

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND  
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

**ITA No.1270/M/2019  
Assessment Year: 2014-15**

M/s. Wellknown Polysters Ltd., 14 <sup>th</sup> Floor, B Wing, Nirmal Nariman Point, Mumbai – 400 021 <b>PAN: AAACW1018K</b>	Vs.	DCIT, Central Circle-7(4), Room No.659, 6 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

**ITA No.1388/M/2019  
Assessment Year: 2014-15**

DCIT, Central Circle-7(4), Room No.659, 6 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Wellknown Polysters Ltd., 14 <sup>th</sup> Floor, B Wing, Nirmal Building, 241/242, Backbay Reclamation, Nariman Point, Mumbai – 400 021 <b>PAN: AAACW1018K</b>
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri Rakesh Joshi, A.R.  
Revenue by : Shri T.S. Khalsa, D.R.

Date of Hearing : 03.08.2021  
Date of Pronouncement : 26.10.2021

**ORDER**

**Per Rajesh Kumar, Accountant Member:**

The above titled cross appeals have been preferred against the order dated 10.12.2018 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to the assessment year 2014-15 which in turn arising out of the penalty order dated 16.02.2017 passed u/s 271AAB of the Act

by the Dy. Commissioner of Income Tax (hereinafter referred to as AO).

**ITA No.1270/M/2019 (Assessee's appeal)**

2. The grounds raised by the assessee are as under:

"1. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in not appreciating the fact that if the tax was paid on Book Profit u/s.115JB of the Income Tax Act, 1961 on returned income as well as assessed income, than no penalty is to be levied as per CBDT Circular No25/2015 dated 31.12.2015, without considering the facts and circumstances of the case.

2. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in restricting the action of the Learned Assessing Officer in levying a penalty to the extent of Rs.1, 56,10,778/- U/S.271AAB of the Income tax Act, 1961, being 10% of the alleged undisclosed income of Rs. 15, 61,07,788/-, without considering the facts and circumstances of the case."

3. The assessee has also taken additional ground which is reproduced as under:

"On the facts and circumstances of the case as well as in law, the Ld. CIT(A) has erred in upholding the order passed by the AO imposing penalty under section 271AAB of the Act by ignoring the fact that the notice issued under section 271AAB read with section 274 of the Act are in standard format without mentioning the clause under which the penalty was proposed to be levied and thus there is no application of mind."

4. We would like to adjudicate the additional ground raised by the assessee before us which has been reproduced above.

5. At the time of hearing, the Ld. Counsel of the assessee pointed out that assessee has filed an additional ground of appeal challenging the validity of the penalty proceedings initiated u/s 271AAB of the Act. The Ld. A.R. submitted before the Bench that the additional ground has been raised by the assessee challenging the validity of penalty proceedings completed u/s 271AAB of the Act on the ground that notice under section 271AAB and 271(1)(c) of the Act have issued to

assessee in standard format without application of mind by the AO as the clause/limb on which the penalty was proposed to be levied has not been indicated which is a fatal and non-curable lapse on the part of the AO as it goes to the root of the matter. The Ld. A.R. submitted that this being a legal issue which has not been raised before the Ld. CIT(A) and being raised for the first time before this forum. The Ld. A.R. submitted that issue raised does not require any verification of facts as this very issue is emanating out of the assessment order and the assessment folder and therefore there is no need to restore back this issue to the file of the AO. The Ld. A.R. submitted that this being a legal issue it can be raised at any appellate stage as has been decided by the Hon'ble Apex Court in the case of National Thermal Power Corporation Ltd 229 ITR 383(SC) and Hon'ble Bombay High Court in the case of Inventories Industrial Corporation Ltd. vs. Commissioner of Income Tax 194 ITR 548 Bombay HC. The Ld. A.R., therefore, prayed that the additional ground filed by the assessee may kindly be admitted for adjudication. As Per contra the ld DR submitted that the issue is being raised for the first time before the tribunal and may not be admitted. The ld DR alternatively submitted that it may be restored to the file of AO for adjudication. Having considered the contentions of both the parties in the light of decisions of the Apex court and Jurisdictional High Court, we are inclined to admit the additional ground for adjudication as this being a legal issue and can be raised at this stage also.

6. The facts in brief are that the assessee is a domestic limited company engaged in the business of manufacturing of polyester

yarn. A search & seizure action u/s.132(1) of the Act was conducted on 23.05.2013 in the case of Wellknown Group. The appellant being a group company was also covered in the same search action. During the course of search Shri Anil Agarwal admitted in the statement recorded U/s 132(4) of the Act that the appellant assessee company has booked non-genuine capital expenditure to the tune of Rs. 188.39 crores and has agreed to offer the depreciation claimed thereon of Rs. 58.57 crore as income in the respective years. The break up of such expenditure and depreciation thereon is as under:-

Financial	Purchase Amount	Total Depreciation
2008-09	34,81,11,365/-	1,75,47,967/-
2009-10	43,82,82,217/-	8,56,72,834/-
2010-11	4,53,74,000/-	6,23,55,635/-
2011-12	31,71,32,777/-	7,49,03,680/-
2012-13	53,18,59,857/-	18,91,44,475/-
2013-14	20,31,34,172/-	15,61,07,788/-
TOTAL	1,88,38,94,388/-	58,57,32,379/-

7. The assessee filed the return of income on 30.11.2014 declaring total income at NIL and Book Profits u/s.115JB of the Income Tax Act,1961 of Rs.1,90,45,10,696/-. Subsequently the assessee revised its return of Income and declared income of Rs.48,57,49,456/- under normal provision of Income Tax Act, 1961 and Rs.1,90,45,10,696/- as book profits u/s.115JB of the Act. Later on, case was selected for scrutiny and the Ld. AO framed assessment order u/s. 143(3) of the Act on 01.04.2015 by assessing the total income at Rs.48,58,18,270/- and book profit of Rs.2,44,83,34,499/- after making the following additions/disallowances to the returned income:

- Disallowance of expenses of Rs.8,813/- u/s. 14A as per Rule 8D and also added the same while computing the Book profit u/s.115JB of the Act.
- Addition on account of provision made for premium on redemption of preference shares of Rs.54,38,14,990/- while computing Book Profit u/s.115JB of the Act.

8. The AO also issued notices u/s 274 r.w.s 271(1)(c) as well as u/s 271AAB of the Act dated 24/04/2015 for levying penalty. Finally , the AO vide order dated 16.02.2017, levied a penalty u/s 271AAB of the Act of Rs.5,85,73,238 /- @ 10% of alleged undisclosed income of Rs.58,57,32,379/- offered in A.Y. 2009-10 to 2014-15 on amount of depreciation on bogus capital expenditure.

9. The Ld. A.R. submitted before the Bench that the order passed by Ld. CIT(A) in part sustaining the imposition of penalty under section 271AAB of the Act is against the provisions of the Act and therefore bad in law. The Ld. A.R. submitted that the assessee filed the return of income in response to section 153A at Rs.48,58,09,456/- under the normal provisions of the Act and book profit at Rs.2,44,83,34,499/- under section 115JB of the Act. The Ld. A.R. submitted that since the tax payable on the book profit was higher than the tax payable under the normal provisions of the Act, therefore assessee paid tax as per the provisions of section 115JB of the Act. The Ld. A.R. submitted that the penalty imposable is primarily based on the tax sought to be evaded, however, in the present case, the tax is payable on the income prior to addition on account of additional income disclosed during search as well as post additions remained the same as the assessee has paid tax under MAT as per the provisions of section 115JB of the Act.

9.1 The Ld. A.R. submitted that the disallowances by the AO would not result in any higher tax effect so as to calculate the tax sought to be evaded. The Ld. A.R. submitted that the income declared during the search has not resulted into payment of any additional taxes. The Ld. A.R. submitted that the assessee filed return wherein the taxes were paid as per the provisions of section 115JB of the Act on book profit and even after the assessment was framed after making additions, the income tax payable still remained the same as per the provision of section 115JB of the Act. Thus the additions have not resulted into any additional tax being paid by the assessee and therefore there is no question of imposition of penalty. The Ld. A.R. in defense of his argument relied on the decision of Hon'ble Delhi High Court in the case of Nalva Sons Investment Ltd. 327 ITR 543 (Del.) which has been confirmed by the Apex Court in the SLP filed by the Revenue which has been dismissed. The Ld. A.R. also submitted that the penalty imposed by the Revenue under section 271AAB of the Act is also in violation of the spirit of CBDT circular No.25/2015 dated 31.12.2015 which says that pursuant to judgment of Hon'ble Delhi High Court in Nalva Sons Investment Ltd. (supra) and the substitution of explanation NO.4 of section 271 with prospective effect, it is now settled position that prior to 01.04.2016 where income tax payable on total income as computed under normal provisions of the Act is less than the tax payable under book profits under section 115JB of the Act then penalty is not attracted with reference to addition/disallowances made under the normal provisions. The Ld. A.R. submitted that the said circular is binding on the tax authorities and even directs the authorities not to file any

appeal, henceforth and also the appeals already filed were directed to be withdrawn or not pressed. The Ld. A.R. submitted that though the above circular and decision rendered by the Hon'ble Delhi High Court in the case of Nalva Sons Investment Ltd. (supra) was though rendered in relation to penalty under section 271(1)(c) of the Act, however, the main basis of which is whether any tax is sought to be evaded or not. The Ld. A.R. submitted that in this case though the penalty was imposed under section 271AAB, however, the basis will remain the same whether any tax evasion is there which in the present case is not there. Therefore, the ratio of the said decision is squarely applicable to the assessee. The Ld. A.R., therefore, requested that the penalty may kindly be deleted in view of these legal positions.

