

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 22.01.2018
Pronounced on: 12.03.2018

+ **ITA 672/2016**

PRINCIPAL COMMISSIONER OF INCOME TAX
(CENTRAL)-I

.... Appellant

Through: Mr. Rahul Chaudhary, Sr. Standing
Counsel with Mr. Sanjay Kumar, Jr. Standing
Counsel.

versus

SMT. RITU SINGAL

.... Respondent

Through: Mr. Ajay Vohra, Senior Advocate
with Mrs. Kavita Jha and Ms. Devika Jain,
Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

S. RAVINDRA BHAT, J.

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1. The question of law in the present appeal by the revenue, framed in this case reads as follows:

“Did the ITAT fall into error in deleting the penalty under Section 271AAA of ₹ 20,000,000/- added pursuant to search in the overall circumstances of the case?”

2. The Bhushan Steel Group of companies were subjected to search under Section 132 of the Income Tax Act (“the Act” hereafter) on 03.03.2010. The assessee too was covered by the search. She filed return of income for AY 2010-11, electronically, declaring an income of ₹ 20,47,14,190/- on 31.07.2010. The notice under Section 143(2) of the

Act was issued and served on her on 13.01.2011. Another notice under Section 143(2) of the Act was issued on 11.02.2011. Subsequently an order under Section 143(3) of the Act was passed 30.12.2011 assessing the total income of ₹ 20,47,14,190/- at the returned income. During assessment proceedings, the AO noticed that the assessee had reported undisclosed income earned during financial year 2009-10 (relevant to AY 2010-11) to the extent of ₹ 20 crores during the course of search and after the search proceedings, relating to material found and seized during search. The AO also noticed that provisions of section 271AAA of the Act, was applicable in respect to the undisclosed income found during the course of search and declared by the assessee in her return of income for AY 2010-11. He therefore initiated the penalty proceedings under Section 271AAA during assessment proceedings on the ground that assessee had not specified the manner in which the undisclosed income was earned and failed to substantiate it. The penalty of ₹ 2 crore was issued on the assessee by order dated 27.06.2012 under Section 271AAA. Being aggrieved with the aforesaid penalty order, assessee appealed before the CIT (A), who by impugned order dated 05.07.2013 deleted the penalty and allowed the assessee's appeal.

3. The CIT (A), while deleting the penalty imposed by the AO, had reasoned as follows, after quoting Section 271AAA:

“3.3. Keeping in view the above provisions of law and changes brought therein, in the case of Sh. Neeraj Singhal for AY 2010-11 (Appeal No. 51112-13) vide my order dated 17.12.2012, I have held as under:

"I have considered the assessment order and submissions filed by the appellant. From the chart given in para 3.3 above, it is clear that to escape the penalty of 10% on undisclosed income admitted during the course of search, the taxpayer has to fulfill the clause "substantiates the manner in which the undisclosed income was derived." Search in the case was conducted on 3.3.2010. Therefore, the law applicable is as per Column C in the table given in para 3.3 above. The AO has held in this case that the appellant has not substantiated the manner in which the undisclosed income was derived to the extent of Rs. 90,00,00,000/- and has also failed to disclose the sum of Rs. 35,00,00,000/- in the statement recorded u/s. 132(4). The AO, therefore, imposed penalty @ 10 % on the entire amount of Rs. 125,00,00,000/-. What would constitute "substantiates" in section 271AAi(2)(ii) is nowhere indicated and this word itself is not defined anywhere in the Act. The law provides that where a word is not defined, the ordinary and common sense meaning of the word is to be construed. The word 'substantiate' is defined as to "provide evidence to support or prove the truth of" in the Oxford dictionary (source Internet). In the present case, admittedly, the undisclosed income was on the basis of documents seized during the course of search. On the basis of the seized documents (primary evidence in the case), the advances outstanding to the appellant from various persons as on 31.1.2010 was found to be Rs. 69 crore and in another document the appellant was shown to have advanced an amount of Rs. 3 crore on 9.6.2009 for purchase of a property at Q I-A, Hauz Khas Enclave, New Delhi. Based on these documents, the

appellant admitted an amount of Rs. 90 crore as his undisclosed income in his statement recorded u/s. 132(4). As to the question about the source of the amount of Rs. 69 crore, the appellant merely stated that "it is my unaccounted income for the current financial year generated from undisclosed sources". This statement of the appellant cannot be said to have fulfilled the condition in section 271AAA(2)(ii) so as to provide evidence to support or prove the truth of the claim made by the appellant. The amount of Rs. 35 crore does not appear in the statement given by the appellant u/s. 132(4). It is to be noted that a cardinal principle of law in India is that no person can be forced to give evidence against himself. Therefore, both the legality and the efficacy of this clause are questionable. However, the law is to be implemented as it exists and passed by the Parliament in its wisdom. As rightly held by the AO, all the conditionalities imposed u/s. 271AAA, which are inclusive and not exclusive of each other, are not fulfilled in the case. Accordingly, I hold that the AO was correct in imposing the penalty u/s. 271AAA of 10% of the income sought to be evaded of Rs. 125 crore. The appeal of the appellant is according dismissed."

3.4. However, Ld. AR now points out that subsequently, in that case, the Hon'ble ITAT (Delhi) has held as under:-

"In view of above facts of the present case wherefrom it is evident that during the course of search proceedings the authorized officer of the department had not raised any specific query regarding the manner in which the undisclosed income has been derived and on the contrary the assessee has tried to explain the earning of

the undisclosed income in question in its reply during the course of recording of his statement u/s. 132(4) of the Act and thereafter. We thus respectfully following the ratio of above cited decisions of Hon'ble Allahabad High Court and Hon'ble Gujarat High Court hold that in absence of query raised by the authorized officer during the course of recording of statement u/s. 132(4) about the manner in which the undisclosed income has been derived and about its substantiation, the AO was not justified in imposing penalty u/s. 271AAA of the Act specially when the offered undisclosed income has been accepted and due tax thereon has been paid by the assessee."

3.5. The appellant and Sh. Neeraj Singal belong to the same group of cases, and the facts in the two cases are the same. After pronouncement of the above cited ruling by the Hon'ble ITAT, I am bound by the ruling. The appeal is, therefore, allowed and penalty imposed is cancelled."

4. The ITAT affirmed the reasoning of the CIT (A) after noticing that its previous order in Neeraj Singal's case too had affirmed that appellate authority's order, in regard to interpretation of Section 271AAA and the grant of relief.

5. The revenue argues that the interpretation adopted and repeated mechanically by the ITAT- at least in this case, is contrary to the express intent of the provision, which clearly requires that the assessee should not only admits the undisclosed income and specifies the manner in which such income has been derived or substantiates the manner in which the undisclosed income was obtained. Here, the assessee did not in any

manner specify the income, its sources or particulars required of her, much less to the satisfaction of the officer. In the circumstances, the Tribunal went wrong in directing that the penalty imposed should be set aside.

6. Counsel for the assessee argues that Section 271AAA is phrased identically to Explanation 5 (2) to Section 271 of the Act. It was argued that in the case of all other parties searched by the revenue, the explanation given was accepted. In the present case, the revenue was not justified in singling out the assessee and imposing penalty. Learned counsel urged that the approach of the tribunal was justified in the circumstances of the case, given that the assessee had made the appropriate disclosures. He relied on the judgment of the Gujarat High Court in *Commissioner of Income Tax v. Mahendra C. Shah* [2008] 299 ITR 305; *Commissioner of Income Tax v. Radha Kishan Goel* [2005] 278 ITR 454 [2006] 152 Taxman 290 (All.) and the tribunal's bench decision in *Mothers Pride Education Personnel (P.) Ltd. v. Dy. Commissioner of Income Tax* (ITA Appeal No. 3372 (Delhi) of 2011, dated 12-10-2012) and *Neeraj Singal vs. Assistant Commissioner of Income Tax*, (decided on 24.06.2013 - ITAT Delhi). It was also urged that the disclosure made by the assessee was common to the one made and considered in other connected/related parties' cases.

Analysis and conclusions

7. Section 271AAA, which is involved in the present case, reads as follows:

“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."*

8. This provision was brought into force with effect from 01.04.2007. Its scope and effect was explained by Circular of the Central Board of Direct Taxes (CBDT) dated 12.03.2008 (Circular No.3) in the following terms:

“68. Provision for penalty for concealment in search and seizure cases.-68.1 *A new section 271AAA has also been inserted so as to provide that, in a case where search has been initiated under section 132 on or after 1st June, 2007, the assessee shall be liable to 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. However, provisions of this section shall not be applicable if the assessee— (i) in a statement under sub-section (4) of section 132 in the course of the search, 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. It is further provided that no penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be levied or imposed upon the assessee in respect of the undisclosed income referred to in this section. It is also provided that the provisions of section 274 and section 275 shall, so far as may be, apply in relation to the penalty leviable under the new section.

68.2 For the purposes of this section, undisclosed income has been defined to mean— (i) any income of the specified previous years 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 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 which has 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.

68.3 For the purposes of this section, specified previous year has been defined, so as to mean 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.*

68.4 An appeal to the Commissioner against levy of penalty under the proposed new section 271AAA has also been provided.

68.5 Applicability- This amendment will take effect from the 1st day of June, 2007 and will accordingly apply in relation to assessment year 2007-2008 and subsequent years in cases where search under section 132 is initiated on or after 1st June, 2007.”

9. Section 271AAA was amended by the Finance Act, 2012 with effect from 01.04.2012. The effect of the amendment was that it became applicable in all cases where search was initiated under Section 132 on or after 01.06.2007 but before 01.07.2012. Section 271AAA and its amendments are part of series of amendments with respect to the effect of presumption in the case of search cases under Section 132(4A). These were introduced simultaneously with the omission of Explanation 5 to Section 271(1)(c) on the one hand and insertion of Explanation 5A as well as Section 292C. The provision applies to income of the specified period, i.e. period for which return had not yet become due and the broken periods starting from the beginning of the financial years till the date of the search. It provides for 10% penalty of such income through a statutory inference or presumption that such amount or income was not

intended to be disclosed as they were not reflected in the books, soon at the time of the search.

10. One of the conditions that results in the inapplicability of Section 271AA is payment of tax. Since the assessability and quantification of the amount of undisclosed income can be legitimately computed only at the stage of assessment, it was held by the Tribunal concurring with the first appellate authority, that the outer time limit for payment of tax is not prior to the conclusion of assessment proceedings. Where there was a short payment by way of self-assessment tax but made good in response to the notice of demand on completion of the assessment it was held that there was no scope for penalty under section 271AAA as was held in *Mahendra C. Shah* (supra) while interpreting Explanation 5 to Section 271(1)(c).

11. Explanation 5(2) of Section 271(1)(c) was considered by the Supreme Court in *Assistant Commissioner of Income Tax v. Gebilal Kanhailal* [2012] 348 ITR 561 (SC). It was held that Explanation 5 (2) to Section 271 (1) (c) provides, where, in the course of search under Section 132, the assessee, found to be owner of unaccounted assets, claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed particulars of his income for the purpose of imposition of penalty, but

there are exceptions to such deeming provision or to such a presumption of concealment. The Court then said:

“It provides that where, in the course of search under Section 132, the assessee is found to be the owner of unaccounted assets and the assessee claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income for the purposes of imposition of penalty under Section 271(1)(c). The only exceptions to such a deeming provision or to such a presumption of concealment are given in Sub-Clauses (1) and (2) of Expln. 5. In this case, we are concerned with interpretation of Clause (2) of Expln. 5, which has been quoted above. Three conditions have got to be satisfied by the assessee for claiming immunity from payment of penalty under Clause (2) of Expln. 5 to Section 271(1)(c). The first condition was that the assessee must make a statement under Section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in Section 139(1). Such statement was made by the Karta during the search which concluded on 1-8-1987. It is not in dispute that condition No. 1 was fulfilled. The second condition for availing of the immunity from penalty under Section 271(1)(c) was that the assessee should specify, in his statement under Section 132(4), the manner in which such income stood derived. Admittedly, the second condition, in the present case also stood satisfied. According to the Department, the assessee was not entitled to immunity under clause (2) as he did not satisfy the third condition for availing the benefit of waiver of penalty under Section 271(1)(c) as the assessee failed to file his return of income on July 31, 1987,

and pay tax thereon particularly when the assessee conceded on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. However, no time limit for payment of such tax stood prescribed under clause (2). The only requirement stipulated in the third condition was for the assessee to "pay tax together with interest". In the present case, the third condition also stood fulfilled. The assessee has paid tax with interest up to the date of payment. The only condition which was required to be fulfilled for getting the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income up to the date of payment. Clause (2) did not prescribe the time limit within which the assessee should pay tax on income disclosed in the statement under Section 132(4). For the above reasons, we hold that the assessee was entitled to immunity under Clause (2) of Explan. 5 to Section 271(1)(c)."

12. Like in that case, the first condition under Section 271AAA is that the assessee must make a statement under Section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in Section 139(1). The second condition for availing of the immunity from penalty under Section 271(1)(c) is that the assessee *should specify, in his statement under Section 132(4), the manner in which such income stood derived*. The revenue contended *Gebilal Kanhailal* that though the second condition stood satisfied, the third condition was not sought. It urged that the assessee was not entitled to immunity under Clause (2) as he did not satisfy the third condition for availing the benefit of waiver of penalty

under Section 271(1)(c) as he failed to file his return of income on 31st July, 1987 and pay tax thereon particularly when the assessee conceded on 1st Aug., 1987 that there was concealment of income. The third condition under Clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. The court held that no time-limit for payment of such tax stood prescribed under Clause (2) and that the only requirement stipulated in the third condition was for the assessee to "pay tax together with interest". It was held in *Gebilal Kanhailal (supra)* that the third condition was also fulfilled as the assessee paid tax with interest upto the date of payment. The only condition which was required to be fulfilled for securing the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income upto the date of payment. Explanation 5 (2) did not prescribe the time-limit within which the assessee should pay tax on income disclosed in the statement under Section 132(4).

13. In the present case, during the course of the statement made by the assessee, during the course of the search on 4 March, 2010, that she had lent ₹ 16 crores in aggregate to three individuals during financial year 2009-2010. This was in response to a query by the revenue officials during the course of search when the basis of Page 81 of Exhibit A-3 was sought to be questioned. To the next question, the assessee replied that the said amount of “₹ 16 crores is my unaccounted income for the Financial Year 2009-2010 relevant for AY 2010-2011”. However, the requirement of the assessee having to “(ii) substantiates the manner in

which the undisclosed income was derived” was satisfied. Although a general statement that the undisclosed income was the source of ₹ 16 crores was disclosed, no “substantiation” of the “manner” of deriving such undisclosed income was revealed.

14. In construing Section 271AAA one must not lose sight of its essential purpose which resulted in its enactment. There is a penalty at the rate of 10% of the undisclosed amount declared, if the conditions in Section 271AAA (2) are not met with. This is quite different from the penal provision under Section 271 (1) (c) of the Act, which directs that if income is concealed or inaccurate returns are filed, which are disallowed by the AO, the penalty shall be *“three times the amount of tax sought to be evaded”*. In the case of amounts disclosed during the course of search, the penalty amount is only ten percent of the undisclosed income. Parliament has, therefore, given a different treatment to the latter category. At the same time, if an assessee were to successfully urge the “escape route” so to say, of Section 271AAA (2), all three conditions mentioned in the provision, (as held in *Gebilal Kanhailal* in respect of *pari material* provisions) have to necessarily be fulfilled. In the preset case, the assessee, while declaring the “undisclosed income” also stated, that *“the surrender is being made subject to no penal action of Section 271 (1) (c)”*.

15. While dealing with a case of similar surrender- but made in the course of survey proceedings, by an assessee (which led to imposition of penalty), the Supreme Court, in *Mak Data (P) Ltd v Commissioner of Income Tax* 358 ITR 539 (SC) held as follows:

“7. The AO, in our view, shall not be carried away by the plea of the assessee like “voluntary disclosure”, “buy peace”, “avoid litigation”, “amicable settlement”, etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to 271 raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.

8. Assessee has only stated that he had surrendered the additional sum of Rs.40,74,000/- with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department. Statute does not recognize those types of defences under the explanation 1 to 271 (1) (c) of the Act. It is trite law that the voluntary disclosure does not release the Appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.

9. We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. AO during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer deeds duly signed, have been impounded in the course of survey proceedings under Section 133A conducted on 16.12.2003, in the case of a sister concern of the assessee.”

16. That the income which was ultimately brought to tax pursuant to the disclosure made, which was voluntary on the part of the assessee is stating the obvious. The assessee merely stated that the sums advanced were undisclosed income. However, she did not specify how she derived that income and what head it fell in (rent, capital gain, professional or business income out of money lending, source of the money etc). Unless such facts are mentioned with some specificity, it cannot be said that the assessee has fulfilled the requirement that she, in her statement (under Section 132 (4)) “*substantiates the manner in which the undisclosed income was derived*”. Such being the case, this court is of opinion that the lower appellate authorities misdirected themselves in holding that the conditions in Section 271AAA (2) were satisfied by the assessee.

17. For the above reasons, it is held that the impugned order is in error; the substantial question of law is answered in favour of the revenue and against the assessee. The appeal is consequently allowed. No costs.

S. RAVINDRA BHAT, J

न्यायमेव जयते

A.K. CHAWLA, J

MARCH 12, 2018