

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

**BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No. 2702/DEL/2015 (A.Y 2009-10)

Rajendra Aggarwal 23/5, Shakti Nagar New Delhi ADPQA4147F (APPELLANT)	Vs	DCIT Central Circle-5 New Delhi (RESPONDENT)
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Appellant by	Sh. V. K. Bindal, CA
Respondent by	Ms. Ashima Neb, Sr. DR

Date of Hearing	15.01.2019
Date of Pronouncement	22.01.2019

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 18/3/2015 passed by CIT(A)-XXIV, New Delhi for Assessment Year 2009-10.

2. The grounds of appeal are as under:-

“ 1. The CIT(A) erred in law and on facts in confirming the penalty of Rs. 5,16,410/-, @ 10% of the amount offered as undisclosed income at the time of search, u/s 271 AAA of the Act ignoring the fact that the appellant filed complete details regarding source of shares, cash and jewellery found and surrendered during the course of the assessment proceedings though the appellant also deposited the due tax alongwith interest on the surrendered amount in order to buy peace. Thus the penalty so confirmed must be deleted.

2. The CIT(A) erred in law and facts in confirming the above penalty and not

appreciating the fact that the penalty of Rs. 20,000/- could not have been imposed by the assessing officer being the DC IT without seeking prior approval of the Additional / Joint Commissioner of the Income-tax as has been provided u/s 272(2) of the Act which is as under:

Section 274

- (1) No order...*
- (2) No order imposing a penalty under this Chapter shall be made-*
 - (a) by the Income-tax Officer, where the penalty exceeds ten thousand rupees:*
 - (b) by the Assistant Commissioner or Deputy Commissioner, where the penalty exceeds twenty thousand rupees. except with the prior approval of the Joint Commissioner*

Since the assessment order does not show any such approval therefore penalty imposed is illegal and must be deleted.

3. The CIT(A) erred in law and on facts in confirming the penalty ignoring that the offer of this additional income AO accepted was conditional that no penalty would be imposed under the Act on the said amount.

2. The appellant craves the leave to add, substitute, modify, delete or amend all or any ground of appeal either before or at the time of hearing.

3. A search and seizure operation was conducted in this case on 31.07.2008 and assessment proceedings in this case was computed u/s 153A of the Income Tax Act, 1961 on 30.12.2010 at a total income of Rs. 69,34,690/-. During the course of search & seizure operation conducted on 31.07.2008, the assessee surrendered income of Rs.51,64,100/-. As per the observations of the Assessing Officer, since the assessee did not specify the manner in which undisclosed income was derived and also not substantiate the same, therefore, penalty proceedings u/s 271AAA of the Act were

accordingly initiated vide notice dated 30.12.2010. Another show cause notice dated 10.06.2011 was issued. In response thereto, assessee filed reply. The Assessing Officer did not find the submissions of the assessee tenable therefore, imposed the penalty of Rs. 5,16,410/- which is equal to 10% of the undisclosed income of Rs. 51,64,100/- surrendered by the assessee.

4. Being aggrieved by the Assessment Order, the assessee filed appeal before the CIT(A). The CIT(A) dismissed the appeal of the assessee.

5. The Ld. AR submitted that in this case, a search was conducted on 31/07/2008 in the residential premises of the assessee. The return of income for the AY 2009-10 was filed on 30/07/2009 (wrongly mentioned as on 27/08/2010 in the assessment order) and notice u/s 143(2) was issued on 27/08/2010. Assessment order was passed on 30/12/2010. On perusal of the panchnama dated 01/08/2008 in respect of the search conducted in the premises of the assessee, it is clear that the search commenced on 31/07/2008 and was concluded on 01/08/2008. Similarly, in respect of the bank locker no. 12 with Axis Bank, Shakti Nagar, Delhi of the assessee which was the only bank locker, the assessee had, as per the panchnama dated 01/08/2008, it would be seen that the locker was opened in August 2008 and the search thereon was also concluded on the very same day. Thus, the income-tax search proceedings u/s 132 of the Act stood completed before 31/08/2008.

6. The Ld. AR pointed out that the assessee had no business / professional income and he was receiving salary, rent, interest on FDR and other bank accounts. (Please refer answer to the question no. 4 of the statement recorded u/s 132(4) of the Act on 31/07/2008 in this regard). The Assessee in his return of income filed u/s 139(1) after the search included miscellaneous income of Rs. 51,64,100/-. The Ld. AR submitted that certain documents of the two Pvt. Ltd companies belonging to the assessee's family were found during the search. The documents as detailed in Question nos. 17 to 18 of the statement u/s 132(4) of the Act dated 01/08/2008 were:

1. *Application for shares by named corporate-applicants*
2. *Blank transfer forms by those applicants*
3. *POA by applicants which were not completely filled*
4. *Blank receipt for the sale of shares*
5. *Blank but signed sale bill which is undated*
6. *Signed but undated delivery note for shares*

It is important to appreciate that no share certificates against the said blank papers.

When questioned, the assessee vide reply 17 informed that *“I have no full knowledge of these documents. However, I would like to add that these papers were taken from the seller in good faith with the intentions to buy the same from the sellers. Since the rate of the share and its premium could not be settled therefore, the documents were not filled and remained unfilled.”* The Ld. AR submitted that unquestionably, nothing can be inferred from these documents. It cannot be determined whether shares were actually purchased or the documentation was preparatory, who was intended / actual buyer, date of transfer, amount of sale consideration etc. Thus, these were in fact dumb documents unless the signatory (seller) was questioned about these documents, narrations thereupon or necessity of blank signatures etc. The Ld. AR relied upon the decision in case of in ACIT v. Satyapal Wassan (2007)295 ITR (AT) 352 (Jabalpur). Further, the assessee vide Ans. 31 stated that the cash of Rs. 3.61 lakhs was out of his family drawings and cash in hand shown in the books of account. Similarly, the jewellery worth 16,45,500/- was, vide question no. 32, was explained as of his mother and wife disclosed in their Wealth-tax returns. Thus, specific replies were given then. After conclusion of the search, the assessee sent a letter dated 12/09/2008 i.e. during the relevant financial year itself, to the DDIT-Inv. and offered to surrender a sum of Rs. 51.641 lakhs as his income and categorically submitted that this offer was for buying peace of mind and to avoid litigation and to cooperate ‘on the specific condition that no penalty proceedings and prosecution proceedings’

would be initiated. The assessee indicated that Rs. 45 lakhs was paid for purchasing shares and further, lump sum Rs. 6.641 lakhs on account of cash in hand, jewellery and any other items, without any specific break up / details.

7. The Ld. AR submitted that the Hon'ble jurisdictional Delhi High Court in case of Bhagirath Aggarwal vs CIT 2013-TIOL-82-HC-DEL-IT held that where the assessee make a voluntary surrender, income-tax officials are bound to record a statement u/s 132(4) of the Act to make it reliable and to be used as evidence. Further, it has been held that a letter written after one and a half month after the search cannot be treated as a statement u/s 132(4) of the Act. In fact, this view has also been held by the CIT(A) in the concluding para of his appellate order. The AO completed the assessment by accepting the return of income filed by the assessee which included this 'surrender' of Rs. 51,64,100/- without any reference to above mentioned letter or any independent investigation to determine income sans the voluntary inclusion by the assessee and that too without any comment regarding acceptance/ rejection of the offer to buy peace of mind. However, the AO added another sum of Rs. 14,00,000/- as unexplained cash found at the time of search which in the second round after the Hon'ble ITAT's order was deleted by the AO himself accepting that this cash belonged to the other entities. Further, penalties were initiated after mentioning as "Initiate penalty u/s 271 (l)(c). Penalty proceeding u/s 271 AAA are also being initiated as the assessee has failed to substantiate the manner in which the surrender income of Rs 51,64,100/- was earned. Issue necessary forms'. It is submitted that the impugned penalty has been initiated without application of mind and in a mechanical manner. The provisions of 271 AAA are as under:

271 AAA. (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;

8. Thus, the Ld. AR submitted that a plain reading clearly shows that the said penalty is leviable in respect of "undisclosed income" of the previous year as defined in the Explanation and not for substantiating the manner of the earning "undisclosed income". The issue regarding substantiation is relevant only for exemption from the said penalty. But, the question of exemption comes only when there is "undisclosed income" as mentioned in the Explanation. The assessment order and the penalty initiation part therein are totally silent on the assets found during the search, which particular entry was found not entered in the appropriate books of account. The Assessing officer is bound to furnish at least some basis for initiating the penalty. Even the impugned penalty notice is silent as in this notice, section has been reproduced but nothing has been scored off or tick marked. It is well established law that the SCN must indicate precise charge as penalty has civil consequences. It has been held in CIT Vs MANJUNATHA COTTON AND GINNING FACTORY 2013-TIOL-536-HC-KAR-IT that *A reading of Section clearly indicates that the assessment order should contain a direction for initiation of penalty proceedings. The meaning of the word direction is of importance. Merely saying that penalty proceedings are being initiated will not satisfy the requirement. The direction to initiate proceedings should be clear and not be ambiguous. It is well settled law that fiscal statutes are to be construed strictly and more so the deeming provisions by way of legal fiction are to be construed more strictly. They have to be interpreted only for the said issue for which it has deemed and the manner in which the deeming has been contemplated to be restricted in the manner sought to be deemed. As the words used in the legal fiction or the deeming provisions of Section 271 (IB) are directive, it is imperative that the assessment order contains a direction. The Ld. AR submitted that use of the phrases like (a) penalty proceedings are being initiated separately and (b) penalty proceedings under Section 271(l)(c) are initiated separately, do not comply with the meaning of the word direction as contemplated even in the amended provisions of law. The direction should be clear and without any ambiguity.... As the provision stands, the penalty*

proceedings can be initiated on various ground set out therein. If the order passed by the Authority categorically records a finding regarding the existence of any said grounds mentioned therein and then penalty proceedings is initiated, in the notice to be issued under Section 274, they could conveniently refer to the said order which contains the satisfaction of the authority which has passed the order. However, if the existence of the conditions could not be discerned from the said order and if it is a case of relying on deeming provision contained in Explanation- 1 or in Explanation-1(B), then though penalty proceedings are in the nature of civil liability, in fact, it is penal in nature. In either event, the person who is accused of the conditions mentioned in Section 271 should be made known about the grounds on which they intend imposing penalty on him as the Section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in Section 271(1)(c) do not exist as such he is not liable to pay penalty. The practice of the Department sending a printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law when the consequences of the assessee not rebutting the initial presumption is serious in nature and he had to pay penalty from 100% to 300% of the tax liability. ”

The above has been duly affirmed by the Apex Court in SSA’s Emerald Meadows (2016) 73 taxmann.com 248 (SC). The Ld. AR further submitted that in case of CIT Vs ECS LTD 2010-TIOL-287-HC-DEL-IT it was held that “The net effect of the aforesaid judgment is that even when the AO has not recorded his satisfaction in explicit terms, the assessment order should indicate that the AO had arrived at such a satisfaction. Though the assessment order need not reflect every item, viz., addition or disallowance, yet we have to find out that the order is couched in such a manner and the discussion herein leads towards the opinion of the AO that the assessee had concealed particulars of income or furnishing inaccurate particulars. This has to be discerned from the reading of the assessment order.”

The Ld. AR further submitted that though this order is in respect of concealment penalty u/s 271(l)(C) of the Act, but legal ratio would equally apply to the section 271 AAA of the Act which is leviable in respect of i) assets ii) entries in books / documents relating to income not entered in regular books and iii) unrecorded expenses. The assessment order and the SCN must indicate prima facie reason for initiating penalty and failure of the AO would lead to cancellation of penalty. The Ld. AR submitted that in the present case, even the penalty order is silent on subject of undisclosed income. The Ld. AR submitted that the Assessing Officer has also not mentioned in the impugned notice that it is a notice u/s 274 r.w.s. 271 AAA of the Act. The assessment order does not show that any approval u/s 153D read with Section 153B(l)(b) of the Act was received from the Addl./Jt. CIT by the assessing officer. The same has been left blank. No approval of the Addl. CIT to the assessment order seems to be there as no such approval is mentioned in the assessment order nor it was found on inspection in the assessment folder. Thus, the assessment order itself is illegal and consequently the impugned penalty. It clearly shows that the Assessing Officer was very much aware that this is a necessity and that is why this was duly mentioned in the assessment order on page 4. Thus, the impugned assessment order itself is bad in law. The Ld. AR relied upon the decision in case of Valuelines Securities India Ltd 106 ITD 639 where the Hon'ble ITAT, Hyderabad Bench of the Tribunal held *"Thus, whatever may be the internal records with the Revenue given to the assessee have to be the basis of conclusion. The panchnamas and the assessment orders are in the public domain and can be held as carrying more weight as compared to the secret internal files off the income-tax department."* Therefore, any penalty imposed in consequence to the said illegal order itself is bad in law.

10. On merit, the Ld. AR submitted that the assessee was not conducting any business or profession and as such, was not required and was factually not maintaining any books of account. Therefore, this case does not fall under non-entering of income or expenses in the books of account maintained in the

normal course. The assessment order does not at all spell as to what undisclosed assets were found by way of money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents. It also does not specify what transactions found were not recorded in the books of account or other documents in the normal course. It is pertinent to note that the assessee had no business / professional income and he was just receiving salary, rent, interest on FDR and other saving bank accounts. (Kindly refer the question no. 4 of the statement dated 31/07/2008 in this regard) and therefore, there could not be any undisclosed income which was required to be entered in the normal books of account as those were not required to be maintained u/s 44 A A of the Act. The Ld. AR further submitted that the assessee sent a letter dated 12/09/2008 i.e. during the relevant financial year itself, to the DDIT (Inv.) and offered to surrender Rs. 51.641 lakhs as his income and asserted that this offer was for buying peace of mind and to avoid the litigation and to cooperate 'on the specific condition that no penalty proceedings and prosecution proceedings' would be initiated. The assessee indicated that Rs. 45 lakhs was paid for purchasing the shares and further, lump sum Rs. 6.641 Lakhs on account of cash in hand, jewellery and any other items without any specific break up / details. The Ld. AR further submitted that the blank share transfer forms were not valuable article or thing. Transfer of shares is complete only when the share certificates along with the transfer form are delivered. Therefore, the blank forms are not covered by 'undisclosed income' as defined in section 271 AAA of the Act.

11. Further, the Ld. AR submitted that though the assessee mentioned 'sum of Rs. 6.641 lakhs on account of cash in hand, jewellery and any other items, but in fact nothing pertains to cash or jewellery. The total jewellery found was valued at Rs. 26,74,710/- and nothing was seized. The notice u/s 142(1) of the Act dated 28/09/2010 was issued by the AO and the query number no. 31 was in respect of jewellery found. In reply, the assessee submitted that the Jewellery worth 23,90,082/ belonged to the assessee and was disclosed in his

Wealth-tax returns. The balance belonged to his wife and was disclosed in her Wealth-tax returns. As regard the cash, only cash of Rs 3,61,200/- was found from the assessee and the remaining cash of Rs 17,80,000/- was found in the bedroom of Mr. Sanjay Agrawal. The Panchnama was joint in the name of assessee and his brother Mr Sanjay Agarwal. Out of the total cash found at the time search, a sum of Rs 5,41,200/- was released and a sum of Rs 16,00,000/- was seized. In the statement recorded u/s 132(4) of the Act, the assessee was confronted only to the cash found with him where he stated that the cash of Rs. 3.61 lakhs was out of his family drawings and cash in hand shown in the books of account (*of his companies*). These facts clearly show that this sum of Rs 6.641 lakhs has no relation with the cash / jewellery but part of the 'settlement' with the investigation wing so as to ease departmental pressure, to buy peace and end litigation etc. Otherwise, there was no occasion for filing any letter with the investigation wing as the authorised officer / investigation wing becomes function officio after completion of the searches which had concluded on a much earlier date.

12. The Ld. AR further submitted that the assessee disclosed Rs. 45,00,000/- in his return of income on account of purchase of shares but the search did not yield any evidence for payment of any such amount for the said purchases as only application for shares by the named corporate-applicants, blank transfer forms by shareholders, POA by them which were not completely filled in, blank receipt for the sale of shares, blank but signed sale bill which is undated and signed but undated delivery note for shares were found. The shares of Rs 10/- each were issued by the company to various shareholders for a total amount of Rs. 95,00,000/- at a premium of Rs. 90/- to Rs. 190/- per share. In the Question No. 19 of the statement recorded of the assessee in the midnight at 1:00 am on 01/08/2008 which was concluded early morning of the said date, the assessee was asked as to how the shares of Kiwi Food India (P) Ltd. had been transferred by a number of allottees at a meager rate of Rs. 2/50 to Rs. 5/- per share to the family members of the assessee and his

associates which shows that the shares issued were acquired for a very low amount. Thus, the disclosure of Rs. 45,00,000/- for purchases of 87,045 equity shares of the face value of Rs. 88,87,450/- is without any basis. It is neither for the full amount of Rs 95 lakhs nor at the rate of Rs 2.50 or Rs 5/- per equity share as per some information found as mentioned above which in that case could only be at the most Rs 4,35,225/- for 87,045 equity shares. The Revenue accepted the said offer just because the Revenue pressurized the assessee for a surrender of Rs. 55,00,000/- which is clear from the offer letter dated 12/09/2008 where besides 45,00,000/- for the shares, a sum of Rs. 3,35,837.39 (rounded off to Rs. 3,35,900/-) for stocks of his company and Rs. 6,64,100/- miscellaneous income covering cash, jewellery, etc. was mentioned whereas no such undisclosed asset was found. Thus, no specific undisclosed income in terms of the definition u/s 271 AAA of the Act was found during the course of search. The Ld. AR relied upon the decisions of SPS Steel & Power Ltd vs ACIT ITA nos. 1391/KOL/2011 (DoD 30/06/2015) and Abu Mansur Ali vs DCIT 2017-TIOL-587-ITAT- KOL. The Ld. AR submitted that the surrender was made just to buy peace and avoid penalties/litigations. Thus, the penalty imposed u/s 271 AAA of the Act void ab initio, illegal and must be cancelled.

13. The Ld. DR submitted that the assessee has not challenged the quantum assessment order and there was no surrender u/s 132(4). Thus, the Ld. DR submitted that if there is no surrender then 271AAA is applicable in the assessee's case. The Ld. DR further submitted that both the notices u/s 274 read with Section 271AAA and 271(1)(c) are valid and there is no defect in the said notices. The Ld. DR relied upon the decision of the Hon'ble High Court in case of Ritu Singhal 2018-TIOL-438.

14. We have heard both the parties and perused the material available on record. It is pertinent to note that the Assessing Officer completed the assessment by accepting the return of income filed by the assessee which

included surrendered amount of Rs. 51,64,100/-. In fact in the Assessment Order, the Assessing Officer added another sum of Rs. 14,00,000/- as unexplained cash found at the time of search which in the second round after the Tribunal's order was deleted by the Assessing Officer whereby accepting this cash belonged to the other entities. This aspect is not denied by the revenue. The initiation of penalty u/s 271AAA in the Assessment order is based on the surrendered amount which cannot be termed as undisclosed income. In fact, by surrendering the said amount, the assessee has disclosed it before the Revenue authorities. The quantum assessment order has nowhere stated that the surrendered amount of Rs. 51,64,100 is an undisclosed income. The surrendered amount was declared in the return of income u/s 153A as misc. incme. The Assessing Officer accepted this surrendered amount as misc. income as declared by the assessee in the return of income and levied the income tax on it accordingly. In the present case, even the penalty order is silent on subject of undisclosed income. Therefore, provisions u/s 271AAA will not come under the purview as it is specifically a penalty relating to undisclosed income. Therefore, appeal of the assessee is allowed.

15. In result, the appeal of the assessee is allowed.

Order pronounced in the Open Court on 22 JANUARY, 2019.

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 22/01/2019

*R. Naheed **

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	16.01.2019
Date on which the typed draft is placed before the dictating Member	16.01.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	.01.2019
Date on which the final order is uploaded on the website of ITAT	22.01.2019
Date on which the file goes to the Bench Clerk	.01.2019
Date on which the file goes to the Head Clerk	