

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "बी", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "B", CHANDIGARH

श्री एन.के.सैनी, उपाध्यक्ष एवं श्री संजय गर्ग, न्यायिक सदस्य
BEFORE: SHRI. N.K.SAINI, VP & SHRI , SANJAY GARG, JM

आयकर अपील सं./ ITA NO. 698/Chd/ 2017
निर्धारण वर्ष / Assessment Year : 2013-14

Palace Infratech Pvt. Ltd. B-XIX-546, College Road Civil Lines, Ludhiana	बनाम	The Dy CIT Central Circle-III Ludhiana
स्थायी लेखा सं./PAN NO: AAGCP3488G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारित की ओर से/Assessee by : Shri Tej Mohan Singh, Advocate
राजस्व की ओर से/ Revenue by : Shri Manjit Singh, CIT DR

सुनवाई की तारीख/Date of Hearing : 03/12/2019
उद्घोषणा की तारीख/Date of Pronouncement : 06/12/2019

आदेश/Order

PER N.K. SAINI, VICE PRESIDENT

This is an appeal by the Assessee against the order dt. 14/02/2017 of Ld. CIT(A)-5, Ludhiana.

2. Following grounds have been raised in this appeal:

1. That the Ld. CIT(A) has grossly erred both in law and on facts in sustaining penalty of Rs. 57,00,000/- (Fifty Seven Lacs) under section 271AAB without appreciating that no penalty was exigible.
2. That while upholding penalty of Rs. 57,00,000/- under section 271AAB both the Ld. CIT(A) has grossly erred in law that the appellant had fulfilled all conditions pre-requisite as prescribed under clause (a) of sub-section (1) of Section 271AAB of the Income tax Act, 1961
3. That while sustaining penalty of Rs. 57,00,000/- (Fifty Seven Lacs) the Ld. CIT(A) did not appreciate that neither clause (b) nor clause (c) of sub-section (1) of section 271AAB was applicable as the appellant had not filed the return of income within time prescribed but had paid tax as payable.
4. That the appellant reserves the right to add , alter or take fresh ground either before or during the course of hearing.

3. From the above grounds it is gathered that only grievance of the assessee relates to the sustenance of penalty of Rs. 57,00,000/- levied by the A.O. under section 271AAB of the Income Tax Act, 1961 (hereinafter referred to as 'Act').

4. Facts of the case in brief are that a search and survey operation under section 132(1) of the Act was conducted on 31/10/2012 on the business and residential premises belonging to the assessee. During the course of assessment proceedings the A.O. noticed that the assessee at the time of search admitted an undisclosed income of Rs. 1.90 Crores under section 132(4) of the Act, he therefore initiated the penalty proceedings under section 271AAB of the Act. In response the assessee submitted that he had filed an appeal before the Ld. CIT(A), therefore the penalty may be kept in abeyance till the disposal of the appeal. The A.O. observed that the assessee had not substantiated the manner and mode of earning the income neither during the course of search conducted nor penalty proceedings and simply stated that the same was relatable to undisclosed forward / speculative transactions. The A.O. did not found merit in the submissions of the assessee and levied the penalty of Rs. 57,00,000/- i.e; @ 30% on the undisclosed income of Rs. 1,90 crores.

5. Being aggrieved the assessee carried the matter to the Ld. CIT(A) and furnished the written submission which has been incorporated in para 2 of the impugned order for the cost of repetition the same is not reproduced herein.

6. Ld. CIT(A) confirmed the penalty levied by the A.O. by observing in para 3.2 to 3.3 of the impugned order as under:

"3.2 The facts of the case, the order of the AO imposing the penalty and the arguments of the AR have been considered. The AR has repeated the contentions which were raised before the AO. The AR has reproduced the provisions of Section 271AAB which was introduced by Finance Act, 2012. It is stated that there similarity in the provisions of Section 271AAB with Explanation-5 to section 271(l)(c). The AR repeated the argument that the appellate has duly fulfilled all the conditions as prescribed u/s 271AAB by admitting the undisclosed income, substantiating the manner in which the undisclosed income was derived and paid the tax together with interest in respect of undisclosed income on the specified date. The AR contended that on the above facts of the case no penalty under Section 271AAB is attracted in this case. The AR has quoted certain case laws in support of his argument.

