

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "B" JAIPUR

श्री रमेश सी० शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH. C. SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA No. 1014/JP/2016
निर्धारण वर्ष / Assessment Year : 2013-14

M/s Shri Balaji Industrial Engineering Ltd. 48, Jhothwara Industrial Area, Jaipur- 302012.	बनाम Vs.	The ACIT, Circle-1, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AADCB 4480 B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by: Shri Rajeev Sogani (CA)
राजस्व की ओर से / Revenue by : Shri Ashok Bhatra (JCIT)

सुनवाई की तारीख / Date of Hearing : 16/05/2019
उदघोषणा की तारीख / Date of Pronouncement: 10/06/2019

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 09.09.2016 of the Id. CIT(A), Jaipur arising from the penalty order passed U/s 271AAB of the I.T. Act for the assessment year 2013-14.

The assessee has raised following ground:-

"1. In the facts and circumstances of the case and in law the Id. CIT(A) has erred in confirming the penalty of Rs. 19,50,000/- under section 271AAB as imposed by Id. AO. The Action of the Id.

CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the penalty amounting to Rs. 19,50,000/- imposed under section 271AAB.

2. The assessee company carves its rights to add, amend or alter any of the grounds on or before the hearing."

2. The assessee has also raised additional ground which reads as under:-

"In the facts and circumstances of the case and in law, the Id. AO erred in treating the declared income during the course of search as 'undisclosed income' within the meaning as defined in section 271AAB. Action of the Id. AO is illegal. Relief may please be granted by quashing the penalty order"

3. We have heard the Id. AR as well as the Id. DR on the admission of the additional ground, we find that the assessee has raised a legal issue in the additional ground that the income surrendered by the assessee during the course of search is not 'undisclosed income' within the meaning as defined in the explanation to Section 271AAB of the IT Act. Therefore, the additional ground raised by the assessee is purely a question of law and does not involve investigation of any new facts or inquiry for adjudication of the same. There is no quarrel on the point that the parties in appeal can raise a fresh plea or ground before this Tribunal for the first time so long as the relevant facts for adjudication of such legal plea are already on record. Therefore, once the relevant facts are already on record for adjudication of the question raised in the

additional ground and no new facts are required to be investigated then in view of the decision of the Hon'ble Supreme Court in case of **NTPC vs. CIT 229 ITR 383** the additional ground raised by the assessee is admitted for adjudication along with the main ground of appeal. We may make it clear that the additional ground raised by the assessee is only a plea in respect of the main ground raised in the memo of appeal.

4. There was a search and seizure action U/s 132(1) of the Income-tax Act on 06.11.2012 at various premises of Kanodia Group to which the assessee belongs. Thus, the assessee was also covered by the search and seizure action and statement of Shri kailash Kanodia a director of the assessee was recorded U/s 132(4) of the Act on 06.11.2012 & 07.11.2012. In those statements he disclosed/surrendered a sum of Rs. 2 crore on his behalf and equal amount of Rs. 2 crore on behalf of his son Shri Abhishak Kanodia total amounting to Rs. 4 crore. Thereafter vide letter dated 25.01.2013 of Shri Kailash Kanodia also surrendered a sum of Rs. 65,00,000/- on behalf of the assessee company on account of cash purchase of raw material. The assessee filed its return of income U/s 139(1) of the Act on 28.09.2013 declaring total income as loss of Rs. 72,92,396/-. This loss was due to unabsorbed depreciation which has been carried

forward. The assessee filed its revised return of income on 21.03.2015 in which undisclosed income of Rs. 65,00,000/- was also declared as surrendered vide letter dated 25.01.2013. The AO has completed the assessment on the revised return of income accepting the surrender income of Rs. 65,00,000/-. Subsequently, The AO initiated the proceedings U/s 271AAB of the Act by issuing show cause notice dated 19.08.2015. The assessee objected to the proposed levy of penalty U/s 271AAB of the Act. The AO while passing the order dated 29.09.2015 levied penalty @ 30% of undisclosed income amounting to Rs. 19,50,000/-. The assessee challenged the action of the AO before the Id. CIT(A) but could not succeed.

5. Before us, the Id. AR of the assessee has submitted that during the course of search on 06.11.2012 a paper Exhibit-2 page 25 was found and seized containing the details of payment made in cash for purchase of raw material. The Id. AR has referred to the said seized document and submitted that it contains the date of payment for purchase of iron ore in cash however, at the time of search the stock found was duly recorded in the accounts. Therefore, there was no discrepancy found in the stock of the assessee at the time of search and hence the payment made in cash for purchase of raw material itself

is not undisclosed income of the assessee. The Id. AR has further contended that as per the definition of undisclosed income given in explanation to Section 271AAB of the Act the purchase of raw material cannot be stated to be income which is represented by any money, bullion, jewellery or other valuable article or thing. In the definition of undisclosed income it talks about "income by way of any entry in the books of account or other documents or transactions found in the course of a search U/s 132 of the Act". The investments which are found not recorded cannot be deemed as undisclosed income in the context of Section 271AAB of the Act. The Id. AR has relied upon the decision of the Coordinate Bench of this Tribunal dated 11.01.2019 in case of **M/s Rambhajo's vs. ACIT** in ITA No. 991/JP/2017 and submitted that the Tribunal has held that the investment itself cannot be deemed as undisclosed income for the purpose of Section 271AAB of the Act. Hence, the Id. AR has submitted that the disclosure made by the assessee cannot be held as undisclosed income and therefore, the penalty levied by the AO U/s 271AAB of the Act may be deleted. Alternatively, the Id. AR has submitted that the assessee filed letter dated 25.01.2013 whereby the surrender of Rs. 65,00,000/- was made with the special mention that the same may be treated as disclosure

U/s 132(4) of the Act. The DDIT, Investigation has accepted the letter and did not object to the surrender and disclosure U/s 132(4) of the Act. The Id. AR has further submitted that since the department itself has not considered the documents exhibit-2 page 25 containing cash payments for purchase of raw material as incriminating material therefore, no question was asked during the statement recorded U/s 132(4) of the Act regarding the said documents and consequently the assessee was not having any occasion to surrender the alleged income of Rs. 65,00,000/-. Subsequently, the assessee has voluntarily surrendered Rs. 65,00,000/- vide letter dated 25.01.2013 which was accepted by the department. Since the assessee has paid tax on the said surrender before the due date as provided u/s 271AAB(1)(a)(i) of the Act therefore the mere declaration of the said amount in the revised return of income would not be a violation of provisions of Section 271AAB of the act to attract the penalty @ 30%. Hence, the Id. AR has submitted that in any case penalty @ 10% could have been levied instead of 30% of the surrendered income.

5.1 The Id. AR has also challenged the initiation of the penalty proceedings on the ground that the AO has not specified the limb/default of the assessee in the show cause notice issued U/s

271AAB r.w.s 274 of the Act and therefore, there is an illegality in the show cause notice which renders the impugned order passed U/s 271AAB of the Act as invalid. In support of his contention, he has relied upon a series of decisions of this Tribunal including the decision dated 13.06.2018 in case of Shri Ravi Mathur vs. DCIUT in ITA No. 969/JP/2017, decision dated 02.07.2018 in case of Shri Suresh Chand Mittal vs. DCIT in ITA No. 931/JP/2017 and also decision dated 24.07.2018 in case of Dinesh Kumar Agarwal vs ACIT in ITA No. 855 & 856/JP/2017.

6. On the other hand, the Id. DR has submitted that the assessee has made disclosure vide letter dated 25.01.2013 and therefore, it is a conscious decision of the assessee to disclose the said income but the said amount of Rs 65,00,000/- was not declared while filing the return of income by the assessee and only in the revised return of income filed on 25.03.2015 the assessee has cleared the said income of Rs. 65,00,000/-. Therefore, it is a clear default and violation of provisions of Section 271AAB(1) of the Act which attracts the levy of penalty @ 30% to 90% of undisclosed income. The Id. DR has further submitted that once the seized documents clearly manifest the cash payment by the assessee for purchase of raw material then it is undisclosed income of

the assessee which is not recorded in the books of account. Therefore, the disclosure made by the assessee even vide letter dated 25.01.2013 is covered by the definition of undisclosed income U/s 271AAB of the Act. He has relied upon the orders of the authorities below.

7. We have considered the rival submissions as well as the relevant material on record. During the course of search and seizure action carried on 06.11.2012 the statement of Shri Kailash Kanodia the director of the assessee was recorded U/s 132(4) on 06.11.2012 and 07.11.2012. After going through the statement recorded U/s 132(4) of the Act we note that the director of the assessee company surrendered Rs. 2 crore each on his behalf as well as on behalf of his son Shri Abhishak Kanodia. Further, there was no question asked by the investigating team about any incriminating material or undisclosed income in respect of the cash purchase of raw material. We further note that the said seized documents exhibit-2 page 25 contains the details of purchase of raw material on various dates. The summary of the purchases as recorded in the said documents are as under:-

<i>Date of payment</i>	<i>Amount (Rs.)</i>
<i>7-9-12</i>	<i>15,00,000</i>
<i>21-09-12</i>	<i>10,00,000</i>

<i>11-10-12</i>	<i>20,00,000</i>
<i>No Date</i>	<i>4,00,000</i>
<i>No Date</i>	<i>16,00,000</i>
<i>Total</i>	<i>65,00,000</i>

The details as recorded in the seized document is only purchase made by the assessee but at the same time the investigating team had inventoried the stock of the assessee and found no discrepancy as far as the physical stock and the stock recorded in the books of accounts. Therefore, there was no irregularity found in the books of accounts so far as the stock of raw materia is concerned. Hence, even if the some purchases are made in cash if the said stock is duly recorded in the books of accounts as it is evident from the inventorisation made by the investigating team itself then it would not be held as undisclosed income. Thus, we find that the said documents containing the details of purchase of raw material in itself does not disclose or constitute any undisclosed income when there was no excess stock or discrepancy in the physical stock with the stock recorded in the books of account found at the time of search. This fact is recognized by the investigating team when no such question was raised at the time of statement of Shri Kailash Kanodia recorded U/s 132(4) of the Act on two consecutive

dates i.e. 06.11.2012 & 07.11.2012. The facts which are manifest from record and also not disputed by the Department that at the time of statement recorded U/s 132(4) of the Act the Department has not suspected or raised any question about any undisclosed income with respect to the purchase of raw material as recorded in the seized document exhibit-2 page 25. Therefore, the department was satisfied about the stock found at the time of search which was duly inventoried based on the physical stock and was compared with the books of accounts and no discrepancy was found. Once, no question was raised or asked about the undisclosed income for purchase of iron ore as recorded in the exhibit-2 page 25 at the time of search then the disclosure made by the assessee vide letter dated 25.01.2013 on account of the cash purchases cannot be considered as undisclosed income for the purpose of levy of penalty U/s 271AAB of the Act. Neither the investigating team nor the AO during the assessment proceedings detected any excess stock or discrepancy in the stock as recorded in the books of accounts by the assessee in comparison to the stock which was found at the time of search and seizure action. The Coordinate Bench of this Tribunal in case of M/s Rambhajo's vs. ACIT

(supra) while considering the issue on account of cash advance for land purchase has held in para 39 as under:-

"39. Now, coming to surrender made on account of cash advances for land purchases in the statement recorded u/s 132(4) of the Act. During the course of search, a diary has been found wherein there are notings relating to advance given to various persons towards purchase of land. The notings describe the name of the persons, the amount advanced which ranges from Rs 2 lacs to Rs 50 lacs to 4 persons totaling to Rs 1.12 Crores and the date of such advance during the period 28.07.2013 to 3.9.2013 just before the date of search on 4.9.2013. Therefore, what has been found during the course of search is certain entries relating to undisclosed investment in purchase of land. Besides the said entries, there are no other documents/material in terms of any agreement to sell, the description of the property etc, which has been found during the course of search. As per the definition of undisclosed income u/s 271AAB, the undisclosed investment in so called purchase of land cannot be stated to be income which is represented by any money, bullion, jewellery or other valuable article or thing. Whether it can then be said that such undisclosed investment represent income by way of any entry in the books of account or other documents or transactions found in the course of a search under section 132. An investment per se represents an outflow of funds from the assessee's hand and an income per se represents an inflow of funds in the hands of the assessee. Therefore, once there is an inflow of funds by way of income, there could be subsequent outflow by way of investment. Investment and income thus connotes different meaning and connotation and thus cannot be used interchangeably. In the definition of undisclosed income, where it talks about "income by way of any entry in the books of account or other documents or transactions found in the course of a

search under section 132”, what perhaps has been envisaged by the legislature is an inflow of funds in the hands of the assessee which has been found recorded by way of any entry in the books of accounts or other documents, and which has not been recorded before the date of search in the books of accounts or other documents maintained by the assessee in the normal course. We are also conscious of the fact that there are deeming provisions in terms of section 69 and 69B wherein such investments are deemed to be treated as income in absence of satisfactory explanation. In our view, the deeming fiction so envisaged under Section 69 and Section 69B where investments which are found either not recorded or found recorded at a lesser value in the books of accounts, and such investments are deemed to be income of the assessee of the year in which such investments have been made, cannot be extended and applied automatically in context of section 271AAB. It is a well-settled legal proposition that the deeming provisions are limited for the purposes that have been brought on the statute book and have therefore to be applied in the context of provisions wherein they have been brought on the statute book and not otherwise. In the instant case, the deeming provisions are contained in section 69 and section 69B and therefore, the same could have been applied in the context of bringing to tax such investments to tax in the quantum proceedings, though the fact of the matter is that the AO has not even invoked the said deeming provisions in the quantum proceedings in the instant case. Therefore, even on this account, the deeming fiction cannot be extended to the penalty proceedings which are separate and distinct from the assessment proceedings and more so, where the provisions of section 271AAB provide for a specific definition of undisclosed income. Where a specific definition of undisclosed income has been provided in Section 271AAB, being a penal provision, the same must be strictly construed and in light of satisfaction of conditions specified therein and it is not expected to examine other provisions where the same has been defined or deemed for the

purposes of bringing the amount to tax. In light of the same, the undisclosed investment by way of advance for purchase of land can be subject matter of addition in the quantum proceedings, as the same has been surrendered during the course of search in the statement recorded u/s 132(4) and offered in the return of income, however the same cannot be said to qualify as an undisclosed income in the context of section 271AAB read with the explanation thereto and penalty so levied thereon deserved to be set-aside.”

Thus, even there is payment for purchase of raw material the said outgo of money itself cannot be treated as undisclosed income of the assessee in the absence of corresponding asset found at the time of search. A similar view has been taken by this Tribunal in a series of decision as relied upon the Id. AR of the assessee. In view of the facts and circumstances of the case where there was no discrepancy found in the physical stock as well as stock recorded in the books of account despite the physical verification and inventorization carried out of investigating team at the time of search then the mere details of payment for purchases in cash would not constitute undisclosed income as per the definition provided in explanation to Section 271AAB of the Act. Accordingly, the penalty levied U/s 271AAB of the Act is not sustainable and the same is liable to be deleted. Since, we have decided the issue of levy of penalty on merits and deleted the penalty therefore,

we do not propose to go into the other plea raised by the Id. AR. Even otherwise the issue of validity of initiation was not raised in any of the ground raised by the assessee.

In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 10/06/2019.

Sd/-
(रमेश सी0 शर्मा)
(Ramesh. C. Sharma)
लेखा सदस्य / Accountant Member

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:-10/06/2019.

*Santosh.

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s Shri Balaji Industrial Engineering Ltd., Jaipur.
2. प्रत्यर्थी / The Respondent- ACIT, Central Circle-1 Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 1014/JP/2016}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar