

IN THE INCOME TAX APPELLATE TRIBUNAL, "B" BENCH, KOLKATA

Before : **Shri N.V.Vasudevan,** **Judicial Member,** and
 Shri M. Balaganesh, **Accountant Member**

ITA No. 1082/Kol/2013 A.Y : 2009-10

D.C.I.T, CC-V, Kolkata

Vs.

M/s. Salasar Stock Broking Ltd
PAN: AADCS8020Q

(Appellant)

(Respondent)

For the Appellant/department: Md. Ghayas Uddin Ansari, JCIT, Id. Sr.DR

For the Respondent/assessee: Shri K.K. Chhaparia, FCA, Id.AR

Date of Hearing: 08-04-2016

Date of Pronouncement: 15- 4 -2016

ORDER

SHRI M.BALAGANESH, AM

This appeal of the revenue arises out of the order of the Learned CIT(A), Central-I, Kolkata in Appeal No. 348/CC-V/CIT(A)C-I/12-13 dated 4.2.2013 against the order of the Learned AO for the Asst Year 2009-10 levying Penalty u/s 271AAA of the Income Tax Act , 1961 (hereinafter referred to as the 'Act').

2. The only issue to be decided in this appeal is as to whether the penalty u/s 271AAA of the Act could be levied in the facts and circumstances of the case.

3. The assessee has raised the following grounds:-

(1) That the ld. CIT(A) erred in deleting the Penalty u/s. 271AAA.

(2) That the ld. CIT(A) erred in holding that additional income disclosed u/s. 132(4) did not qualify as undisclosed income within the meaning of section 271AAA.

(3) That the ld. CIT(A) erred in allowing relief to the assessee by not considering the fact that the provisions of Clause (ii) of Sub-

section (2) of Sec. 271AAA has not been fulfilled in the assessee's case. “

4. The brief facts of this case are that a search and seizure operation was conducted in the business premises of the assessee on 11.9.2009. In the course of search and seizure operation in the office premises of the assessee jointly held with M/s Shree Salasar Properties & Finance Pvt Ltd and M/s Krishna Trade & Commerce Pvt Ltd, the following books and documents were found / seized :-

<i>Annexure with Date</i>	<i>Description</i>	<i>Found</i>	<i>Seized</i>
<i>'A' Dt. 12-9-09</i>	<i>Books of a/cs</i>	<i>SSB-1 to SSB-15</i>	<i>SSB-1 to SSB-15</i>
<i>'C' Dt. 12-9-09</i>	<i>Cash</i>	<i>Rs. 14,82,430/-</i>	<i>Rs.14.50 lakhs</i>
<i>'2' Dt. 12-9-09</i>	<i>Inventory of Bank A/c</i>	<i>25 bank a/cs</i>	<i>Not seized</i>

The assessee filed its return of income on 25.9.2009 declaring total loss of Rs. 6,71,01,221/- . Pursuant to the search, notice u/s 153A of the Act was served upon the assessee. The assessee filed the return of income in response to notice issued u/s 153A of the Act on 31.5.2010 declaring total loss of Rs. 4,71,01,221/- wherein the assessee included the disclosure made during the course of search operations of Rs. 2,00,00,000/-. Pursuant to the search, the assessee filed a disclosure petition before the ADIT (Investigation), Unit-III(4), disclosing additional income of Rs. 2,00,00,000/- for this year as the assessee may not be able to instantly produce all the relevant documentation required by the department with regard to monies received from various parties including advances, margin money and deposits. The assessee explained that it was carrying on the activity of sale and purchase of shares for its own and also carried on the same on behalf of the clients to earn brokerage. The Learned AO found that closing balance of margin money, out of receipts from various clients as advance / deposit during the year was Rs. 1,45,50,000/- as on 31.3.2009 from seven clients, three of which belongs to the group. The assessee had the following income and losses during the year :-

Share trading	Rs. (-) 7,04,47,593/-
F&O Income	Rs. 1,12,23,048/-
Intra day trading income	Rs. 79,46,637/-
Brokerage income	Rs. 19,26,662/-
Mutual Fund Trading	Rs. 55,94,908/-
Other Income (including disclosure)	Rs. 4,60,28,734/-
	----- Rs. 22,72,396/-

After deducting administrative cost of Rs. 3,70,13,193/- , finance charges of Rs. 1,05,57,283/- and depreciation of Rs. 22,28,085/-, the assessee furnished a loss return of Rs. 4,71,01,220/-. The assessment was completed u/s 153A / 143(3) of the Act on 11.5.2011 by treating the share trading loss as speculation loss in terms of Explanation to Section 73 of the Act and after making minor disallowances and determining total income of Rs. 1,73,55,290/-. Penalty proceedings u/s 271AAA of the Act was initiated by the Learned AO.

5. The assessee pleaded before the Learned AO that the assessee had made disclosure petition u/s 132(4) of the Act soon after the search. The assessee pleaded that the said disclosure of Rs. 2,00,00,000/- for the Asst Year 2009-10 and Rs. 2,00,00,000/- for the Asst Year 2010-11 was made to avoid long drawn litigation and to buy peace as the assessee was instantly not able to produce all the relevant documentation or paper work as required by the department. It was also pleaded that the disclosure petition also stated that the assessee has been carrying on bonafide and regular transactions. It was further pleaded that this claim about the bonafide and regular transactions also gets strengthened from the fact that during the course of search assessment proceedings, the Learned AO could not find any infirmity in the books of accounts. The assessee pleaded that it is entitled for immunity from levy of penalty as all the conditions stipulated in section 271AAA(2) of the Act have been satisfied. The Learned AO did not agree with the contentions of the assessee and proceeded to levy penalty u/s 271AAA of the Act in the sum of Rs. 20,00,000/- for the

Asst Year 2009-10 on the contention that the additional disclosure of Rs. 2,00,00,000/- was not returned by the assessee in the return filed u/s 139(1) of the Act but included only in the return filed u/s 153A of the Act. The penalty was also levied on the ground that but for the search, the assessee would not have come forward with the additional disclosure. Moreover, it was observed by the Learned AO that the assessee had not substantiated the manner in which the undisclosed income was derived by the assessee and accordingly held that assessee is not entitled for immunity from levy of penalty.

6. On first appeal, the assessee argued that the contention of the Learned AO that the disclosure made u/s 132(4) of the Act was not included in the return filed u/s 139(1) of the Act was not only factually incorrect but also misleading. It was argued that the search got concluded on 7.11.2009 being the last date of panchanama drawn by the authorized officer and the disclosure u/s 132(4) of the Act was made by the assessee on 7.11.2009 on which date, the return of income u/s 139(1) of the Act had already been filed. Hence the assessee cannot be expected to offer the additional income in the return filed u/s 139(1) of the Act for the Asst Year 2009-10. It was also argued that in order to avail the immunity provided in section 271AAA(2) of the Act, it is not necessary that the disclosure u/s 132(4) should be included in the return filed u/s 139(1). It was argued that it would suffice if the additional income disclosed u/s 132(4) was included in the return filed u/s 153A of the Act and tax along with interest was paid thereon. It was also argued that there is absolutely no reference to any seized material brought on record by the Learned AO with regard to the additional income offered by the assessee and hence the entire addition has been accepted by the Learned AO only based on the offer made voluntarily by the assessee and not with reference to any seized materials. It was also argued by drawing attention to the disclosure petition u/s 132(4) of the Act that the assessee had been carrying out regular and bonafide transactions which has not been disapproved by the Learned AO and disclosure was pertaining to the transactions whereby it had received money by way of advance, margin money and deposits which might not be satisfactorily proved by

proper documentation and paper work at this juncture and accordingly had come forward to make additional disclosure of Rs. 2 crores for Asst Year 2009-10 and Rs 2 crores for Asst Year 2010-11 to avoid unnecessary long drawn litigation and to buy peace with the department. It was also argued that the disclosure made u/s 132(4) of the Act does not represent any undisclosed asset or unrecorded entry in the books of accounts or false expenses and accordingly the said offer is completely outside the scope of definition of undisclosed income defined in section 271AAA of the Act. The assessee also placed reliance on certain decisions before the Learned CITA in support of its propositions. Without prejudice, it was further argued that the assessee is still entitled for immunity from levy of penalty even if the assessee was not able to substantiate the manner in which the undisclosed income admitted u/s 132(4) of the Act had been derived. For this proposition, reliance was placed on the decision of the co-ordinate bench of Ahmedabad Tribunal in the cases of DCIT vs Sulchanadevi A Agarwal in ITA No. 1052/Ahd/2012 dated 20.7.2012. The Learned CIT(A) based on the aforesaid submissions duly appreciated the contentions of the assessee and deleted the penalty. Aggrieved, the revenue is in appeal before us.

7. The Learned DR vehemently relied on the order of the Learned AO. In addition, he argued that the assessee had only tried to reduce his loss by Rs 2 crores by offering the same as additional income u/s 132(4) and it never had any intention to pay tax on the same. In response to this, the Learned AR reiterated the submissions made before the Learned CIT(A) and also stated that the assessee had in fact also paid taxes on the additional disclosure of Rs 2 crores made and accordingly he argued that the statement of the Learned DR is factually incorrect as could be evident from the assessment order itself.

8. We have heard the rival submissions and perused the materials available on record. The Learned AR stated that the Learned AO had not initiated any penalty proceedings u/s 271AAA of the Act for the Asst Year 2010-11, being the year of

search, for the additional disclosure made u/s 132(4) of the Act in the sum of Rs. 2 crores, in view of the fact that the same was offered in the return filed u/s 139(1) of the Act. In this regard, it is pertinent to note that the assessee had time to file its return u/s 139(1) of the Act and hence assessee true to his disclosure petition thought it fit to offer the additional income of Rs. 2 crores in the return filed u/s 139(1) of the Act. But what is to be understood here is originally the disclosure was made u/s 132(4) of the Act which was followed by return u/s 139(1) of the Act. We find that the assessee had not disclosed the additional income in the return filed u/s 139(1) of the Act for the Asst Year 2009-10 for the reason that the assessee had filed return u/s 139(1) of the Act prior to the date of disclosure u/s 132(4) of the Act. The assessee had made disclosure petition u/s 132(4) of the Act substantiating the reasons for offering the additional income . For the sake of convenience, the disclosure petition u/s 132(4) of the Act is reproduced hereunder:-

Disclosure petition u/s 132(4) of the Act in the case of M/s Salasar Stock Broking Ltd

*“To
The Ld. A.D.I.T. (Inv)
Unit - III (4)
Aayakar Bhawan Annexe
P-13, Chowringhee Square,
Kolkata - 700 069*

Respected Sir,

Re : Disclosure consequent to search and seizure operations carried out by the Income Tax Department on our premises on 11th September' 2009/12th September' 2009

We are members of National Stock Exchange - Capital Market, F&O and Currency Derivatives, Mumbai Stock Exchange - Capital Market, F&O and Currency Derivatives, NSDL, MCX - Currency Derivatives, Calcutta Stock Exchange - Capital Market. We have done transactions on behalf of various clients and on our self account. During the course of our transactions with various parties, we have received money from various parties including advances, margin money and deposits. Your goodself has raised a query on

explaining the sources of all such advances and deposits and it appears that you have raised doubts on the genuineness of certain transactions earned out by us including the receipt of funds into our Company. We have been carrying out regular and bonafide transactions. However, we are not able to instantly produce all the relevant documentation or paper work which may be required by the department. Hence to demonstrate our co-operative attitude and to avoid unnecessary long drawn litigations with the department and to buy peace, we are offering an additional income of Rs. 2,00,00,000/- for Financial year 2008-09 and Rs. 2,00,00,000/- for Financial year 2009-10 respectively.

During the course of search, certain documents pertaining to the Company were inventorized at our office premises at 4A, Clive Row, Suit No. 411, 301A, 301B, 301C Kolkata - 700 001 . Based on various seized documents, we hereby offer a sum of Rs. 7,00,00,000/- as our income for the Financial year 2009-2010 upto the period of search. Reference may be made to seized document, SSB/6, page I to 25 and 35-36. The aforesaid income have been deployed in the working capital of the Company including securities and margin money with stock exchanges.

We shall file return accordingly in accordance with law after making technical adjustments (if any). We have tried to project a full and true picture on an estimated basis of all the income and we assure you that we shall make full and true disclosure in the return accordingly and pay taxes thereon.

We also understand that we shall not be penalized in any manner for making the above statements.

*Thanking You,
For Salasar Stock Broking Limited
R.K. Saraogi
(Director).”*

8.1. From the above disclosure statement , we find that the assessee had substantiated the fact that the income in the form of advances, margin money and deposits etc which might not be proved to the satisfaction of the department with proper documentation and paper work. We also find that even the Learned AO had accepted the said offer for the said reason in his assessment order. We find that the assessee

had not retracted from the disclosure petition . We find that the assessee had duly offered the additional income of Rs. 2,00,00,000/- in the case of M/s Salasar Stock Broking Ltd for the Asst Year 2009-10 in the return filed u/s 153A of the Act and paid taxes thereon. In the disclosure petition itself, we find that the assessee had clearly demonstrated the inability to substantiate the manner of deriving the undisclosed income in the case of M/s Salasar Stock Broking Ltd. We find that the offer of Rs. 2 crores has been made voluntarily by the assessee in the disclosure petition u/s 132(4) followed by filing of return u/s 153A of the Act. It is also pertinent to note that this offer has been voluntarily by the assessee without any incriminating materials found during the course of search. Hence it goes to prove beyond doubt that the offer of undisclosed income of Rs. 2 crores was made voluntarily by the assessee without any detection by the department and accordingly the argument of the Learned DR that but for the search, this income would not have been offered does not hold any water and deserves to be dismissed. It is already well settled that though the income is not disclosed in the return filed u/s 139(1) of the Act, but duly disclosed in the petition filed u/s 132(4) of the Act followed by the filing of return in response to section 153A of the Act and taxes paid thereon, then the assessee would not be invited with the levy of penalty. We find that if the argument of the Learned DR that since the assessee had not offered the said income in return filed u/s 139(1) of the Act thereby levy of penalty is in order is to be accepted, then it would make the immunity provisions contemplated u/s 271AAA(2) of the Act redundant. The legislature in its wisdom had given a thoughtful consideration on the facts and circumstances under which the assessee would not be invited with the levy of penalty pursuant to the search subject to fulfillment of certain conditions stipulated in the said section . Hence in view of the above, we hold that the levy of penalty is not automatic and assessee is clearly entitled for immunity from levy of penalty.

8.2. We also find that the decision of the Hon'ble Supreme Court in the case of Sudarshan Silks & Sarees vs CIT reported in (2008) 300 ITR 205 (SC) supports the case of the assessee. The brief facts of this are as below:-

“3. A search was conducted on the premises of the assessee on 14 and 15-10-1987 and incriminating documents evidencing concealment of income by the assessee were unearthed apart from cash and jewellery found at the time of search. It was found that the appellant was maintaining double set of books and was accounting for only 50 per cent of sales in the regular set of books. This fact was admitted by Shri I.S. Ramesh, a partner of the firm in the statement recorded under section 132(4) of the Act. Shri I.S. Ramesh is the person-in-charge of the entire group. The total turnover suppressed by the assessee for the assessment year 1987-88 was found to be to the tune of Rs. 44,07,783. These have been discussed in detail in the order of assessment. Assessing Officer estimated that the sales of the assessee were Rs. 50,000 per day, whereas the accounted sales were not found even 50 per cent of the total sales. Apart from this, it was found that certain purchases were also not being accounted for. Similarly certain payments made were not being accounted for. All these were pointed out to the assessee. The assessee came forward with offer of additional income. Assessee filed a revised return on 31-3-1989 declaring a total income for this year at Rs. 3,74,226 as against the earlier amount of Rs. 43,650. This was accepted and after verification the assessment was completed on 29-12-1989.

4. During the course of recording the statement under section 132(4) of the Act, Shri Ramesh agreed to declare such additional income as had been estimated by the search party in the office of the appellant and its sister concerns. On the basis of these calculations, revised returns were filed by the appellant for all the years under appeal. The income as per revised returns were also accepted in toto. In the course of assessment proceedings, penal action under section 271(1)(c) of the Act was initiated and, after considering the reply filed by the appellant, the learned Assistant Commissioner of Income-tax/Assessing Officer chose to levy maximum penalty under section 271(1)(c). While levying the penalty, the Assessing Officer repelled the contention of the appellant that a promise had been made not to levy the penalty, as there was no evidence to this effect on record. It was also held that the appellant was not entitled to the immunity given under section 132(4) read with section 271(1)(c) of the Act.”

The Learned CIT(A) deleted the levy of penalty u/s 271(1)(c) of the Act. On second appeal by the revenue, the tribunal held as follows:-

"Although there is nothing on record to show that he was given an assurance that no penalty would be levied, the fact however clearly suggest that such an inducement must have been given by the searching party. When only partial evidence in support of concealment for a very limited period was detected during the search, why would a man go to offer much higher amounts for a large number of years unless he was promised some reciprocal benefit like not being visited with penalty? The learned DR has tried to argue before us that a change of heart might have taken place as a result of which Sri Ramesh came forward with all the disclosures for different years voluntarily. But looking into the hard facts of life and the general experience of mankind, especially with regard to financial affairs, it would be difficult to accept such a proposition. Evidently, huge amount of unexplained investments including unexplained stock was found at the time of search. Ultimately, almost the same amount of income was offered by the assessee over a number of years. As the tax rates over the entire period was more or less the same, the tax effect, either from the point of view of the Department, or the assessee would have more or less the same, had the entire undisclosed assets been subjected to tax in the year of search or the entire income was spread over a number of years as has been done in the present assessments. In view of the deposition given under section 132(4) followed by the cooperating attitude of the assessee in paying up the tax, it would be clear that no penalty under section 271(1) would have been leviable had the entire undisclosed income been assessed in the year of search. Instead of going for that simple way, Sri Ramesh went into the question of admitting undisclosed income on estimated basis for the different past years. He must have felt that in that process alone, he would avoid the levy of penalty by the departmental authorities. The facts and circumstances strongly indicate that an inducement and an allurements had been provided to him at the time of search in that matter.

Again, although incriminating materials were found out during the search, such materials were however ultimately not used by the departmental authorities in making the assessments. The assessments were made totally on the basis of estimation income for the earlier years as disclosed in the revised returns. The revised returns should therefore be considered as having been filed in good faith. So far as assessment of the undisclosed income is concerned, such revised returns would be sufficient evidence for that purpose. However, for levying penalty, some further and stronger evidences were surely required. In the cases relied upon by the learned DR, the search itself discovered the undisclosed income. In the instant cases, the search merely led to certain clues to the undisclosed income and but for the statement made by Sri Ramesh, it would perhaps have not

been possible for the Department to assess the undisclosed income over all these years in the way in which such assessments have been made. The only way for the department in such a case would have been to assess the entire amount of undisclosed investments for the year of search as has been discussed by us above, the Deptt. could not have been in a position to levy penalty for concealment in such a case. We are therefore of the opinion that the case laws as cited by the Department, do not exactly support its case, so far as the present appeals are concerned. On the other hand, most of the judgments cited by the learned counsel for the assessee support the case of the assessee that on account of strong circumstantial evidences being there about inducement having been given by the departmental authorities for not levying penalty in case of disclosure of income over the earlier years, no penalty can actually be levied by the Department."

