

आयकर अपीलीय अधिकरण “सी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI

श्री संजय अरोड़ा, लेखा सदस्य के समक्ष एवं श्री अमित शुक्ला, न्यायिक सदस्य ।
BEFORE SHRI SANJAY ARORA, AM AND SHRI AMIT SHUKLA, JM

आयकर अपील सं./I.T.A. No. 5221/Mum/2012
(निर्धारण वर्ष / Assessment Year: 2009-10)

Asst. CIT, Central Circle-13, Room No.1006, 10 th Floor, Old CGO Annexe Bldg., Mumbai-400 020	बनाम/ Vs.	Prakash Steelage Ltd. 101, 1 st Floor, Shantrunjay Apts., 28, Sindhi Lane, N. D. Road, Mumbai-400 004
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACP 6673 K		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri Premanand J.
प्रत्यर्थी की ओर से/Respondent by	:	Dr. K. Shivram & Ms. Neelam C. Jadhav
सुनवाई की तारीख / Date of Hearing	:	12.11.2014
घोषणा की तारीख / Date of Pronouncement	:	28.01.2015

आदेश / ORDER

Per Sanjay Arora, A. M.:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-37, Mumbai ('CIT(A)' for short) dated 31.05.2012, allowing the assessee's appeal contesting the levy of penalty u/s.271AAA of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2009-10 vide order dated 29.06.2011.

2. The only issue arising in the instant appeal is the maintainability or otherwise in law, and in the facts and circumstances of the case, of the deletion of the penalty levied

u/s.271AAA of the Act by the Id. CIT(A) vide his impugned order, which is in fact a combined order for A.Ys. 2004-05, 2008-09 and 2009-10.

3. The facts of the case in brief are that there was a search and seizure action u/s.132 of the Act in the case of Prakash Steelage group of companies, of which the assessee-company forms a part, on 09.02.2009. Several incriminating materials were found, leading to a disclosure of undisclosed income of Rs.15,00,21,000/- for the entire group vide statement u/s.132(4) dated 06/3/2009, to be appropriated by the 'assessee' amongst the various group concerns. The disclosure in the case of the assessee was for A.Ys. 2008-09 and 2009-10, at Rs.49,21,666/- and Rs.99,13,210/- respectively. The assessee subsequently filed its return of income for the relevant year on 29.11.2009, declaring a total income of Rs.7,52,43,818/-. Its assessment was completed u/s.143(3) on 31.12.2010, determining the total income at Rs.7,55,90,450/-, i.e., at an increase of Rs. 3,46,632/- over that returned, also initiating penalty proceedings u/s.271AAA vide notice u/s.274 of even date. The same was subsequently levied at Rs.66,52,232/-, being 10% of the undisclosed income of Rs.6,65,22,317/-, detailed as under, included in the assessed income of Rs.755.90 lacs:

- | | | |
|----|--|------------------|
| a) | Undisclosed interest income declared by the assessee | Rs.99,13,210/- |
| b) | Undisclosed income relating to stock | Rs.5,62,62,475/- |
| c) | Undisclosed income relating to stock discrepancy | Rs.3,46,632/- |

In appeal, the Id. CIT(A) deleted the penalty on the basis of a finding as to substantial compliance (of the provision), not warranting any further denial of benefit of *Explanation 5A* to section 271(1)(c), which is worded similar to *Explanation 5*, after noting the decision in the case of *CIT vs. Mahendra C. Shah* [2008] 299 ITR 305 (Guj). Aggrieved, the Revenue is in appeal, raising the following two grounds, which we may number as 1 & 2:

'1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the penalty order u/s.271AAA relying on the decision of Gujarat High Court in the case of *CIT vs. Mahendra Shah* 299

ITR 205 (Guj) without appreciating the fact that the decision relied upon was not squarely applicable in the instant case as it related to explanation 5A of section 271(1)(c) and not u/s.271AAA.

2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in allowing the appeal of the assessee without appreciating the fact that the assessee failed to fulfill the preconditions stipulated in section 271AAA particularly the condition u/s.271AAA(2)(ii) of the I.T. Act.'

4. We have heard the parties, and perused the material on record.

4.1 At the outset, we observe, even as would be apparent from the foregoing narration of events, and as also sought to be brought forth by the Revenue per its first ground of appeal, that the Id. CIT(A) has grossly misapplied himself in the matter; examining the levy of penalty under a provision (section 271(1)(c)) which was neither invoked by the Assessing Officer (A.O.) nor could in fact be in the facts and circumstances of the case. Penalty in the instant case stands levied u/s.271AAA, 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 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;
- (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.

4.2 The matter stands dealt with by the Id. CIT(A) vide sub-para 6 of his order, which stands perused by us. Para 6.1.1 records the assessee’s grounds before him. Sub-para 6.2 notes briefly the facts of the case and the basis of the levy of penalty as recorded by the A.O. Sub-para 6.3 reproduces the assessee’s submissions before the Id. CIT(A). Vide sub-para 6.4.1, the Id. CIT(A) records having considered the rival submissions and perused the materials on record. Sub-para 6.5 details his ‘Decision’, which we may reproduce as under:

‘6.5.1 Penalty u/s.271AAA has been levied by the Ld. A.O. on the following undisclosed income /additions:-

- a. Undisclosed interest Income declared by the assessee of Rs.99,13,210/-
- b. Undisclosed Income relating to stock of Rs.5,62,62,475/- declared by the assessee and addition due to discrepancy in stock of Rs.3,46,632/-.

6.5.2 Ld. A.O. has initiated penalty u/s.271AAA only because the appellant could not specify the manner in which such income had been derived and failed to substantiate the same. In this regard, it is pertinent to look into the provisions of sec.271AAA, relevant part of which are as under:-

“(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”

6.5.3 It may also be profitable to refer to Explanation 5A substituted by the Finance Act, 2009 w.r.e.f. 01.06.2007 which is as under:-

“Where, in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of-

- (i) Any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to assets) and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income for any previous year; or*
- (ii) Any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year,*

Which has ended before the date of search and –

- (a) Whether the return of income for such previous year has been furnished before the said date but such income has not been declared therein; or*
- (b) The due date for filing the return of income for such previous year has expired but the assessee has not filed the return,*

Then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.”

6.5.4 On perusal of the same it is to be seen that an explanation has been provided in the aforesaid provisions on fulfillment of which penalty is not to be levied. The same being:

1. A statement is made u/s. 132(4) admitting the undisclosed income,
2. Specifying the manner in which the undisclosed income was derived and
3. The assessee pays the tax together with interest, if any, on the same.

6.5.5 I find that the appellant has already made a statement admitting the undisclosed income and also stated that it has paid all the taxes together with interest on the sum offered for taxation in the statement u/s.132(4) as reflected in the return of income filed for the year. The appellant group has also stated during and immediately after the search that the income of the group was earned from undisclosed business based on the entries found in the seized documents. While dealing with similar circumstances, in respect of Explanation-5 to sec. 271(1)(c) which also contained similar requirements of disclosing the manner in which the income was earned and substantiating the same Hon'ble Gujarat High Court in the case of *CIT vs. Mahendra Shah* 299 ITR 305 (Guj.) has held as under:

(Paras 7 to 15 of the decision stand reproduced)

6.5.6 In view of the above, it is clear that even if the statement does not specify the manner in which income is derived but the income is declared and tax thereon is paid, there would be substantial compliance not warranting on further denial of the benefit under Explanation 5A to sec. 271(1)(c) which is similarly worded as Expl. 5. In view of the same, I am of the considered opinion that penalty imposed u/s.271AAA is not warranted in the facts of the case. Accordingly, the same is directed to be cancelled.’

4.3 The ingredients of section 271AAA, for which reference may be made to sub-sections (1) and (2) thereof, and which provision only is applicable for the current year –

the year of search (s. 271AAA(1) r/w *Explanation* thereto), and in fact applied by the A.O., vary substantially from that of section 271(1)(c) (*Explanation 5*), noted at para 6.5.4 of the impugned order, inasmuch as the former provides for substantiation of the manner in which the undisclosed income, as disclosed per s. 132(4), is derived by the assessee. In fact, the Id. CIT(A) records the ingredients of *Explanation 5* to section 271(1)(c) at para 6.5.4 of his order, while *Explanation 5A* to s. 271(1)(c) alone is relevant for a search initiated u/s.132 on and after 01.06.2007, as in the instant case; the former applying only in case of a search initiated before 01.06.2007. Even the decision relied upon by him (at para 6.5.5), i.e., *Mahendra C. Shah* (supra), is only in the context of section 271(1)(c). The two sections, i.e., s. 271(1)(c) and s. 271AAA, are not only worded differently, with thus different concomitant scopes, are rather mandated to operate exclusively (refer section 271AAA(3)). The foregoing, we believe, would bring forth the basis as well as the validity of our initial observation at para 4.1 of this order, i.e., of the Id. CIT(A) having grossly misapplied himself in the matter. We, therefore, accepting the Revenue's Ground # 1, vacate the findings by the Id. CIT(A) as well as his consequent decision as recorded in the concluding sub-para (# 6.5.6) of his order.

The same, however, would not by itself imply a positive satisfaction of the conditions of section 271AAA, only on the basis of which the penalty as levied could be sustained. The matter would therefore; the Id. CIT(A) having examined the levy on the basis and anvil of a different provision, require being restored back to him for a consideration afresh, i.e., the issue on merits, and toward which the Revenue has raised its Ground No. 2 before us. We, accordingly, restore the matter back to the file of the Id. CIT(A) to adjudicate the issue arising, i.e., the applicability of s. 271AAA in the facts of the case, and after allowing the assessee an opportunity to state its case before him.

4.4 In this regard, we also consider it relevant to state our *prima facie* observations, so that the same are kept in view by the Id. CIT(A) while deciding the assessee's case before him. Firstly, any income to be subject to penalty u/s.271AAA should be an 'undisclosed income', as defined vide *Explanation* below sub-subsection (4) the said section. The

penalty in the instant case, however, has been levied on the income of Rs.3,46,632/-, which, as it would appear to us on a reading of the assessment and penalty order, is only on account of a difference in the valuation of stock. Thus a finding as to the impugned incomes being undisclosed incomes is a pre-requisite for the application of the provision.

Further, each of the three ingredients as specified u/s. 271AAA(2) would need to be separately examined for their satisfaction by the assessee if the penalty there-under is not to be levied and, thus, sustained. While this may seem axiomatic and, therefore, superfluous for us to be stating so, liable to be construed as an expression of over anxiety, we do so as we observe a gross overlooking of this vital aspect of the matter. As we observe, the undisclosed income of Rs.562.62 lacs relating to stock was declared by the assessee, i.e., for the first time, only per its return of income filed on 29.11.2009, and not per the declaration vide a statement/deposition u/s.132(4) of the Act; the disclosure following search extending only to an income of Rs.99.13 lacs, i.e., by way of interest. The only finding by the Id. CIT(A) in the matter is that vide para 6.5.5 of his order, which states of tax and interest having been paid on the incomes offered u/s. 132(4), and which find due reflection in the return of income. The only income, of the three incomes under reference, which satisfies this requirement, is the interest income, i.e., presuming that the manner of its derivation stands also specified. The admission u/s.132(4) is to specify the undisclosed income, or at least the manner in which it is to be arrived at; the whole premise for extending immunity from the penalty, statutorily mandated, being that the assessee commits himself, providing the necessary details under a condition of oath.

Further, surprisingly again, we observe no finding by the Id. CIT(A) in respect of substantiation of the manner of deriving the undisclosed income, which stipulation, while missing in section 271(1)(c), stands incorporated in section 271AAA. The A.O. clearly records a finding, both in respect of the assessee having failed to specify the manner in which the undisclosed income is derived as well as of the assessee having failed to substantiate the same, and which in fact the Id. CIT(A) notes vide para 6.5.2 of his order. Clearly, these findings of fact would need to be addressed by the Id. CIT(A), either endorsing or reversing or otherwise modifying the same, i.e., based on his reappraisal of

the materials found from the possession of, or otherwise furnished by, the assessee, or even the evidences led by it before him for the first time, of-course by and upon observing the due process of law (refer r. 46A). The onus to satisfy the conditions of the provision though, would only be on the assessee. In fact, all this would precisely be the purview of the first appellate authority in the set aside proceedings.

Coming to the decision in the case of *Mahendra C. Shah* (supra), relied upon by the Id. CIT(A), the same, as afore-stated, is firstly in respect of section 271(1)(c), the parameters as well as ingredients of which are different from that of section 271AAA. While the former provision is applicable in the case of concealment of or furnishing inaccurate, particulars of income, considering the deeming provisions in its respect under the section, s. 271AAA provides for a mandatory levy of penalty except where the assessee satisfies the conditions of section 271AAA(2). Even the saving upon proving a reasonable clause, as provided under section 273B, is not applicable for a penalty imposable u/s.271AAA, which is only in respect of undisclosed income, so that what alone is relevant is the applicability of the provision in the facts of the case. It is apparent from the reading of the said decision that the environmental conditions existing at the time of the search, including the manner in which the statement u/s.132(4) is generally recorded, prevailed with the hon'ble court in holding of a substantial compliance in the facts of the case, i.e., *qua* the condition of admission of undisclosed income and the statement of the manner in which it is derived, also provided u/*Expl.5* to s. 271(1)(c), saving penalty. As explained by it, this is as the assessee had no occasion to state or make averments in the manner as required by or under the law. Its prescription is therefore to be read contextually. The legal proposition that thus arises from the said judgment is that the satisfaction of the conditions must be considered in the background and the context of the obtaining facts and circumstances of the case. In the instant case, the statement u/s.132(4), which is by Shri Prakash C. Kanugo, a director of the assessee-company, was recorded only on 06.03.2009 (copy on record), i.e., *nearly a month after the search*. The assessee cannot be said to be constrained for want of time - which was ample, to deliberate in the matter, as well as seek legal advice. In fact, the statement was made only

in the presence of its counsel, Shri Vinay Doshi, CA, and itself makes a plea for grant of condonation from the levy of penalty (in answer to Q.11). Could it be therefore be said that the assessee had no occasion to aver with regard to the manner of deriving the income being disclosed? A company acts through the human agency of its management, which alone could depose *qua* the manner in which its undisclosed income stood earned/derived, being rather in its exclusive knowledge? *All that the law postulates is a honest disclosure qua the said income.* A finding as to the satisfaction or otherwise of the said condition, or for that matter its' substantiation, i.e., of the manner in which the undisclosed income was derived, it needs to be appreciated, are pure findings of fact. The hon'ble high courts can interfere with such a finding/s only where it is in its view either perverse or without evidence or based on irrelevant material, or which is partly relevant and partly irrelevant (refer, inter alia, *CIT v. Daulat Ram Rawatmull* [1973] 87 ITR 349 (SC)). Further, even where so, the province of the hon'ble court is to restore the matter back to the tribunal, stating its reasons, as clarified by the hon'ble court in *Janatha Contract Co. v. CIT* [1976] 105 ITR 627 (Ker), following the binding decisions by the apex court in *CIT v. Greaves Cotton & Co. Ltd.* [1968] 68 ITR 200 (SC) and *CIT v. Indian Mollasses & Co. (P.) Ltd.* [1970] 78 ITR 474 (SC). The authorities on the law in the matter could in fact be multiplied. Then, again, we wonder, rather than reading down the provision, so as to operate to negate the mandatory requirement of the section, defeating the legislative intent, which, as explained by the hon'ble courts as well as the official pronouncements explaining the provision, is of plugging the generation of undisclosed income and the consequent leakage of revenue for future, why could the same be not read so as to allow the assessee the latitude for providing the necessary details subsequently, i.e., where the disclosure u/s.132(4) is made under excruciating or difficult circumstances. The same of course would be under oath, making it a part of and refer to the earlier statement u/s. 132(4), complying thus substantially and effectively, with the substantive provision of law. Further, the further condition of 'substantiation', as provided u/s. 271AAA(2)(ii), which was not there in the case, being u/s. 271(1)(c), before the hon'ble court in *Mahendra C. Shah* (supra), could only be interpreted to mean of the

law casting a further obligation on the assessee to demonstrate the manner of deriving the undisclosed income, as specified per the statement u/s.132(4), as valid and true, i.e., stands validated and is on a firm basis; the presumption as to the truth of the materials found being already provided for u/s. 292C. The said decision would thus be of little assistance to the assessee.

5. In the result, the Revenue's appeal is allowed for statistical purposes
परिणामतः राजस्व की अपील सांख्यिकीय उद्देश्य के लिए स्वीकृत की जाती है ।

Order pronounced in the open court on January 28, 2015

Sd/-
(Amit Shukla)

न्यायिक सदस्य / Judicial Member

Sd/-
(Sanjay Arora)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 28.01.2015

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai