order dated 16.08.2016 passed by the Ld. Commissioner of Income Tax (Appeals)-3, Gurgaon {CIT(A)} for Assessment Year 2010-11 and

challenges the confirmation of penalty of Rs.1,15,230/- imposed u/s 271AAA of the Income Tax Act, 1961 (hereinafter called 'the Act').

2.0 The brief facts of the case are that the search and seizure action u/s 132 of the Act and surveys u/s 133A of the Act were carried out on 06.11.2009 at various business premises of M/s Action Construction Equipment Ltd., Group of Companies, Faridabad. A search operation u/s 132 of the Act was also carried out at the residential and business premises of the assessee and in other associated cases. The return of income was filed declaring income at Nil and had also shown current year loss of Rs.1,42,45,889/- to be carried forward. Although, the due date for filing of return was 30.09.2010, the return was filed on 12.10.2010. The assessment was completed at an income of Rs.11,52,314/- (rounded of to Rs.11,52,300/-) on account of estimation of gross profit rate due to difference in stock as per the books of accounts and the stock as per the physical inventory taken. Subsequently, penalty of Rs.1,15,230/- was imposed u/s 271AAA of the Act being

10% of the alleged undisclosed income. The assessee's appeal against the imposition of this penalty was dismissed by the Ld. CIT(A) and now the assessee has approached this Tribunal challenging the confirmation of the penalty by raising the following grounds of appeal:

*"1. That on facts and in law imposition of penalty under section 271AAA for Rs.1,15,230/- is without any basis, totally wrong, unjustified, illegal and unwarranted. The appellant is not liable to penalty u/s 271AAA on the following grounds:*

- i) That the Ld. CIT(A) has not considered the various facts before passing the order.*
- ii) That addition was made on estimation basis of GP rate assuming a certain amount as stock in trade. There was no material available to assume the stock figures and no penalty can be imposed on ad hoc additions.*
- iii) That the Ld. A.O has imposed penalty even when no "undisclosed income" was discovered.*

*Therefore the basis taken and method adopted by the Assessing Officer for imposing penalty u/s 271AAA for Rs.1,15,230/- and confirmed by CIT(A) is totally wrong, unjustified and unwarranted and the same deserves to be deleted in full.*

2. *That the assessee craves leave to add, amend, alter or withdraw any of the ground of appeal on or before the date of hearing.”*

3.0 The Ld. Authorized Representative (AR) submitted that no surrender had been made by the assessee during the course of search and that the addition of Rs.11,52,314/- in the assessment proceedings was made by the Assessing Officer by applying average gross profit rate for the last three years @ 3.68% on account on some discrepancy in stock. It was further submitted that the discrepancy in the stock figures had arisen due to some technical problem in the new ERP software installed by the assessee and, therefore, the discrepancy in stock could not be attributed to any default on the part of the assessee. The Ld. AR further submitted that this was an adhoc addition based on applying the average gross profit rate for last three years and, therefore, the penalty imposed u/s 271AAA of the Act would not apply. It was submitted that there was no undisclosed income of the assessee in this year and, therefore, the penalty was wrongly imposed. It was further submitted that there was no addition by the Assessing Officer on

account of any undisclosed sale, although, the physical stock was found to be less than the book stock. It was also submitted that the assessee manufactured hydraulic cranes which could not be sold without payment of excise duty and, therefore, on this account also the sales figures of the assessee were duly corroborated. He also drew our attention to a petition filed by the assessee before the Company Law Board seeking extension of date for adopting the annual accounts in view of the failure of the implementation of new accounting software. It was submitted that this petition, which was accepted and the offence was compounded vide order dated 29.04.2011, also establishes the bonafide of the assessee in this case.

4.0 Per contra, the Ld. CIT-DR submitted that the assessee had accepted the dismissal of the assessee's appeal in the quantum proceedings by the Ld. CIT(A) and, therefore, the penalty had rightly been levied. It was further submitted that the difference in the stock cannot be ignored. The Ld. CIT-DR submitted that the discrepancy in stock had been existing for three years as per the

records and the assessee had not taken suitable steps to get the same rectified. The Ld. CIT-DR also submitted that the issue arose out of data migration and not out of data malfunction and, therefore, the penalty had been rightly imposed and should be upheld.

5.0 We have heard the rival submissions and have also perused the material on record. The facts leading to imposition of penalty are that there was a search operation u/s 132(1) of the Act at the factory premises of the assessee at 45<sup>th</sup> Mile Stone, Prithla, Palwal. Physical inventory of the stock was prepared with the help of Sh. Sanjeev Sharma who was working in the capacity of Manager (production) since 2004. The total stock as on the date of search i.e., 06.11.2009 was inventorized and valued at Rs.4,46 25,176.94 and the statement of Sh. Sanjeev Sharma was recorded u/s 132(4) of the Act and he agreed to the above mentioned figure. The Assessing Officer concluded that since there was difference in stock as per the physical inventory taken and the books of account prepared by the assessee, sales had been made out of books. The assessee was asked to explain its position vide questionnaire dated

04.10. 2011 and the assessee was also asked to show cause as to why an addition of Rs.15,53,119/- for the year under consideration by taking the gross profit rate of 4.6% on the difference of stock of Rs.3,13,12,889/- may not be made. The assessee, vide reply dated 19.10.2011, stated that the discrepancy in stock was only due to failure of the accounting software. However, the Assessing Officer did not accept the assessee's contention and made an addition of Rs.11,52,314/-. The quantum appeal by the Ld. CIT(A) was dismissed and subsequently, penalty u/s 271AAA was imposed which was also confirmed by the Ld. CIT(A). The essential question for our consideration at this juncture is only whether an addition made on account of taking the average gross profit rate can be considered to be assessee's undisclosed income for the purpose of imposition of penalty u/s 271AAA of the Act.

5.1 Section 271AAA(1) specifies that:

*“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.”*

*For the purposes of this section “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 or Commissioner before the date of the 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.”*

5.2 In the present appeal, the only addition made in the income was of Rs.11,52,300/- on account of estimation of Gross Profit @ 3.68%. It is the contention of the assessee that the discrepancy in



stock was due to malfunction in the ERP software. Though, this explanation was not accepted by the Assessing Officer, the assessee has demonstrated with evidence that due to malfunction of the software, the accounts could not be completed in time and that the assessee had to approach the Company Law Board with a petition to extend the date for adoption of audited accounts. This petition was accepted by the Company Law Board and the offence was compounded. Therefore, in our considered opinion, the assessee had a reasonable explanation for the discrepancy found in stock and due credence should have been given to this explanation. Therefore, it cannot be said that the assessee had no explanation to offer regarding the difference in stock. Further, the amount on which the penalty has been imposed is only an *ad-hoc* addition based on average gross profit rate and does not relate directly to any undisclosed income unearthed during the course of search. In such a situation, it is our considered opinion that the imposition of penalty u/s 271AAA is not sustainable. We set aside the order of the Ld. CIT(A) and delete the impugned penalty.

6.0 In the final result, the appeal of the assessee stands allowed.

Order pronounced on 12<sup>th</sup> April, 2021.

Sd/-  
**(G.S.PANNU)**  
**VICE PRESIDENT**

Dated:12/04/2021

PK/Ps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-  
**(SUDHANSHU SRIVASTAVA)**  
**JUDICIAL MEMBER**

ASSISTANT REGISTRAR  
ITAT NEW DELHI