

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, KOLKATA
[Before Shri A. T. Varkey, JM & Shri Manish Borad, AM]**I.T.A. No. 431/Kol/2021**
Assessment Year:2012-13

Garg Brothers Pvt. Ltd. (PAN: AAACG9775F)	Vs.	Deputy Commissioner of Income-tax, Central Circle-3(2), Kolkata
Appellant		Respondent

Date of Hearing	23.02.2022
Date of Pronouncement	23.03.2022
For the Appellant	Shri Akkal Dudhwewala, FCA
For the Respondent	Shri Biswanath Das, Addl. CIT

ORDER**Per Shri A. T. Varkey, JM:**

This is an appeal preferred by the assessee against the order of Ld. CIT(A), Kolkata-21 dated 24.09.2021 for AY 2012-13.

- The only grievance of the assessee is against the action of the Ld. CIT(A) in confirming the penalty by restricting it to Rs.4 lacs (10% of Rs.40,00,000/-).
- Brief facts of the case are that a search and seizure operation u/s. 132(1) of the Income Tax Act, 1961 (hereinafter referred to as the “Act”) was carried out at the assessee’s premises on 29.05.2012 and had admitted *undisclosed income* during the course of search to the tune of Rs.3,78,57,991/-; and the details of which were filed through a disclosure petition dated 25.07.2012 filed u/s. 132(4) of the Act which reads as under:

Statement of Undisclosed Income

Sl. No.	Particulars	Document Reference	FY 11-12	Total Amount
1	Loss of commodities offered as additional income	Pg 33 of BSL/06	2,06,99,150.00	2,06,99,150.00
2	Loss of sarees offered as additional income	Pg 30 to 32 of BSL/05	1,31,58,841.00	1,31,58,841.00

3	Discrepancies, Technical Adjustments & Misc. Income			40,00,000.00
	Total		3,38,57,991.00	3,78,57,991.00

4. From the aforesaid details of the disclosure made by the assessee it can be seen that the assessee's total disclosure u/s 132 (4) of the Act at the time of search was to the tune of Rs.3,78,57,991/- which comprised of false claim made by the assessee regarding loss of commodities to the tune of Rs.2,06,99,150/- and false loss of sarees of Rs.1,31,58,841/- which was found during search and marked BSL/05 & BSL/06. After making this disclosure still, the assessee found that there was a deficit/difference of Rs. 40,00,000/- (Rs.3,78,57,991/- - Rs.3,38,57,991/-) so, it made a conditional offer of Rs. 40,00,000/- to cover any contingency/discrepancies/technical adjustments/miscellaneous income which would have been unearthed during search. Thereafter, during the assessment proceedings pursuant to search, the AO considered the aforesaid disclosure and assessed a total income at Rs.4,05,73,450/- by order dated 30.03.2015 which included Rs.40,00,000/- (conditional disclosure).

5. Thereafter, pursuant to the notice of the AO regarding penalty proposed to be levied u/s. 271AAA of the Act, the assessee brought to his notice that the assessee had offered additional income (*commodity loss and saree loss*) to the tune of Rs.3.38 cr. and thus have satisfied the condition as stipulated in clause (i) to sub-section 2 of section 271AAA of the Act, since the assessee had admitted the undisclosed income in the course of search u/s. 132(4) of the Act and has also stated the manner how such undisclosed income was earned (*i.e. by booking false commodity and saree loss*). It was also brought to the notice of the AO that condition under clause (ii) of section 271AAA(2) of the Act was satisfied since in its disclosure petition it was stated that the seized documents as referred to in the working of undisclosed income explains the manner in which the undisclosed income was derived which forms part of the disclosure petition. And the condition under clause (iii) of section 271AAA(2) of the Act also stand satisfied because the assessee has included the said income in its return of income and the same has been accepted by the AO. In such an event the assessee contended that penalty u/s. 271AAA of the Act is not leviable. The AO did

not accept the contention of the assessee and levied penalty at the rate of 10% of the total un-disclosed income to the tune of Rs.3,78,57,991/- i.e. Rs.37,85,799/-. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who gave partial relief to the assessee by restricting the penalty to Rs. 4 lacs (10% of Rs.40 lacs). Still not satisfied, the assessee is before us.

6. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the search operation u/s. 132 of the Act was conducted in Banktosh Group of cases on 29.05.2012. During search Shri Keshaw Kumar Bubna admitted in his statement recorded u/s. 132(4) of the Act additional income of Rs.34 cr. for entire group which included his individual capacity, and that of his family members and that of various group companies. And out of this total Rs.34 crores, an amount of Rs.3,78,57,991/- was offered on behalf of assessee as its undisclosed income for taxation for AY 2012-13. Thereafter, the AO initiated assessment proceedings u/s. 153A of the Act against the assessee from AYs 2007-08 to 2012-13. Pursuant to the notice u/s. 153A of the Act, the assessee filed return declaring total income of Rs.3,63,19,410/-. The assessment was completed u/s. 153A/143(3) of the Act on 30.03.2015 at an assessed income of Rs.4,05,53,450/- after making an addition of Rs.42.54 lacs on account of disallowance of discrepancy, technical adjustment and miscellaneous income to the tune of Rs.40 lakhs and certain disallowance under section 14A, amortization of capital issue expenditure. Thus, it is noted that the total undisclosed income of Rs.3,78,57,991/- which was offered as undisclosed income of assessee u/s. 132(4) of the Act was taxed by AO.

7. Thereafter, the AO had initiated the penalty proceedings u/s. 271AAA of the Act on the additional income admitted by the assessee in its statement u/s. 132(4) of the Act and which was declared in the return of income. Even though the assessee pleaded that the penalty as contemplated u/s. 271AAA of the Act is not attracted, since it satisfied all the three (3) conditions stipulated u/s. 271AAA(2) of the Act and since the fact remains that assessee has paid the entire amount of tax along with interest so it was contended that no penalty under sub-section (1) of section 271AAA of the Act was warranted. However, the AO did not agree and levied penalty @ 10% of the total amount of the entire undisclosed

income of Rs.3,78,57,991/- which comes to Rs.37,85,799/-. On appeal, the Ld. CIT(A) has taken note of the fact that during the search operation Shri Keshaw Kumar Bubna the key person of the assessee company in his statement recorded u/s. 132(4) of the Act has disclosed the additional income of Rs.3,78,57,991/- for AY 2012-13 and accordingly, the assessee filed its return of income showing Rs.3,63,19,410/- u/s. 153A of the Act (*as noted by AO in the assessment order dated 30.03.2015*). The Ld. CIT(A) has found that AO while completing the assessment u/s. 153A/143(3) of the Act on 30.03.2015 had accepted the returned income after making, *inter alia*, the addition of Rs. 40 lacs on account of discrepancies, technical adjustment and miscellaneous income which was offered during search and through the disclosure petition but not included in the return of income filed in response to the notice u/s. 153A of the Act. The Ld. CIT(A) found that the AO's action of levying penalty on the entire amount disclosed to the tune of Rs.3.78 cr. was erroneous. According to him, the assessee had fulfilled the condition as laid down in section 271AAA of the Act in respect of the amount of Rs.3,38,57,991/- and, therefore the balance of Rs.40 lacs only would fall in the ken of penalty u/s. 271AAA of the Act and, therefore, he levied 10% of Rs. 40 lacs which comes to Rs. 4 lacs which he upheld. Thus assessee got partial relief. The assessee still being dissatisfied is in appeal before us challenging the confirmation of penalty of Rs. 4 lacs. For adjudicating this issue let us have a look at Section 271AAA of the Act which reads as under:

“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 1st day of June, 2007, (but before the 1st 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, 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) 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 Principal or Chief Commissioner or Principal 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;

(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 such 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."

8. From a bare reading of the aforesaid provision it is noted that sub-section (1) of section 271AAA empowers the AO to levy penalty under this sub-section, if search u/s. 132 of the Act has been initiated against an assessee between 01.06.2007 to 01.07.2012. However, it has to be borne in mind that if an assessee satisfies the condition specified in sub-section (2) of section 271AAA of the Act then no penalty u/s. 271AAA of the Act is leviable because the opening words of sub-section (2) of section 271AAA of the Act reads "Nothing contained in sub-section (1) shall apply, if assessee" satisfies the conditions stipulated under clause (1), (ii) and (iii) of this sub-section. It is to be noted that it is not mandatory on the part of the AO to levy penalty as per this provision because the Parliament has used the opening words in sub-section (1) is "The AO may". So, it is not mandatory that AO in every cases of search penalty u/s. 271AAA is leviable but it is discretionary. And as discussed, if the assessee satisfies the conditions stipulated in sub-section (2), then no penalty is leviable u/s. 271AAA of the Act. But if the conditions stipulated under sub-section (2) of section 271AAA of the Act are not satisfied then the AO may levy penalty as per sub-section (1) of section 271AAA of the Act. And when we said that levy of penalty u/s. 271AAA of the Act is

discretionary, we mean that it should be judicial discretion. With the aforesaid understanding let us examine whether the penalty as sustained by Ld. CIT(A) in respect of Rs.40 lakhs (10% of it i.e., Rs. 4 lakhs) is legally sustainable. After examination of the facts, we note that the assessee in this case has satisfied the condition laid down in clause (i) of sub-section (2) since in the course of search in the statement under sub-section (4) of section 132 of the Act, Shri Bubna on behalf of assessee has admitted the undisclosed income of Rs.3.78 cr. (out of total disclosure of Rs.34 cr. for the whole group) and had specified the manner in which such income has been derived which is evident from page 6 of the paper book (disclosure petition dated 25.07.2012 filed before the DDIT (Inv.) (refer page 2 to 10 of paper book); coming to clause (ii) the assessee has substantiated the manner in which the undisclosed income was derived i.e. by producing the schedule 6 wherein it was shown that loss on commodities and sarees which was falsely claimed, so it was offered as additional income to the tune of Rs.3,38,57,991/-; and to be on the safe side and out of caution in its disclosure petition had offered the deficit/difference of Rs. 40 lacs (Rs.3.78 cr. – Rs.3.38 cr.) on account of any discrepancy, technical adjustment and miscellaneous income. We note that the AO has noted in the assessment order dated 30.03.2015 that the assessee had filed its return of income pursuant to notice u/s. 153A of the Act reflecting Rs.3,63,19,410/- and the balance amount as admitted during search [Rs.3,78,57,991/- (admission/disclosure petition) – Rs.3,38,57,991/-] to the tune of Rs. 40 lacs was also included in the assessment order passed by AO on 30.03.2015. This fact the Ld. CIT(A) has taken note of which according to him satisfies condition (i) and (ii) under sub-section (2) of section 271AAA of the Act in respect of Rs.3,38,57,991/-. And according to Ld. CIT(A), the other condition in clause (iii) also stands satisfied and so the AO erred in levying penalty u/s. 271AAA of the Act for the entire amount of Rs.3.78 cr. when assessee has satisfied the condition in respect of Rs.3.38 cr. So, according to him, only the deficit portion i.e. Rs. 40 lacs is amenable to penalty u/s. 271AAA of the Act. However, according to assessee since all conditions have been satisfied in respect of the entire amount of Rs.3.78 cr. and since assessee has paid the tax together with interest in respect of the undisclosed income of Rs.3,78,57,991/- penalty u/s. 271AAA of the Act was not warranted.

9. The Ld. AR, has submitted an alternate argument that the amount of Rs. 40 lacs cannot be termed as '*undisclosed income*' within the meaning of section 271AAA of the Act since it doesn't fall in the definition of '*undisclosed income*' given in the Explanation to section 271AAA of the Act. On consideration of this contention of the assessee, we note that in order to qualify as

undisclosed income within the meaning of section 271AAA of the Act, [that is in this case the amount of Rs. 40 lakh] should fall in the ken of the definition given therein (supra). In order to qualify as undisclosed income as per the definition given therein, one has to see whether this amount of Rs. 40 lakhs [sustained by the Ld. CIT(A)] was discovered by the searched party during search in the form of undisclosed *money, bullion, jewelry or valuable article or thing or any entry in the books of account or other documents or transactions* found in the course of search and which (i.e, the undisclosed facts as discovered), (A) has not been recorded on or before the date of search in the books of account or other documents maintained in the course relating to such previous year; or (B) otherwise not disclosed to the PCIT before date of search. Here (B) is not relevant. What is relevant is whether Rs. 40 lakhs (out of Rs.3.78 cr.) has been discovered during search in any description given hereinabove viz. money, jewellery, transaction which has not been recorded in the books before search. Here in order to appreciate the contention of assessee that this Rs. 40 lakhs would not fall in the definition of '*undisclosed income*' one has to see the surrounding facts and circumstances during search in assessee's premises. It is an admitted fact that Shri Bubna during search has disclosed Rs. 34 crores as *undisclosed income* for the whole group, out of which Rs. 3.78 cr. was on behalf of assessee. Pursuant thereto assessee had filed the disclosure petition and had given details of the *undisclosed income*, wherein assessee had offered Rs.2,06,99,150/- which was falsely shown by assessee as loss on account of commodity business (BSL/06) and Rs.1,31,58,841/- (which was falsely shown by assessee as loss from business of sarees – BSL/05), which totals Rs.3,38,57,991/-. This amount qualifies as *undisclosed income* since by discovery of seized documents BSL-5 & 6 it revealed that assessee have falsely claimed loss from these two transactions this amount, so it qualifies as '*undisclosed income*' i.e. Rs.3.38 cr.. However, the question is what about the deficit/difference of Rs.40 lakhs which has been offered by assessee Shri Bubna on behalf of assessee of Rs.3.78 cr (out of Rs.34 cr.) which assessee has not shown in its return pursuant to notice u/s. 153A of the Act. In this regard, it is noted that assessee in its disclosure petition has conditionally offered Rs. 40 lakhs to cover any other undisclosed income which has been unearthed during search. This action of assessee was out of abundant caution and conditional (provided there is material suggesting any undisclosed income un-earthed during search). However, finding that there was no other *undisclosed income* to identify with the seized materials/Panchanama, the assessee while filing the return of income of Rs.3.63 crores pursuant to section 153A notice did not offer Rs. 40 lakhs. However, the AO in the assessment order dated 30.03.2015, added Rs. 40 lakhs since assessee admitted Rs.3.78 cr. during search. And the Ld.

CIT(A) deleted penalty in respect of Rs.3.38 cr. but sustained Rs. 40 lakhs, which we do not countenance because, the addition of Rs. 40 lakhs, was not based on any material discovered during search in any form described therein the definition of un-disclosed income u/s 271AAA of the Act. It is noted that based on the bald statement of Shri Bubna Rs.3.78 cr. (out of Rs.34 cr.) was admitted which includes Rs 40 Lakhs. Since Rs. 40 lakhs cannot be attributed to any money, bullion, jewellery, article or transaction or entry or documents which has not been recorded in the books for the previous year (AY 2012-13) when searched on 29.05.2012, the same cannot fall in the ken of the definition of *undisclosed income* for the purpose of levying penalty u/s. 271AAA of the Act. Having taking note that the amount of Rs. 40 lakhs has been brought to tax by the AO though not shown by the assessee in the Return of Income, the penalty u/s. 271`AAA of the Act cannot be legally sustained. So, the assessee succeeds.

10. In the result, assessee's appeal is allowed.

Order is pronounced in the open court on 23rd March, 2022.

Sd/-
(Manish Borad)
Accountant Member

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

Dated : 23rd March, 2022

JD(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Garg Brothers Pvt. Ltd., 57, Burtolla Street, 3rd floor, West Bengal-700 007.
- 2 Respondent – DCIT, Central circle-3(2), Kolkata.
3. CIT(A), Kolkata-21, Kolkata
4. PCIT , Kolkata
5. DR, ITAT, Kolkata. (sent through e-mal)

/True Copy,

By order,

Assistant Registrar