

IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD “C” BENCH AHMEDABAD

BEFORE, SHRI S. S. GODARA, JUDICIAL MEMBER  
AND SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No. 1552/Ahd/2016  
(Assessment Year : 2010-11)

The Jt. Commissioner of Income-tax(OSD),  
Circle-1(3), 3<sup>rd</sup> Floor, Room No.302,  
Aaykar Bhavan, Race Course Circle,  
Vadodara – 390 007

Appellant

Vs.

Shri Jayendra N. Shah  
“Janod” 4, Amrakunj Society,  
Ellor Park, Vadodara (390007)

Respondent

PAN: AJKPS6643Q

राजस्व की ओर से / By Revenue : Shri Prasoon Kabra, Sr. D.R.

□ वेदक की ओर से / By Assessee : Shri M. J. Shah, A.R.

सुनवाई की तारीख/Date of Hearing : 15.03.2018

घोषणा की तारीख/Date of

Pronouncement : 16.03.2018

**ORDER**

**PER S. S. GODARA, JUDICIAL MEMBER**

This Revenue’s appeal for assessment year 2010-11 arises from the CIT(A)-5, Vadodara’s order dated 09.03.2016 in case no. CAB/5-192/2014-15, reversing Assessing Officer’s action levying penalty of Rs.19,83,000/- @ 10% of assessee’s undisclosed income of Rs.1,98,30,000/-, in proceedings u/s.271AAA of the Income Tax Act, 1961; in short “the Act”.

Heard both the parties. Case file perused.

2. We notice at the outset that the CIT(A)'s elaborate discussion on the above sole penalty issue reads as under:

“5.3 *I have considered the facts and circumstances of the case, the observations of the Assessing Officer, the submissions of the assessee, material available on record and the judicial pronouncements on the subject. In this case, action u/s 132(1) was taken on 11.02.2010 and the same is covered u/s 271AAA(1) of the Act. There is no dispute regarding the nature and quantum of the "undisclosed income" declared by the assessee in his Return of Income for the year under consideration. It is also not in dispute that the undisclosed income of Rs.1,98,30,000/- was declared by the assessee in his statement u/s 132(4), at the time of the search. It is also not in dispute that the Assessment Year under consideration is part of the "Specified Previous Year", as defined in Explanation (b) to section 271 AAA. It is matter of record that the assessee has paid necessary taxes on the undisclosed income declared by him in his statement u/s 132(4) and offered the undisclosed income to tax in his Return of Income for the relevant year. The only ground on which the Assessing Officer has imposed penalty u/s 271 AAA in this case is on that the assessee has failed to comply with the provisions of sub clauses (j) and (ii) of section 271(2) of the Act, viz. he has failed to specify the manner in which such income was derived and had also failed to substantiate the same.*

5.4 *The assessee has objected to levy of penalty u/s 271 AAA in the year under consideration viz. A.Y. 2010-11, on the ground that the assessee was never specifically asked to specify the manner in which the declared unaccounted income was derived or to substantiate the same in his statement u/s 132(4) of the Act. The assessee has argued that in the absence of specific opportunity/questions by the authorized officer during recording of his statement u/s 132(4) of the Act, either to specify the manner in which the declared unaccounted income was derived or to substantiate the same, the assessee cannot be penalized, holding that he had failed to comply with the provisions of section 271AAA(2)(i) and 271AAA(2)(ii) of the Act. I have perused assessee's statement u/s 132(4) and have also perused the assessment records of the assessee for the relevant A.Y. and have noted that no specific questions were ever asked by the Authorised Officer during the recording of assessee's statement u/s 132(4) of the Act, requiring the assessee to specify the manner in which the declared unaccounted income was derived or to substantiate the same. Even the Assessing Officer has failed to provide any specific opportunity to the assessee requiring him to comply with the provisions of sub clauses (i) and (ii) of section 271AAA(2) of the Act.*

5.5 *The provisions of section 271 AAA read as under-*

**“[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 7[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.]**

5.6 Hon'ble ITAT, Ahmedabad has, in the case of **DCIT vs Rajendra Prasad Dokania (2012) 32 CCH 0260 AhdTrib**, held that in a case where the assessee was neither asked by the Authorised Officer nor by the Assessing Officer at the stage of either recording of statement u/s 132(4) or at the time of assessment proceedings, to substantiate the manner in which the undisclosed income was derived, the assessee will be deemed to have discharged his onus of substantiating the manner in which the undisclosed income was derived and it cannot be said during penalty proceedings that the assessee had not fulfilled this condition.

5.7 *Hon'ble ITAT, Chandigarh has, in the case of **Sunil Kumar Bansal vs DCIT [2015] 62 taxmann.com 78 (Chandigarh-Trib)**, held that where no question was asked during statement recorded u/s 132(4), in respect of manner of earning income surrendered, assessee could not be expected to substantiate the same later on and penalty could not be levied u/s 271AAA. Similarly, Hon'ble Delhi ITAT has, in the case of **Neerat Singhal vs ACIT [2013] 37 taxmann.com 189 (Delhi-Trib)**, held that penalty levied under section 271 AAA was not justified in absence of query raised by authorized officer during course of recording of statement under section 132(4), about manner in which undisclosed income has been derived and about its substantiation. Similar views have also been expressed by Hon'ble Chandigarh ITAT in **ACIT vs Munish Kumar Goyal [2015] 152 ITD (Chandigarh)**.*

5.8 *Hon'ble Gujarat High Court has, in the case of **CIT vs Mahendra C.Shah (2008) 299 ITR 0305 (Guj)**, held that even if the statement does not specify the manner in which the income is derived, if the income is declared and tax thereon is paid, there would be substantial compliance not warranting denial of benefit under exception 2 in Explanation 5 to section 271(1)(c) of the Act. Applying the analogy to penalty u/s 271 AAA in the present case where income has been declared in statement u/s 132(4) and taxes have been paid on the same, even though the statement u/s 134(4) does not specify the manner in which income is derived, there is substantial compliance with sub clauses (i) and (ii) of section 271 AAA(2) of the Act.*

5.9 *In view of the above discussion and keeping in view the decision of Hon'ble ITAT in **Rajendra Prasad, Dokania (supra)** and also other cited judicial precedents, penalty of Rs,19,83,000/- levied u/s 271AAA for the year under consideration is directed to be deleted. The assessee succeeds on this ground of appeal.*

3. Learned Departmental Representative vehemently contends that the CIT(A) has erred in law and on facts in deleting the impugned penalty as imposed by the Assessing Officer on account of assessee's failure in specifying the manner of having derived the above undisclosed income as well as substantiation thereof during the course of search as well as assessment proceedings. He however fails to rebut the CIT(A)'s clinching finding that no such query of manner of deriving the impugned undisclosed income had been put to the assessee by the authorized officer whilst recording the search statement in question. We notice in this backdrop that hon'ble jurisdictional high court's recent judgment in **PCIT vs. Mukeshbhai Ramanlal Prajapati Tax Appeal No. 434 of 2017** decided on 24.07.2017 holds that it is incumbent for the authorized officer to question the assessee about the relevant manner of having derived the undisclosed income in question and then only the onus shifts on the tax payer to substantiate the same. Their lordships' operative portion reads as under:

“5. From the perusal of the orders on record, it becomes clear that the assessee had admitted the undisclosed income in his statement recorded under section 132(4) of the Act during the survey. The assessee had owned up to such income in the return filed and had also paid tax and interest on such sum. The Assessing Officer imposed a penalty on the ground that the assessee failed to substantiate the manner of earning the income. However, CIT (Appeals), as noted, concluded that no question was asked by the departmental representatives (in the course of recording the statement under section 132(4) of the Act) regarding the manner of earning such income. It was, on this basis, that the CIT (Appeals) as well as the Tribunal found that the Assessing Officer committed an error in imposing penalty.

6. As is well known, section 271, providing for penalty for concealment of income etc., contained an Explanation 5 inserted w.e.f. 01.10.1984 and held the field till introduction of Explanation 5A w.e.f. 01.06.2007. Under this Explanation 5, prevailing at the relevant time, an assessee could avoid payment of penalty on the assessee being found to be the owner of any money, bullion, jewellery or other valuable article or thing acquired by undisclosed income, if in the course of search, the assessee made a statement under sub-section (4) of section 132 admitting acquisition of such asset out of his income not disclosed in the return and also specifies in the statement the manner, in which, such income has been derived and pays the tax together with interest in respect of such income.

7. To avoid penalty, with the aid of Explanation 5 therefore, the assessee had to make a statement under sub-section (4) of section 132 admitting such undisclosed income and specify in such statement the manner, in which, such income was derived and to pay tax, if any, on such income.

8. This provision came-up for consideration before Allahabad High Court in case of Commissioner of Income Tax vs. Radha Kishan Goel reported in 278 ITR 454. The Revenue was in appeal before the High Court challenging judgement of the Income Tax Appellate Tribunal. Grievance of the Revenue was that the assessee had not disclosed the manner of deriving such income. Despite which, the Tribunal had deleted the penalty. The High Court rejected the Revenue's appeal primarily on the ground that a statement under section 132(4) of the Act is recorded by the departmental authorities and if in such statement no question is asked about the disclosure of manner in which the income is derived, the Revenue cannot impose penalty on the premise that the assessee did not make any such disclosure. It was held and observed as under:

“10. Under Section 132(4) of the Act, it is the authorised officer, who examine on oath any person, who is found to be in possession or control of any books of account, document, money, bullion, jewellery or other valuable article or thing, therefore, it is on the authorised officer to record the statement in his own way. Therefore, it is not expected from the person to state those things, which are not asked by the authorised officer.

11. It is a matter of common knowledge, which can not be ignored that the search is being conducted with the complete team of the officers consisting of several officers with the police force. Usually telephone and all other connection are disconnected and all in-charge and out-charge are blocked. During the course of search person is so tortured, harassed and put to a mental agony that he loses its normal mental state of



*mind and at that stage it can not be expected from a person pre-empt the statement required to be given in law as a part of his defence.*

*12. In these circumstances, we are of the view that under Section 132(4) of the Act unless authorised officer puts a specific question with regard to the manner in which income has been derived, it is not expected from the person to make a statement in this regard and in case if in the statement the manner in which income has been derived has not been stated but has been stated subsequently, amounts to the compliance of Explanation 5(2) of the Act. We are also of the opinion that in case if there is nothing to the contrary in the statement recorded under Section 132(4) of the Act, in the absence of any specific statement about the manner in which such income has been derived, it can be inferred that such undisclosed income was derived from the business, which he was carrying on or from other source. The object of the provision is achieved by making the statement admitting the non-disclosure of money bullion, jewellery etc. Thus, we are of the opinion that much importance should not be attached to the statement about the manner in which such income has been derived. It can be inferred on the facts and circumstances of the case, in the absence of anything to the contrary. Therefore, mere non- statement of manner in which such income was derived would not make the Explanation 5 (2) inapplicable."*

*9. Similar situation arose before this Court. Division Bench in case of Commissioner of Income Tax vs. Mahendra C Shah reported in 299 ITR 305 adopted the same logic as that of the Allahabad High Court and observed as under:*

*"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 Vs. Radha Kishan Goel (supra). 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."*

*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.*

*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 assessee'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."*

We therefore conclude that CIT(A) has rightly deleted the impugned penalty. Revenue's sole substantive ground as well as its main appeals fails.

4. This Revenue's appeal is dismissed.

[Pronounced in the open Court on this the 16<sup>th</sup> day of March, 2018.]

Sd/-  
(AMARJIT SINGH)  
ACCOUNTANT MEMBER  
Ahmedabad: Dated 16/03/2018

Sd/-  
(S. S. GODARA)  
JUDICIAL MEMBER

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अद्योषित / Copy of Order Forwarded to:-

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DR, ITAT, Ahmedabad
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By order/□ देश से,

उप/सहायक पंजीकार  
□ यकर अपीलीय अधिकरण, अहमदाबाद ।