

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA**  
 (समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)  
 [Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

**I.T.A. No. 477/Kol/2017**  
**Assessment Year: 2014-15**

Assistant Commissioner of Income-tax, Central Circle-2(3), Kolkata.	Vs.	Late Baijnath Agarwal (PAN: ACTPA4174A)
Appellant		Respondent

&

**C.O. No. 19/Kol/2017**  
**In I.T.A. No. 477/Kol/2017**  
**Assessment Year: 2014-15**

Late Baijnath Agarwal	Vs.	Assistant Commissioner of Income- tax, Central Circle-2(3), Kolkata.
Cross Objector		Respondent

Date of Hearing	03.01.2019
Date of Pronouncement	23.01.2019
For the Revenue	Shri Ajoy Kumar Singh CIT, DR
For the Assessee/Cross Objector	Shri A. K. Tulsian, FCA & Ms. Shikha Agarwal, AR

**ORDER**

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

This appeal preferred by the revenue and the Cross Objection preferred by the assessee are against the order of the Ld. CIT(A)-20, Kolkata dated 13.01.2017 for AY 2014-15.

2. The Revenue has raised the following sole ground of appeal:

*“1. Whether, in the facts & circumstances of the case and in view of the distinction of facts of the instant case (discussed elaborately in the statement of facts) than that of the case laws relied upon, the Ld. CIT(A)’s order justified in allowing relief to the assessee.”*

The assessee has also raised the following grounds for Cross Objection:

*“1a. That the Ld. CIT(A) erred in not appreciating the fact that the penalty proceedings u/s 271 (1 )(c) were not initiated with the assessment order passed u/s 143(3) dated 22.03.2016. The same is initiated by notice dated 16.09.2016 much after the completion of the assessment proceedings. As such, initiation of penalty proceedings itself is bad in law and need to be quashed. Also in consequence to that the order passed u/s 271 (1 )(c) of the Act need to be quashed.*

*1b. That the Ld. CIT(A) erred in not appreciating the fact that in the assessment order passed u/s 143(3) dt. 22.03.2016, the Ld. AO initiated the penalty proceedings u/s 271 AAB of the I. T. Act, as evident from the assessment order & penalty initiation notice u/s 271AAB dt. 22.03.2016. As per assessment order, the Ld. AO initiated penalty proceedings u/s 271AAB but later on he issued notice u/s 271 (1)(c) dt. 16.09.2016 and imposed penalty u/s 271 (1)(c) of the Act. As no penalty u/s 271 (1 )(c) was initiated in the assessment order u/s 143(3), the order imposing penalty u/s 271(1)(c) is bad in law & needs to be quashed.”*

3. Briefly stated facts are that a search & seizure operation u/s 132 of the Act was carried out in the Rupa Group of cases on 07.11.2013 and on subsequent dates. The assessee an individual belonged to this group but no search warrant u/s. 132 was issued against the assessee. For the year under consideration, the assessee filed his original return on 12-01-2016 declaring total income of Rs.38,05,69,310/-. Assessment was completed u/s 143(3) of the Act on 22-03-2016 by accepting the returned income of Rs.38,05,69,310/-. However, while completing the assessment order u/s. 143(3) of the Act dated 22.03.2016, the AO recorded his opinion that assessee is liable to penalty u/s. 271AAB of the Act and thereafter he recorded that penalty proceeding u/s 271AAB of the Act was initiated. Thereafter, the AO issued show cause notice on 22.03.2016 asking the assessee as to why penalty u/s. 271AAB should not be made against him. Pursuant to the notice u/s. 271AAB of the Act, the assessee objected to the penalty notice u/s. 271AAB of the Act on the premise that as no search u/s. 132 of the Act was conducted against him, the penalty u/s 271AAB is not attracted in the instant case and therefore pleaded that the same to be dropped. Realizing his

mistake, the AO dropped the sec. 271AAB penalty proceeding against assessee, however he thereafter issued a fresh notice u/s 271(1)(c) of the Act on 16-09-2016. Further, the AO mentioned in the penalty order that he inadvertently issued notice u/s. 271AAB of the Act and then levied penalty on 27.09.2016 u/s. 271(1)(c) at Rs.12,91,28,908/-. Aggrieved by the said penalty order, assessee preferred an appeal before the Ld. CIT(A), who allowed the assessee's ground of appeal. Aggrieved revenue is before us. The assessee also filed Cross Objection for the omission on the part of Ld. CIT(A) not to adjudicate the ground raised by the assessee that the AO did not initiate penalty u/s. 271(1)(c) while framing assessment order on 22.03.2016, admittedly the first notice u/s. 271(1)(c) was issued on 13.09.2016 and therefore, the action of AO is bad in law. Since the assessee has raised the legal issue, we are first going to adjudicate the ground raised by the assessee in the cross objection.

4. The facts stated above are not disputed, so we are not repeating it for the sake of brevity. At the outset itself, we note the following admitted facts that though there was search happened on M/s. Rupa Group on 07.11.2013, neither there was any search warrant u/s. 132 of the Act was issued against the assessee nor sec. 153A proceedings was initiated against the assessee. In this regard it is pertinent here to note that there was no search against the assessee though the search & Seizure operation was conducted against M/s. Rupa group. Also we note that no statement of the assessee an individual was recorded u/s. 132(4) of the Act or of any of his sons and/or any of the family members. And we note from a perusal of the assessment order dated 22.03.2016 the AO after para 9, clearly initiated penalty u/s. 271AAB of the Act after assessing the income as returned by the assessee. Further we note that in the assessment order at para 8, the AO specifically expressed his opinion that assessee is liable to penalty u/s 271AAB of the Act, which is as under:

*“The assessee was supposed to file return of income 31-07-2014. Now in this return filed on 12.01.2016 the assessee has shown miscellaneous income of Rs.38,05,50,000/- in accordance with the disclosure made during the course of search in Rupa group of cases. Thus, I am of the opinion that the assessee is liable to penalty u/s. 271AAB of the I. T. Act, 1961.”*

Thereafter on 22.03.2016 in the penalty notice issued, the AO has stricken down the ingredients of the charges in sec. 271(1)(c) of the Act i.e. “concealment of income or furnishing inaccurate particulars of income” and the assessee was put to notice against levy of penalty u/s. 271AAB of the Act.

5. However, when assessee objected to penalty proceedings u/s 271AAB since no search u/s. 132 of the Act happened, the AO changed his opinion and after issuing notice for the first time on 16.09.2016 u/s. 271(1)(c), he levied penalty u/s. 271(1)(c) of the Act which action according to the Ld. AR cannot be done by the AO. The Ld. R drew our attention to section 271(1B) of the Act, which reads as under:

*“271(1B) Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and the said order contains a direction for initiation of penalty proceedings under clause (c) of sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c).”*

The said section inserted by Finance Act, 2008 with retrospective effect from 01.04.1989. The Ld. AR drew our attention to the circular issued to explain the amendment to para 40.5 which is as under:

***“40. Clarification regarding satisfaction for initiation of penalty under sub-section (1) of section 271***

***40.1*** *Sub-section (1) of section 271 of the Income-tax Act empowers the Assessing Officer to levy penalty for certain offences listed in that sub-section. It is a requirement that the Assessing Officer is required to be satisfied before such a penalty is levied.*

***40.2*** *In the context of levy of penalty under section 271 of the Income-tax Act, there has been an ongoing dispute between the Income-tax department and taxpayers on whether an Assessing Officer is required to record his satisfaction before initiating penalty proceedings. The Income-tax department has held the view that no separate satisfaction is required to be recorded before initiating penalty proceedings. In the case of CIT v. S.V. Angidi Chettiar (44 ITR 739; 1962), the Supreme Court has, while dealing with penalty under section 28 of the Indian Income-tax Act, 1922, held that "satisfaction before conclusion of proceeding under the Act, and not the issue of a notice or initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction". The same matter came up once again before the Calcutta High Court in the case of Becker Gray & Co. (1930) Ltd. v. ITO Central Circle-I Calcutta and Others (112 ITR 503; 1977). Relying on the Supreme Court decision in the above case, the Calcutta High Court held that "It is true that the Income-tax Officer should be prima*

*facie satisfied before the penalty notice is issued, but it does not mean that he is required to record such satisfaction in writing in every case." Following these decisions, wherever additions are made, Assessing Officers have, without separately recording any satisfaction, been issuing directions for initiating penalty proceedings.*

**40.3** *However, interpreting the aforesaid Supreme Court decision, the Delhi High Court has, in the case of CIT v. Ram Commercial Enterprises Ltd. (246 ITR 568; 2000) held that "It is the assessing authority which has to form its own opinion and record its satisfaction before initiating penalty proceedings."*

**40.4** *Subsequently, the Allahabad High Court went into this issue in the case of Shyam Biri Works (P.) Ltd. v. CIT (259 ITR 625; 2002). After considering the above Calcutta High Court decision and the Delhi High Court decision, it has held that "With profound respect to the Delhi High Court decision, we are unable to agree.... We are, therefore, of the opinion that although the Assessing Officer must have satisfaction as required under section 273 of the Act, it is not necessary for him to record that satisfaction in writing before initiating penalty proceedings under section 273 of the Act."*

**40.5** *In view of conflicting judicial opinion on this issue, it was necessary to make legislative intervention and settle the matter. Therefore, a new sub-section (1B) in section 271 of the Income-tax Act has been inserted. This sub-section unambiguously provide that where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment, and such order contains a direction for initiating of penalty proceedings under sub-section (1) of section 271, such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiating penalty proceedings under sub-section (1) of that section.*

**40.6** *The proposed amendment has been given retrospective effect in order to protect the revenue's contention on this issue in pending cases. However, this retrospective effect will not prejudice taxpayers' right to agitate the levy of penalty on merits. Further, while no separate satisfaction is required to be recorded before initiating penalty proceedings, it is still incumbent upon the Assessing Officer to record his satisfaction before levying the penalty. Accordingly, there is neither violation of the principle of natural justice nor any prejudice caused to the taxpayer as a result of the retrospective amendment.*

