

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
[Before Shri P.K.Bansal, AM & Shri Mahavir Singh, JM]

I.T.A Nos. 1391 & 1414 /Kol/2011
Assessment Year: 2008-09

SPS Steel & Power Ltd. 68A, Ballygunge Circular Road Kolkata-700019 (PAN:AAHCS 8656C)	Vs.	Asst. Commissioner of Income-tax Central Circle-X Kolkata
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DCIT, CC-X, Kolkata 18, Rabindra Sarani Kolkata-1 (Appellant)	Vs.	Concast Steel & Power Ltd. (Formerly SPS Steel & Power Ltd) (Respondent)
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Date of hearing: 13.05.2015
Date of pronouncement: 30.06.2015

For the Assessee : Shri Ravi Tulsian, FCA
For the Revenue: Shri Dilip Kr. Mitray, JCIT, Sr. DR

ORDER

Per Shri Mahavir Singh, JM:

These cross-appeal by assessee and Revenue are arising out of common order of CIT(A)-I, Kolkata vide Appeal No. 34/CIT(A)-C-II/CC-X/10-11 dated 03.08.2011. Assessment was framed by ACIT, C.C-X, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as ‘the Act’) for Assessment Year 2008-09 vide order dated 31.12.2009.

2. Only common issue in these cross-appeals is against the order of CIT(A) in restricting the penalty levied by Assessing Officer u/s 271AAA of the Act at Rs.11,36,560/- as against the penalty levied at Rs.79,76,560/-. For this, assessee is in appeal against the retention of penalty and Revenue is against the deletion of penalty. For this, assessee has raised following ground No.2 in ITA No.1391/K/2011:

“2. On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming the penalty u/s. 271AAA of the Income-tax Act, 1961, to the extent of Rs.11,36,560/- without paying due attention to the facts that out of the addition of Rs.1,13,65,623/- made in this regard, the appellant company had voluntarily accepted the addition of Rs.86,90,623/- during the scrutiny assessment proceedings and paid due taxes thereon also and that so far as the other amount of Rs.26,75,000/- is concerned, it has not been proved that the same belongs to the appellant company and is its concealed income.”

And Revenue in ITA No.1414/K/2011 has raised the following grounds No.1 & 2:-

"1. This in the facts and circumstances of the case, the Ld. CIT(A) has erred in reducing the penalty levied u/s 271AAA of the Act, to the extent of Rs.68,40,000/- without considering that the assessee had failed to substantiate the manner in which the undisclosed income was derived and, therefore, all the conditions as stipulated u/s 271AAA of the Act, were not satisfied in this case.

2. This in the facts and circumstances in the case, the Ld. CIT(A) has erred in holding that working of undisclosed income with reference to the seized documents tantamount to specification of manner of earning of the undisclosed income, without considering that what the assessee had done was mere quantification of undisclosed income and not the substantiation of manner of its earning."

3. Briefly stated facts are that a search and seizure operation u/s 132 of the Act was conducted on the business and residential premises of SPS Group of cases on 14-02-2008. During the course of search, one of the Director of SPS Steel & Power Ltd, disclosed an income of Rs.6.84 crores. This disclosure was explained by assessee by filing detailed working and manner of earning of the above income. The AO considered the disclosure and accepted the disclosure of Rs.6.84 crores by observing as under:-

"Disclosure:

During the course of operation u/s. 132(4) of I.T act 1961, the assessee vide its disclosure petition dated 11.04.2008 had disclosed an amount of Rs. 6.84 crores as net undisclosed income which is as under:-

-1) Assessee was confronted with Page no. 1 to 5 of AS/1 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s. S.P.S. Steel & Power Ltd. stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores in which unaccounted cash expenses of Rs.1,77,60,565/- is being taken as unaccounted cash expenses for purchase of imported scrap as worked out from various entries of Page 1 to 5.

2) Assessee was confronted with Page no. 1 to 15 of AS/2 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs. 6.84 crores as net undisclosed income in which Rs.1,75,65,790/- is being taken as undisclosed trading profit as worked out from various entries of Page 1 to 15.

3) Assessee was confronted with Page no. 16 & 17 of AS/2 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.2,72,77,923/- is being taken as undisclosed income as worked out from various entries of Page 16 & 17.

4) Assessee was confronted with Page no. 4 of AS/3 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.68,500/- is being taken as undisclosed

miscellaneous income and Rs.72,049/- as undisclosed miscellaneous expenditure as worked out from various entries of Page 4.

5) Assessee was confronted with Page no. 5 to 24 of AS/3 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.11,20,440/- is being taken as undisclosed trading profit as worked out from various entries of Page 5 to 24.

6) Assessee was confronted with Page no. 25 of AS/3 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.21,9453/- is being taken as undisclosed miscellaneous income and Rs.1,53,608/- as undisclosed miscellaneous expenditure as worked out from various entries of Page 25.

7) Assessee was confronted with Page no. 26 of AS/3 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.34,00,000/- is being taken as undisclosed cash income as worked out from various entries of Page 26.

8) Assessee was confronted with Page no. 27 of AS/3 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.1,06,932/- is taken as undisclosed miscellaneous expenditure as worked out from various entries of Page 27.

9) Assessee was confronted with page no 28 of AS/3 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.24,62,114/- is being taken as undisclosed trading profit as worked out from various sentries of Page 28.

10) Assessee was confronted with Page no. 30 of AS/3 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.4,47,377/- is being taken as undisclosed trading profit as worked out from various entries of Page 30.

11) Assessee was confronted with Page no. 6 of AS/4 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.31,50,000/- is being taken as undisclosed trading profit as worked out from various entries of Page 6.

12) Assessee was confronted with a bag containing torn papers of C/5 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that

the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.20,00,000/- is being taken as undisclosed payment for purchase of coal of 4000 M./t. as worked out from various entries of torn papers.

13) Assessee was confronted with Page no. 1 to 14 of SPSG/1 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd sated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income of Rs.6.84 crores as net undisclosed income in which Rs.7,00,000/- is being taken as undisclosed payment for purchase of coal of 1395 M.T as worked out from various entries of Page 1 to 14.

14) Assessee was confronted with Page no. 9 & 10 of SPSG/13 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.4,40,000/- is being taken as undisclosed advertisement expenditure as worked out from various entries of Page 9 & 10.

15) Assessee was confronted with Page no. 11 & 12 SPSG/13 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.25,41,155/- is being taken as undisclosed miscellaneous expenditure as worked out from various entries of Page 121 & 12.

16) Assessee was confronted with Page no. 2 of UKS/1 found from the residential premises of Sri Uttam Kumar Sarawagi. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.1,22,53,900/- is being taken as undisclosed trading profit as worked out from various entries of Page 2.

17) Assessee was confronted with Page no. 21 of UKS/1 found from the residential premises of Sri Uttam Kumar Sarawagi. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.10,46,550/- is being taken as undisclosed trading profit as worked out from various entries of Page 21.

18) Assessee was confronted with Page no. 22 of UKS/1 found from the residential premises of Sri Uttam Kumar Sarawagi. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.1,54,620/- is being taken as undisclosed trading profit as worked out from various entries of Page 22.

19) Assessee was confronted with Page no. 32 of RM/1 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. steel & Power Ltd sated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.61,00,000/- is being taken as undisclosed miscellaneous income and Rs.1,01,36,805/- as undisclosed miscellaneous expenditure as worked out from various entries of Page 32.

20) Assessee was confronted with Page no. 11 of RM/1 found from the residential premises of Sri Arjun Kumar Santhalia. In reply Sri Arjun Kumar Santhalia one of the directors of M/s S.P.S. Steel & Power Ltd stated that the company M/s S.P.S. Steel & Power Ltd is making a disclosure of Rs.6.84 crores as net undisclosed income in which Rs.1,00,000/- is taken as undisclosed miscellaneous expenditure and Rs.7,11,589/- is taken as payment made to Kalinga Associates worked out from various entries of Page 11.

In support of the disclosure made during the search, the assessee has submitted a detailed working with a cash flow statement which was considered and verified.ø

The AO initiated penalty proceedings u/s 271AAA and 271(1)(c) of the Act in respect to above disclosure.

