

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

SPECIAL LEAVE PETITION (CIVIL) Diary No(s). 43696/2024

[Arising out of impugned final judgment and order dated 24-07-2024 in ITA No. 1251/2018 passed by the High Court of Delhi at New Delhi]

AMUL GABRANI

Petitioner(s)

VERSUS

PRINCIPAL COMMISSIONER OF INCOME TAX 9

Respondent(s)

(FOR ADMISSION and IA No.270727/2024-CONDONATION OF DELAY IN REFILEING / CURING THE DEFECTS and IA No.270725/2024-PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

Date : 02-12-2024 This petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ABHAY S. OKA

HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASHI

For Petitioner(s)

Mr. Sandeep Chilana, Adv.

Ms. Anjali jain, Adv.

Ms. Rusheet Saluja, AOR

For Respondent(s)

UPON hearing the counsel the Court made the following
O R D E R

Heard the learned counsel appearing for the
petitioner.

Delay condoned.

We concur with the view taken by the Delhi High
Court about the interpretation of sub-section 2 of

Section 271-AAA of the Income Tax Act, 1961. Hence, no
case for interference is made out in exercise of our
jurisdiction under Article 136 of the Constitution of



India. The Special Leave Petition is accordingly dismissed.

Pending application also stands disposed of.

(ANITA MALHOTRA)
AR-CUM-PS

(AVGV RAMU)
COURT MASTER



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ ITA 1251/2018
PRINCIPAL COMMISSIONER OF INCOME TAX-9

.....Appellant

Through: Mr. Abhishek Maratha, Sr. SC
alongwith Mr. Parth Semiwal,
Mr. Apoorv Agarwal, Jr. SCs.
with Ms. Nupur Sharma, Mr.
Manav Goyal, Mr. Gaurav
Singh, Ms. Divya Verma and
Mr. Bhanukaran Singh Jodha,
Advs.

versus

AMUL GABRANI.....Respondent

Through: Mr. Sandeep Chilana, Ms.
Anjali Jain, and Ms.
Kannopriya Gupta, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

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24.07.2024

1. This appeal calls in question the order of the Income Tax Appellate Tribunal [**“Tribunal”**] dated 03 April 2018. By our order dated 22 March 2024, we had succinctly captured the issues which arose, as would be evident from the extracts of that order which are reproduced hereinbelow: -

“1. Having heard Mr. Maratha, learned counsel appearing for the appellant, we note that the impugned judgment rendered by the Income Tax Appellate Tribunal [**“ITAT”**] would give rise to the following question:-

(a) Whether the ITAT in facts and circumstances of the case was correct in law in deleting the penalty of INR 1,97,70,670/- imposed by Assessing Officer under Section 271AAA of the Income Tax Act, 1961 [**“Act”**]?



2. While dealing with the issue of penalty under Section 271AAA of the Act, the ITAT has observed as follows: -

"**2.4** If the aforesaid judicial pronouncements are analyzed with the facts of the present appeal there is uncontroverted finding in the impugned order and also in the assessment order that in computation of income, attached with the return, the assessee declared the surrendered amount of Rs. 19,77,06,696/- under the head "additional income" which was accepted by the Revenue. It is further noted that while initiating the penalty proceedings the Ld. AO nowhere stated as to why the penalty proceedings were initiated and whether the conditions laid down in the section were satisfied or not. The Ld. AO without assigning any reason and merely on the basis of surrender made by the assessee initiated penalty proceedings. The amount of surrender was made by the assessee on the basis of certain loose papers found and seized during search operation upon tecpro group at Gurgaon. There is a further observation that these papers were, dictated by the search team and further from the statement tendered by the assessee there is a condition that the surrender made by the assessee shall be without penal action by the Department whatsoever and the surrender was made to buy peace and to avoid litigation with the Department in the spirit of cooperation. Considering the totality of facts and the decision in CIT vs. Suresh Chander Mittal (251 ITR 9) (MP), we find merit in the conclusion drawn by the Ld CIT (A) and confirm the same, resultantly the appeal of the Revenue is dismissed."

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4. It is in the aforesaid backdrop that we prima facie find merit in the submission of Mr. Maratha, that a mere surrender of income would not absolve the assessee from the levy of penalty.

5. We are thus of the considered opinion that the appeal merits further consideration and it shall consequently stand admitted on the aforementioned question of law."

2. The principal question which is sought to be canvassed is whether the Commissioner of Income Tax (Appeals) ["CIT(A)"] and the Tribunal were justified in deleting the penalty which came to be imposed in terms of Section 271-AAA of the Income Tax Act, 1961 ["Act"], notwithstanding a purported failure on the part of the assessee to substantiate the manner in which the undisclosed income was derived.



3. We note that the Assessing Officer [“AO”] while passing the penalty order had in this regard observed as follows:-

“I. There is no doubt that the assessee had admitted the undisclosed income of Rs. 19,77,06,696/- in its hands but the assessee fails to specify the manner in which such income has been derived.

II. The return of income filed u/s 139(1) cannot be considered as voluntary return as the same has been filed after the assessee was subjected to search u/s 132 and it was this search and the fact of seizure of incriminating documents / assets which resulted into filing of enhanced income u/s. 139(1) of the I. T. Act.

III. Disclosure of undisclosed income in the return filed U/S 139(1) shall not absolve the assessee from penalty U/S 271AAA. The immunity from penalty provided in section 158BFA has not been provided in the new assessment scheme w.e.f. 1.6 2003.”

4. When the matter reached the CIT(A), the said authority took the view that the absence of any specific query having been put to the assessee to disclose the manner in which the undisclosed income had been derived would be fatal, and consequently it could not be said that the provisions of sub-section (2) of Section 271-AAA of the Act had not been adhered to. It is this view which has come to be affirmed by the Tribunal.

5. Section 271-AAA of the Act reads as follows: -

“271-AAA. Penalty where search has been initiated.—

(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;

(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.”

6. As is manifest from a reading of the aforesaid provision, an assessee would, pursuant to a search which may have been initiated



and where undisclosed income is unearthed, become liable to pay a penalty in addition to tax at a rate computed at 10% of the undisclosed income in the specified previous year. In terms of sub-section (2), however, the assessee would stand absolved of the additional tax burden if it were able to satisfy the preconditions which are prescribed therein. In terms of Section 271-AAA(2), the statute clearly provides that sub-section (1) would not apply provided the assessee admits to the undisclosed income and specifies the manner in which such income had been derived in a statement made and recorded under Section 132(4). That provision then places the additional burden of substantiating the manner in which the undisclosed income was derived upon the searched assessee. It is only thereafter that in terms of clause (iii) of sub-section (2), a payment of tax together with interest in respect of undisclosed income is contemplated.

7. As we read clauses (i) and (ii) of sub-section (2), it becomes evident that there is a statutory obligation placed upon the assessee to not only “specify” the manner in which the undisclosed income had been derived but also to “substantiate” the statement that may be made under Section 132(4). We also bear in mind the indubitable position that for the purposes of being absolved from the additional tax burden which stands constructed in terms of Section 271-AAA(1), the burden is placed upon the assessee to establish that its case falls squarely within the scope and ambit of sub-section (2) thereof.

8. The imperatives underlying the statutory provision, when it speaks of specification and substantiation of the manner in which undisclosed income was derived, stands enunciated in a decision of the Delhi High Court in **Principal Commissioner of Income Tax vs.**



Ritu Singal¹ and relevant extracts whereof are reproduced hereinbelow: -

“**11.** Explanation 5(2) of section 271(1)(c) was considered by the Supreme Court in *Asst. CIT v. Gebilal Kanhaialal* (2012) 348 ITR 561 (SC). It was held that Explanation 5(2) to section 271(1)(c) provides, where, in the course of search under section 132, the assessee, found to be owner of unaccounted assets, claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed particulars of his income for the purpose of imposition of penalty, but there are exceptions to such deeming provision or to such a presumption of concealment. The court then said (page 565):

"It provides that where, in the course of search under section 132, the assessee is found to be the owner of unaccounted assets and the assessee claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income for the purposes of imposition of penalty under section 271(1)(c). The only exception to such a deeming provision or to such a presumption of concealment are given in sub-clauses (1) and (2) of Explanation 5. In this case, we are concerned with interpretation of clause (2) of Explanation 5, which has been quoted above. Three conditions have got to be satisfied by the assessee for claiming immunity from payment of penalty under clause (2) of Explanation 5 to section 271(1)(c). The first condition was that the assessee must make a statement under section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in section 139(1). Such statement was made by the karta during the search which concluded on August 1, 1987. It is not in dispute that condition No. 1 was fulfilled. The second condition for availing of the immunity from penalty under section 271(1)(c) was that the assessee

¹ 2018 SCC OnLine Del7692



should specify, in his statement under section 132(4), the manner in which such income stood derived.

Admittedly, the second condition, in the present case also stood satisfied. According to the Department, the assessee was not entitled to immunity under clause (2) as he did not satisfy the third condition for availing of the benefit of waiver of penalty under section 271(1)(c) as the assessee failed to file his return of income on July 31, 1987, and pay tax thereon particularly when the assessee conceded on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. However, no time limit for payment of such tax stood prescribed under clause (2). The only requirement stipulated in the third condition was for the assessee to 'pay tax together with interest'. In the present case, the third condition also stood fulfilled. The assessee has paid tax with interest up to the date of payment. The only condition which was required to be fulfilled for getting the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income up to the date of payment. Clause (2) did not prescribe the time limit within which the assessee should pay tax on income disclosed in the statement under section 132(4).

For the above reasons, we hold that the assessee was entitled to immunity under clause (2) of Explanation 5 to section 271(1)(c)."

12. Like in that case, the first condition under section 271AAA is that the assessee must make a statement under section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in section 139(1). The second condition for availing of the immunity from penalty under section 271(1)(c) is that the assessee should specify, in his statement under section 132(4), the manner in which such income stood derived. The Revenue contended Gebilal Kanhaialal that though the second condition stood satisfied, the third condition was not sought. It urged that the assessee was not entitled to immunity under clause (2) as he did not satisfy the third condition for availing of the benefit of waiver of penalty under section 271(1)(c) as he failed to file his return of income on July 31, 1987 and pay tax thereon particularly when the assessee conceded on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the



assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. The court held that no time-limit for payment of such tax stood prescribed under clause (2) and that the only requirement stipulated in the third condition was for the assessee to "pay tax together with interest". It was held in *Gebilal Kanhaiyalal* (supra) that the third condition was also fulfilled as the assessee paid tax with interest up to the date of payment. The only condition which was required to be fulfilled for securing the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income up to the date of payment. Explanation 5(2) did not prescribe the time-limit within which the assessee should pay tax on income disclosed in the statement under section 132(4).

13. In the present case, during the course of the statement made by the assessee, during the course of the search on March 4, 2010, that she had lent Rs. 16 crores in aggregate to three individuals during the financial year 2009-10. This was in response to a query by the Revenue officials during the course of search when the basis of page 81 of Exhibit A-3 was sought to be questioned. To the next question, the assessee replied that the said amount of "Rs. 16 crores is my unaccounted income for the financial year 2009-10 relevant for the assessment year 2010-11." However, the requirement of the assessee having to "(ii) substantiates the manner in which the undisclosed income was derived" was satisfied. Although a general statement that the undisclosed income was the source of Rs. 16 crores was disclosed, no "substantiation" of the "manner" of deriving such undisclosed income was revealed.

14. In construing section 271AAA one must not lose sight of its essential purpose which resulted in its enactment. There is a penalty at the rate of 10 per cent. of the undisclosed amount declared, if the conditions in section 271AAA(2) are not met with. This is quite different from the penal provision under section 271(1)(c) of the Act, which directs that if income is concealed or inaccurate returns are filed, which are disallowed by the Assessing Officer, the penalty shall be "three times the amount of tax sought to be evaded." In the case of amounts disclosed during the course of search, the penalty amount is only ten per cent. of the undisclosed income. Parliament has, therefore, given a different treatment to the latter category. At the same time, if an assessee were to successfully urge the "escape route" so to say, of section 271AAA(2), all three conditions mentioned in the provision, (as held in *Gebilal Kanhaiyalal* in respect of *pari materia* provisions) have to necessarily be fulfilled. In the present case, the assessee, while declaring the "undisclosed income" also stated, that "the surrender is being made subject to no penal action of section 271(1)(c)".



15. While dealing with a case of similar surrender—but made in the course of survey proceedings, by an assessee (which led to imposition of penalty), the Supreme Court, in *MAK Data (P) Ltd. v. CIT* (2013) 358 ITR 593 (SC) held as follows (page 597):

"The Assessing Officer, in our view, shall not be carried away by the plea of the assessee like 'voluntary disclosure', 'buy peace' 'avoid litigation', 'amicable settlement', etc. to explain away its conduct. The question is whether the assessee has offered any Explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to section 271(1) raises a presumption of concealment, when a difference is noticed by the Assessing Officer, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the Explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.

The assessee has only stated that he had surrendered the additional sum of Rs. 40,74,000 with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the Income-tax Department. The statute does not recognize those types of defences under Explanation 1 to section 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.

We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the Assessing Officer in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. The Assessing Officer during the course of assessment proceedings has noticed that certain documents comprising share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income-tax returns and assessment orders and blank share transfer deeds duly signed, have been impounded in the course of survey proceedings under section 133A conducted on December 16, 2003, in the case of a sister concern of the assessee."

16. That the income which was ultimately brought to tax pursuant to the disclosure made, which was voluntary on the part of the



assessee is stating the obvious. The assessee merely stated that the sums advanced were undisclosed income. However, she did not specify how she derived that income and what head it fell in (rent, capital gain, professional or business income out of money lending, source of the money, etc.). Unless such facts are mentioned with some specificity, it cannot be said that the assessee has fulfilled the requirement that she, in her statement (under section 132(4)) "substantiates the manner in which the undisclosed income was derived". Such being the case, this court is of the opinion that the lower appellate authorities misdirected themselves in holding that the conditions in section 271AAA(2) were satisfied by the assessee."

9. Although learned counsel for the respondents sought to draw support from an earlier judgment rendered in **Principal Commissioner of Income Tax vs. Emirates Technologies Pvt. Ltd.**², we find that the same rests solely on the Court ultimately coming to conclude that the same did not give rise to a substantial question of law. In any case, we find ourselves bound by the more elaborate discussion which appears in the judgment rendered in *Ritu Singal*.

10. Accordingly, the appeal is allowed and the questions raised are answered in favour of the appellant. The order of the Tribunal and CIT(A) shall stand set aside.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 24, 2024/neha

² (2017) 399 ITR 189 (Del.)

**(2018) 403 ITR 97 : 2018 SCC OnLine Del 7692 : (2018) 303 CTR
738**

In the High Court of Delhi

(BEFORE S. RAVINDRA BHAT AND A.K. CHAWLA, JJ.)

Principal Commissioner of Income-tax ... Appellant

Versus

Smt. Ritu Singal ... Respondent

I. T. A. No. 672 of 2016.

Decided on March 12, 2018

Advocates who appeared in this case:

Rahul Chaudhary, Senior Standing Counsel with *Sanjay Kumar*, Junior Standing Counsel, for the appellant.

Ajay Vohra, Senior Advocate with *Mrs. Kavita Jha* and *Ms. Devika Jain*, Advocates, for the respondent.

The judgment of the court was delivered by

S. RAVINDRA BHAT J.—The question of law in the present appeal by the Revenue, framed in this case reads as follows:

"Did the Income-tax Appellate Tribunal fall into error in deleting the penalty under section 271AAA of Rs. 20,000,000 added pursuant to search in the overall circumstances of the case ?"

2. Bhushan Steel Group of companies were subjected to search under section 132 of the Income-tax Act ("the Act" hereafter) on March 3, 2010. The assessee too was covered by the search. She filed return of income for the assessment year 2010-11, electronically, declaring an income of Rs. 20,47,14,190 on July 31, 2010. The notice under section 143(2) of the Act was issued and served on her on January 13, 2011. Another notice under section 143(2) of the Act was issued on February 11, 2011. Subsequently an order under section 143(3) of the Act was passed on December 30, 2011 assessing the total income of Rs. 20,47,14,190 at the returned income. During the assessment proceedings, the Assessing Officer noticed that the assessee had reported undisclosed income earned during the financial year 2009-10 (relevant to the assessment year 2010-11) to the extent of Rs. 20 crores during the course of search and after the search proceedings, relating to material found and seized during the search. The Assessing Officer also noticed that the provisions of section 271AAA of the Act, was applicable in respect to the undisclosed income found during the course of search and declared by the assessee in her return of income for the assessment year 2010-11. He therefore initiated the penalty

proceedings under section 271AAA during the assessment proceedings on the ground that the assessee had not specified the manner in which the undisclosed income was earned and failed to substantiate it. Penalty of Rs. 2 crores was levied on the assessee by an order dated June 27, 2012 under section 271AAA. Being aggrieved with the aforesaid penalty order, the assessee appealed before the Commissioner of Income-tax (Appeals), who by an impugned order dated July 5, 2013 deleted the penalty and allowed the assessee's appeal.

3. The Commissioner of Income-tax (Appeals), while deleting the penalty imposed by the Assessing Officer, had reasoned as follows, after quoting section 271AAA:

"3.3. Keeping in view the above provisions of law and changes brought therein, in the case of Sh. Neeraj Singhal for the assessment year 2010-11 (Appeal Nos. 51112-13) vide my order dated December 17, 2012, I have held as under:

'I have considered the assessment order and submissions filed by the appellant. From the chart given in para 3.3 above, it is clear that to escape the penalty of 10 per cent. on undisclosed income admitted during the course of search, the taxpayer has to fulfil the clause "substantiates the manner in which the undisclosed income was derived". Search in the case was conducted on March 3, 2010. Therefore, the law applicable is as per Column C in the table given in para 3.3 above. The Assessing Officer has held in this case that the appellant has not substantiated the manner in which the undisclosed income was derived to the extent of Rs. 90,00,00,000 and has also failed to disclose the sum of Rs. 35,00,00,000 in the statement recorded under section 132(4). The Assessing Officer, therefore, imposed penalty at 10 per cent. on the entire amount of Rs. 125,00,00,000. What would constitute "substantiates" in section 271AAA(2)(ii) is nowhere indicated and this word itself is not defined anywhere in the Act. The law provides that where a word is not defined, the ordinary and common sense meaning of the word is to be construed. The word "substantiate" is defined as to "provide evidence to support or prove the truth of" in the Oxford Dictionary (source Internet). In the present case, admittedly, the undisclosed income was on the basis of documents seized during the course of search. On the basis of the seized documents (primary evidence in the case), the advances outstanding to the appellant from various persons as on January 31, 2010 was found to be Rs. 69 crores and in another document the appellant was shown to have advanced an amount of Rs. 3 crores on June 9, 2009 for purchase of a property at Q I-A, Hauz Khas Enclave, New

