

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ “ए”, चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL,
CHANDIGARH BENCH ‘A’, CHANDIGARH

श्री एन. के. सैनी, उपाध्यक्ष एवं श्री संजय गर्ग, न्यायकि सदस्य
BEFORE SHRI N.K. SAINI, VICE PRESIDENT
AND SHRI SANJAY GARG, JUDICIAL MEMBER

आयकर अपील सं./ ITA No.267/Chd/2018

निर्धारण वर्ष / Assessment Year : 2014-15

Sh. Chetan Rupal, H.N. 374, Baba Balak Nath Road, civil Lines, Ludhiana.	बनाम	The A.C.I.T., Central Circle-II, Ludhiana.
स्थायी लेखा सं./PAN NO.AGAPR0397P		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by: S/Shri Ashwani Kumar, CA
& Aditya Kumar, CA
राजस्व की ओर से/ Revenue by : Shri Rohit Mehra, S.DR
सुनवाई की तारीख/Date of Hearing : 10.04.2019
उदघोषणा की तारीख/Date of Pronouncement: 24.04.2019

आदेश/ORDER

Per N.K.Saini, Vice President:

This is an appeal filed by the assessee against the order dated 7.12.2017 of learned Commissioner of Income Tax (Appeals)-5, Ludhiana (in short ‘CIT(A’).

2. The ground raised by the assessee reads as under:

“That order passed u/s 250(6) of the Income Tax Act, 1961 by the Ld. Commissioner of Income Tax (Appeals)-5, Ludhiana upholding levy of penalty u/s 271AAB at Rs.6,00,000/- is against law and facts on the file in as much no such penalty was exigible in the facts and circumstances of the case.”

3. The only grievance in this appeal relates to sustenance of penalty of Rs.6 lacs u/s 271AAB of the Income Tax Act, 1961 (hereinafter referred as ‘Act’)

4. Facts of the case in brief are that a search and seizure operation under section 132(1) of the Income Tax Act, 1961 (hereinafter referred to as 'Act') was carried out at the business premises of the assessee on 24.10.2013.

5. During the course of assessment proceedings it was found that the assessee at the time of search proceedings u/s 132 of the Act, had admitted undisclosed income of Rs. 60,00,000/- under section 132(4) of the Act and the return of income was filed on 31.7.2014. The Assessing Officer initiated the penalty proceedings on the undisclosed income under section 271AAB of the Act, and required the assessee to show cause as to why the penalty under section 271AAB of the Act should not be imposed. In response the assessee submitted as under:

"It is respectfully submitted that a search u/s 132 of the Income Tax Act, 1961 was conducted at business premises of the group concerns on dated 24.10.2013. During the course of assessment proceedings a detailed reply with respect to income declared/surrender to cover various discrepancies subject to no penal action, added in the returned income and whole due tax thereon had been already deposited, was furnished/explained, which was surrendered u/s 132(4) of the Income Tax Act, 1961. In order to escape the rigours of penalty u/s 271AAB of the Income Tax Act, 1961 an assessee is required to specify and substantiate the manner in which the undisclosed income has been derived. The question of specifying the manner in which the income has been derived is duly answered and thus it can safely said that the assessee has duly complied with the relevant provisions and if provisions of section 271AAB are perused the opening sentence read as under:-

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,-

It clearly shows that it is the discretion of the Ld. A.O. to levy or not to levy penalty u/s 271AAB in as much as the legislature in its own wisdom has used the word 'May' and not 'shall'.

In view of the above, it is respectfully submitted that the penalty proceedings in question may kindly be filed as no such penalty is chargeable in the facts and circumstances of the case".

The Assessing Officer, however, did not find merit in the submissions of the assessee and levied the penalty under section 271AAB(1) of the Act, @ 10% of the undisclosed income. Accordingly penalty of Rs. 6,00,000/- was levied.

