

आयकर अपीलीय अधिकरण, न्यायपीठ – “C” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA**  
 (समक्ष)Before श्री ए. टी. वर्की, न्यायीक सदस्य एवं/and श्री एम .बालागणेश, लेखा सदस्य)  
 [Before Shri A. T. Varkey, JM & Shri M.Balaganesh, AM]

**I.T.A. No. 1472/Kol/2015**  
**Assessment Year: 2013-14**

Deputy Commissioner of Income-tax, Central Circle-2(2), Kolkata.	Vs.	Sanwar Mal Agarwala (PAN: ADTPA5153E)
Appellant		Respondent

&

**I.T.A. No. 1477/Kol/2015**  
**Assessment Year: 2013-14**

Deputy Commissioner of Income-tax, Central Circle-2(2), Kolkata.	Vs.	Agtam Saran Khemka (PAN: AFNPK3645K)
Appellant		Respondent

Date of Hearing	20.02.2018
Date of Pronouncement	26.04.2018
For the Appellant	Shri Saurav Kumar, Addl. CIT, Sr. DR
For the Respondent	Shri M. D. Shah, Ld. AR

**ORDER**

**Per Shri A.T.Varkey, JM**

Both these appeals filed by the revenue are against the separate orders of Ld. CIT(A), Kolkata dated 14.09.2015 for AY 2013-14. Since facts are common and grounds are identical we dispose of both these appeals by this consolidated order for the sake of convenience.

2. At the outset itself, the Ld. Counsel for the assessee Shri M. D. Shah drew our attention to the fact that the penalty imposed u/s. 271AAB of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) was based on search and seizure operation carried out against the Neezone Group of cases on 01.08.2012. In the penalty order the AO notes that assessee Shri Agam Saran Khemka has admitted an undisclosed income of Rs.1,50,00,000/- and Shri Sanwar Mal Agarwala has admitted an undisclosed income of

Rs.2,55,00,000/- for AY 2013-14 under consideration in the form of commodity profit vide consolidated disclosure petition filed by Shri Manoj Biswal, Chairman of Nezone group. Similar penalty imposed u/s. 271AAB of the Act in respect of Shri Sanwar Mal Agarwal who was also one of the assesseees whose income was admitted as undisclosed income from commodity profit vide consolidated disclosure petition filed by Shri Manoj Biswal, Chairman, Nezone group was deleted by the Ld. CIT(A) which action of the Ld. CIT (A) has been upheld by the Tribunal in ITA No. 1479/Kol/2015 for AY 2013-14 by observing as under:

*“3. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the AO has levied the penalty u/s. 271AAB on the ground that the income from commodity profit has been found during search u/s. 132 of the Act which is not reflected in the regular books of account. The AO has accepted that during search the assessee has admitted u/s. 132(4) of the Act the income from speculative trading. The undisputed facts the AO has given finding pertaining to this case is as follows:*

*i) The assessee has substantiated the manner in which the income was derived. Ii) Furnished the return of income therein and*

*iii) Paid the tax along with interest.*

*Based on the said finding, according to AO, the assessee satisfies the conditions enumerated in sec. 271AAB(i)(a) of the Act and thereafter levied ten percent of Rs.3 cr., which have been deleted by the impugned order of Ld. CIT(A).*

*4. The Ld. DR brought to our notice that in the very same group case of Manoj Beswal & Ors. the Tribunal had confirmed the levy of penalty and contended before us that penalty u/s. 271AAB of the Act is mandatory and therefore, according to Ld. DR, the Ld. CIT(A) erred in deleting the penalty by stating that the assessee did not had any ‘mens rea’ not to disclose the amount in question. According to him, penalty has to be mandatorily levied u/s. 271AAB of the Act on the undisclosed income found during search. On the other hand, Ld. AR Shri Miraz D. Shah, supporting the decision of Ld. CIT(A) made contentions though taken up before the Ld. CIT(A) but has not been adjudicated on those averments, which the Ld. AR urges before us to consider while adjudicating the appeal of the Revenue. The Ld. AR also pointed out that the contentions which he is going to raise has been taken up before the AO also, however, according to Ld. Counsel, those legal arguments were not considered by the AO in the right perspective. The first contention of the Ld. AR is that since Sec. 271AAB of the Act is a penalty section it should be construed strictly, which we agree being it is a trite law that penalty provisions have to be strictly interpreted. Next contention of Ld. AR is that sec. 271AAB of the Act is not mandatory because Parliament in its wisdom has used the word ‘may’ and not ‘shall’. So, according to him, it is the discretion bestowed upon the AO whether to initiate and impose penalty u/s. 271AAB of the Act. We agree with the said contention of Ld. AR because when a similar issue was adjudicated by ITAT Lucknow (the author of this order was a member of the Bench) in Sandeep Chandak & Ors. Vs. CIT (2017) 55 ITR (Trib) 209 and 2017 (5) TMI 675-ITAT-Lucknow in ITA No. 416, 417 and 418/LKW/2016 dated 30.01.2017 while adjudicating a case where penalty was levied under section 271AAB of the Act it was held that the provisions of Sec. 271AAB of the Act are not mandatory, which means that penalty need not be levied in each and every case wherever the assessee has made default as stated in clauses (a), (b) and (c) of the Act. Sub-section (1) of Sec. 271AAB of the Act uses the word “may” not “shall”. “May” cannot be equated with “shall” especially in penalty proceeding. Using the word “may” in our opinion, gives a discretion to the AO to levy the penalty or not to levy, even if the assessee has made the default under the said provision.”*

Therefore, the 2<sup>nd</sup> ground of Revenue fails and we hold that penalty u/s. 271AAB of the Act is not mandatory and is discretionary. Before proceeding further, we note that the ex parte order passed by the Coordinate Bench relied upon by Ld. DR, Manoj Beswal, supra, have been recalled in MA Nos. 218 to 220/Kol/2017 dated 12.01.2018 by observing as under:

“By virtue of these miscellaneous applications, the assessee seeks to recall the order passed by this Tribunal in I.T.A. Nos. 1471, 1475&1476/Kol/2015 in the hands of Amit Agarwal, Madan Lal Beswal and Manoj Beswal respectively for the assessment year 2013-14 on the ground that notice was not served on the assessee for the hearing and on certain factual error that had crept in the order of the Tribunal. The first preliminary objection raised by the Ld. AR was that the notice of hearing was not served on the assessee for the hearing scheduled on 06.11.2017 and hence, the assessee could not be present on the said date by way of personal appearance. The second objection raised by the Ld. AR was that the Tribunal had stated in para 9 of its order that the assessee himself had accepted that he is engaged in commodities trading business and therefore mandated to maintain books of accounts in terms of section 44AA of the Act and thereby inferring that the assessee had reported the profit from commodities trading business under the head “income from business or profession”. Based on this crucial finding, the Tribunal had concluded that since the transaction of commodities trading had not been entered by the assessee in his books of accounts as on the date of search on 01.08.2012 and thereby it takes the character of undisclosed income for which penalty u/s 271AAB of the Act is exigible. In this regard, we find that the Ld. AR drew our attention to the computation of the total income wherein the assessee had offered income from commodity trading only under the head income from other sources. We also find that the Ld. AO had also specifically stated in the body of the assessment order vide column no. 10 that the assessee is having only salary income and income from other sources. We find that due to the absence of the assessee at the time of hearing this particular fact had escaped the attention of the Tribunal. On perusal of the fact available on record, we find that the finding recorded by this Tribunal in para 9 of its order dated 10.11.2017 that the assessee is mandated to maintain books of accounts u/s 44AA of the Act is factually incorrect and deserves to be rectified. This mistake of primary fact had lead to a conclusion of upholding the levy of penalty u/s 271AAB of the Act. Hence, in these facts and circumstances and in view of the aforesaid mistake of primary fact rightly pointed out by the Ld. AR, we deem it fit to recall the orders of this Tribunal dated 10.11.2017 in the case of aforesaid assesseees.”

In the aforesaid scenario, the legal position is that an order which has been recalled for de novo adjudication, is no order in the eyes of law and so it cannot be treated as a precedent. Hence, the reliance placed by the Ld. DR in respect of assessee's in the same group concern cases as decided by the Tribunal no longer survives and cannot be treated as covered against the assessee.

5. The third contention of the Ld. AR is that the assessee is an individual, who was drawing salary income. So, according to him, he need not maintain any books of account as per the Act. According to Ld. AR, undisputedly the assessee was engaged for the first time this AY only in trading of commodities, that too which was conducted in a non-systematic manner and the income from it was duly offered to tax by the assessee in his return of income under the head “Income from Other Sources”, which, according to Ld. AR was accepted as such by the AO and drew our attention to page one of assessment order, (not the penalty order) wherein we note that the AO has acknowledged that the assessee owned up Rs. 3 cr. as his income from commodity profit and it has been disclosed in his income and expenditure for AY 2013-14 under the head “income out of speculative business from sale of commodities”, and thereafter the AO confirmed the assessee's claim and thereafter total income was assessed by the AO as per the return submitted by the assessee. In the light of the aforesaid facts discerned from assessment order, the assessee's case is that for the first time in this AY he was doing unsystematic speculative activity which earned income and, it was brought under the head “Income from Other Sources”, and so, accordingly, he is not required to maintain books of account as stipulated in Sec. 44AA or Sec. 44AA(2)(ii) of the Act because, these provisions are

*only for assesseees who are earning income under the head “Business or profession”. We note that Sec. 44AA or Sec. 44AA(2)(ii) of the Act casts a duty upon the assessee who are into “Business or Profession” and such assessee’s are bound to maintain books of account as stipulated therein. For appreciating this submission let us go through the provisions of law.*

*“44AA. (1) Every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified by the Board in the Official Gazette shall keep and maintain such books of account and other documents as may enable the [Assessing] Officer to compute his total income in accordance with the provisions of this Act. (2) Every person carrying on business or profession [not being a profession referred to in sub-section (1)] shall,—*

- (i) if his income from business or profession exceeds [one lakh twenty] thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession exceed or exceeds [ten lakh] rupees in any one of the three years immediately preceding the previous year; or*
- (ii) where the business or profession is newly set up in any previous year, if his income from business or profession is likely to exceed [one lakh twenty] thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession are or is likely to exceed [ten lakh] rupees, [during such previous year; or*
- (iii) where the profits and gains from the business are deemed to be the profits and gains of the assessee under [section 44AE] [or section 44BB or section 44BBB], as the case may be, and the assessee has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, during such [previous year; or]*
- (iv) where the profits and gains from the business are deemed to be the profits and gains of the assessee under section 44AD and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his business and his income exceeds the maximum amount which is not chargeable to income-tax during such previous year,]*

*keep and maintain such books of account and other documents as may enable the [Assessing] Officer to compute his total income in accordance with the provisions of this Act.*

*(3) The Board may, having regard to the nature of the business or profession carried on by any class of persons, prescribe, by rules, the books of account and other documents (including inventories, wherever necessary) to be kept and maintained under sub-section (1) or sub-section (2), the particulars to be contained therein and the form and the manner in which and the place at which they shall be kept and maintained.*

*(4) Without prejudice to the provisions of sub-section (3), the Board may prescribe, by rules, the period for which the books of account and other documents to be kept and maintained under sub-section (1) or sub-section (2) shall be retained.]”*

*So from a reading of the above provisions which clearly stipulates that assessee who are carrying on business or profession shall keep and maintain such books of account and other documents which may enable the AO to compute the total income. We note that assessee in the statement of total income filed before the AO has shown income only under two heads (i) salary income (ii) income from other sources. We would like to reproduce the summary of total income of the assessee filed along with the return:*

<i>Income from Salary</i>	<i>Rs. 45,57,600</i>
<i>Income from Other sources</i>	<u><i>Rs.3,00,24,047</i></u>
	<i>Rs.3,45,81,647</i>

6. We note that the AO has accepted the aforesaid statement of total income filed before him without contesting the claim of the assessee as to whether the assessee's claim of income other than from salary should be from "Income from Business". The confusion that has arisen in this case, we note is on the misdirection of AO in the assessment proceedings wherein the assessment order of the assessee, the AO has observed "during search and seizure operation, Shri Manoj Beswal had made a consolidated disclosure of Rs.32 crore vide his disclosure petition. Out of this consolidated disclosure, the assessee owned up Rs. 3 cr. In the disclosure petition Shri Manoj Beswal it was stated that the source of such undisclosed income was out of commodity profit. It has been submitted that the amount has already been disclosed in his Income & Expenditure account for the AY 2013-14 under the head 'Income out of Speculative Business from sale of commodities'. Verification of accounts confirms his claim." This observation is flawed because, we note that AO got carried away by perusal of the "Income & Expenditure Account for AY 2013-14" submitted by the assessee before him, wherein it was shown in the income side that is right hand column as "Income from Speculative Business from sale of commodities" and left hand side column reflects the expenditure; and AO came to the conclusion that assessee has disclosed under the heading income out of Speculative Business from sale of commodities. The character of a receipt and the head under which it has to be taxed is not based on the nomenclature of receipt of income shown in Income & Expenditure Account. All the incomes of revenue nature will be posted in the right hand side column of 'income' in the Income & Expenditure Account and the description given therein cannot determine the head of income prescribed under chapter IV of the Act. Therefore, the observation of the AO in assessment order in the light of his action of accepting the statement of total income filed by the assessee along with return which without being contested, is erroneous, unless the AO was able to negate the claim of the assessee by bringing the income from commodity transactions as part of business income. It should be remembered that under the Income Tax Act 1961, the total income of an assessee/individual/company is chargeable to tax u/s. 4 of the Act. The total income has to be computed in accordance with the provisions of the Act. Section 14 of the Act lays down that for the purpose of computation, income of an assessee has to be classified under five heads. It is possible for an assessee/individual/company to have five different sources of income, each one of it will be chargeable to Income Tax Act. Profits and gains of business or profession is only one of the heads under which an assessee's income is liable to be assessed to tax. If an assessee has not commenced business there cannot be any question of assessment of its profits and gains of business. That does not mean that until and unless the assessee commences its business, its income from any other source will not be taxed as held by the Hon'ble Supreme Court in the case of Tuticorin Alkali & Chemicals Ltd. Vs. CIT (1997) 227 ITR 172 (SC). It has been further held that when the question is whether a receipt of money is taxable or not or whether certain deduction from that receipt is principles of law and not in accordance with accountancy practice. Further, the Hon'ble Apex Court held that the question as to whether a principal receipt is of the nature of income and falls within the charge of sec. 4 of the Act is a question of law which has to be decided by the Court on the basis of the provisions of the Act and interpretation of the term 'income' given in a large number of decisions of the Hon'ble Supreme Court, High Court and Privy Council. After taking note of the Apex Court order as above, we note that the AO in the assessment order after having accepted the statement of total income (supra) and the return wherein the assessee has shown the income from commodities under the head "Income from Other Sources" cannot now after perusal of "Income & Expenditure Account" determine the character of transaction in the penalty proceedings as "Income from Business or Profession" which approach/action is erroneous. We note that the assessee in his statement of total income along with return has classified his income under two heads (i) Salary and (ii) from other sources and the income of Rs. 3 cr. as income from other sources, which we find the AO has not contested in the assessment order,

has thus crystallized and the necessary inference drawn is that assessee an individual who was admittedly a salaried person engaged in the previous year relevant to the assessment year under consideration (that too for the first time) in an activity from which he derived "Income from Other Sources" are not required to maintain books of account which are applicable only if the assessee was engaged in Business or Profession. However, we further note that the transactions which yielded income, the assessee had in fact maintained records from which the AO was able to deduce the true income and expenditure of the assessee. We note the AO in the assessment order has accepted the returned income comprising of income from salary and income from other sources by observing as under :

"Total income assessed as per return Rs.3,44,65,120/-".