Delhi. Based on these documents, the appellant admitted an amount of Rs. 90 crores as his undisclosed income in his statement recorded under section 132(4). As to the question about the source of the amount of Rs. 69 crores, the appellant merely stated that "it is my unaccounted income for the current financial year generated from undisclosed sources".

This statement of the appellant cannot be said to have fulfilled the condition in section 271AAA(2)(ii) so as to provide evidence to support or prove the truth of the claim made by the appellant. The amount of Rs. 35 crores does not appear in the statement given by the appellant under section 132(4). It is to be noted that a cardinal principle of law in India is that no person can be forced to give evidence against himself. Therefore, both legality and the efficacy of this clause are questionable. However, the law is to be implemented as it exists and passed by Parliament in its wisdom. As rightly held by the Assessing Officer, all the conditionalities imposed under section 271AAA, which are inclusive and not exclusive of each other, are not fulfilled in the case. Accordingly, I hold that the Assessing Officer was correct in imposing the penalty under section 271AAA of 10 per cent. of the income sought to be evaded of Rs. 125 crores. The appeal of the appellant is accordingly dismissed.'

3.4. However, the learned authorised representative now points out that subsequently, in that case, the hon'ble Income-tax Appellate Tribunal (Delhi) has held as under:

'In view of above facts of the present case wherefrom it is evident that during the course of search proceedings the authorized officer of the Department had not raised any specific query regarding the manner in which the undisclosed income has been derived and on the contrary the assessee has tried to explain the earning of the undisclosed income in question in its reply during the course of recording of his statement under section 132(4) of the Act and thereafter. We thus respectfully following the ratio of the above cited decisions of the hon'ble Allahabad High Court and the hon'ble Gujarat High Court hold that in the absence of query raised by the authorized officer during the course of recording of statement under section 132(4) about the manner in which the undisclosed income has been derived and about its substantiation, the Assessing Officer was not justified in imposing penalty under section 271AAA of the Act specially when the offered undisclosed income has been accepted and due tax thereon has been paid by the assessee.'

3.5. The appellant and Sh. Neeraj Singal belong to the same group of cases, and the facts in the two cases are the same. After pronouncement of the above cited ruling by the hon'ble Income-tax

Appellate Tribunal, I am bound by the ruling. The appeal is, therefore, allowed and penalty imposed is cancelled."

4. The Income-tax Appellate Tribunal affirmed the reasoning of the Commissioner of Income-tax (Appeals) after noticing that its previous order in Neeraj Singal's case too had affirmed that the appellate authority's order, in regard to interpretation of section 271AAA and the grant of relief.

5. The Revenue argues that the interpretation adopted and repeated mechanically by the Income-tax Appellate Tribunal at least in this case, is contrary to the express intent of the provision, which clearly requires that the assessee should not only admit the undisclosed income and specify the manner in which such income has been derived or substantiate the manner in which the undisclosed income was obtained. Here, the assessee did not in any manner specify the income, its sources or particulars required of her, much less to the satisfaction of the officer. In the circumstances, the Tribunal went wrong in directing that the penalty imposed should be set aside.

6. The counsel for the assessee argues that section 271AAA is phrased identically to Explanation 5(2) to section 271(1)(c) of the Act. It was argued that in the case of all other parties searched by the Revenue, the Explanation given was accepted. In the present case, the Revenue was not justified in singling out the assessee and imposing penalty. The learned counsel urged that the approach of the Tribunal was justified in the circumstances of the case, given that the assessee had made the appropriate disclosures. He relied on the judgment of the Gujarat High Court in CIT v. Mahendra C. Shah (2008) 299 ITR 305 (Guj) ; CIT v. Radha Kishan Goel (2005) 278 ITR 454 (All) ; (2006) 152 Taxman 290 (All) and the Tribunal's Bench decision in Mothers Pride Education Personnel (P) Ltd. v. Deputy CIT (ITA No. 3372 (Delhi) of 2011, dated October 12, 2012) and Neeraj Singal v. Asst. CIT (decided on June 24, 2013 - ITAT Delhi). It was also urged that the disclosure made by the assessee was common to the one made and considered in other connected/related parties' cases.

