

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA BENCH "C", KOLKATA**

**BEFORE SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, HON'BLE ACCOUNTANT MEMBER**

**ITA No.2274/Kol/2019
Assessment Year: 2016-17**

Sushil Kumar Paul		ACIT, Circle-2, Siliguri.
C/o. Subash Agarwal & Associates, Advocates, Siddha Gibson, 1, Gibson Lane, Suite 213, 2 nd Floor, Kolkata – 700 069.	Vs.	
(PAN: AKFPP 4837 K)		
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Siddarth Agarwal, Advocate
Revenue by : Smt. Ranu Biswas, Addl. CIT, DR

Date of Hearing : 24.11.2022

Date of Pronouncement : 15.12.2022

ORDER

PER SONJOY SARMA, JM:

This appeal filed by the assessee is against the order of Id. CIT(A), Siliguri dated 23.08.2019 for A.Y. 2016-17. The assessee has taken the following grounds of appeal:

“i. For that on the facts and circumstances of the case, the Id. CIT(A) was not justified in confirming the penalty of Rs. 23,70,000/- imposed by the AO by wrongly invoking the provisions of section 271AAB of the Income Tax Act.

ii. Without prejudice to the ground no. 1, the Id. CIT(A) ought to have restricted the penalty u/s 271AAB to Rs. 7,90,000/- being 10% on the income disclosed during the course of search and seizure operation.

iii. For that the Id. CIT(A) failed to appreciate that the appellant assessee had requested the AO to adjust the tax liability as per his return of income with the seized cash during search.

iv. The appellant craves leave to add further grounds of appeal or alter the grounds at the time of hearing.”

2. Brief facts of the case are that a search and seizure operation was conducted on the premises of assessee on 28.03.2016 and consequence to that the assessee had disclosed a sum of Rs. 79,00,000/-. Subsequently, the assessee was filed his return of income by showing income of Rs. 83,02,410/- including the said undisclosed income of Rs. 79,00,000/- on 31.01.2017. The ld. AO had accepted the return of income filed by the assessee without making any further addition. During the intervening period, the assessee had requested the ld. AO to adjust his tax liability of Rs. 28,34,610/- as per his return with the seized cash of Rs. 36,00,000/- vide his letter dated 26.09.2017. The ld. AO although accepted the return filed by the assessee and assessed the total income at Rs. 83,02,410/- initiated a penalty proceeding u/s 271AAB of the Act and subsequently passed an order dated 27.06.2018 u/s 271AAB of the Act.

3. Aggrieved by the above order dated 27.06.2018, the assessee preferred an appeal before the ld. CIT(A) and appeal of the assessee was dismissed. While deciding the appeal of the assessee, the ld. CIT(A) observed as follows:

"I have perused the penalty order, grounds of appeal and the submission made by the appellant. The only ground of appeal is against levy of penalty u/s 271AAB of the I.T. Act, 1961 of Rs. 23,70,000/-. The Ld. A.O. has levied penalty of Rs. 23,70,000/- u/s 271AAB as the appellant has made a disclosure of Rs. 79,00,000/- for the A.Y. 2016-17 during search and seizure operation. However, on examination of the return filed by the appellant, it is seen that appellant had not paid the tax on the total undisclosed income of Rs. 79,00,000/- which was accepted by the appellant at the time of search and seizure operation. The Ld. A.O. has observed that the appellant has not fulfilled the condition for concessional rate of imposition of penalty u/s 271AAB(1)(a) or 271AA(1)(b) of the Act as he has not paid the tax, together with interest in respect of undisclosed income declare.

Accordingly, he has levied penalty of Rs. 23,70,000/-. The appellant had submitted and argued that the Ld. AO had imposed a penalty of Rs.23,70,000/- at highest rate of 30% instead of 10% considering the facts of the case of the appellant. Penalty u/s 271AAB is payable at different rates depending upon the fulfillment of certain condition. As per provision of sec. 271AAB(1)(a)(ii) penalty @ 10% of the undisclosed income is payable if the appellant has paid the tax together with interest on or before due date of submission of return. The appellant has made a disclosure of Rs. 79,00,000/- for the A.Y. 2016-17 during the search & seizure operation. However, in his return filed he has not paid the tax on the total undisclosed income of Rs. 79,00,000/-. In fact the appellant has declared total income of Rs. 83,02,410/- only in the return filed for the A.Y. 2016-17 and this income includes the normal

income of the appellant. Therefore, it cannot be treated as true and full disclosure of the appellant. Moreover, the appellant has not paid the total tax on the undisclosed income. The appellant has accepted the undisclosed income only after the concealment had been detected during the search & seizure operation. The appellant would not have accepted the suppression of income had the search & seizure operation was not conducted at the premises of the appellant. The acceptance of the appellant came subsequent to the finding made and admission of the appellant was not a voluntary act. Hence, there was conscious concealment or act of concealment of income on the part of the appellant. The appellant has not fulfilled the condition for concessional rate of imposition of penalty u/s 271AAB(1)(a) or 271AA(1)(b) of the Act as he has not paid the tax, together with interest in respect of undisclosed income declared. Thus, it is a fit case for imposition of penalty u/s 271AAB(1)(c). Hence, penalty u/s 271AAB(1)(c) of the Income Tax Act, 1961 of Rs. 23,70,000/- is imposed upon the appellant which is about 30% of the undisclosed income of Rs. 79,00,000/-. The appellant did not give any documentary evidences with regard to payments of tax on undisclosed admitted income. In view of the above, penalty levied by the A.O. amounting to Rs. 23,70,000/- is hereby confirmed and the appeal is dismissed.”

4. During the course of hearing, ld. Counsel for the assessee raised the legal ground relying on the judgement of the Hon’ble Apex Court in the case of National Thermal Power Company Limited 229 ITR 383 (SC) challenging the validity of notice issued u/s 274 r.w.s. 271AAB of the Act claiming it to be illegal and bad in law. Ld. Counsel for the assessee further placed reliance on the written submissions and judicial pronouncements referred therein:

“(i) Defective notice

Ld AO initiated penalty proceedings in a casual mechanical manner. The notice on PB 57 shows that assessing officer has not made a specific charge. The notice so issued is illegal and therefore not sustainable in law:

Reliance is placed on judgment of Shri Vivek Chugh ITA No.636/Ind/2017 dated 28.03.2019 (Indore Tribunal), (CL 120- 123) in which it was held that:

.... notice

7. A bare reading of the above notice suggests that the notice has been issued in a casual fashion. The officer has not applied his mind and no specific charge is mentioned for which the assessee was required to be show caused. In absence of the requisite contents of specific charge the initiation of proceedings cannot be sustained being bad in law.”

Further, reliance is also placed on the judgment in DCIT vs R. Elangovan (Trib. Chennai) (CL 113), where again it was held that since the penalty notice u/s. 271AAB was vague, penalty cannot be levied.

Further, Id CIT(A) has referred to the judgment of Pr. CIT vs Sandeep Chandak 405 ITR 648 (All.). This judgment was discussed and distinguished in the case of Ravi Mathur vs DCIT (TS-8004-ITAT-2018(Jaipur)-O) (CL-131-155)."

5. Ld. Counsel for the assessee submitted that before levying the penalty u/s 271AAB of the Act, the ld. AO has to issue noticed u/s 274 of the Act as provided in section 271AAB(3) of the Act. In the notice issued to the assessee there is no mention about the various conditions provided u/s 271AAB of the Act relating to levy of penalty @ 10% or 20% or 30% (as the case may be). Nothing is specified in the notice about Clause-a, b & c of section 271AAB of the Act as to what percentage the penalty will be levied on the assessee for undisclosed income not surrendered during the course of search. The assessee deserves an opportunity to plead before the ld. AO before being visited with the penalty u/s 271AAB of the Act. The alleged notice issued u/s 274 r.w.s. 271AAB of the Act is liable to be quashed since there is a technical defect in issuing the notice. Reliance placed on the decision of Co-ordinate Bench, Chennai in the case of DCIT vs R. Elangovan 1199/CHNY/2017 order dated 05.04.2018 which has also been followed by other benches laying down the proposition that show cause notice issued u/s 271AAB of the Act is a defective notice and liable to be quashed.

6. Per contra, the ld. departmental representative vehemently argued supporting the orders of the lower authorities and also submitted that the legal issue raised by the assessee is liable to be dismissed since the notice issued u/s 274 of the Act, the ld. AO has specifically mentioned that section 271AAB of the Act and it may have been a clerical error on the part of ld. AO to use the same proforma as used for issuing notice u/s 274 r.w.s. 271(1)(c) of the Act. On merits, the assessee has no case since the alleged addition was surrendered during the course of search, not included in the income tax return and taxes not paid and such undisclosed income has rightly been penalized @ 30% as per the provisions of section 271AAB(c) of the Act. The ld. departmental representative strongly relied on the decision rendered by the authorities below.

7. We have heard the rival contentions and perused the records placed before us. The legal issue before us is that whether the notice issued u/s 274 r.w.s. 271AAB of the Act suffers from fatal error and technical defect thereby not providing an opportunity to the assessee to plead his case. Since the legal ground goes to the root cause of the issue levying penalty u/s 271AAB of the Act, in view of the ratio held by the Hon'ble Apex Court in the case of National Thermal Power Company Limited (supra) admit the legal ground for adjudication. For levying penalty u/s 271AAB of the Act, the Id. AO needs to primarily issue notice u/s 274 of the Act so for initiating proceedings u/s 271AAB of the Act. The Id. AO has to first pass through the hurdle of section 274 of the Act which reads as follows:

“Section 271AAB of the Act.

'271AAB. 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 July, 2012, 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 therein;

(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 sum which shall not be less than thirty per cent but which shall not exceed ninety per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).

(2) 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).

(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,—

"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;

"specified previous year" means the previous year—

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 Chief 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.'.

Section 274 of the Act

(1) No order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard.

(2) No order imposing a penalty under this Chapter shall be made—

(a) by the Income- tax Officer, where the penalty exceeds ten thousand rupees;

(b) by the Assistant Commissioner, where the penalty exceeds twenty thousand rupees, except with the prior approval of the Deputy Commissioner.]

(3) An income- tax authority on making an order under this Chapter imposing a penalty, unless he is himself the Assessing Officer, shall forthwith send a copy of such order to the Assessing Officer']”

8. From the perusal of the above proposition, we observe that sub section 3 of section 271AAB of the Act talks about issuing the notice u/s 274 of the Act. So for initiating the penalty proceedings u/s 271AAB of the Act, the first step to be taken by ld. AO issue a valid notice u/s 274 of the Act provides a procedure that “No order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard.” To comply with this requirement the notice u/s 274 should be clear enough to convey the assessee about charge which is to be leveled against him/her it for levying penalty for contravention of the related provisions of the Act. So it was incumbent for ld. AO that in the notice issued u/s 274 of the Act should have mentioned that penalty u/s 271AAB of the Act may be levied @ 10/20/30% since the assessee falls in Clauses (a)/(b)/(c) of section 271AAB of the Act. He should have further mentioned that as the assessee’s case falls under Clause-c of section 271AAB of the Act, why he should not be visited by the penalty @ 30% of the undisclosed income. Against this charge, the assessee should have been given reasonable opportunity of being heard.

9. Now let us revert back to the fact instant case of the assessee and look into what has been mentioned in the alleged notices issued u/s 274 r.w.s. 271AAB of the Act which is reproduced below:

***NOTICE UNDER SECTION 274 READ WITH SECTION 271AAB OF THE
INCOME TAX ACT, 1961***

PAN- AKFPP 4837 K

OFFICE OF THE DCIT, Circle-2, Siliguri

Date: 28.12.2017

***To
Shri Sushil Kumar Paul
Milan Mandir Road,
Subhash Pally
Siliguri-734001.***

***Whereas in the course of proceedings before me for the assessment year 2016-17,
it appears to me that you:-***

Have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under section 22(1)/22(2)/34 of the Indian Income Tax Act, 1922 or which you were required to furnish under section 139(1) or by a notice given under section 139(2)/ 148 of the Income-tax Act, 1961, No..... dated..... Or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said section 139(1) or by such notice.

Have without reasonable cause failed to comply with a notice under Section 22(4)/ 23(2) of the Indian Income Tax Act, 1922 or under Section 142(1)/ 143(2) of the Income Tax Act, 1961.

Have concealed the particulars of your Income or furnished inaccurate particulars of such income.

You are hereby requested to appear before me at 1.00 P.M on 25.01.2018 and show cause why an order imposing a penalty on you should not be made under Section 271 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.

Assessing Officer
Sd/-

(R. Lama)
Deputy Commissioner of Income Tax,
Circle-2, Siliguri

10. From going through the above notice issued to the assessee on 28.12.2017, we find that there is no mention about various conditions provided u/s 271AAB of the Act. The ld. AO has very casually used the proforma used for issuing notice before levying penalty u/s 271(1)(c) of the Act for the concealment of income or furnishing of inaccurate particulars of income. Except mentioning the section 271AAB of the Act in the notice, it does not talk anything about the provisions of section 271AAB. Therefore, certainly such notice has a fatal error and technically is not a correct notice in the eyes of law because it intends to penalize an assessee without spelling about the charge against the assessee.

11. In the case of DCIT vs R. Elangovan Ltd. (supra), Co-ordinate Bench, Chennai while dealing with the legal ground challenging the validity of notice issued u/s 274 r.w.s. 271AAB of the Act had observed that:

“It is clear from the Sub Section (3) of Section 271 AAB that Sections 274 and Section 275 of the Act shall, so far as may be, apply. Sub Section (1) of Section 274 of the Act mandates that order imposing penalty has to be imposed only after

hearing the assessee or giving a assessee opportunity of hearing. Opportunity that is to be given to the assessee should be a meaningful one and not a farce. Notice issued to the assessee reproduced (supra), does not show whether penalty proceedings were initiated for concealment of income or for furnishing inaccurate particulars of income or for having undisclosed income within the meaning of Section 271AAB of the Act. Notice in our opinion was vague. Hon'ble Karnataka High Court in the case of SSA's Emerald Meadows (supra) relying in its own judgment in the case of Manjunatha Cotton and Ginning Factory (supra) had held as under:-

"2. This appeal has been filed raising the following substantial questions of law. Whether, omission if assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the penalty notice under Section 274 r.w.S. 271(1)(c) is bad in law and invalid despite the amendment of Section 271 (1 B) with retrospective effect and by virtue of the amendment, the assessing officer has initiated the penalty by properly recording the satisfaction for the same?

(3) Whether on the facts and in the circumstances of the case, the Tribunal was justified in deciding the appeals against the Revenue on the basis of notice issued under Section 274 without taking into consideration the assessment order When the assessing officer has specified that the assessee has concealed particulars of income?

3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271 (1)(c) of the Income Tax Act, 1961 (for short 'the Act,) to be bad in law as it did not specify Which limb of Section 271 (1)(c) of the Act, the penalty proceedings had been initiated i.e., Whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, While allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of CIT vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565.

4. In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises in this appeal for determination by this Court. The appeal is accordingly dismissed".

In the earlier case of Manjunatha Cotton and Ginning Factory (supra) their lordship had observed as under:-

"Notice under section 274 of the Act should specifically state the grounds mentioned in section 271(l)(c) , i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income. Sending printed form where all the grounds mentioned in section 271 are mentioned would not satisfy the requirement of law;

The assessee should know the grounds which he has to meet specifically. Otherwise, the principles of natural justice are offended. On the basis of such proceedings, no penalty could be imposed on the assessee) taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law; penalty proceedings are distinct from the assessment proceedings : though proceedings for imposition of penalty emanate from proceedings of assessment, they are independent and a separate aspect of the proceedings;

The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the proceedings on the merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared invalid in the penalty proceedings".

View taken by the Hon'ble Karnataka High Court in the above judgment was indirectly affirmed by the Hon'ble Apex Court, when it dismissed an SLP filed by the Revenue against the judgment in the case of SSA's Emerald Meadows (supra), specifically observing that there was no merits in the petition filed by the Revenue. Considering the above cited judgments, we hold that the notice issued u/s.274 r.w.s. 271AAB of the Act, reproduced by us at para 5 above was not valid. Ex-consequenti, the penalty order is set aside.

12. The view taken by the Co-ordinate Bench of Chennai in the case of DCIT vs Rs. Elangovan 1199/CHNY/2017 order dated 05.04.2018 has been subsequently followed by the Co-ordinate Bench of Jaipur in the case of Ravi Mathur vs DCIT, ITA 969/JP/2017 holding that such show cause notice issued u/s 274 r.w.s 271AAB of the Act are not sustainable in law.

13. We, therefore, respectfully following the judgement of decision of Co-ordinate Bench of Chennai in the case of DCIT vs R. Elangovan (supra) and Jaipur Bench in the

case of Ravi Mathur vs DCIT (supra) and in the given facts and circumstances of the case wherein the matter written in the body of the notice issued u/s 274 of the Act does not refer to the charges of provision of section 271AAB of the Act makes the alleged notice defective and invalid and thus deserves to be quashed. Since the penalty proceeding itself has been quashed the impugned penalty of Rs. 83,02,410/- stands deleted. Thus the assessee succeeds on legal ground challenging the validity of notice issued u/s 274 r.w.s. 271AAB of the Act.

14. Since the penalty u/s 271AAB has been deleted on the preliminary legal points, other arguments of the assessee dealing with the merits of the levy of penalty are not been dealt with, as the same are rendered academic in nature. Thus grounds raised on merits are dismissed as infructuous. Appeal of the assessee for the assessment year 2016-17 is allowed

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

Order pronounced in the open court on 15.12.2022.

Sd/-
(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

Sd/-
(SONJOY SARMA)
JUDICIAL MEMBER

Kolkata, Dated:15.12.2022.
 Biswajit, Sr. P.S.

Copy to:

1. The Appellant: Sushil Kumar Paul.
2. The Respondent: ACIT, Circle-2, Siliguri.
3. The CIT, Concerned, Kolkata
4. The CIT (A) Concerned, Kolkata
5. The DR Concerned Bench

//True Copy//

By Order

Assistant Registrar
 ITAT, Kolkata Benches, Kolkata