And further we note that the AO had specifically stated in the body of the assessment order vide column no. 10 that the assessee is having only salary income and income from other sources. Thus from a perusal of the assessment order, it is not in dispute that assessee is not engaged in any business. And the AO cannot change the character of income in a derivative proceeding which is an off-shoot of assessment proceedings i.e. the penalty proceedings without contesting and making a finding against the claim of the assessee in the assessment order as discussed above.

7. Finally, the Ld. AR submitted that during the search, the search party found the records of the assessee's transactions in speculative commodity from the drawer of assessee's accountant from which the AO could compute the income of the assessee from the said transaction which amount assessee declared during search and which was duly returned and which figure was accepted by the AO. According to Ld. AR, the fact that search happened on 01.08.2012 need to be taken note of since undisputedly there was enough and more time for the assessee to submit the accounts during assessment proceedings which fact has been taken note of and concurred by the Ld. CIT(A). Thereafter, the Ld. AR drew our attention to the definition of undisclosed income given under section 271AAB which reads as under:

**"Penalty where search has been initiated.**

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, 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—

\*\*\*\*\*

Explanation – For the purposes of this section, -

(a) .....

(b) .....

- (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 [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.”

*According to the Ld. AR, from the facts and circumstances described above, since the assessee is not engaged in business or profession, he does not require to maintain the books of account as per sec. 44AA or sec. 44AA(2) of the Act, therefore, the assessee's case falls in the second limb i.e. "or other documents" as stipulated u/s. 271AAB Explanation (c) (supra) which describes undisclosed income for the purposes of this section which is very important to adjudicate this issue. Therefore, the question is when the search took place, the assessee's transactions (in this case, the speculative transaction) has been found to be recorded in the "other documents" which is (retrieved from the assessee's accountant's drawer) and based on that the assessee declared Rs. 3 cr. during search and later returned income of Rs. 3 cr. as income under the head "Income from Other Sources" which was accepted by the AO in toto. We note that since the income under question (Rs. 3 cr.) was in fact entered in the "other documents" maintained in the normal course relating to the AY 2013-14, which document was retrieved during search, hence, the amount of Rs. 3 cr. offered by the assessee does not fall in the ken of "undisclosed income" defined in Sec. 271AAB of the Act. So, Rs. 3 cr. which was commodity profit recorded in the other document maintained by the assessee which was retrieved during search cannot be termed as "undisclosed Income" in the definition given u/s. 271AAB of the Act. Since Rs. 3 cr. cannot be termed as "Undisclosed Income" as per sec. 271AAB of the Act, no penalty can be levied against the assessee. Therefore, we uphold the order of the Ld. CIT(A) on the aforesaid reasoning rendered by us."*

3. Since there is no change in facts and law respectfully following the decision of the coordinate bench of this Tribunal in the case of the other assessee's who were subjected to search and who had offered undisclosed income from commodity profit cannot be levied penalty u/s. 271AAB of the Act, in the facts and circumstances of this case, we confirm the order of the Ld. CIT(A) on the reasons stated above and dismiss both the appeals of the revenue.

4. In the result, both the appeals of revenue are dismissed.

Order is pronounced in the open court on 26.04.2018

Sd/-  
(M. Balaganesh)  
Accountant Member

Sd/-  
(Aby. T. Varkey)  
Judicial Member

Dated : 26th April, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – DCIT, CC-2(2), Kolkata.
2. Respondent – (i) Shri Sanwar Mal Agarwala, Budhia Bhawan, Sati Jayanti Road, Athgaon, guwahati-781 001.  
(ii) Shri Agm Saran Khemka, GC-213, Sector-III, Salt Lake City, Kol-700 091.
3. The CIT(A) Kolkata.
4. CIT Kolkata
5. DR, ITAT, Kolkata.

/True Copy,

By order,

Sr. Pvt. Secretary