

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
SMT. BEENA A PILLAI, JUDICIAL MEMBER**

ITA NO. 6379 /DEL/2016 (A.Y 2012-13)

DCIT Circle-13(1) C. R. Building New Delhi (APPELLANT)	Vs	Jainco Developers Pvt. Ltd. 8, New Rajdhani Enclave, Vikas Marg New Delhi AABCJ6893J (RESPONDENT)
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Appellant by	Sh. Rajkumar & Sh. Sumit Goyal, CA
Respondent by	Sh. Amit Jain, Sr. DR

Date of Hearing	11.01.2018
Date of Pronouncement	12.02.2018

ORDER

PER R. K. PANDA , AM

This appeal filed by the Revenue is directed against the order dated 6th October, 2016 of the CIT(A)-5, Delhi relating to Assessment Year 2012-13.

2. Deletion of penalty of Rs.22,71,150/- levied by the A.O. u/s 271AAA is the only issue raised by the Revenue against the order of the Id. CIT(A) in the grounds of appeal.

3. Facts of the case, in brief, are that the assessee is a company and filed its return of income on 26th March, 2013 declaring total income of Rs.2,12,72,940/-. A search and seizure action u/s 132 of the I.T. Act was

carried out at the business premises of M/s. Aggarwal Associates and Jainco Group of cases and their relatives on 19.10.2011. This group is carrying out the activities of real estate development and related services. The information in respect of the assessee i.e. M/s. Jainco Developers Pvt. Ltd. was passed on to the present Assessing Officer along with satisfaction recorded on 21.02.2014 by the DCIT, Central Circle, Ghaziabad. The material received from Central Circle, Ghaziabad was thoroughly examined and satisfaction in concurrence to the earlier satisfaction recorded by DCIT, Central Circle, Ghaziabad was also recorded. During the course of search and seizure operation, certain documents, loose papers and other assets were found / seized. The documents seized from the premises of the searched party in relation to the assessee i.e., M/s Jainco Developers Pvt. Ltd. as listed below was forwarded to the Assessing Officer by the Assessing Officer of the searched party for necessary action as per provisions of section 153C of the I.T. Act:

- a) Satisfaction note dated 21.02.2014.
- b) Photocopy of seized documents (216 pages)
- c) Appraisal report of M/s Aggarwal Associates & Jainco Group (pages-6(1 to 99))
- d) Part-A, chapter-XI / details of documents taken of extracts from seized documents (pages - 300 to 302).
- e) Part-A chapter -XII - details of immovable properties (pages 303 to 305).”

4. The A.O. accordingly issued notice u/s 153C of the I.T Act. The assessee, in response to the statutory notices, attended before the A.O. The A.O. observed that during the search operation the assessee has surrendered an amount of Rs.2.10 crores on account of discrepancy in its books of accounts and the documents seized from its premises. The assessee company has declared the amounts surrendered as miscellaneous income under the head

income from other sources. The A.O. accepted the returned income declared by the assessee and determined the income at Rs. 2,12,72,940/-.

5. Thereafter, the A.O. initiated penalty proceedings u/s 271AAA of the I.T Act. The assessee submitted that the penalty u/s 271AAA is not leviable since the conditions of the said Section do not satisfy in the case of the assessee. It was argued that the assessee company has admitted the amount of undisclosed income voluntarily and surrendered a sum of Rs.2.10 lakhs in respect of discrepancies found in the books of accounts and the documents seized from its premises. The assessee has substantiated the manner of earning of such income by explaining each and every entry of the seized material and has paid the tax due thereon along with interest in respect of such undisclosed income. Various decisions were also brought to the notice of the A.O.

6. However, the A.O rejected the explanation given by the assessee and levied penalty of Rs.22,71,150/- of the I.T. Act u/s 271AAA of the I.T Act. While doing so, he observed that the assessee failed to specify the manner in which such income was derived and also failed to substantiate the manner in which the undisclosed income was derived. Further, such undisclosed income was not recorded on or before the date of search, in the books of accounts or other documents maintained in the normal course or otherwise not disclosed to the Chief Commissioner of Income Tax or Commissioner of Income Tax before the date of search. According to the A.O. if the search and seizure operation had not been carried out by the Department, the assessee would not have disclosed such income. According to the Assessing Officer, mala-fide intention of the assessee behind it cannot be denied in this case.

7. In appeal, the ld. CIT(A) deleted the penalty so levied by observing as under :-

“3.1 I have carefully perused the written submission and the impugned

assessment and penalty orders. In the assessment order the A.O has mentioned at page 2 therein the search had been carried out in the business premises of M/s Aggarwal Associates and Jainco Group and on receipt of the satisfaction note dated 21.02.2014, photocopies of seized documents and appraisal report, he issued notice u/s 153C for A.Y. 2006-07 to 2011-2012. The assessment for the impugned year 2012-13 was completed u/s 143(3) as it was the search year. The surrender of Rs. 2.10 crores on account of discrepancies in the books of accounts and documents seized from the appellant's premises was accepted as per the return of income. This appears to be a contradictory statement by the A.O. as the books of accounts and documents that were forwarded to the A.O. by the A.O. of the searched officer, after recording satisfaction that they belonged to the appellant company, could not be said to have been seized from the appellant company's premises. If it were so, the A.O. would not have initiated and completed the assessment u/s 153C. The A.O. under the mistaken premise that the surrender had been made on the basis of the discrepancies found in the books and document as seized from the appellant's premises, recorded his satisfaction for initiation of penalty u/s 271AAA.

3.4 The provisions of section 271AAA need to be referred at this stage and read as under:

20[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 21[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 22[Principal Chief Commissioner or] Chief Commissioner or 22[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.

3.4.1. Perusal of sub section (1) of Section 271AAA clearly shows that penalty can levied under this section only in a case where search action u/s 132 has taken place on or after 01.06.2007 but before 01.07.2012. In the present case the search has taken place on 19.10.2011 but there has been no search on the appellant company. It is very clearly mentioned at page 2 of the assessment order that the search action has taken place at the business premises of M/s Agarwal Associates and Jainco Group and the document seized from the premises of the searched parties as listed at page 2 have been received by the A.O of the appellant for necessary action u/s 153C of the I.T Act. On receiving the satisfaction of the A.O. of the searched person dated 21.02.2014 and the seized material, the A.O. of the appellant company initiated proceedings u/s 153C and completed assessments accordingly for the A.Y.s 2006-07 to 2011-12. The impugned year being the year of search (search took place on 19.10.2011), the assessment stands completed u/s 143(3). In the assessment order, the A.O. recorded his satisfaction for initiation of penalty u/s 271 AAA and the penalty has been levied accordingly. This aspect has been reiterated at the para 4 of the penalty order. However, in the penalty proceedings, the AO has recorded a finding that the surrender of Rs. 210 crore was on account of discrepancies in the books of accounts and documents seized from appellant's premises. These are apparent from perusal of paras 2&5 of the penalty order. Thus the facts on record in assessment order are in contradistinction to the facts mentioned at para 2 and para 5 of the penalty order. The present penalty proceedings emanate from the assessment proceedings and hence, the facts mentioned in the assessment order by the A.O have to be given precedence. In sum total, therefore, the facts clearly show that there was no search on the appellant company. The appellant has placed reliance on the Delhi ITAT decision in the case of Sam India Abhimanyu Housing ITA no. 1257/Del/2015 wherein the facts were that the penalty had been deleted by the CIT (A) since the assessee was not covered u/s 132 i.e. no search had been conducted on the assessee but the assessee was covered by survey u/s 133A. The Tribunal upheld the finding of the CIT(A) that the penalty

u/s 271AAA was legally not sustainable. Since the facts of the present case are identical and even better, as there is no mention of even survey action in the appellant's case, the penalty cannot be legally sustained.

3.2.2 It is found that the courts have held that section 271AAA and 271(l)(c) penalties are mutually exclusive and cannot be substituted to each other. In the case of Marvel Tea Estate 171 TTJ 589 when the A.O levied penalty u/s 271(l)(c) where as search took place at 07.09.2008, that is after 01.06.2007 as provided u/s 271AAA, it was held by the Delhi ITAT that section 271AAA(3) made it mandatory that penalty under section 271AAA is to be invoked in cases where search took place after 01.06.2007 & the penalty, if any, had to be levied only under 271AA- not 271(l)(c). Applying the reverse logic as held by the ITAT Delhi in the aforesaid case, in a case where no search has taken place at the assessee - premises, no penalty u/s 271AAA can be levied. In such a situation, the A.O. ought to have levied penalty u/s 271(l)(c). Accordingly grounds 1-3 are allowed.

3.5 Grounds 4 to 6 challenge the penalty on merits as well as the calculation of the said penalty. Although there are decisions of Delhi ITAT such as in the case of Neerat Singhal 146 ITD 152 for the proposition that where the authorized officer of the department has not raised any specific query regarding manner in which undisclosed income was derived and on the contrary, the assessee tried to explain the earning of such income in his reply u/s 132(4), the penalty u/s 271AAA was not justified, however I do not propose to go into the merits of the case. Since the penalty stands deleted vide grounds 1 to 3 above, these grounds become infructuous and are accordingly dismissed.”

8. Aggrieved with the such order of the Ld.CIT(A), the Revenue is in appeal before the Tribunal.

9. We have heard rival arguments made by both the sides and perused the material available on record. We have also considered the various decisions relied on by both the sides. A perusal of the assessment order shows that no search had taken place in the case of the assessee on 19th October, 2011 and the assessment was completed by issuing notice u/s 153C of the I.T Act. We, therefore, find merit in the arguments of the ld. counsel for the assessee that the provision of section 271AAA are not applicable to the assessee since the said provision as applicable to cases where search has been conducted u/s 132 of the I.T. Act, 1961. We find the Assessing Officer in the instant case has recorded his satisfaction for initiation of penalty u/s 271AAA and thereafter levied penalty u/s 271AAA. We find in the assessment order, the A.O has

categorically mentioned in Para 3 of the order that the assessee company has declared the amounts surrendered as miscellaneous income under the head income from other sources. A perusal of the assessment order shows that the assessee has surrendered the income, explained the manner in which it was earned and has paid the taxes due thereon. Therefore, the assessee has fulfilled all the conditions laid down in Section 271AAA for non-levy of penalty under the said provisions. Even otherwise also, it is an admitted fact that no search has taken place in the premises of the assessee and, therefore, provisions of Section 271AAA are not at all applicable. In view of the above discussion and in view of the detailed reasoning given by the Ld.CIT (A) on this issue, we do not find any infirmity in the same. Accordingly, the order of the Ld.CIT(A) is upheld and the grounds raised by the Revenue are dismissed.

10. In the result, the appeal filed by the Revenue is dismissed.

Pronounced in the open court on 12th February, 2018.

Sd/-
(BEENA A PILLAI)
JUDICIAL MEMBER

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

Dated: 12/02/2018
*R. Naheed */Sujeet*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI