

**IN THE INCOME TAX APPELLATE TRIBUNAL, NAGPUR BENCH,
NAGPUR**

BEFORE SHRI SANDEEP GOSAIN, JM & SHRI O.P. KANT, AM

ITA Nos. 125 & 126/NAG/2021
Assessment Years: 2014-15 & 2015-16

Chandra Suresh Kothari, 1164, Kothari Enclave, Bhaji Mandi, Nikalas Mandir Road, Sarafa Bazar, Itwari, Nagpur.	Vs.	D.C.I.T., Central Circle-2(2), 207, Aayakar Bhavan, Telangkhedi Road, Civil Lines, Nagpur-440001.
PAN No.: AGXPK 4011 C		
Appellant		Respondent

Assessee by: Shri Hitesh P Shah (CA)
Revenue by : Shri Pradeep Hedao (CIT-DR)

Date of Hearing: 27/10/2021
Date of Pronouncement: 20/12/2021

ORDER

PER: SANDEEP GOSAIN, J.M.

Both these appeals have been filed by the assessee against the common order of the Id. CIT(A)-3, Nagpur dated 20/07/2021 for the A.Y. 2014-15 and 2015-16 respectively.

2. Both these appeals have common issue, therefore, for the sake of convenience and brevity, a common order is being passed.

3. Firstly, we take ITA No. 125/Nag/2021 for the A.Y. 2014-15 for deciding the appeal. In this appeal, the assessee has basically aggrieved by

the order of the Id. CIT(A) in confirming the penalty of Rs. 7,20,000/- levied U/s 271(1)(c) of the Income Tax Act, 1961 (in short, the Act).

4. The brief facts of the case are that the assessee derived income from salary, business, house property and other sources. The assessee had filed his return of income on 31/07/2014 declaring total income of Rs.19,66,100/-. A search and seizure operation U/s 132 of the Act was carried out at the residential premises of the assessee on 10/09/2014. The A.O. completed the assessment vide order dated 29/12/2016 determining total income of the assessee at Rs. 43,66,100/-. Thereafter proceedings U/s 271(1)(c) of the Act was initiated and the A.O. levied penalty of Rs. 7,20,000/- U/s 271(1)(c) of the Act.

5. Being aggrieved by the order of the A.O., the assessee carried the matter before the Id. CIT(A), who after considering the submissions of both the parties and material placed on record, upheld the action of the A.O. in levying the penalty U/2 271(1)(c) of the Act.

6. Now the assessee is in appeal against the order of the Id. CIT(A) in upholding the penalty levied U/s 271(1)(c) of the Act.

7. The Id. AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the Id. CIT(A) and also relied on the written submissions filed before the Id. CIT(A). For the cost of repetition,

there is no need to reproduce the written submissions filed before the Id. CIT(A).

8. On the contrary, the Id. DR has vehemently supported the orders of the lower authorities.

9. We have considered the rival contentions and carefully perused the material placed on record. From perusal of the record, we noticed that the assessee is a director of M/s. Karan Kothari Jewellers Private Limited (in short, the KKJPL) and derives income consisted of remuneration from the company and income from other sources only. During the year under consideration, the KKJPL had opened office in Mumbai and he was entrusted with the work of purchases from Mumbai. Hence, he used to frequently travel to Mumbai for business purposes of the company and had developed business contacts. During the search action on 10/09/2014 at the premises of the company KKJPL, the diaries containing the personal transactions were seized and he was asked to explain the said transactions. When he enquired with his representative, he was advised to declare income out of such transactions in his personal returns. He was ready to declare 2 % as his income out of the said transactions as for him that was the running rate in the market for such type of transactions. However, he was advised to declare 8% as net income out of such transactions otherwise he was required to get

the said transactions audited, which would entail cost and was also time consuming as he would be required to get confirmation from all the said parties for audit purposes. He was also informed that the penalty provisions were not applicable in his case as he was declaring income on estimate basis. He was advised to declare 8% of total turnover plus some additional amount to take care of any deficiencies or discrepancies. Hence, he had declared Rs.21,20,000/- being 8% of turnover as also additional amounts of Rs.2,80,000/- for Asst. Year 2014-15. The said additional amount was declared voluntarily to buy peace and avoid litigation. He had also filed the returns for both the years and paid due taxes thereon. He had explained the said transactions alongwith modus oprendi to the A.O. through letter that was filed with the A.O. on 23/12/2016. Further, the A.O. had accepted the said declaration of income without any modification.

10. We further noticed that the AO has neither mentioned in the assessment order nor in his Penalty notice as to whether the penalty is initiated for concealment of income or for furnishing inaccurate particulars of income. He has also not mentioned in the order that the penalty is initiated under explanation 5 of section 271(1)(c) of the Act. We find that the only words used in the Assessment order are, "It is found that the assessee has shown additional income of Rs.24,00,000/- in the computation of income filed with the return, hence proceedings for penalty under section 271(1)(c)

of the Act are to be initiated". Further, the Final Show-cause notice issued on 29/12/2016 alongwith the Assessment order clearly mentions the words "Whereas in the course of proceedings before me for A.Y.2014-15, it appears that you have concealed the particulars of your income or furnished inaccurate particulars of such income", and the AO has not stricken off the not applicable words. In this regard, we draw strength from the decision, as relied by the Id. AR, in the case of **Manu Engineering Works (1980)122 ITR 306 (Guj)**, wherein it was held that "where there is no clear cut finding recorded by the AO on the point whether he intends to levy penalty for assessee's concealing the particulars of income or for his furnishing inaccurate particulars of such income, the order of penalty is liable to be struck down. It is for the assessing officer to clearly say as to under which provision he is going to impose penalty". The Coordinate Bench of the Mumbai ITAT has also taken a specific view in the case of **Spykar Lifestyles (P) Ltd. 2021 182 TR (A) 93 -Mum Trib -2020 TaxPub(DT) 4773** wherein the Coordinate Bench has also taken a view that where there is no clear cut finding of the AO on the point whether the A.O. intends to levy penalty for assessee's concealing the particulars of income or for his furnishing inaccurate particulars of such income, in view thereof, the order of penalty is liable to be struck down. We also draw strength from the decision in the case of **CIT and others Vs. Manjunatha Cotton & Ginning**

Factory & others (2013) 359 ITR 565, (KAR)-HC, wherein it was held that "while issuing the notice under section 274, the AO has to come to conclusion as to whether it is concealment of income or furnishing of inaccurate particulars of income and sending printed forms where all grounds as mentioned in section 271 were mentioned would not satisfy requirement of Law. The Hon'ble Apex Court in the case of **CIT & Anr. SSA's Emerald Meadows (2016) 73 Taxman.com 248** has also upheld the said finding in case of **Manjunatha Cotton & Ginning Factory & others** (supra).

11. In the present case before us, we find that the AO has sent one printed form, wherein the specific finding of the AO as to whether he is initiating penalty for concealment of income or for furnishing inaccurate particulars of income is not mentioned. Further, the AO has also not mentioned that he intends to levy penalty under explanation 5 of Section 271(1)(c) and hence the said penalty U/s. 271(1)(c) is not justified and is directed to be deleted. Therefore, we direct to delete the same.

12. In the result, this appeal of the assessee stands allowed.

13. Now we take ITA No. 126/Nag/2021 for the A.Y.2015-16. In this appeal, the assessee has basically aggrieved by the order of the Id. CIT(A) in confirming the penalty of Rs. 10,87,500/- levied U/s 271AAB of the Act.

14. Having considered the rival contentions and carefully perused the material placed on record. From perusal of the record, we found that the AO had mentioned in his show cause notice dated 29/12/2016 that *"it is seen that, on the basis of incriminating seized material, undisclosed income as per assessment order has been passed. Therefore you have committed default within the meaning of provisions of section 271AAB of the IT ACT. You are therefore liable to pay, by way of penalty, a sum computed at the rate of ten percent of the undisclosed income of that year."* However, the penalty was ultimately levied at 30% of the undisclosed income. This shows total non-application of mind on the part of the AO and hence the said penalty is required to be deleted as laid down in the case of **Rainbow Products P. Ltd. Vs. ACIT (ITA 61/PAT/2019)**, wherein the Coordinate Bench of Patna ITAT, has held that "From going through the above three notices issued to the assessee on 22.03.2016, 03.06.2016 and 16.09.2016, we find that there is no mention about various conditions provided u/s 271 AAB of the Act. The Ld. A.O has very casually used the proforma used for issuing notice before levying penalty u/s 271(1)(c) of the Act for the concealment of income or furnishing of inaccurate particulars of income. Except mentioning the Section 271AAB of the Act in the notice, it does not talk anything about the provision of section 271AAB. Certainly, such notice has a fatal error and technically is not a correct notice in the eyes of law because it intends to

penalize an assessee without spelling about the charge against the assessee." In the case of assessee before us also the notice issued U/s. 271AAB of the Act, that except for mentioning the levy of penalty U/s. 271AAB, it does not mention about the various conditions provided under the said section. Further, the AO has also casually mentioned in the notice that penalty is leviable at 10%. Our attention was also drawn to the judgment in the case of **Vivek Chug Vs. ACIT-2019 TaxPub (DT) 2665 (Ind-Trib)** wherein, the Coordinate Bench of the Indore Tribunal has held that "Where notice for initiating penalty under section 271AAB, was issued in a casual fashion and where assessing officer did not apply his mind and no specific charge was mentioned in such notice for which the assessee was required to be show caused, in absence of the requisite contents of specific charge, the initiation of proceedings under section 271AAB, could not be sustained being bad in Law." We also draw strength from the decision of Coordinate Bench of Kolkata Tribunal in the case **of Naresh Jalan HUF Vs, ACIT -2020 Tax Pub (DT) 4851 (Kol-Trib)**, wherein it is held that "Where AO in the show cause notice u/s.274 read with section 271AAB failed to specify default and charge against assessee which necessitated levy of penalty U/s. 271AAB, penalty levied on the basis of such defective notice was deleted."

15. So far as issue of levy of penalty u/s 271AAB of the Act whether is mandatory or not is concerned, the issue has been dealt with by the Co-

ordinate Chandigarh Bench of the Tribunal in the case of '**M/s SEL Textiles Ltd. Vs DCIT' ITA No. 695/Chd/2018 order dated 18.04.2019**. The Tribunal in the above case has relied upon the decisions of the Coordinate Benches of the Tribunal in the cases of ACIT Vs. Marvel Associates, **ITA No. 147/Vizag/2017 order dated 16.3.2018 (ITAT Visakhapatnam Bench); DCIT Vs. M/s Rashmi Metaliks Ltd., ITA No.1608/Kol/2017 dated 1.2.2019; (ITAT Kolkata Bench); DCIT Vs. Rashmi Cement Ltd, ITA No.1606/Kol/2017 order dated 28.2.2019 (ITAT Kolkata Bench)**. The co-ordinate Chandigarh bench of the Tribunal (supra) after analyzing the aforesaid decisions, wherein, reliance has also been placed on the decisions of the Hon'ble High Courts has held that levy of penalty u/s 271AAB of the Act is not mandatory. It has also been noted that the Legislature has consciously used the word 'may' in contradistinction to the word 'shall' in the opening words of Section 271AAB of the Act. That the choice of the expression 'may' and not 'shall' in the opening Section of 271AAB shows that the Legislature did not intend to make the levy of penalty statutory, automatic and binding on the Assessing Officer but the Assessing Officer has been given discretion in the matter of levy of penalty. Further that as per sub section (3) of section 271AAB of the Act, the provisions of section 274 and 275 of the Act have been made applicable in relation to the penalty referred to section 271AAB of the Act. It has been further observed

that Section 274 deals with the procedure for levy of penalty, wherein, it directs that no order imposing penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. Therefore, from plain reading of section 271AAB of the Act, it is evident that the penalty cannot be imposed unless the assessee is given a reasonable opportunity and assessee is being heard. Once the opportunity is given to the assessee, the penalty cannot be mandatory and it is on the basis of the facts and merits placed before the competent authority. It has also been held that the penalty u/s 271AAB will not be attracted if the surrendered income would not fall in the definition of 'undisclosed income' as defined under explanation to section 271AAB of the Act.

16. On a perusal of the provisions of section 271AAB, it is evident that the Section 271AAB is self-contained. There can be no doubt that there is no discretion with the AO as the parameters by which the AO or the tax authorities are bound in regard to the rate of penalty and the circumstances on the basis of which the penal provision can be attracted are self-explanatory. It can be noticed that the Co-ordinate Benches of the Tribunal have categorically held that the expression 'undisclosed income' is given a definite and specific meaning and the word has not been described in an inclusive manner so as to enable the tax authorities to give wider or elastic meaning which enables them to bring within its ambit the species of income

not specifically covered by the definition. Moreover, such penal provisions are required to be interpreted in a strict, specific and restricted manner and not in an inclusive manner. If the surrendered income does not fall in the definition of "undisclosed income" as defined u/s 271AAB of the Act, the penalty is not warranted. It can be further noted that the penalty under section 271AAB can be initiated in respect of undisclosed income as defined in the section 271AAB itself found during the search action, independent of the assessment proceedings. Though, the fact in a case that the assessee has been able to explain the source of the alleged 'undisclosed income' may be relevant for final imposition of the penalty, however, for initiation of the penalty proceedings, the provisions of section 271AAB are self contained and are not dependent upon commencement or finalization of the assessment proceedings. It is further pertinent to note here it is not mandatory for the AO to invoke provisions of section 271AAB of the Act in each every case of levy of penalty pursuant to search action. Assessee has neither made any surrender of any undisclosed income during the search action nor the penalty has been initiated on the basis of undisclosed income found during such search action. In view of the above factual position, the impugned order of the AO imposing the penalty on the assessee under section 271AAB of the Act does not pass the mandate of the provisions of section 271AAB of the

Act, therefore, the same being bad in law is hereby quashed and we direct to delete the penalty levied U/s. 271AAB of Rs. 10,87,500/-.

17. Finally, in the result, both these appeals of the assessee are allowed.

Order pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963 by placing the details on the notice board.

Sd/-
(O.P. KANT)
Accountant Member

Sd/-
(SANDEEP GOSAIN)
Judicial Member

Nagpur

Dated:- 20/12/2021

*Ranjan

Copy of the order forwarded to:

1. The Appellant- Shri Chandra Suresh Kothari, Nagpur.
2. The Respondent- The D.C.I.T., Central Circle-2(2), Nagpur.
3. CIT
4. The CIT(A)
5. DR, ITAT, Nagpur
6. Guard File (ITA No. 125 & 126/Nag/2021)

By order,

Asst. Registrar