

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Shri Aby. T. Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No. 1923/Kol/2016

Assessment Year : 2013-14

Pankaj Jalan
[PAN: ACTPJ 8249 B]
(Appellant)

-vs- DCIT, CC-4(2), Kolkata
(Respondent)

For the Appellant : Shri M. Satnaliwala, FCA

For the Respondent : Shri Saurabh Kumar, Addl. CIT Sr. DR

Date of Hearing : 14.05.2018

Date of Pronouncement : .05.2018

ORDER

Per M.Balaganesh, AM

1. This is an appeal filed by the assessee against the order of Ld. CIT(A)-21, Kolkata dated 4.8.2016 for AY 2013-14 by which he upheld the penalty imposed u/s. 271AAB of the Income-tax Act, 1961 (hereinafter referred to as the "Act")..

2. Briefly stated facts are that there was a search and seizure operation in respect of Jalan Group of cases on 06/07.09.2012 and on subsequent dates; and the assessee before us is belonging to the said group. The assessee is deriving salary income, income from short term capital gains , income from house property and income from other sources. In the penalty order, the Id AO notes that during the course of post search operation, the assessee admitted an undisclosed income of Rs. 1,32,44,000/- for the Asst Year under consideration in the form of commodity profit vide disclosure petition

filed by him. Further, the Id AO acknowledges that the assessee has filed his return of income for AY 2013-14 on 27.7.2013 declaring total income of Rs. 1,89,69,260/-. According to Id AO, on verification of computation of income, he noticed that the assessee for the relevant year disclosed a sum of Rs. 1,32,44,000/- and had shown the commodity profits under the head "Income from other sources". Then the Id AO notes that the return was selected for scrutiny and assessment was completed u/s. 143(3) of the Act on 17.04.2014 on total income of Rs. 1,89,69,260/- (on the same income returned by the assessee in the ROI) and penalty proceedings were initiated u/s. 271AAA of the Act on the commodity profit disclosed in the sum of Rs 1,32,44,000/- disclosed during search. This penalty notice was later shifted to proceedings u/s 271AAB of the Act vide issuance of fresh notice dated 29.1.2015. The assessee submitted that penalty proceedings u/s 271AAA of the Act cannot be initiated in respect of search conducted on or after 1.7.2012 and that only proceedings u/s 271AAB of the Act could be initiated from the said date. The Id AO after considering the submission of the assessee, imposed penalty u/s. 271AAB(1)(a) of the Act by observing that the commodity profits of the assessee becomes the undisclosed income arising out of documents/transactions/evidence found in the course of search u/s. 132 of the Act and accordingly levied penalty u/s 271AAB(1)(a) of the Act in the sum of Rs 13,24,400/- (10% of Rs 1,32,44,000). This penalty order was upheld by the Id CITA by observing as under:-

5.2. The relevant penalty order, assessment order and the submission of the appellant are referred and perused. It is apparent from the facts and circumstances of the case, as mentioned in the relevant penalty order, that the Assessing Officer was justified in the levying of penalty u/s 271AAB of the Act. Penalty @ 10% of the disclosed income i.e Rs 13,24,400/- has been correctly levied u/s 271AAB of the Act, by the Assessing Officer. Appeal on this ground is dismissed.

Aggrieved, the assessee is in appeal before us.

3. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the Id 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. The Id AO has accepted that during search, the assessee has admitted u/s. 132(4) of the Act the income from commodities trading. The Id AO has given finding pertaining to this case that the assessee had duly satisfied the prescribed three conditions stipulated in section 271AAB(1)(a) of the Act and accordingly levied penalty @ 10% of such income.

4. The Id AR pointed out that the penalty proceedings were initially initiated u/s 271AAA of the Act by the Id AO by recording the same while completing the assessment u/s 143(3) of the Act on 17.4.2014 and later on 29.1.2015, he issued a fresh notice u/s 271AAB of the Act rectifying his mistake in originally initiating proceedings based on wrong section. He argued that immunity provisions from levy of penalty were provided in section 271AAA (2) of the Act which is not provided in section 271AAB of the Act. The first contention of the Id 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 Id 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 Id AO whether to initiate and impose penalty u/s. 271AAB of the Act. The Id DR argued penalty has to be mandatorily levied u/s. 271AAB of the Act on the undisclosed income found during search. We are inclined to agree with the contentions of the Id AR because when a similar issue was adjudicated by the Co-ordinate Bench of Lucknow Tribunal in the case of *Sandeep Chandak v. CIT reported in 185 TTJ (Lucknow) 265 dated 30.1.2017* 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 Id AO to levy the penalty or not to levy, even if the assessee has made the default under the said provision." Therefore we hold that levy of penalty u/s. 271AAB of the Act is not mandatory and is discretionary.

5. The next contention of the Id AR is that the assessee is an individual, who was drawing salary income , income from house property, income from short term capital gains and income from other sources. So, according to him, he need not maintain any books of account as per the Act. According to Id AR, undisputedly the commodity profit was offered to tax under the head 'income from other sources' and taxed as such by the Id AO. In the light of the aforesaid facts discerned from assessment order, the assessee's case is that commodity profit is assessed under the head 'income from other sources' and 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 Id AO to compute the total income. Moreover, the entire workings of commodity profit of Rs 1,32,44,000/- was admittedly found in the seized document itself. Hence the Id AO need not look into the books of accounts or any other records other than the seized document to ascertain the figure of commodity profit of Rs 1,32,44,000/-. We note that assessee in the statement of total income filed before the Id AO has shown income only under the following heads , i.e (i) salary income, (ii) income from house property , (iii) income from short term capital gains and (iv) income from other sources. The Id AO had assessed the following income under the head 'income from other sources' of the assessee in the assessment completed u/s 143(3) of the Act on 17.4.2014 :-

- (a) Dividend - Rs 62,810/- (claimed as exempt)
- (b) Interest on tax free bond – Rs 26,165/- (calimed as exempt)
- (c) Interest on PPF – Rs 83,952/- (claimed as exempt)
- (d) **Others**
 - (i) Interest – Rs 27,15,727/-
 - (ii) Commodity profit disclosed u/s 132(4) – Rs 1,32,44,000/-

6. We note that the Id 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". It is not the case of the revenue that the commodity profit of Rs 1,32,44,000/- earned by the assessee is the business income of the assessee. We also find that the Id AO had not initiated any penalty proceedings u/s 271B of the Act treating the commodity profit as business income and thereby warranting the conduct of tax audit , failure of which would result in initiating penalty proceedings u/s 271B of the Act. Hence the Id AO was consciously clear that the commodity profit would be taxed only under the head 'income from other sources'. The Id 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. At this juncture, it would be relevant to reproduce the provisions of section 271AAB defining 'undisclosed income' 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—

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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."

7.1. We find that the commodity transactions are not carried out by the assessee in the course of his business and hence he is not required 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 commodity transactions) has been found to be recorded in the "other documents" and based on that the assessee declared Rs. 1,32,44,000/- during search and later returned the same as his income under the head "Income from Other Sources" which was accepted by the Id AO in toto. We note that since the income under question i.e Rs 1,32,44,000/- 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. 1,32,44,000/- offered by the assessee does not fall in the ken of "undisclosed income" defined in Sec. 271AAB of the Act. So, Rs. 1,32,44,000/- 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. 1,32,44,000/- cannot be termed as "Undisclosed Income" as per sec. 271AAB of the Act, no penalty can be levied against the assessee. We also find that in similar circumstances, this tribunal in the case of DCIT vs Subhas Chandra Agarwala & Sons (HUF) reported in (2018) 91 taxmann.com 442 (Kolkata Trib.) had cancelled the levy of penalty u/s 271AAB of the Act. Respectfully following the aforesaid judicial precedent and in the facts and circumstances of the case, we delete the levy of penalty

levied u/s 271AAB of the Act. Accordingly, the grounds raised by the assessee are allowed.

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

Order pronounced in the Court on 23.05.2018

Sd/-
[A.T. Varkey]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Dated : 23.05.2018

SB, Sr. PS

Copy of the order forwarded to:

1. Pankaj Jalan, 2/1A, Burdwan Road, 2nd Floor, 'Babylon Apartment', Kolkata-700027
2. DCIT, CC-4(2), Kolkata, Aayakar Bhawan Poorva, 5th Floor, 110, Shanti Pally, E.M. Bye Pass, Kolkata-700107.
3. C.I.T(A)- , Kolkata
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches