

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,  
*IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH “B” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and  
**Shri, M. Balaganesh, Accountant Member**

**ITA No.1605/Kol/2017 &  
C.O.No.99/Kol/2017**  
(a/o ITA No.1605/Kol/2017)  
Assessment Year :2013-14

DCIT, Central Circle- 2(2), Aayakar Bhawan, Poorva, 110, Shantipally, Kolkata-107	<b>V/s.</b>	Shri Liadhar Agarwala Flat No.4A & 4B, 4 <sup>th</sup> Floor, Shanti Kunj Apartment, 52/2B, Hazra Road, Kolkata-19 <b>[PAN No.ACYP A 6161 C]</b>
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent / प्रतयाक्षेपक/ Co-objector

आवेदक की ओर से/By Assessee	Shri Radhyey Shyam, CIT-DR
राजस्व की ओर से/By Respondent	Shri A.K. Tibrewal, AR
सुनवाई की तारीख/Date of Hearing	04-12-2018
घोषणा की तारीख/Date of Pronouncement	26-12-2018

**आदेश /O R D E R**

**PER S.S.Godara, Judicial Member:-**

This Revenue's appeal and assessee's cross objection for assessment year 2013-14 arise from Commissioner of Income Tax (Appeals)-20, Kolkata's order dated 21.03.2017 passed in case No.264/CIT(A)-20/CC-2(2)15-16 partly reversing Assessing Officer's action imposing penalty of ₹27,91,507 in proceedings u/s 271AAB of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file(s) perused.

2. It is noticed at the outset that the Revenue's instant appeal ITA No.1605/Kol/2017 suffers from 25 days' delay in filing. The Revenue/appellant

has preferred a condonation petition dated 06.07.2017 quoting reasoning thereof to various procedural formalities and compilation of necessary records. Learned authorized representative is very fair in not disputing the same during the course of hearing. We thus condone the impugned delay of 25 days in filing. This main appeal is taken up for adjudication on merits.

3. The Revenue's / appellant's sole substantive ground raised in the instant appeal pleads that CIT(A) has erred in law and on facts in reversing the Assessing Officer's action imposing sec. 271AAB penalty of ₹26 lac. imposed by the Assessing Officer in his order dated 27.03.2015. The CIT(A)'s detailed discussion on above sole issue reads as follows:-

*"3. I have considered the finding of the AO in the assessment order and the written submissions as well as oral submissions made by the AR during the appellate proceedings.*

*4. Appeal on grounds no 1, 2 and 3 are against the imposition of penalty u/s 271AAB (1)(a). Brief facts of the case are that*

a) Search and seizure proceedings were conducted on 20-12-2012 and thereafter at the residential as well as business premises of BLA Group. Panchanarna was also drawn in the name of the assessee.

b) During the course of search proceeding, while making the statement u/s 132(4) of the Act, an amount of Rs.2,79,15,065/- was offered to tax in the hands of assessee as additional income in FY 2012-13. Break-up of disclosure of Rs.2,03,96,750/- consists of following-

Cash seizure	1,00,000/-
Jewellery Inventorised	18,15,065/-
Others	<u>2,60,00,000/-</u>
TOTAL	2,79,15,065/-

c) In the previous year relevant to the assessment year 2013-14, the assessee filed its Return of Income u/s 139 of the Act on 07-03-2014 declaring total income at Rs.3,95,95,810/- including the offered income of Rs.2,79,15,065/-.

d) The return was selected for scrutiny assessment. Compliance to notices u/s 143(2) and 142(1) were duly made. Assessment Order for AY 2013-14 was passed u/s 143(3) on 06-06-2014 at a total income of Rs.3,96,04,140/-.

e) Penalty proceedings was initiated separately on the disclosure amount of Rs.2,79,15,065/- u/s 271AAB of the Income Tax Act, 1961

f) During the course of penalty proceeding, it had been stated that out of such offering of Rs.2,79,15,065/-, an amount of Rs.2,60,00,000/- was not backed by any evidence of undisclosed income or any undisclosed assets 1 items that had been found / inventorised by the Department. Hence, such suo moto offering of Rs.2,60,00,000/- does not come under the purview of "undisclosed income" as explained in Explanation (c) of Section 271AAB and hence the penalty provision cannot be invoked on such figure of Rs. Rs.2,60,00,000/-. Further, such suo moto offering of Rs. Rs.2,60,00,000/- has been made in order to buy peace, to avoid unnecessary long drawn litigations

with the department and to demonstrate utmost cooperative attitude with the department.

g) However; the Assessing Officer did not pay any heed to such submission and went on to pass an order u/s 271AAB of the Act considering the offered amount of Rs.2,79,15,065/- as undisclosed income and imposed a penalty of Rs.27,91,507/-.

5. *Because of the act of the AO of imposing penalty u/s 271AAB(1)(a) in this case, this appeal has been filed. In the penalty order the AO has brought it on record that the contention of the assessee that the aforesaid amount of Rs.2,60,00,000/- is not 'undisclosed income' is contrary to the fact that the said additional income of Rs.2,60,00,000/- was offered for taxation during the course of search operation and was substantiated by the assessee as earned out of the business in which the assessee is engaged. By dint of assessee's own submissions, the assessee was found to have accumulated an undisclosed income of Rs.2,60,00,000/- which was not recorded on or before the date of search in the books of account or other documents maintained in the normal course of business. By virtue of the very nature of disclosure by the assessee himself, that such unaccounted income was generated out of transactions in business it was involved in the additional income of Rs.2,60,00,000/- disclosed only during the course of search & seizure operation partakes the character of undisclosed income.*

6. *During the appellate proceedings the AR has made oral submission as well as filed a written submission on this issue which is as under:*

Aggrieved by the said penalty order of the Assessing officer, I have filed an appeal before your good-self to consider the above matter in the principle of natural justice. I re-iterate that such offering of Rs. Rs.2,60,00,000/- was made suo moto and to buy peace and was not backed by any evidence of undisclosed income or any undisclosed assets / items that had been found / inventorised by the Department and as such no penalty u/s 271AAB should be imposed. The similar view has also been expressed by the Hon'ble High Court of Gujarat in the case of Girish Devchand Rajani [2013] 33 taxmann.com 174 (Gujarat) where it had been held that Where assessee to buy peace and to avoid protracted litigation filed revised return disclosing additional income, imposition of penalty under section 271(1)(c) upon assessee on plea that he had furnished inaccurate particulars of income was not justified.

*Further, in the case of Punjab Tyres [1986] 162 ITR 517 (Madhya Pradesh), the Hon'ble High Court of Madhya Pradesh also held that when surrender is made to purchase peace or for other similar reason, surrender cannot amount to admission, constituting evidence of concealment in penalty proceedings.*

*I also rely on the judgement of the Supreme Court of India in the case of Dilip N. Shroff v. .Jt.CIT (2007) 291 ITR 519 (SC) wherein it was held that Imposition of penalty is not automatic. Levy of penalty is not only discretionary in nature, but such discretion is required to be exercised on the part of the Assessing Officer, keeping the relevant factors in mind.*

*In this regard, I would like to state that assessment has been completed based on the explanations given and documents produced during the course of assessment without making any further addition on the ground of disclosure. I had been a co-operative assessee during the course of assessment proceeding.*

7. I have considered the findings given by the AO in the penalty order and submissions made by the AR during the appellate proceeding. I find that the AO has taken the undisclosed income of the assessee found during the search operation u/s 132 (for which evidences, documents/papers, stock, cash etc were found) along with the amount declared suo moto by the assessee (for which no evidence, papers/documents, stock, cash etc were found during the search operation) in order to buy peace of mind and avoid any further litigation. The assessee has brought on record the case law of *Drlip N Shroff vs CIT (2007) 291 ITR 519 (SC)*. In this case law the Hon'ble Supreme Court has held that imposition of penalty is not automatic. Levy of penalty is not only discretionary in nature, but such discretion is required to be exercised on the part of the Assessing Officer keeping the relevant factors in mind. The AR has also brought on record the case of *Pubjab Tyres (Pubjab Tyres [1986] 162 ITR 517 (Madhya Pradesh)*, the Hon'ble High Court of Madhya Pradesh) in which it was held that when surrender is made to purchase peace or for other similar reason, surrender cannot amount to admission, constituting evidence of concealment in penalty proceedings.

The AR has brought on record the case law of *Sudharsan Silk and Sarees, 300 ITR 30 (Supreme Court)* in this case, the Hon'ble Supreme Court has held that if the appellant offers any amount for taxation for the purpose of purchasing peace and assessment has been made based upon the aforesaid offerings, even if no assurance in writing is given by the searching party, it may be clearly inferred that such an inducement must have been given by searching party. When only partial evidence or no evidence in support of concealment was detected during the search, why would a person go to offer a higher amount unless he was promised some reciprocal benefits like not being visited by penalty. Thus, it was held that where additions have been made based on assessee's own offerings, penalty provision shall not lie.

I find that during the search and seizure operation u/s 132 in this case evidences regarding concealment/undisclosed income in the form of cash seizure papers/documents/ stock etc were found and seized of the value of Rs.19,15,065/- only. Nothing incriminating/no evidences were found regarding Rs.2,60,00,000/- which was offered for taxation by the assessee suo moto in order to buy peace of mind. I also find that neither the officers in the investigation wing in the post search investigation nor the Assessing Officer during assessment process found any discriminating evidence of undisclosed income other than the assessee for making the addition of Rs.2,60,00,000/-. Further I have levied penalty u/s 271AAB(1)(a). This section reads like sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.

8. Thus, it is clear that in order to levy penalty two things are essential (1) undisclosed income and (2) specified previous year. Here in this case Rs.2,60,00,000/- was offered for taxation by the assessee suo motu in the statement recorded at the time of search. From the ratio decided by the Hon'ble Supreme Court in the case of *Sudarshan Silk & Saries (supra)*, it is clear that only the statement of the assessee without any corroborating evidence cannot be the only basis for levying penalty. Here it is also clear that from the statement of the assessee one cannot point out which amount of undisclosed income pertains to which specified previous year. In this situation, where nothing is clear from assessee's statement to levy penalty u/s. 271AAB(1) on the amount offered by the assessee suo moto to buy peace of mind, cannot be justified. The Hon'ble Supreme Court has also categorically decided the ratio that penalty cannot be levied on the amount offered by the assessee in order to buy peace of mind [**in the case of Sudarshan Silk & Saries (supra)**]. Thus, respectfully following the ratio decided by the Hon'ble Supreme

*Court, the AO is directed to calculate and levy penalty u/s 271AAB(1)(a) on Rs.19,15,065/- only. Accordingly, assessee's appeal on grounds no 1, 2 and 3 are partly allowed."*

4. Learned CIT.DR vehemently contends during the course of hearing that the Assessing Officer had rightly invoked the impugned penal provision as stipulated u/s 271AAB on account of search operation in issue conducted in assessee's case on 20.12.2012. He heavily relies upon assessee's admission stating his undisclosed income of ₹2,79,15,065/-. His case therefore is that the same formed sufficient reasons for the Assessing Officer to imposed the impugned penalty. We sought to know from learned CIT-DR as to whether the authorized officer had found any specified asset i.e. any money, bullion, jewellery or other valuable article or things as per explanation (c) forming of sec. 271AAB. There is no such material indicated during the course of hearing. We find that co-ordinate bench's order in **ITA No.538/Kol/2017** in ACIT vs. Sri Kanwar Sain Gupta decided on 29.06.2018 declines Revenue's identical arguments para 3-4 follows as under:-

*"3. We now come to the impugned penalty proceedings. The Assessing Officer levied penalty in question in his order dated 23.02.2016 by quoting section 271AAB of the Act on the ground that all the relevant conditions stipulated therein stood duly satisfied qua the above stated undisclosed income.*

*The CIT(A) reverses the Assessing Officer's action as follows:*

"I find that during the search and seizure operation u/s 132 in this case no evidences regarding concealment/undisclosed income in the form of cash seizure/papers/documents/stock etc were found and seized. Nothing incriminating/no evidences were found regarding Rs.1 crore which was offered for taxation by the assessee suo moto in order to buy peace of mind. I also .find that neither the officers in the investigation wing in the post search investigation nor the Assessing Officer during assessment process found any discriminating evidence of undisclosed income other than the statement of the assessee for making the addition of Rs.1 crore.

Further I find that the AO has levied penalty u/s 271AAB (1)(a). This section reads like sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.

Thus, it is clear that in order to levy penalty two things are essential (1) undisclosed income and (2) specified previous year. Here in this case Rs.1 crore was offered for taxation by the assessee suo moto in the statement recorded at the time of search. From the ratio decided by the Hon'ble Supreme Court in the case of Sudarshan Siik & Saries (supra), it is clear that only the statement of the assessee without any corroborating evidence

cannot be the only basis for levying penalty. Here it is also clear that from the statement of the assessee one cannot point out which amount of undisclosed income pertains to which specified previous year. In this situation, where nothing is clear from assessee's statement recorded at the time of search, the action of the AO to levy penalty u/s 271AAB(1)(a) on the amount offered by the assessee suo moto to buy peace of mind, cannot be justified. The Hon'ble Supreme Court has also categorically decided the ratio that penalty cannot be levied on the amount offered by the assessee in order to buy peace of mind (in the case of Sudarshan Silk & Saries (supra)]. Thus, respectfully following the ratio decided by the Hon'ble Supreme Court, the AO is directed to delete the penalty u/s 271AAB(1)(a). Accordingly, assessee's appeal on grounds no 1, 2 and 3 are allowed. "

*4. Learned Departmental Representative argued that the Assessing Officer had rightly imposed the impugned penalty in assessee's case @ 10% of his undisclosed income of Rs.1 crore coming Rs.10,00,000 in question. We find no substance in Revenue's instant arguments. We first of all make it clear that section 271AAB of the Act applies in relation to the impugned penalty @ 10% of the undisclosed income as stood defined in Explanation (c) thereto. There is no material in the case file to indicate that the assessee's undisclosed income represents any money, bullion, jewellery or valuable article or any entry in the books or other documents therein. We make it clear that we are dealing with a penalty provision in tax statute which is to be strictly interpreted. We therefore are of the opinion that the CIT(A) has rightly deleted the impugned penalty as the assessee's search statement nowhere indicated the corresponding undisclosed income as per specific requirement in the Act. The CIT(A),s findings under challenge deleting penalty in question are accordingly confirmed."*

We adopt above detailed reasoning *mutatis mutandis* to affirm the CIT(A)'s findings under challenge deleting the impugned penalty. The Revenue's appeal ITA No.1605/Kol/2017 fails therefore.

5. Next comes assessee's cross objection No.99/Kol/2017. His former ground supports the CIT(A)'s findings deleting the impugned penalty *qua* undisclosed income of ₹ 2 crores forming subject matter of Revenue's grievance. The same is rendered infructuous in view of our finding in Revenue's appeal affirming the CIT(A)'s action *qua* this former limb.

6. Next comes assessee's latter substantive ground seeking to reverse CIT(A)'s action confirming the impugned penalty @ 10% of ₹19,15,065/- (supra). Mr. Tibrewal fails to dispute the clinching facts that this latter penalty is very much based on assessee's undisclosed income in the form of cash seizure / papers / documents / stock found during the course of search. Both

the lower authorities' have their rightly invoked sec. 271AAB Explanation (c) in cases of the instant case. The assessee fails in its latter substantive ground.

7. This Revenue's appeal ITA No.1605/Kol/2017 and assessee's cross objection No.99/Kol/2017 are dismissed.

Order pronounced in the open court 26/12/2018

Sd/-  
(लेखा सदस्य)  
(M.Balaganesh)  
(Accountant Member)  
Kolkata,  
\*Dkp, Sr.P.S

दिनांक:- 26/12/2018 कोलकाता ।

Sd/-  
(न्यायिक सदस्य)  
(S.S.Godara)  
(Judicial Member)

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. आवेदक/Assessee-Shri Liadhar Agarwala Flat No.4A & 4B, 4<sup>th</sup> Floor, Shanti Kunj Apartment, 52/2B, Hazra Road, Kolkata-19
2. राजस्व/Revenue-DCIT, C.C-2(2), Aayaka Bhawan, Poorva, 110, Shantipally, Kolkata-107
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
कोलकाता ।