These findings have been finally approved by the Hon'ble Supreme Court by observing as under:-

17. Accordingly, the orders under appeal are set aside and that of the CIT(Appeals) and Tribunal restored. It is held that in the facts and circumstances of the case, penalty under section 271(1)(c) was not exigible. The appeals are accepted with costs.

8.3. We find that the following decisions support the case of the assessee :-

a) Decision of co-ordinate bench of Cuttack Tribunal in the case of Pramod Kumar Jain vs DCIT reported in (2013) 33 taxmann.com 651 (Cuttack – Trib.)

"6. We have heard the rival contentions and perused the material available on record. On consideration of the facts and circumstances of the case, we are inclined to hold that no definition could be given to the "specified manner" insofar as the very statement on oath u/s. 132(4) specifies the manner on which the assessee is prepared to pay tax thereon. The inscribing in the books of account was taken care of by the assessee when he filed the returns in pursuance to notice u/s. 153A accounting the assets. Therefore, the case laws cited at the Bar clearly indicate that the penalty is not automatic if one of the purported condition is not fulfilled although all the conditions have been agreed to of having fulfilled by the Assessing Officer insofar as the tax and interest has been recovered. Penalty has been levied after the tax has been recovered therefore

answers the queries raised by the learned DR for that the said provisions become redundant was not the intention of the legislation. The manner, during the search operation, is noted by the search party which the Assessing Officer has acceded to. Therefore, following the decisions as relied upon by the learned Counsel for the assessee, wherein the Tribunal was pleased to consider cancelling the penalty so levied are also applicable to the assessee's cases before us insofar as there is no prescribed method to indicate the manner in which income was generated when the definition of "undisclosed income" has been defined in the Act itself when no income of the specified previous year represented "either wholly or partly" which onus lay upon the assessee stood discharged. In view of the above, we are of the considered view that the levy of penalty u/s. 271AAA in the instant cases are not justified and as such, we cancel the penalty so levied u/s. 271 AAA for the AYs under consideration in the case of respective assesseees.

In the result, all the appeals filed by the assesseees are allowed. “

b) Decision of co-ordinate bench of Nagpur Tribunal in the case of Concrete Developers vs ACIT reported in (2013) 34 taxmann.com 62 (Nagpur-Trib.)

“Section 271AAA of the Income-tax Act, 1961 - Penalty - Where search has been initiated - Assessment year 2009-10 - Whether where during course of search assessee admitted undisclosed income, paid tax together with interest, filed return showing said income as business income and Assessing Officer had accepted same, it could not be said that assessee had not specified manner or could not substantiate manner in which income was derived - Held, yes - Whether, therefore, penalty under section 271AAA was not leviable as assessee's case fell under sub-section (2) of section 271AAA - Held, yes [Para 9] [In favour of assessee]”

9. In view of the aforesaid facts and circumstances and specific findings given by us and in view of the judicial precedents relied upon hereinabove, we hold that the assessee is entitled for immunity from levy of penalty u/s 271AAA(2) of the Act and accordingly the penalty levied by the Learned AO is cancelled. The grounds raised by the revenue are dismissed.

10. In the result, the appeal of the revenue is dismissed.

ORDER PRONOUNCED IN THE OPEN COURT ON 15-4-2016.

Sd/-
(N.V.Vasudevan, Judicial Member)

Sd/-
(M. Balaganesh, Accountant Member)

Date 15 -4 -2016

Copy of the order forwarded to:-

- 1.. The Appellant/department: The DCIT, CC-V, Kolkata Aaykar Bhawan Poorva 3rd Floor, 110 Shantipally, Kolkata-107.
- 2 The Respondent/assessee: M/s. Salasar Stock Broking Ltd, Mukti Chamber, 4A Clive Row, Kolkata-700001.
- 3 /The CIT, 4.The CIT(A)
5. DR, Kolkata Bench
6. Guard file.

True Copy,

By order,

Asstt Registrar

**PRADIP SPS