6. Being aggrieved the assessee carried the matter to the Ld. CIT(A) and submitted that penalty was not mandatory as it was the discretion of the Assessing Officer to levy or not to levy the penalty as the legislature used the word "may" and not "shall". It was further stated that the assessee had admitted undisclosed income under section 132(4) of the Act and substantiated the manner of deriving the income and also paid the tax together with interest in respect of undisclosed income before the specified date, therefore, the penalty under section 271AAB (1)of the Act was not leviable. Ld. CIT(A) however did not find merit in the submission of the assessee and sustained the penalty by observing in para 4.5 of the impugned order as under:

"The facts of the case, the order of the AO imposing the penalty and the arguments of the AR have been considered. The AO has mentioned that the assessee surrendered undisclosed income amounting to Rs. 60,00,000/- for the A.Y. under consideration on account of 'Income earned from trading of textiles fabrics and invested in

jewellery, machinery and other personal assets etc/ as per the statement recorded u/s 132(4) dated 28.11.2013. The assessee offered this additional income over and above the normal income only after the search and seizure action undertaken by the Income Tax Authorities. On the other hand, the AR has submitted that the appellant has duly declared the income in his return of income along with the undisclosed income offered in the statement and has also specified the manner of earning such undisclosed income. Dues taxes along with interest have already been paid before filing the return. The AR further argued that the penalty u/s 271AAB is not automatic and cited certain judgments in support of his claim.

As the search action in this case was conducted on 24.10.2013, therefore, provisions of section 271AAB are applicable. It is also not in dispute that the case of the assessee is covered under sub-section (l)(a) of Section 271AAB because in the submission filed before the AO, it was argued that penalty at a rate of 10% only is attracted in this case. During the appellate proceedings, the AR in the submissions has reproduced the provision of section 271AAB. The language of the Section is very clear and unambiguous that in a case where the assessee admits the undisclosed income under Section 132(4), pays the tax together with the interest on the undisclosed income before the specified date and also specifies the manner in which the undisclosed income was derived, then the assessee shall pay penalty equal to 10% of the undisclosed income. The AO has accepted that all these conditions are fulfilled in the case of the assessee in respect of the undisclosed income of Rs. 60,00,000/- surrendered after the search. The AR has not been able to rebut the findings of the AO during the appellate proceedings. Therefore, under the facts and the circumstances of the case and in view of the clear provisions of law, the penalty imposed by the AO in this case @ 10% of undisclosed income is found sustainable as per law and hence confirmed.

Accordingly, this ground of appeal is dismissed.”

7. Now the assessee is in appeal.
8. Ld. Counsel for the assessee submitted that the penalty u/s 271AAB of the Act levied by the Assessing Officer was *void abinitio* because he has not taken the prior approval under section 274(2) of the Act, which was accorded vide letter No. 1034 dated 30.09.2016 while the penalty order was passed by the Assessing Officer on 29.09.2016 i.e. prior

to taking the approval from the Additional CIT, Central Circle, Range Ludhiana.

9. In his rival submissions the Ld. Sr. DR strongly supported the orders of the authorities below and further submitted that there may be a typographical mistake in the order passed under section 271AAB(1) of the Act and by mistake the date was mentioned as 29.09.2016 while the DCR number was dated 30.09.2016.

10. We have considered the submissions of both the parties and perused the material available on the record. To resolve the present controversy it is relevant to refer the provisions contained in Section 274(2) of the Act which read as under:

*“Section 274(1).....
(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 or Deputy Commissioner, where the penalty exceeds twenty thousand rupees,
except with the prior approval of the Joint Commissioner.”*

11. From the above provisions contained in section 274 of the Act, it is crystal clear that the penalty under section 271AAB of the Act, which falls in Chapter XXI of the Act shall not be imposed by the Assessing Officer until and unless prior approval is taken from the concerned Joint Commissioner of Income Tax (JCIT). The use of word “shall” make it mandatory to take the prior approval of the JCIT/Additional CIT before passing the order imposing the penalty under section 271AAB of the Act. In the present case it is crystal clear from the penalty order passed by the

Assessing Officer that the order was passed on 29.09.2016 while the approval from the Additional CIT, Range Ludhiana was accorded vide letter no. 1034 dated 30.09.2016, which clearly established that the penalty order was passed by the Assessing Officer on 29.09.2016 before taking the approval from the concerned Additional CIT/JCIT. Therefore the penalty order passed by the Assessing Officer for levying the penalty under section 271AAB of the Act was *void abinitio*. In that view of the matter the impugned penalty levied u/s 271AAB of the Act by the Assessing Officer and sustained by the Ld. CIT(A) is deleted.

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

Order pronounced in the Open Court on 24.04.2019.

Sd/-
संजय गर्ग
(SANJAY GARG)
न्यायकि सदस्य/ Judicial Member
दिनांक /Dated: 24th April, 2019
रती

Sd/-
एन. के. सैनी
(N.K. SAINI
उपाध्यक्ष/ Vice President

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar