

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCH-A, VC, JAIPUR

डॉ. एम. एल. मीना, लेखा सदस्य एवं डॉ. एस. सीतालक्ष्मी, न्यायिक सदस्य के समक्ष
BEFORE: DR. M.L. MEENA, AM & DR. S. SEETHALAKSHMI, JM

आयकर अपील सं./ITA No. 1218/JP/2019
Assessment Year : 2016-17.

Shri Mahaveer Prasad Agarwal, 1, Hospital Campus, Bhilwara – 311 001.	बनाम Vs.	The DCIT, Central Circle, Kota.
स्थायी लेखा सं./जीआईआर सं./PAN No. ACSPA 7547 E		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Devang Gargieya (Adv.)
राजस्व की ओर से / Revenue by : Shri A.S. Nehra (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 26.05.2022.
घोषणा की तारीख / Date of Pronouncement : 02/06/2022.

आदेश / ORDER

PER DR. MITHA LAL MEENA, A.M.

This is an appeal filed by the assessee against the order of learned CIT (Appeals-2), Udaipur dated 22.07.2019 for the assessment year 2016-17. The assessee has raised the following grounds of appeal :-

1. That on the facts and in the circumstances of the case, the Id. CIT (A) erred in upholding the validity of order passed by the Id AO.
2. That on the facts and in the circumstances of the case, the Id. CIT (A) erred in sustaining penalty of Rs. 87,300/- u/s 271AAB of the Act.
3. That on the facts and in the circumstances of the case, the Id. CIT (A) erred in recording various observation in the appellate order are contrary to the provisions of the law and also against the law decided by the Hon'ble Courts.



4. That on the facts and in the circumstances of the case, the Id. CIT (A) erred in not considering the explanation and judicial decisions referred by the appellant.
5. That the petitioner may kindly be permitted to raise any additional or alternative grounds at or before the time of hearing.
6. The petitioner prays for justice & relief.

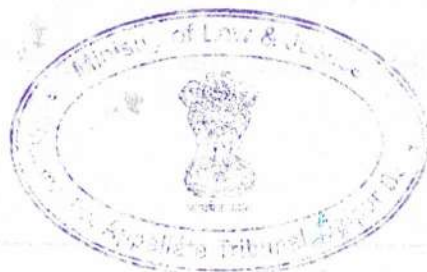
The assessee has also raised an addition ground vide an application received in this office on 28th July, 2020 which reads as under :-

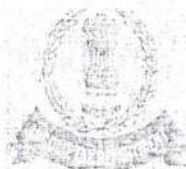
" That the show cause notice issued u/s 274 r/w 271AAB(1) of the Act, is quite vague and did not at all specify the specific clause of S. 271AAB of the Act under which the penalty was initiated i.e. whether it is for clause (a) or clause (b) or clause (c) of section 271AAB(1) because the conditions for imposing the penalty under each such clauses are separate. The impugned penalty based on such a notice being contrary to the provisions of law & facts kindly be quashed."

2. The brief facts of the case are that the assessee is an Individual and derives income from salary from Arihant Hospital and Research Sansthan, Bhilwara, pension from Government of Rajasthan, income from medical practice, earning interest, dividend income and also agricultural income. A search and seizure operation under section 132(1) of the I.T. Act, 1961 was carried out on 02.07.2015 at the various premises of M/s. Kota Dal Mill Group (Shri Rajendra Agarwal), Kota. The case of the assessee was also covered. The search action was carried out on 02.07.2015 at the

residence of the assessee situated at 18, Mahesh Colony, Dewa Sadan Road, Bhilwara, Rajasthan. In response to notice issued on 07.10.2016 under section 142(1), the assessee furnished return of income on 17.10.2016 declaring total income of Rs. 66,62,000/- and net agriculture income of Rs. 2,20,400/-. The additional income surrendered during search action of Rs. 8,73,000/- was included in returned income. As the assessee had made an entry of undisclosed income in Income and Expenditure account, penalty under section 271AAB of the Act was initiated on such undisclosed income of Rs. 8,73,000/- by way of issue of notice u/s 274 read with section 271AAB of the Act and imposed penalty @ 10% Rs. 87,300/-. On appeal, the Id. CIT (A) confirmed the order of the AO thereby sustained the penalty. Now the assessee is in appeal before us.

3. At the outset, the Id. Counsel for the assessee has challenged the order of the Id. CIT (A) in sustaining the penalty levied under section 271AAB of the Act by not considering the explanation furnished and the judicial decisions referred by the appellant. The Id. Counsel has drawn our attention to the show cause notice issued by the AO for levy of penalty under section 271AAB (APB Pg.1), copy of the show cause notice under section 274 read with section 271AAB dated 27.12.2017 is reproduced below :-





GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE DEPUTY COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE, KOTA

To,	
Shri Mahavir Prasad Agarwal, Mahatma Gandhi Hospital, Agarwal Diagnostic Clinic, Seva Sadan Road, Mahesh Colony, Bhilwara, Rajasthan	

PAN : ACSFA7547E	A.Y. : 2016-17	Dated : 27.12.2017	Notice No. :
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Notice under section 274 read with section 271AAB(1) of the Income Tax Act, 1961

Sir/Madam,

Whereas in the course of proceedings before me for the Assessment Year 2016-17, it appears to me that a search was conducted in your case and you were found to have undisclosed income.

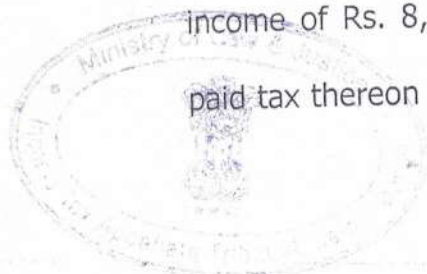
You are hereby requested to appear before me either personally or through a duly authorized representative at 10.30 AM on 30.01.2018 and show cause why an order imposing a penalty on you should not be made under section 271AAB(1) of the Income Tax Act, 1961.

If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271AAB(1) of the Income Tax Act, 1961.



(S.L. Verma)
Deputy Commissioner of Income Tax,
Central Circle, Kota

3.1. The Id. A/R has argued that a search was conducted in the case of the assessee on 2nd July, 2015 and consequently the assessee admitted undisclosed income of Rs. 8,73,000/- on account of excess cash found during the search and paid tax thereon accordingly. He further submitted that the assessee has explained

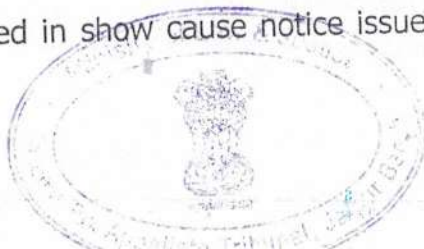


the availability of cash and has substantiated the cash availability. However, he has surrendered the income to the extent of aforesaid amount of Rs. 8,73,000/- in order to settle the dispute to buy peace and accordingly paid tax along with interest suo moto as evident from the return of income accepted by the AO except miscellaneous disallowance of Rs. 23,320/-.

3.2. The Id. A/R has further argued that the AO while concluding the assessment, has not mentioned anything as to the precise charge on which he proposed to impose the said penalty. The AO has not even stated the rate at which the penalty is being imposed i.e. @ 10%, 20% or 30% to 90% as specified in clause (a), (b) or (c) of section 271AAB respectively. Thus the AO has not mentioned specific charge/limb for which the penalty is being initiated and levied thereof. In support of its contention, the Id. A/R placed reliance on the decision of the Coordinate Bench of the Tribunal in the case of Shri Padam Chand Pungliya vs. ACIT (2019) 201 TTJ 307 (JP) wherein the ITAT while considering its own decision in the case of Ravi Mathur vs. DCIT in ITA No. 969/JP/2017 and Chennai Benches of the Tribunal in the case of DCIT vs. R. Elangovan in ITA No. 1199/CHNY/2017 dated 05.04.2018 has quashed the penalty order passed under section 271AAB of the Act.

4. The Id. D/R supported the order of the Id. CIT (Appeals).

5. Heard the rival contentions, perused the material available on record and the case laws cited before us. Admittedly, the AO has not mentioned specific charge or limb as specified in clause (a), (b) or (c) of section 271 AAB under which the penalty proceeding was initiated in show cause notice issued under section 274 read with



section 271AAB dated 27.12.2017. The provisions of section 271AAB are reproduced hereunder for ready reference :-

" 271AAB. (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 July, 2012⁴⁹ [but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President⁵⁰], the assessee shall pay by way of penalty, in addition to tax, if any payable by him,—

(a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such 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) on or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income herein;

(b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, does not admit the undisclosed income; and

(ii) on or before the specified date—

(A) declares such income in the return of income furnished for the specified previous year; and

(B) pays the tax, together with interest, if any, in respect of the undisclosed income;

(c) a sum⁵¹ [computed at the rate of sixty per cent] of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).

⁵² [(1A) 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 date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

(a) a sum computed at the rate of thirty per cent of the undisclosed income of the specified previous year, 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) on or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of sixty per cent of the undisclosed income of the specified previous year, if it is not covered under the provisions of clause (a).]

(2) No penalty under the provisions of ⁵³[section 270A or] 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) ⁵²[or sub-section (1A)].

(3) The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.

Explanation.—For the purposes of this section,—

(a) "specified date" means the due date of furnishing of return of income under sub-section (1) of section 139 or the date on which the period specified in the notice issued under section 153A for furnishing of return of income expires, as the case may be;

(b) "specified previous year" means the previous year—

(i) which has ended before the date of search, but the date of furnishing 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 date of search; or

(ii) in which search was conducted;

(c) "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 ⁵⁴[Principal Chief Commissioner or] Chief Commissioner or ⁵⁴[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.]”



It is evident from the above that in section 271AAB of the Act the words used are "Assessing Officermay direct" and again "the assessee shall pay by way of penalty.....". Thus, the word "May" directly indicate the discretion of the AO. A conjoint reading of section 271AAB and section 274 of the Act indicate that imposition of penalty under section 271AAB of the Act is not mandatory but discretionary. Hence, in our view, the penalty under section 271AAB be imposed on merits of each case.

5.1. In case of Shri Padam Chand Pungliya vs. ACIT (supra), the Coordinate Bench has held at para 5 page 7 of its order as under :-

" It is pertinent to note that the disclosure of additional income in the statement recorded under section 132(4) itself is not sufficient to levy the penalty under section 271AAB of the Act until and unless the income so disclosed by the assessee falls in the definition of undisclosed income defined in the explanation to section 271AAB(1) of the Act. Therefore, the question whether the income disclosed by the assessee is undisclosed income in terms of the definition under section 271AAB of the Act has to be considered and decided in the penalty proceedings. Since the assessee has offered the said income in the return of income filed under section 139(1) of the Act, therefore, the question of taking any decision by the AO in the assessment proceedings about the true nature of surrender made by the assessee does not arise and only when the AO has proposed to levy the penalty then it is a pre-condition for invoking the provisions of section 271AAB that the said income disclosed by the assessee in the statement under



section 132(4) is an undisclosed income as per the definition provided under section 271AAB. Therefore, the AO in the proceedings under section 271AAB has to examine all the facts of the case as well as the basis of the surrender and then arrive to the conclusion that the income disclosed by the assessee falls in the definition of undisclosed income as stipulated in the explanation to the said section. Therefore, we do not agree with the contention of the Id. D/R that the levy of penalty under section 271AAB is mandatory simply because the AO has to first issue a show cause notice to the assessee and then has to make a decision for levy of penalty after considering the fact that all the conditions provided under section 271AAB are satisfied."

It is evident from the show cause notice issued under section 274 read with section 271AAB (APB Page 1) that the AO was not clear as to on what precise charge the appellant was asked to show cause, whether the assessee shall pay by way of penalty under clause (a), (b) or (c) of section 271AAB. The AO has just mentioned "deliberately concealed the true income". Thus the AO without mentioning specific default of the assessee in terms of clause (a), (b) or (c) of section 271AAB of the Act, the show cause notice issued in routine manner cannot be considered a valid notice in the eyes of law and accordingly the levy of penalty against the assessee is held to be void ab initio. Further, the assessee has substantiated the undisclosed cash available, as to the extent of surrendered income of Rs. 8,73,000/-.

6. In view of the above, considering the peculiar facts, the grievance of the assessee is accepted as genuine and as such the order of the Id. CIT (A) sustaining the penalty is hereby quashed.

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



Order pronounced in the open court on 02/06/2022.

Sd/-
(डॉ. एस. सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य / Judicial Member

Sd/-
(डॉ. एम. एल. मीना)
(Dr. M.L. Meena)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 02/06/2022.

das/

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

1. अपीलार्थी / The Appellant- Shri Mahaveer Pd. Agarwal, Bhilwara.
2. प्रत्यर्थी / The Respondent-The DCIT, Central Circle, Kota.
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. 1218/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

अधीक्षक अपीलीय अधिकरण
Income Tax Appellate Tribunal
जयपुर / Jaipur