9.2 The Ld. A.R. drew our attention to the notices issued under section 274 read with section 271(1)(c) as well as under section 271AAB of the Act both dated 01.04.2015 and also subsequent notice dated 18.08.2016 and submitted before the Bench that while issuing the notice the AO has failed to mention the particular clause in reference to which the penalty was proposed to be levied. The Ld. A.R. submitted that the AO has issued notice under section 271(1)(c) as well as section 271AAB of the Act without mentioning the particular limb/clause on which the penalty was proposed to be levied and thus the notices have been issued in a mechanical manner without application of mind. The Ld. A.R. stated that AO was not sure as to the section under which the penalty was proposed to be initiated and thus issued notices under section 271(1)(c) as well as

271AAB of the Act. The Ld. A.R. submitted that the non mentioning of particular clause is a fatal mistake on the part of the AO and therefore the penalty imposed on the basis of such defective notice would be invalid and has to be deleted. The Ld. AR in defense of his arguments relied on the following decisions:

- a) PCIT Vs Shri R Elangovan ( Tax Case appeal No. 770 & 771 of 2018 dated 30/03/2021)(Mad)
- b) Mohd. Farhan A Shaikh (125 Taxmann.com 253)(Bom)

The Ld. AR therefore prayed that the penalty proceedings and consequent order may kindly be quashed and declared to be invalid.

10. The Ld. D.R., on the other hand, relied heavily on the order of AO on the ground that the penalty has been imposed in terms of the provisions of section 271AAB of the Act in respect of bogus capital purchases to the tune of Rs.188,38,94,388/- on which depreciation of Rs.58,57,32,379/- was claimed from financial year 2008-09 to 2013-14, the detail whereof has been given hereinabove. The Ld. A.R. submitted that the issue being raked up by the Ld. A.R. of the assessee for the first time before the tribunal and thus has not been raised before the authorities below prior to that. Moreover, the assessee has participated and responded to the notices issued and therefore the assessee is precluded from claiming that no proper opportunity is given on account of these so called defective notices. The Ld. D.R., therefore, prayed that the additional ground raised by the assessee may kindly be dismissed.







OFFICE OF THE  
DEPUTY COMMISSIONER OF INCOME-TAX CENTRAL CIRCLE-7(4)  
Room No. 655, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai-20,  
Phone No.22086216/22038131 Extn.:2655

No. DCIT/CC/7(4)/271AAB/2016-17

19.08.2016

To,  
The Principal Officer  
M/s. Wellknown Polysters Pvt. Ltd.,  
14<sup>th</sup> floor, 241/242, Nariman Point,  
Backbay Reclamation, Mumbai.

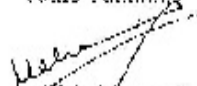
Sub: Penalty proceedings u/s 271AAB of the I.T. Act for  
A.Y 2012-13 to 2014-15.

The scrutiny for the assessment years under consideration was completed u/s 143(3) of the Act vide order dated 01.04.2015. While completing assessment u/s 143(3), penalty proceedings u/s 271AAB of the I.T. Act have been initiated in your case for A.Y 2012-13 to 2014-15. In this connection, you are hereby being given an opportunity to submit any explanation for not levying the penalty.

You are hereby requested to file the explanation, if any, on or before 29.08.2016 at 11.30 a.m. and show cause why penalty should not be levied in your case for A.Y 2012-13 to 2014-15 under section 271AAB of the Act, 1961. In absence of any reply, it shall be presumed that you have nothing to state in this regard & action will be taken accordingly.



Yours Faithfully

  
(Nakul Agrawal)  
Deputy, Commissioner of Income Tax,  
Central Cir-7(4), Mumbai.

12. A close look at the above notices reveals that the AO has failed to mention the clause on which the penalty under section 271AAB of the Act was proposed to be levied. Similarly, we find that the notice under section 271(1)(c) dated 01.04.2015 was issued that too in a standard format. We would like to mention here that how the AO can issue notice in respect of imposition of penalty under section 271AAB as well as section 271(1)(c) of the Act which are independent and mutually exclusive so much so that the AO was not even aware as to under which section this penalty was to be levied leave aside particular clause/limb under the relevant section. This shows a complete non application of mind on the part of the AO which in our opinion is incurable and goes to the root of the matter. The penalty imposed based on the said notices not possible to be sustained as the very foundation of levy of penalty is wrong. In our considered view the assessee is deprived of its legitimate and legal right of responding to the show cause notice on the particular clause under which the penalty was proposed to be levied which was apparently missing in the present case as the assessee was not aware under which clause/limb the penalty was proposed to be levied. Similarly, notice under section 271AAB of the Act dated 18.08.2016 also did not specify the particular clause under which the penalty was to be levied. Under these facts and circumstances we are of the considered view that the penalty has been imposed in violation of principle of natural justice and accordingly can not be sustained. The case of the assessee is squarely covered by the decision of PCIT vs. Shri R. Elan Govan TCA No.770 & 771/2018 dated 30.03.2021 in which the Hon'ble High Court has held that the

Tribunal was right in observing that penalty could not have been levied based on the defective notice. The operative part of the reason is as under:

“15. As rightly pointed out by the learned counsel appearing for the assessee, Section 271AAB of the Act, which deals with penalty consists of three contingencies. Therefore, the Assessing Officer should point out to the assessee as to under which of the three clauses, he chooses to proceed against the assessee so as to enable the assessee to give an effective reply. Since the same has not been mentioned, the assessee has been denied reasonable opportunity to put forth their submissions. The Tribunal, in paragraph 5 of the impugned order, has verbatim reproduced the penalty notice and we find that the notice is absolutely vague and none of the irrelevant portions had been struck off nor the relevant portions had been marked or indicated. Hence, the Tribunal is right in observing that the penalty could not have been levied based on such defective notice and more particularly, when the assessee has been strenuously canvassing the jurisdictional issue from the inception.

16. In so far as the decision of the Allahabad High Court in the case of Sandeep Chandak is concerned, the factual position is slightly different. This decision is for the principle that where the assessee, in the course of search, makes a statement, in which, he admits the undisclosed income and specifies the manner, in which, such income has been derived, then the provisions of Section 271AAB of the Act would automatically get attracted. There can be no quarrel over this proposition. But, once the provisions get attracted, it is incumbent on the part of the Assessing Officer to specify as to under which clause in Section 271AAB(1) of the Act, he intends to proceed against the assessee. In the instant case, in the absence of such material in the penalty notice, it has to be held that the notice is defective.

17. The decisions of the Karnataka High Court in the cases of Manjunatha Cotton and Ginning Factory and SSA's Emerald Meadows and the decision of this Court in the case of Babuji Jacob clearly support our above conclusion. For all the above reasons, we find no grounds to interfere with the common order passed by the Tribunal.

18. Accordingly, the above tax case appeals are dismissed confirming the common impugned order passed by the Tribunal. No costs. Consequently, the connected CMP is also dismissed.”

13. Similarly, the jurisdictional High Court in the case of Mohd. Farhan A. Sheikh vs. Dy. Commissioner of Income Tax, Central Circle-1, (2021) 25 taxmann.com 253 (Bom.) took a similar view by holding that issuance of notice without application of mind is a fatal error and consequently the penalty order can not survive based on the said defective notice.

14. In view of these facts and the ratio laid down by the Hon'ble High Court of Madras and jurisdictional High Court as discussed hereinabove, we hold that the penalty levied on the basis of defective and invalid notice is also invalid and nullity. Accordingly, we set aside the order of Ld. CIT(A) and direct the AO to delete the penalty. Since we have allowed the appeal of the assessee on the legal issue the grounds raised on merit by the assessee need no adjudication.

15. Accordingly, appeal of the assessee is allowed.

**ITA No.1388/M/2019 (Revenue's appeal)**

16. In the grounds of appeal the Revenue has challenged the deletion of penalty in respect of the depreciation disallowed from financial year 2008-09 to 2012-13 on the ground that the same relates to the earlier years and the penalty can not be imposed in the current year. Since we have held the penalty order itself as invalid and void, therefore the appeal of the Revenue becomes infructuous and is accordingly dismissed.

17. In the result, the appeal of the assessee is allowed and that of the Revenue is dismissed.

**Order pronounced in the open court on 26.10.2021.**

**Sd/-**  
**(Pavan Kumar Gadale)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(Rajesh Kumar)**  
**ACCOUNTANT MEMBER**

Mumbai, Dated: 26.10.2021.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent

The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.