**40.7** *Similar amendment has also been carried out in the Wealth-tax Act."*

6. So when we read sec. 271 and sec. 271(1B) of the Act, we note for levying penalty u/s. 271(1)(c) of the Act that though the AO has to record his satisfaction while passing the assessment order itself that assessee has to be proceeded against for faults specified in penalty u/s. 271(1)(c) of the Act and the AO has to give direction to initiate penalty u/s. 271(1)(c) of the Act in the assessment order itself, and in case, if he doesn't record the satisfaction as aforesaid, however if he has given direction to initiate penalty u/s. 271(1)(c) of the Act in the assessment order itself, then it would be deemed to constitute satisfaction of the AO for initiating penalty proceedings u/s. 271(1)(c) of the Act. We note that in the case in hand, the AO has not initiated penalty u/s. 271(1)(c) of the Act while

framing the assessment order whereas we note that he was satisfied while framing assessment order that assessee is liable to penalty u/s. 271 AAB of the Act and thereafter he has initiated penalty u/s. 271AAB of the Act. And when pointed out by the assessee that penalty u/s. 271AAB cannot be legally leviable against the assessee, the AO dropped the sec. 271AAB proceedings and initiated sec. 271(1)(c) proceeding which is legally not tenable because for assumption of jurisdiction to levy penalty u/s. 271(1)(c) of the Act, the condition precedent for exercising this jurisdiction is the satisfaction of AO before conclusion of proceedings under the Act that penalty u/s. 271(1)(c) need to be levied against the assessee as held by the Hon'ble Supreme Court in S.V. Angidi Chettiar (supra). However, there was conflicting order of the Hon'ble High Courts, the Parliament in its wisdom has inserted sub sec. 1B of the Act vide Finance Act 2008 (wr.e.f. 01.04.1989), however, even as per section. (1B) to sec. 271, and by virtue of this insertion if the AO has given direction to initiate the penalty u/s. 271(1)(c) of the Act while framing the assessment/reassessment order, then it would be deemed to constitute satisfaction of the AO for initiating penalty proceedings u/s. 271(1)(c) of the Act. Here in this case, even the deeming provision will not come to the assistance of the Revenue, because there is no direction to even initiate penalty u/s. 271(1)(c) of the Act while framing the assessment order. The CBDT has clarified about inserting sub-section (1B) in section 271 of the Act, *where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment, and such order contains a direction for initiating of penalty proceedings under sub-section (1) of section 271, such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiating penalty proceedings under sub-section (1) of that section.* So if in the assessment/reassessment order the AO directs initiation of penalty u/s 271(1)(c) then only the deemed satisfaction for initiating penalty proceedings under sub-section (1) of sec. 271 can be deemed to constitute satisfaction as required u/s. 271 of the Act can come into play. Here in this case, we have reproduced the satisfaction of AO in the assessment order which was for levy of penalty u/s. 271 AAB of the Act and in the assessment order, the AO

initiated penalty u/s. 271AAB of the Act. So, as per the discussion above, the AO without even initiating penalty u/s. 271(1)(c) of the Act in the assessment order itself, the imposition of penalty u/s. 271(1)(c) of the Act where in the assessment order AO adds any amount or disallowed while computing the total income or loss of an assessee in and the said order does not contains a direction for initiation of penalty proceedings under clause (c) of sub-section (1), such an order of assessment or reassessment cannot be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c). From the above discussion, we note that in the assessment order the AO has neither recorded satisfaction to levy penalty against the assessee u/s. 271(1)(c) of the Act nor has he initiated the penalty u/s. 271(1)(c) of the Act. Therefore, after recording satisfaction in assessment order to levy penalty u/s. 271AAB and initiation of penalty u/s. 271AAB of the Act, the AO does not have jurisdiction to levy penalty u/s. 271(1)(c) of the Act. For coming to such conclusion, we also rely on the Karnataka High Court decision in CIT Vs. MWP Ltd. (2014) 41 Taxmann.com 496 (Kar). Since we allow the grounds raised by assessee in Cross Objection, the appeal of Revenue is academic and the legal issue raised by assessee is allowed, therefore, AO's order u/s. 271(1)(c) of the Act is not in accordance to Rule of Law and it is without jurisdiction as discussed above, so the same is quashed.

7. In the result, appeal of revenue as well as the Cross Objection of assessee is dismissed.

Order is pronounced in the open court on 23rd January, 2019.

Sd/-

(Dr. A. L. Saini)  
Accountant Member

Sd/-

(A. T. Varkey)  
Judicial Member

Dated: 23rd January, 2019

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – ACIT, Central Circle-2(3), Kolkata.
- 2 Respondent – Late Baijnath Agarwal, L/H Shri Kunj Bihari Agarwal, 8A/4, 8<sup>th</sup> floor, 3, Alipore Road, Satyam Tower, Alipore, Kolkata-700 027.
- 3 CIT(A)-20, Kolkata (sent through e-mail)
- 4 CIT , Kolkata.
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Assistant Registrar