IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1688 OF 2016

Principal Commissioner of
Income Tax (Central)-4 … Appellant
V/s.
M/s Phoenix Mills Limited … Respondent

Mr.Tejveer Singh for the Appellant.
Mr.Madhur Agrawal i/by Mr.Atul Karsandas Jasani for the Respondent.

CORAM : AKIL KURESHI AND
B.P.COLABAWALLA, JJ.
DATE : FEBRUARY 07, 2019.

P.C.:-

1. This appeal is filed by the revenue to challenge the judgment of Income Tax Appellate Tribunal. Following question is presented for our consideration:-

> "Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in upholding the order of CIT(A) deleting the penalty under Section 271AAA without appreciating the fact that the assessee has failed to explain the source and the manner in which the undisclosed income was earned and therefore, the assessee was not covered by the exception

> provided in the sub-section 2 of the section 271AAA of the Income Tax Act, 1961 and consequently liable for penalty under Section 271AAA of the Act?"

2. The issue pertains to imposition of penalty under Section 271AAA of the Income Tax Act ("the Act" for short). During search the assessee in the statement recorded under Section 132(4) of the Act had admitted certain undisclosed income. The Assessing Officer however was of the opinion that since the assessee had not disclosed the manner of earning such income, the assessee cannot claim immunity from penalty. In this context, the reference was made to sub-section (2) of Section 271AAA which requires that in addition to admitting the undisclosed income in statement under sub-section (4) of Section 132, the assessee also specifies the manner in which such income has been derived. In the opinion of the Assessing Officer, this later requirement of the assessee specifying the manner in which such income have been derived, was not specified. When the issue ultimately reached the Tribunal, the Tribunal by impugned judgment deleted the penalty relying on the decisions of

Allahabad High Court in case of **Commissioner of Income-Tax Vs. Radha Kishan Goel**[1] and that of the Gujarat High Court in case of **Commissioner of Income-Tax Vs. Mahendra C. Shah**[2].

3. Having heard learned counsel for the parties and having perused the documents on record, we do not find any error in the view of the Tribunal. The requirement in question flowing from clause (i) of sub-section (2) of Section 271AAA of the Act is similar to one specified in sub-clause (2) of Explanation 5 to Section 271 of the Act. In context of this provision that Allahabad High Court in case of **Radha Kishan Goel (supra)** had held that unless the Authorized Officer recording the statement under Section 132(4)(a) of the Act puts the specific question with regard to the manner in which income have been derived, it cannot be expected from a person to make a statement in this regard and in case in the statement the manner in which income has been derived has not been stated, but has been stated subsequently, it amounts to compliance with Explanation 5(2).

1 (2005) 278 ITR 454(All)
2 (2008) 299 ITR 305 (Guj)

4. In case of **Mahendra C. Shah (supra)** Gujarat High Court reiterated this position and held that:-

> "15. In so far as the alleged failure on the part of the assessee to specify in the statement under Section 132(4) of the Act regarding the manner in which such income has been derived, suffice it to state that when the statement is being recorded by the authorized officer it is incumbent upon the authorized officer to explain the provisions of Explanation 5 in entirety to the assessee concerned and the authorized officer cannot stop short at a particular stage so as to permit the Revenue to take advantage of such a lapse in the statement. The reason is not far to seek. In the first instance, the statement is being recorded in the question and answer form and there would be no occasion for an assessee to state and make averments in the exact format stipulated by the provisions considering the setting in which such statement is being recorded, as noted by Allahabad High Court in case of CIT v. Radha Kishan Goel (2005) 278 ITR 454. Secondly, considering the social environment it is not possible to expect from an assessee, whether literate or illiterate, to be specific and to the point regarding the conditions stipulated by Exception No. 2 while making statement under Section 132(4) of the Act. The view taken by the Tribunal as well as Allahabad High Court to the effect that even if the statement does not specify the manner in which the income is derived, if the income is declared and tax thereon paid, there would be substantial compliance not warranting any further denial of the benefit under Exception No. 2 in Explanation 5 is commendable."

5. This decision of the Gujarat High Court in case of **Mahendra C. Shah(supra)** came up for consideration before the said High Court in case of **Mukeshbhai Ramanlal Prajapati in Tax Appeal No.434 of 2017** in the context of the penalty provision under Section 271AAA of the Act. The revenue's appeal was dismissed by an order dated 24th July, 2017 making following observations:-

> "10. It can thus be seen that this Court in case of Commissioner of Income Tax vs. Mahendra C.Shah and Allahabad High Court in case of Commissioner of Income Tax vs. Radha Kishan Goel (supra) have put considerable stress on the recording of the statement under section 132(4) of the Act in the context of the requirement of the assessee to disclose the manner in which the undisclosed income was derived in order to avoid penalty. The High Court in case of Commissioner of Income Tax vs. Mahendra C.Shah, in particular, observed that considering the social environment, it is not possible to expect from an assessee to be specific and to the point regarding the conditions stipulated by exception No.2 while making statement under section 132(4) of the Act. The Court went on to observe that if the income is declared and tax is paid thereon, there would be substantial compliance.
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> 11. It is this principle which the CIT (Appeals) and the Tribunal have applied in the present case. As noted, CIT (Appeals) was specific that no question was put to the assessee while recording statement under section 132 regarding the manner of deriving the undisclosed income. Counsel for the Revenue,

however, vehemently contended that in the present case, the penalty was being imposed under section 271AAA of the Act and the statutory provisions enabling the assessee to avoid such a penalty are entirely different as compared to Explanation 5 to section 271.

12. Sub section (1) of section 271AAA provides for a penalty in addition to tax at the rate of ten percent of the undisclosed income in case where the search has been initiated under section 132 of the Act on or after 1st day of June 2007 but before 1st day of July 2012. Such penalty may, however, be avoided if the conditions specified under sub section (2) are satisfied which are as under:

(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."

13. Sub section (2) of Section 271AAA thus while retaining the other requirements of avoiding penalty as provided in clause

(ii) of Explanation 5 has now introduced an additional requirement of the assessee having to substantiate the manner in which, the undisclosed income was derived. It is this requirement which the counsel for the Revenue would place great emphasis on. According to her, onus is now entirely shifted on the assessee not only to make a disclosure of the undisclosed income but also to specify the manner, in which, the income has been derived and to substantiate the same. It was therefore, contended that the earlier decisions of this Court in case of Commissioner of Income Tax vs. Mahendra C.Shah and the decision of Allahabad High Court in case of Commissioner of Income Tax vs. Radha Kishan Goel rendered in backdrop of different statutory provisions would not automatically apply.

14. We do not reject this contention totally. However, insofar as the facts of the present case are concerned, the field would still be held by the decision of this Court in case of Commissioner of Income Tax vs. Mahendra C.Shah (supra). Sub-section (2) of section 271AAA imposes an additional condition of the assessee having to substantiate the manner in which, the undisclosed income was derived. This requirement, however, must be seen as consequential to or corollary to the base requirement of specifying the manner, in which, the undisclosed income was derived. It is only when such declaration is made, the question of substantiating such disclosure or claim would arise. If, as in the present case, the Revenue failed to question the assessee while recording his statement under section 132 (4) of the Act as regards the manner of deriving such income, the Revenue cannot jump to the consequential or later requirement of substantiating the manner of deriving the income. In the context of the requirement of the assessee specifying the manner of deriving the income the decision of this Court in case of Commissioner of Income Tax vs. Mahendra C.Shah (supra) would hold the field even in the context of sub-section (2) of section 271AAA of the Act. It is only when the officer of the raiding party recording the statement of the assessee under section 132(4) of the Act elicits a response from the assesse's this requirement, the assessee's responsibility to substantiate the manner of deriving such income would commence. When the

base requirement itself fails, the question of denying the benefit of no penalty would not arise."

6. In the result, this appeal is dismissed.

(B.P.COLABAWALLA,J.) **(AKIL KURESHI,J.)**

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