It is mentioned here that as submitted by the AR also there was an amendment into the Income Tax Act, 1961 by Finance Act, 2012 and a new section 271AAB, applicable from 01.07.2012, has been introduced. The provisions of this section are applicable to the cases where search u/s 132 was initiated on or after 1st day of July, 2012 and in the present case,

the search was conducted on 21.10.2012 and hence governed by the provisions of section 271AAB (and the provisions of section 271AAA are not applicable). For deciding the issue and to have clarity in the matter the provisions of Sections 271AAB are reproduced below:

"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-

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) substantiates the manner in which the undisclosed income was derived; and

(iii) on or before the specified date-

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee-

(i) in the course of the search, in a statement under sub-section (4) of section 132, does not admit the undisclosed income; and

(ii) on or before the specified date-

(A) declares such income in the return of income furnished for the specified previous year; and

(B) pays the tax, together with interest, if any, in respect of the undisclosed income;

(c) a sum which shall not be less than thirty per cent but which shall not exceed ninety per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).

(2) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

(3) The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.

Explanation- For the purposes of this section,-

(a) "specified date" means the due date of furnishing of return of income under sub-section(I) of section 139 or the date on which the period specified in the notice issued under section 153A for furnishing of return of income expires, as the case may be;

(b) "specified previous year" means the previous year-

(i) Which has ended before the date of search, but the date of furnishing the return of income under sub-section(I) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or

(ii) In which search was conducted;

(c) "undisclosed income" means-

(i) Any income of the specified previous year represented, either wholly or partly, by any money, bullions, jewellery or other valuable article or thing or any entry in the books of accounts 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 24 Principal Chief Commissioner or Chief Commissioner or 24 Principal Commissioner or Commissioner before the date of search; or
 (ii) 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.

3.3 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), substantiate the manner in which the undisclosed income was derived and pays the tax together with interest & furnishes the return of income declaring such undisclosed income on or before the specified date then penalty @ 10% of the undisclosed income will be levied as per section 271AAB(l)(a). Also if the undisclosed income is not admitted during the search u/s 132 but the assessee declares such income in the return of income & pays the tax together with interest on or before the specified date, then penalty @ **20%** of the undisclosed income is leviable as per section 271AAB(l)(b). In other cases, not covered under clause (a) and clause (b) of sub-section (1) of section 271AAB, penalty @ 30% of the undisclosed income is attracted as per the provisions of the section 271AAB(l)(c) if the search under Section 132 was conducted after 1st July, 2012. It is also provided under Section 271AAB(2) that no penalty under Section 271(l)(c) is leviable in respect of undisclosed income referred to in sub-Section 271AAB(1). Therefore, Explanation-5 to Section 271(l)(c) referred by the AR in his submission is not applicable in the present case.

As per the Explanation under Section 271AAB, the 'specified date' applicable in this case, was the due date of furnishing of return of income under sub-Section (1) of Section 139 and for the A. Y. 2013-14 it was 31.10.2013 (as extended by the CBDT). Therefore, for application of low rate of 10% or 20% for calculation of the penalty, the assessee was required besides fulfilling other conditions, to pay taxes together with interest before this date and furnish the return declaring the undisclosed income before 31.10.2013. If either the taxes together with interest were not paid or the return declaring the undisclosed income was not filed before 31.10.2013, then penalty @ 30% as per 271AAB(l)(c) is leviable. The fact that the assessee failed to pay the taxes together with interest before the due date i.e. 31.10.2013 is clear from the letter dated 31.03.2014 filed by the assessee before the AO which is reproduced below:-

"Sub:- Intimation of rectification of return of Income relating to Assessment Year- 2013-14 M/s. Palace Infratech Pvt. Ltd., B-XIX-546, Govt. College Road, Fountain Chowk, Civil Lines, Ludhiana- AAGCP3488G.

This is to inform you that the tax payable along with interest up to date has been deposited for the Asstt. Year 2013-14. As a follow up the revised return incorporating payment of taxes has also been filed. Copy of tax deposited and return of income filed is enclosed for your records. Keeping in view the voluntary compliance the assessee be not treated in default."

The AR has also filed a copy of the challan dated 27 March 2014 vide which a sum of Rs.45,09,160/- was deposited for A.Y. 2013-14 along with the copy of acknowledgement of Revised Return filed on 28.03.2014 showing self assessment tax payment of Rs.45,09,160/-. The AR has also filed copy of acknowledgement of the Original Return for A.Y. 2013-14 filed on 29.09.2013 where the tax payable is shown at Rs.42,42,060/-. From the above letter and documents, it is clear that the taxes payable on the returned income as declared in the 'Original Return of Income' filed on 29.09.2013 were not paid before filing the return on 29.09.2013. The tax was admittedly paid on 27.03.2014 (after the 'specified date' which in this case was 31.10.2013). Therefore, the case of the assessee is neither covered under the provisions of section 271AAB (l)(a) nor under 271AAB (l)(b). The case of the assessee is accordingly, covered under the provisions of section 271AAB (l)(c) and the penalty @ minimum 30% or maximum 90% is attracted. In view of the above, the submissions of the AR are not found acceptable and the case laws referred/relied upon by the AR relates to penalty under Section 271AAA which, already mentioned, is not applicable in this case. Therefore, under the facts and circumstances of the case, the penalty imposed by the AO in this case is found sustainable as per law and hence confirmed.

7. Now the assessee is in appeal.

8. Ld. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that this issue is squarely covered vide order dt. 20/12/2018 in ITA No. 697/Chd/2017 for the A.Y. 2013-14 in the case of M/s Palace Jewellers Pvt. Ltd. Ludhiana Vs. The DCIT, CC-III, Ludhiana decided by this Bench of the Tribunal, copy of the said order was furnished which is placed on record.

9. In his rival submissions the Ld. CIT(DR) strongly supported the orders of the authorities below.

10. We have considered the submissions of both the parties and perused the material available on the record. It is noticed that a similar issue having identical facts was a subject matter of the appeal in ITA No. 697/Chd/2017 in case of M/s Palace Jewellers Pvt. Ltd. for the A.Y. 2013-14 wherein vide order dt. 20/12/2018 the relevant findings have been given in para 5 to 10 which read as under:

5. Before us, Ld. Counsel for the assessee has submitted that no undisclosed income of the assessee was found during the search action. The aforesaid surrender of Rs. 4 crores of business income was to buy peace only and to cover the discrepancy, if any, found in the account of the assessee. It has been further pleaded that the surrendered income was duly accounted for in the original return of income filed on 30.9.2013 and further that the Assessing officer was requested to adjust the tax liability relating to such surrender out of the seized assets. However, the assessee was not possessed of sufficient funds to pay the tax on the surrendered income. It has been further pleaded that the assessee, however, has filed revised return of income on 12.2.2014 i.e. within the time specified u/s 139(5) read with section 139(1) of the Income Tax Act and paid the due taxes. It has, therefore, been pleaded that it is not a case of levy of any penalty u/s 271AAB of the Act. Further, at the most the penalty can be levied u/s 271AAB(1) of the Act @ 10% of the undisclosed income and not u/s 271AAB (3) of the Act @30%

6. The Ld. DR, on the other hand, has relied on the findings of the lower authorities.

7. We have considered the rival submissions and have also gone through the records. Admittedly, this is not a case where the assessee was found to be possessed of cash amount of which the assessee could not disclose the source. It is a case where the assessee during the search action had surrendered an amount of Rs. 4 cores on account of discrepancies in the accounts / unaccounted sales etc. The assessee explained that the aforesaid surrender of income was on account of unrecorded business income. The assessee has also returned the said amount as business income which has been admitted by the Assessing officer as such even in the assessment order. In respect of undisclosed income, the assessee is not supposed to prove the source of each and every penny or one by one unaccounted entry, rather, what is required is that the assessee must specify the manner of earning of such income and has to substantiate the said manner. From the facts of this case, it is apparent that the assessee had disclosed / surrendered the aforesaid amount of Rs. 4 crores on account of undisclosed business income and has also

explained that the same was on account of certain discrepancy / unrecorded business transactions. For the sake of convenience, the provisions of section 271AAB are reproduced 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 [but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President], 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—

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) substantiates the manner in which the undisclosed income was derived; and

(iii) on or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, does not admit the undisclosed income; and

(ii) on or before the specified date—

(A) declares such income in the return of income furnished for the specified previous year; and

(B) pays the tax, together with interest, if any, in respect of the undisclosed income;

(c) a sum [computed at the rate of sixty per cent] of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).

(2) No penalty under the provisions of [section 270A or] clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1) [or subsection (1A)].

(3) The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.

Explanation.—For the purposes of this section,—

(a) "specified date" means the due date of furnishing of return of income under sub-section (1) of section 139 or the date on which the period specified in the notice issued under section 153A for furnishing of return of income expires, as the case may be;

(b) "specified previous year" means the previous year—

(i) which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of section 139 for such year has not expired before the date

of search and the assessee has not furnished the return of income for the previous year before the date of search; or

(ii) in which search was conducted;

(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.

8. The provisions of section 271AAB (1) are little bit akin to provisions of section 271AAA of the Act. However, the difference is that if the assessee surrendered the undisclosed income in a statement u/s 132(4) of the Act and specify and substantiate the manner in which the income has been derived and pays the due taxes together with interest in respect to such undisclosed income before the specified date, then, as per the provisions of section 271AAB of the Act, the Assessing officer may levy penalty @ 10% of the such undisclosed income, whereas, as per the provisions of section 271AAA of the Act, in the event of assessee complying the aforesaid condition, no penalty is leviable. Since the search in the case was conducted on 31.10.2012, hence, the provisions of section 271AAB are attracted in this case.

9. So far as the non-deposit of tax by the due date is concerned, the assessee made a statement to the Assessing officer to adjust the due taxes against PD. Account / seized assets. However, the Assessing officer rejected the above contention stating that the seized assets can be adjusted only against the existing liability. As per the provisions of section 271AAB of the Act, on surrendering of the aforesaid amount of Rs. 4 crores, there was a liability on the assessee to deposit the due taxes before the specified date to fall within in the provisions of section 271AAB(1) of the Act which provides for minimum levy of penalty @ 10% of the undecided / surrendered income. Hence, in this case there was an existing tax liability on the assessee to pay the taxes and, therefore, the Assessing officer should have adjusted the tax from the seized assets, hence, it cannot be said that the assessee has not complied the aforesaid requirement of provisions of section 271AAB of the Act. Even otherwise, the assessee has also explained that it was not possessed of sufficient funds and the moment it got possessed of funds, it filed the revised return on 12.2.2014 and paid due taxes.

So far as the contention of the Ld. Counsel for the assessee that the aforesaid surrender can not / does not fall within the definition of the undisclosed income, as defined under the provisions of section 271AAB is concerned, we do not agree with the above submissions. The assessee has duly made a statement that the aforesaid disclosure was on account of unrecorded transactions / discrepancies in the accounts and on account of certain loose papers found during the search action.

10. In view of this, the aforesaid disclosure, in our view, falls within the scope of undisclosed income as provided under Explanation (C) to section 271AAB of the Act. In view of this, we hold that the case of the assessee does not fall under the provisions of section 271AAB(3) of

the Act but under the provisions of section 271AAB(1) of the Act and minimum penalty@ 10% of the undisclosed income is leviable. We order accordingly.

11. So respectfully following the aforesaid referred to order dt. 20/12/2018 we modify the order of the Ld. CIT(A) and direct the A.O. to levy the minimum penalty @ 10% on the undisclosed income.

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

(Order pronounced in the open Court on 06/12/2019)

Sd/-
संजय गर्ग
(SANJAY GARG)
 न्यायिक सदस्य/ Judicial Member
 AG
 Date: 06/12/2019

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