Analysis and conclusions

7. Section 271AAA, which is involved in the present case, reads as follows:

"271AAA. Penalty where search has been initiated.—(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 the 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."

8. This provision was brought into force with effect from April 1, 2007. Its scope and effect was explained by circular of the Central Board of Direct Taxes (CBDT), dated March 12, 2008 (Circular No. 3) in the following terms ((2008) 299 ITR (St.) 8, 84):

"68. Provision for penalty for concealment in search and seizure cases.

68.1 A new section 271AAA has also been inserted so as to provide that, in a case where search has been initiated under section 132 on or after June 1, 2007, the assessee shall be liable to 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. However, the provisions of this section shall not be applicable if the assessee—(i) in a statement under sub-section (4) of section 132 in the course of the search, 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. It is further provided that no penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be levied or imposed upon the assessee in respect of the undisclosed income referred to in this section. It is also provided that the provisions of section 274 and section 275 shall, so far as may be, apply in relation to the penalty leviable under the new section.

68.2 For the purposes of this section, undisclosed income has been defined to mean (i) any income of the specified previous years 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 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 which has otherwise not been disclosed to the Chief Commissioner or Commissioner before the date of the 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.

68.3 For the purposes of this section, specified previous year has been defined, so as to mean 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.

68.4 An appeal to the Commissioner against levy of penalty under the proposed new section 271AAA has also been provided.

68.5 Applicability.—This amendment will take effect from the 1st day of June, 2007 and will accordingly apply in relation to the assessment year 2007-08 and subsequent years in cases where search under section 132 is initiated on or after 1st June, 2007."

9. Section 271AAA was amended by the Finance Act, 2012 with effect from April 1, 2012. The effect of the amendment was that it became applicable in all cases where search was initiated under section 132 on or after June 1, 2007 but before July 1, 2012. Section 271AAA and its amendments are part of series of amendments with respect to the effect of presumption in the case of search cases under section 132 (4A). These were introduced simultaneously with the omission of Explanation 5 to section 271(1)(c) on the one hand and insertion of Explanation 5A as well as section 292C. The provision applies to income of the specified period, i.e., period for which return had not yet become due and the broken periods starting from the beginning of the financial years till the date of the search. It provides for 10 per cent. penalty of such income through a statutory inference or presumption that such amount or income was not intended to be disclosed as they were not reflected in the books, soon at the time of the search.

10. One of the conditions that results in the inapplicability of section 271AAA is payment of tax. Since the assessability and quantification of the amount of undisclosed income can be legitimately computed only at the stage of assessment, it was held by the Tribunal concurring with the first appellate authority, that the outer time limit for payment of tax is not prior to the conclusion of assessment proceedings. Where there was a short- payment by way of self-assessment tax but made good in response to the notice of demand on completion of the assessment it was held that there was no scope for penalty under section 271AAA as was held in Mahendra C. Shah (supra) while interpreting Explanation 5 to section 271(1)(c).

11. Explanation 5(2) of section 271(1)(c) was considered by the Supreme Court in Asst. CIT v. Gebilal Kanhaialal (2012) 348 ITR 561 (SC). It was held that Explanation 5(2) to section 271(1)(c) provides, where, in the course of search under section 132, the assessee, found to be owner of unaccounted assets, claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to

end on or after the date of search, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed particulars of his income for the purpose of imposition of penalty, but there are exceptions to such deeming provision or to such a presumption of concealment. The court then said (page 565):

"It provides that where, in the course of search under section 132, the assessee is found to be the owner of unaccounted assets and the assessee claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income for the purposes of imposition of penalty under section 271(1)(c). The only exception to such a deeming provision or to such a presumption of concealment are given in sub-clauses (1) and (2) of Explanation 5. In this case, we are concerned with interpretation of clause (2) of Explanation 5, which has been quoted above. Three conditions have got to be satisfied by the assessee for claiming immunity from payment of penalty under clause (2) of Explanation 5 to section 271(1)(c). The first condition was that the assessee must make a statement under section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in section 139(1). Such statement was made by the karta during the search which concluded on August 1, 1987. It is not in dispute that condition No. 1 was fulfilled. The second condition for availing of the immunity from penalty under section 271(1)(c) was that the assessee should specify, in his statement under section 132 (4), the manner in which such income stood derived.

Admittedly, the second condition, in the present case also stood satisfied. According to the Department, the assessee was not entitled to immunity under clause (2) as he did not satisfy the third condition for availing of the benefit of waiver of penalty under section 271(1)(c) as the assessee failed to file his return of income on July 31, 1987, and pay tax thereon particularly when the assessee conceded on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. However, no time limit for payment of such tax stood prescribed under clause (2). The only requirement stipulated

in the third condition was for the assessee to 'pay tax together with interest'. In the present case, the third condition also stood fulfilled. The assessee has paid tax with interest up to the date of payment. The only condition which was required to be fulfilled for getting the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income up to the date of payment. Clause (2) did not prescribe the time limit within which the assessee should pay tax on income disclosed in the statement under section 132(4).

For the above reasons, we hold that the assessee was entitled to immunity under clause (2) of Explanation 5 to section 271(1)(c)."

12. Like in that case, the first condition under section 271AAA is that the assessee must make a statement under section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in section 139 (1). The second condition for availing of the immunity from penalty under section 271(1)(c) is that the assessee should specify, in his statement under section 132(4), the manner in which such income stood derived. The Revenue contended Gebilal Kanhaialal that though the second condition stood satisfied, the third condition was not sought. It urged that the assessee was not entitled to immunity under clause (2) as he did not satisfy the third condition for availing of the benefit of waiver of penalty under section 271(1)(c) as he failed to file his return of income on July 31, 1987 and pay tax thereon particularly when the assessee conceded on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. The court held that no time-limit for payment of such tax stood prescribed under clause (2) and that the only requirement stipulated in the third condition was for the assessee to "pay tax together with interest". It was held in Gebilal Kanhaialal (supra) that the third condition was also fulfilled as the assessee paid tax with interest up to the date of payment. The only condition which was required to be fulfilled for securing the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income up to the date of payment. Explanation 5(2) did not prescribe the time-limit within which the assessee should pay tax on income disclosed in the statement under section 132(4).

13. In the present case, during the course of the statement made by the assessee, during the course of the search on March 4, 2010, that she had lent Rs. 16 crores in aggregate to three individuals during the

financial year 2009-10. This was in response to a query by the Revenue officials during the course of search when the basis of page 81 of Exhibit A-3 was sought to be questioned. To the next question, the assessee replied that the said amount of "Rs. 16 crores is my unaccounted income for the financial year 2009-10 relevant for the assessment year 2010-11." However, the requirement of the assessee having to "(ii) substantiates the manner in which the undisclosed income was derived" was satisfied. Although a general statement that the undisclosed income was the source of Rs. 16 crores was disclosed, no "substantiation" of the "manner" of deriving such undisclosed income was revealed.

14. In construing section 271AAA one must not lose sight of its essential purpose which resulted in its enactment. There is a penalty at the rate of 10 per cent. of the undisclosed amount declared, if the conditions in section 271AAA(2) are not met with. This is quite different from the penal provision under section 271(1)(c) of the Act, which directs that if income is concealed or inaccurate returns are filed, which are disallowed by the Assessing Officer, the penalty shall be "three times the amount of tax sought to be evaded." In the case of amounts disclosed during the course of search, the penalty amount is only ten per cent. of the undisclosed income. Parliament has, therefore, given a different treatment to the latter category. At the same time, if an assessee were to successfully urge the "escape route" so to say, of section 271AAA(2), all three conditions mentioned in the provision, (as held in Gebilal Kanhaialal in respect of pari materia provisions) have to necessarily be fulfilled. In the present case, the assessee, while declaring the "undisclosed income" also stated, that "the surrender is being made subject to no penal action of section 271(1)(c)".

15. While dealing with a case of similar surrender—but made in the course of survey proceedings, by an assessee (which led to imposition of penalty), the Supreme Court, in MAK Data (P) Ltd. v. CIT (2013) 358 ITR 593 (SC) held as follows (page 597):

"The Assessing Officer, in our view, shall not be carried away by the plea of the assessee like 'voluntary disclosure', 'buy peace' 'avoid litigation', 'amicable settlement', etc. to explain away its conduct. The question is whether the assessee has offered any Explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to section 271(1) raises a presumption of concealment, when a difference is noticed by the Assessing Officer, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the Explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not

otherwise.

The assessee has only stated that he had surrendered the additional sum of Rs. 40,74,000 with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the Income-tax Department. The statute does not recognize those types of defences under Explanation 1 to section 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.

We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the Assessing Officer in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. The Assessing Officer during the course of assessment proceedings has noticed that certain documents comprising share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income-tax returns and assessment orders and blank share transfer deeds duly signed, have been impounded in the course of survey proceedings under section 133A conducted on December 16, 2003, in the case of a sister concern of the assessee."

16. That the income which was ultimately brought to tax pursuant to the disclosure made, which was voluntary on the part of the assessee is stating the obvious. The assessee merely stated that the sums advanced were undisclosed income. However, she did not specify how she derived that income and what head it fell in (rent, capital gain, professional or business income out of money lending, source of the money, etc.). Unless such facts are mentioned with some specificity, it cannot be said that the assessee has fulfilled the requirement that she, in her statement (under section 132(4)) "substantiates the manner in which the undisclosed income was derived". Such being the case, this court is of the opinion that the lower appellate authorities misdirected themselves in holding that the conditions in section 271AAA(2) were satisfied by the assessee.

17. For the above reasons, it is held that the impugned order is in error ; the substantial question of law is answered in favour of the Revenue and against the assessee. The appeal is consequently allowed. No costs.



[2017] 399 ITR 189 (Del)

[IN THE DELHI HIGH COURT]
PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

EMIRATES TECHNOLOGIES PVT. LTD.

DR. S. MURALIDHAR and MS. PRATHIBA M. SINGH JJ.

July 18, 2017.

Section(s): Income-tax Act, 1961, ss. 132, 271AAA

Assessment Year: 2010-11

Favouring: Assessee, person

PENALTY — SEARCH AND SEIZURE — CONDITION PRECEDENT FOR EXCLUSION FROM PENALTY — INCOME OFFERED TO TAX AND ACCEPTED BY ASSESSING OFFICER AND TAX PAID THEREON — NO QUERY RAISED BY ASSESSING OFFICER REGARDING MANNER OF DERIVATION OF SUCH INCOME AND ITS SUBSTANTIATION — TRIBUNAL CONCURRING WITH FINDING RECORDED BY COMMISSIONER (APPEALS) THAT STATUTORY REQUIREMENT NOT MET BY DEPARTMENT — DELETION OF PENALTY JUSTIFIED — INCOME-TAX ACT, 1961, ss. 132 , 271AAA

On the question whether the Tribunal erred in law in confirming the order of the Commissioner (Appeals) deleting the penalty imposed on the assessee under section 271AAA of the Income-tax Act, 1961 on account of the surrendered undisclosed unexplained income pursuant to the search and seizure under section 132 :

Held, dismissing the appeal, that the concurrent decision of the Commissioner (Appeals) and the Tribunal was a plausible view which was not perverse. The Commissioner (Appeals) had recorded that no specific query was put to the assessee by drawing his attention to section 271AAA asking him to specify the manner in which the undisclosed income, surrendered during the search, had been derived. Relying on the decisions of the High Court, the Commissioner (Appeals) had held that the statutory requirement of section 271AAA had not been met by the Department which view was concurred with by the Tribunal. The concurrent decision of the Commissioner (Appeals) and the Income-tax Appellate Tribunal represent a plausible view which could not be said to be perverse. No question of law arose.

Order of the Appellate Tribunal in ASST. CIT v. EMIRATES TECHNOLOGIES PVT. LTD. [2017] 58 ITR (Trib) 593 (Delhi) *affirmed*.



Asst. CIT v. Emirates Technologies Pvt. Ltd. [2017] 58 ITR (Trib) 593 (Delhi) (para 1) referred to.

I. T. A. No. 400 of 2017.

Puneet Rai, Junior Standing Counsel and *Gaurav Khetrapal*, Advocate, for the appellant.

Pranjal Srivastava, Advocate, for the respondent.

JUDGMENT

Page No : 0190

1. The Revenue is in appeal against the order dated October 28, 2016 passed by the Income-tax Appellate Tribunal in I. T. A. No. 476/Del./2014 for the assessment year ("AY") 2010-11 (Asst. CIT v. Emirates Technologies Pvt. Ltd. [2017]58 ITR (Trib) 593(Delhi)).
2. The question sought to be urged by the Revenue is whether the Income-tax Appellate Tribunal erred in law in confirming the order of the Commissioner of Income-tax (Appeals) ("CIT(A)") deleting the penalty imposed upon the respondent-assessee under section 271AAA of the Income-tax Act, 1961.
3. The Commissioner of Income-tax (Appeals) in para 4.7 of the order dated November 4, 2013 noted that no specific query had been put to the assessee by drawing his attention to section 271AAA of the Act asking him to specify the manner in which the undisclosed income, surrendered during the course of search, had been derived. The Commissioner of Income-tax (Appeals), therefore, relying on the decisions of this court held that the jurisdictional requirement of section 271AAA was not met.
4. The above view has been concurred with by the Income-tax Appellate Tribunal.
5. In the facts and circumstances of the case, the court is of the view that the concurrent decision of the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal represent a plausible view which cannot be said to be perverse.

No substantial question of law arises for consideration.

The appeal is accordingly dismissed.