4. The AO after taking the explanation of the assessee, levied the penalty u/s. 271AAA of the Act for the reason that assessee could not substantiate the manner of earning of income other than mere admission. The AO after considering the submissions of assessee levied the penalty by observing as under:-

The submissions of the assessee have been considered carefully and the same are dealt with hereunder. It has been contended by the assessee that assessee has disclosed an amount of Rs.6.84 crores being its undisclosed income during the course of search. This was duly taken into return filed thereafter. Tax was also paid. Assessee has also specified the manner in which this income was earned as per submission of disclosure of income dated 10.04.2008 before DDIT (Investigation) Unit 1(4), Kolkata. However, assessee was specifically asked to substantiate the manner in which this income was earned. During penalty proceedings assessee was given the opportunity to substantiate the manner of earning this income as mentioned above.

In this regard assessee has failed to provide any corroborative evidence whatsoever with regard to disclosed income (as stated in the disclosure working submitted before the Department dated 10.04.2008) amounting to Rs.6.84 crores which can be taken as substantiation of above specified manner of income. Though assessee has incorporated this amount as undisclosed income for the AY 2008-09, there is no substantiation other than mere admission. Therefore, it can be said that assessee has not been able to satisfy the condition laid down by Sec 271AAA(2)(ii).

(b) Further, an addition of Rs.1,13,65,623/- was also made during assessment. This was detection of concealment of income borne out of seized material. So this form part of undisclosed income as defined in explanation of Sec. 271AAA(4). Applicability of penalty provisions 271AAA is invocable as the search was conducted after 1st June 2007. In this regard also, assessee could not give any substantiation of manner of income other than mere admission. Therefore, it can be said that assessee has not been able to satisfy the condition laid down by Sec. 271AAA(2)(ii).

In view of the above, I am satisfied that it is a fit case for imposition of penalty u/s 271AAA of the I.T. Act, 1961. Considering the totality of the facts and circumstances of the case, I impose penalty of Rs.79,6,560/- being 10% of the total unsubstantiated income (total undisclosed income as per explanation of Section 271AAA(4) being Rs.7,97,65,623/- for AY 08-09) is 271AAA of the I.T. Act, 1961

Aggrieved, assessee preferred appeal before CIT(A).

5. The CIT(A) deleted the penalty in respect to the disclosure of Rs.6.84 cr. and restricted penalty on the balance undisclosed income of Rs.1,13,65,623/- by observing as under:-

“4. I have carefully considering the submission of the L.d A.r. In this case the A./O has imposed penalty on undisclosed income of Rs.7,97,65,623/-. There is no disputed on the act of the case. In the penalty order the AO has not disputed that out of total undisclosed income of Rs.7,97,65,623/- the statement recorded under sub-section (4) of section 132 of the Act. It has been also not disputed that the assessee has duly included the said undisclosed income in the return and also paid the tax due on the income disclosed. The only reason for imposing penalty is that the assessee failed to substantiates the manner in which the undisclosed income was derived, (2) is not fully satisfied. Accordingly the assessee was liable for penalty as per provision of section 271AAA(1) of the Act.

4.1 Section 271AAA reads as under-

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, 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,-

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 as the tax, together with interest, if any, in respect of the undisclosed income.

From the plain reading of the above 271AAA of the Act, it is apparent that if the condition laid down in subsection (2) of section 271AAA is satisfied no Penalty will be imposed. In the case under consideration the assessee declared the undisclosed income of Rs.6,84,00,000/-. Tax on the undisclosed income was also duly paid. Further the detail working and calculation of the above undisclosed income was also duly filed. On perusal of the same, it is apparent that, the assessee with reference to the seized record has worked out total receipt of Rs.10,31,22,703/- and corresponding expenses of Rs.3,47,22,703/- and accordingly undisclosed of Rs.6,84,00,000/- has been calculated. The AO has not disputed the above disclosure and assessment has been completed accordingly. Hence it cannot be said that the assessee has no specified the manner in which the \undisclosed income has been earned. Hence taking all the facts into consideration, I am of the opinion, that penalty under section 271AAA does not attract on the undisclosed income of Rs.6,84,00,000/- as all the condition specified in section 271AAA(2) is satisfied.

4.2 However regarding the penalty imposed on the undisclosed income of Rs.1,13,65,623/- is concerned, none of the condition specified under section 271AAA(@) is satisfied. The undisclosed income in question was neither admitted and disclosed in the statement recorded under sub-section (4) of section 132 of the Act nor the same was subsequently included in the return filed by the assessee. The undisclosed income was deducted by the AO during the course of assessment proceeding. Hence taking all the facts into consideration it is held that the assessee is liable for penalty on the undisclosed income of Rs.1,13,65,623/- as per provision of the section 271AAA of the Act.

Accordingly out of total penalty imposed of Rs.79,76,560/- penalty of Rs.11,36,560/- is confirmed. The appellant will get necessary relief accordingly."

Aggrieved, against the order of CIT(A) deleting the penalty levied by AO u/s. 271AAA of the Act, Revenue came in appeal before Tribunal and against retention of penalty, assessee came in appeal before Tribunal.

6. We have heard rival contentions and gone through the facts and circumstances of the case. Coming to Revenue's appeal, we find that the AO has accepted the disclosure made vide petition dated 11.04.2008 amounting to Rs.8.64 crores. The AO also admitted that assessee filed a detailed working of disclosure with cash flow statement which was verified. The AO discussed the disclosure in his assessment order and the same is reproduced in above para-2. The AO has not disputed that out of the total undisclosed income of Rs.7,97,65,623/-, a sum of Rs.6.84 crores was admitted as undisclosed income in the statement u/s 132(4) of the Act and duly included the same as undisclosed income in the return of income and also paid taxes. The AO levied the penalty only on the reason that the assessee failed to substantiate the manner in which the undisclosed income was derived. From the detailed working and calculation of the undisclosed income as done by the AO in his assessment order as is reproduced in above para-2, and also included in the same in the return of income and paid taxes. The AO has not disputed the above disclosure as each and every entry has been explained by the assessee with narrations stating the manner in which this income was earned by assessee. Hence, in this case it cannot be said that the assessee has not specified the manner in which the undisclosed income has been earned because the papers found during the course of search relates to the business of the assessee or debtors relating to business of the assessee. It is clear from the above that the undisclosed income was earned mainly by virtue of trading activities and income from other sources. This has not been disputed by the AO during the course of scrutiny assessment and accepted the same as it is. In this regard, we have gone to the provision of Sec. 292C of the Act which reads as under:-

"292[(1)] Where any books of accounts, other documents, money, bullion, jewellery or other valuable articles or thing are or is found in the possession or control of any person in the course of a search under section 132 [or survey under section 133A], it may, in any proceeding under this Act, be presumed-

- (i) That such books of accounts , other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;*

- (ii) *That the contents of such books of accounts and other documents are true; and*
- (iii) *That the signature and every other part of such books of accounts and other documents which purport section 132].”*

In view of the above, Section which deems that all recordings in the seized documents are correct unless proved to the contrary. In view of the above provisions and the facts of this case implies that the recordings in the seized documents are trading activity and income from other sources, which were never disputed by the AO. The Cuttak Bench of this Tribunal in the case of *Ashok Kumar Sharma v. DCIT* 149 TTJ 33, in similar circumstances, has held that:-

“Assessee have disclosed concealed income while giving statements u/s. 132 during course of search and paid tax thereon and showed the said undisclosed income in return filed under the head ‘income from business’ and Department has accepted these returns and accordingly passed assessment orders. It is not a case of revenue that assessee has not satisfied the manner in which income is derived and assessee has not paid tax with interest on undisclosed income. Undisputedly, assessee have shown undisclosed income under head ‘income from business’ in returns filed by them, and the same was accepted by Department by passing assessment orders accordingly. Therefore, cases of assessee fall exactly within purview of section 271AAA(2). Therefore provisions contained in subsection 1 of section 271AAA are not applicable.”

In view of the above factual and legal position, in the instant case, the income disclosed by the assessee and also the return has been accepted by the assessee, no penalty u/s 271AAA of the Act can be levied and CIT(A) has rightly deleted the same. We confirm the order of CIT(A) deleting the penalty.

7. Coming to assessee's appeal, as regard to the penalty imposed by the AO u/s 271AAA of the Act on undisclosed income of Rs.1,13,65,623/-, the entire premises of the AO was that none of the conditions specified u/s. 271AAA(2) of the Act is not satisfied. According to AO, the undisclosed income is neither admitted or disclosed u/s. 132(4) of the Act nor subsequently included in the return of income filed by the assessee. According to AO, this undisclosed income was merely detection by the Revenue. The assessee before us explained in respect to the payment of Rs.15,77,307/- which is recorded in page No. 23 of seized document UKS1. According to AO, the assessee has recorded a sum of Rs.1,54,620/- in its disclosure petition and the balance Rs.14,22,687/- was not disclosed. It was explained that as per the disclosure petition the assessee had shown an income of Rs.1,54,620/- with reference to page No. 23 of the seized document UKS1. In arriving at such profits, payment of Rs.55 lakhs has been

considered. Thus, the allegation of the AO that a sum of Rs.1,54,620/- was only disclosed is completely contrary to the facts of the case. The assessee alternatively argued that the aforesaid payments of Rs.14,22,687/- were not considered in the disclosure petition, then in that case said payment should reduce the income voluntarily disclosed by the assessee during the course of search i.e. Rs.6.84 crores. The said income was represented by cash disclosed in the balance sheet of the assessee and as accepted by the AO. Ld. counsel for the assessee before us drew us the provision of Sec. 69C of the Act and argued that from a plain reading of the Sec. 69C of the Act, the addition can be made only if the assessee cannot explain the source of the expenditure. In the instant case, the source of the expenditure of Rs.14,22,687/- clearly stands explained by the disclosed income of Rs.6.84 crores available to the assessee in cash. Thus, no addition u/s. 69C of the Act can be made. Further, he stated that page No. 23 of the UKS1 is a dumb document. The document merely has some figures written on it. The document nowhere mentions the nature of the transactions, the parties to the transaction, the period of transaction etc. Nothing can be gathered from the said document. Thus no addition can be made on the said document. He explained the aforesaid seized document that it is apparent that cash expenses of Rs.13.50 lakh was incurred and paid to Liberty Marine. The same was added by the AO to the income of the assessee disregarding the fact that said sum was already considered in its disclosure petition, wherein Miscellaneous cash expense of Rs.25,41,155/- was disclosed to have been paid to Liberty Marine. But the assessee accepted the addition just to avoid lingering litigation but this is not subject-matter of penalty u/s 271AAA of the Act.

8. Similarly, w.r.t the addition of Rs.44,17,936/- being cash expenses as per the aforesaid seized document, Ld. counsel for the assessee explained that the said amount was considered in the disclosure petition of the assessee, wherein miscellaneous expenditure of Rs.101,36,805/- in connection with miscellaneous receipts of Rs.61 lakh was disclosed by the assessee. He argued that, if for the sake of argument, it is assumed that the aforesaid expenses of Rs.57,7,936/- were not disclosed in the return, then, in that case said expense should reduce the income voluntarily disclosed by the assessee in course of search i.e. Rs.6.84 crores. As already explained in para 4.3 above, the assessee

had enough cash available to meet the said expense. Accordingly, no addition u/s. 69C of the Act can be made.

9. In respect to addition of Rs. 15 lakh the assessee explained that during the relevant FY it had paid transportation charges to Sampoorina Logistics Pvt. Ltd. vide cheques. The AO alleged that out of the total transportation charges paid by the assessee a sum of Rs.15 lakh was received back in cash on account of discounts offered by the transporter and accordingly expenses to the tune of Rs.15 lakh recorded in the books are bogus. He contended that Shri Bipin Vohra, Chairman of the assessee company in his statement obtained in course of search accepted the said allegation. Reliance was also placed on page no. 7 of SPSG/2 and page No. 28 of SPSG/3. Ld counsel explained firstly to the seized documents relied upon by the AO and page No. 7 of SPSG/2 shows the details of cheques issued to various parties. Further, page No. 28 of SPSG/3 shows withdrawal of Rs.6.50 lakh from bank account of the assessee. The said document is the evidence of payment made to Sampoorina Logistics in cheque as transportation charges. They nowhere suggest cash receipt by the assessee. Hence, no addition can be made based on the said documents. Ld. counsel explained the statement of Shri Bipni Vohra, Chairman of the assessee-company, obtained in course of search, and clarified that his statement was recorded by the search party under duress and coercion. Thus, the statement made in course of search does not have much evidentiary value unless it is corroborated with other documentary evidences. For this Ld. counsel for the assessee drew our attention to Departmental issued by CBDT vide Board's letter No. F No.286/2/2003/IT(Inv) dated 11.03.2003 and the extract of which is as under:-

"Instances have come to the notice of the Board where the assessee have claimed that they have been forced to confess the undisclosed income during course of search and seizure and survey. Such confession, if not based on credible evidence, are altered/retracted by the concerned assessee while filing returns of income. In such circumstances, confessions in the course of search and seizure and survey operations do not serve any useful purpose. It is therefore advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before income tax department. Similarly while recording statements during course of search and seizures and survey operations, no attempt should be made to obtain confession as to undisclosed income. Any action on the contrary will be viewed adversely."

In view of the above, Ld. counsel for the assessee argued that the Board recognizes that forced statements are taken by the Authorities from assessee during search admitting or

confessing to undisclosed income but according to him, such confession by an oral statements would not suffice unless there is enough evidence to corroborate such confession. In view of these, he argued that no document supporting cash receipt of Rs.15 lakh was found during the course of search and the entire statement of Shri Bipin Vohra. Accordingly, the penalty levied by the AO cannot be sustained.

10. In respect to addition of Rs.26.75 lakh, Ld. counsel for the assessee argued that this addition relates to seize document enclosed at page 65 of paper book. A perusal of the same shall clarify that the document nowhere mentions the period of the transaction. It merely records some transactions in the cash and bank column. Solely on this basis, the AO presumed that entries of Rs.640.25 on right hand side are cash payments of Rs.6.4025 crores and entries on the left hand side of Rs.667 represent cash receipts of Rs.6.67 crores. Accordingly he treated the net amount of Rs.26.75 lakh as undisclosed income and added the same to the income of the assessee. He explained that the said document is a dumb document since it does not specify the period to which it pertains. Thus, it is not possible to trace out as to which set of transactions cumulate to the figures reflected in the page. Further, the seized document nowhere mentions any basis for deciphering the figures recorded in the said document. Thus, the AO was not justified in presuming that the figures in the seized document were in lakhs. Now, since the document is a dumb document no addition could have been made on that basis as already discussed in para 4.4 above. Moreover, the seized document does not constitute books of accounts of the assessee. It is merely a loose sheet of paper, which has no intrinsic value. Attention in this regard is invited to the definition of books of accounts u/s. 2(12A) of the Act: *“Books or books of accounts” includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc. Tape or any other form of electro-magnetic data storage device;”*

Thus from the above, according to Ld. counsel of assessee it is clear that books of accounts include ledgers, cash books etc., the paper seized from the premises of assessee clearly does not fall within the definition of books of accounts. From a plain reading of the above, it is clear that undisclosed income means *“any income represented by any entry in the documents found in course of search”* which are not recorded in the books of the assessee. However, in the instant case of assessee, the addition I & II i.e. of cash

expenses and payments of Rs.71,90,623/- was included in the disclosure petition and the return filed after search and accordingly recorded in the books of accounts of the assessee. Thus no penalty u/s 271AAA can be imposed on the said amount.

11. From the above explanation of the assessee in regard to the addition of Rs.1,13,65,623/-, the same are more or less included in the disclosure petition of Rs.6.84 crores as against availability of cash. The items outside the disclosure of Rs.6.84 crores is only the expenses paid to Sampoorna Logistics and allegedly to received back in cash on account of discounts offered by Transport and added on the basis of the statement of Shri Bipin Vohra has never been confronted to the assessee and the statement is without any corroborative evidences. Moreover, the assessee has furnished explanation of the above entries added by the AO during the course of scrutiny proceedings and even in penalty proceedings. This was also explained before CIT(A) during the appellate proceedings *qua* the levy of penalty. In view of the above, now we have to discuss the case law of coordinate of ITAT Jabalpur Bench in the case of *ACIT v. Satyapal Wassan* 295 ITR (AT) 352 held that:-

“A charge can be levied on the basis of document only when the document is a speaking one. The document should speak either out of itself or in the company of other material found on investigation and/or in the search. The document should be clear and unambiguous in respect of all the four components of the charge of tax. If it is not so, the document is only a dumb document. No charge can be levied on the basis of a dumb document.

A document found during the course of a search must be a speaking one and without any second interpretation, must reflect all the details about the transaction of the assessee in the relevant assessment year. Any gap in the various components for the charge of tax must be filled up by the Assessing Officer through investigations and correlations with other material found either during the course of the search or on investigations.

The document was bereft of necessary details about the year of transaction, ownership, nature of transaction, necessary code for deciphering the figures. The Assessing Officer presumed that the transaction belonged to the financial year 1988-89 relevant to the assessment year 1989-90, that the figures mentioned in the document were advances made by the assessee, that the transactions belonged to the assessee, and that the transactions were in a code of lakhs and that the unit was the rupee. The Assessing Officer did not carry out any enquiry either during the course of search or during the course of assessment proceedings to find out the nature of transactions and the period in which those transactions were carried out; he had simply presumed that the figures were advances without there being any material on record to support such presumption. The Assessing Officer had drawn inferences, made presumptions, relied on surmises and thus made unsustainable additions.”

In this case also the assessee has explained firstly that the payment of Rs.55 lakh is out of the availability of cash generated out of disclosure of Rs.6.84 crores. Even otherwise,

the document page No. 23 of UKS/1 bears no date and does not mention the nature of the transaction and on the basis of conjecture and surmises presumption cannot be drawn that this is income.

12. Similarly Hon'ble Andhra High Court in the case of Commissioner of Income-tax v. Shri Ramdas Motor Transport (1999) 238 ITR 177 (AP) held that:-

“under the provisions of section 132(4) as it existed at the relevant time the question of examining any person by the authorised officer would arise only when he found such person to be in possession of any undisclosed money or books of accounts. But, in this case, it was admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion or any other valuable articles or things, nor any unaccounted documents nor any such incriminating material either from the premises of the company or from the residential houses of the managing director and other directors. In such a case, when the managing director or any other persons were not found to be in possession of any incriminating material, the question of examining them by the authorised officer during the course of each and recording any statement from them by invoking the powers under section 132(4) did not arise. The Explanation to section 132(4) permitting such examination came into effect only from April 1, 1980. Even if it were held that he statement of the managing director fell under the Explanation to section 132(4), the Tribunal had recorded a finding of fact to the effect that the statement of the managing director or that of the other partners had no evidentiary value as they were not supported by any documentary proof. No question of law arose from the order of the Tribunal.”

13. In view of the above facts and circumstances, and legal position discussed above, the penalty to be levied for undisclosed income as per the provision of Sec. 271AAA of the Act, we have to understand the meaning of undisclosed income and the relevant provision define undisclosed income as under:-

“(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 accounts 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 accounts 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”

From the above, it is clear that undisclosed income means any income represented by any documents found during the course of search, which are not recorded in the books of accounts of the assessee. In the instant case, the additions of cash expenses and payments of Rs.71,90,623/- is the result of cash available out of the disclosed cash of

Rs.6.84 crores which was included in the disclosure petition. Further, addition of Rs.15 lakh on account of alleged cash receipts from Sampoorana Logistics, which was alleged to be reimbursement, it is clear that expenditure recorded in the books of accounts can be held to be undisclosed income of the assessee if the said expenditure is found to be false. It is the Department on whom, onus of proving that expenditure recorded in the books is bogus or false based on documentary evidences found in the course of search. Here in the present case, no documentary evidences establishing the falsity of claim of transportation charges paid to Sampoorana Logistics was found in the course of search. According to us the said expenditure cannot be held to be undisclosed income of the assessee for the purpose of levying penalty u/s. 271AAA of the Act.

14. Hon'ble Calcutta High Court in the case of *CIT v. Sarda Rice and Oil Mills* 117 ITR 917 (Cal) held:-

“the ITO and the IAC had proceed entirely on the basis of the disclosure made by the assessee. The Tribunal had found as a fact that the disclosure had no evidentiary value and was nothing but a scrap of paper and the finding had not been challenged by the revenue as perverse or based on irrelevant evidence or no evidence at all. Therefore, the finding of the Tribunal that the provisions of s. 271(1) were not attracted was not erroneous.”

Similarly, the Hon'ble Madras High Court in case of *CIT vs. M. Pachamuthu* 295 ITR 502 (Mad) held:-

“Mere addition agreed to by the assessee during the course of survey would not empower the Assessing Officer to levy the penalty under section 271(1)© of the Income-tax Act, 1961 ... The fact that the assessee had agreed to additions to income was not proof of concealment.”

Even Hon'ble Kerala High Court in the case of *CIT vs. M. George & Brothers* 59 CTR 298 (Kel) held that:-

“where the assessee for one reason or the other agrees or surrenders certain amounts for assessment, the imposition of penalty solely on the basis of the assessee's surrender will not be well-founded. Depending upon the facts and circumstances of each case the Court has to decide whether penalty is justified. It is always for the Revenue to bring the case under the ambit of sec. 271(1)© by establishing there is concealment on the part of the assessee. The Explanation to sec. 271(1)© inserted w.e.f. 1st April, 1964 merely raises a rebuttable presumption but the basic principle that there should be have been concealment still remains.”

Further Hon'ble Punjab & Haryana High Court in case of *Commissioner of Income-tax v. Rajiv Garg* 313 ITR 256 (P&H) upheld the order of the Tribunal where it was observed that -

“Merely because an income has been offered by the assessee in response to the notice under section 148, it cannot be ipso facto inferred that the penal provisions of section 271(1)© are attracted. In order to apply the penal provisions of section 271(1)© it is to be necessarily inferred that there is positive act of concealment of income or furnishing of inaccurate particulars of such income by the assessee.”

It is further held that *“The Department had simply rested its conclusion on the act of the assessee of having offered additional income in the return filed in response to notice under section 148 of the Act. As noted earlier, the additional income so offered by the assessee was done in good faith and, therefore, in our view, penalty under section 271(1)© of the Act could not be levied.”*

Further Hon'ble Bombay High Court in case of CIT vs. Haji Gaffar Haji Dada Chini 169 ITR 033 (Bom) held that:-

“on the facts of the case, the Tribunal had taken a possible view on the question before it and, therefore, there was no reason to interfere with its conclusion that the letter addressed by the assessee to the Income-tax Officer offering credits in respect of hundi loans for assessment and also stating that the penalty under section 271(1)© of the Income-tax Act, 1961, may be decided on the merits, did not amount to an admission of concealment of income and the levy of penalty on such basis was liable to be quashed.”

From the above, it is clear that penalty cannot be levied merely on the admission of the assessee and there must be some conclusive evidence before the AO that entry made in the seized documents, represents undisclosed income of the assessee. In the instant case, in respect to the amount of Rs.1,13,65,623/-, there is no evidence which proves that the entries recorded in the documents found during the course of search is over and above the income as declared by the assessee at Rs.6.84 crores as undisclosed income and accepted by Revenue. In view of the above, we delete the penalty and allow the appeal of the assessee.

15. In the result, appeal of assessee is allowed and that of Revenue is dismissed.

16. Order is pronounced in the open court on 30.06.2015

Sd/-
(P.K. Bansal)
Accountant Member

Sd/-
(Mahavir Singh)
Judicial Member

*Dkp/.P.S.

Dated : 30 June, 2015

Copy of the order forwarded to:

1. ASSESSEE ó Concast Steel & Power Ltd. (Formerly SPS Steel & Power Ltd) 21, Hemant Basu Sarani, 5th Floor, Kolkata -700 001
- 2 Revenue ó DCIT, CC-X, Kol, 18, Rabindra Sarani, Kolkata-01
3. The CIT(A), Kolkata
4. CIT, Kolkata.
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.