

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH  
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER  
&**

**SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

ITA No.469/Mum/2023

**(Assessment Year :2013-14)**

Shri Prafulla Shashikant Vaidya, A/301, Deep Jyoti CHS Veer Savarkar Marg Ghantali, Thane-West Maharashtra - 400 602	Vs.	Deputy Commissioner of Income Tax Central Circle-1 Thane
<b>PAN/GIR No.AAHPV9842Q</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Rakesh Joshi
Revenue by	Shri Krishna Kumar
<b>Date of Hearing</b>	<b>01/06/2023</b>
<b>Date of Pronouncement</b>	<b>30/08/2023</b>

**आदेश / O R D E R**

**PER AMIT SHUKLA (J.M):**

The aforesaid appeal has been filed by the assessee against order dated 19/12/2022, passed by NFAC in relation to the penalty proceedings u/s. 271 AAB (1) for the A.Y.2013-14, confirming the penalty of Rs. 6,09,244/-.

2. Brief facts of the case are that there was search action on the 'Valuable Group' and consequential search was carried out at the premises of assessee. During the course of search, jewellery of Rs. 2,14,53,102/- was found and Rs. 1,55,54,889/- and cash of Rs. 29.08 lakhs was found, out of which Rs. 27 Lakh was

seized. During the course of search statement of the Director of Valuable group, Mr. Narendra Hete was recorded wherein he on behalf of the entire group offered a sum of Rs. 148.75 crore in the hands of different entities and he enclosed list of various entities, wherein he has declared a sum of Rs. 66,48,000/- for the assessee which was later confirmed by the assessee. Assessee thereafter had filed his return of income wherein he has not disclosed the above declared income.

3. During the course of assessment, the assessee submitted bills for jewellery and also explained cash belongs to M/s Meghabites, a proprietary concern of his wife and in support of the same he submitted sales tax return of the said firm where cash sales duly reflected. However, assessing officer has not accepted the explanation and added the amount of Rs. 66,48,000/- as declared in the statement by Shri Narendra Hete. In the first assessment proceeding, assessee reiterated the same fact and reconciled the entire jewellery and cash found during the course of search. Ld CIT(A) appreciated the submission of the assessee and accepted jewellery to the extent of bills produced, but explanation in the nature of jewellery related to other family members and received by them on different family rituals was not accepted and confirmed to the tune of Rs. 14,88,464/-. Similarly, for the cash balance also Ld CIT(A) deleted to the extent of balance appearing in the books of the said proprietary concern and confirmed balance amount of Rs. 5,42,350/- which

was explained as related to other family members as per their books.

4. Later Assessing officer issued notice for penalty U/s 274 for levying penalty U/s 271AAB (1). Ld counsel for the assessee Mr. Rakesh Joshi pointed out that, in the first notice issued at the time of assessment proceedings on 28/03/2016, do not have any reference of any undisclosed income, but in the subsequent notice dated 09/03/2021 issued after the order of Ld. CIT(A), the AO has mentioned that a search was conducted in your case and you were found to have undisclosed income on which penalty leviable U/s 271AAB(1). However, there was no reference that under which clause out of clause (a), (b) & (c) of section 271AAB(1), penalty is leviable. He submitted that section 271AAB(1) prescribes three situations under which the quantum of penalty is to be determined. Hence before issue of notice AO has to decide, under which clause he intends to levy penalty. Since there was no such reference in the second notice also hence there is no effective communication to the assessee and accordingly there is no compliance to section 274 and penalty levied needs to be dropped. In this regard, he relied upon the decision of Hon'ble Madras High Court in case of PCIT vs. Shri R Elangovan (Appeal No. 770/771 of 2018) dated 30.03.2021, wherein the Hon'ble High Court held as under:-

*“14. In our considered view, the Tribunal is fully right in vacating the penalty on the ground that the notice was defective. The provisions of the Act have clearly laid down the procedure to*

*be followed and adhered to while imposing the penalty. The proposal for such penalty proceedings was separately initiated upon completion of assessment and there may be cases where the assessee would not even contest the order of assessment. But, that would not preclude the assessee from challenging the penalty proceedings, as penalty proceedings are independent and the procedure required to be followed cannot be dispensed with.*

*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.”*

5. Further on merits of the case, Mr. Joshi submitted that the assessee has submitted all the documents to explain source of jewellery found during the course of search and produced bills for the same before AO as well as CIT(A). Part of the jewellery to the extent of Rs. 14,88,464/- was explained as belongs to other family members who have received as gift on various family

rituals and functions alongwith supporting documents. Merely because Ld CIT(A) has not accepted the same and confirmed addition to that extent the same cannot be treated as undisclosed income for the purpose of section 271AAB(1) of the Act. Similarly, for the cash found also, assessee has explained the same belongs to the proprietary concern of the wife where the sales is duly recorded in the books of the said entity and assessee also submitted sales tax returns which were filed before the date of search and the said cash duly recorded in the said returns.

6. Ld DR submitted that the disclosure of undisclosed income is in reference to the assets seized which were found during the course of search. Once the assessee has surrendered the undisclosed income based on the assets found and seized during the search, then the said income was rightly treated by the AO as undisclosed income in terms of provisions of section 271AAB of the Act. He further stated that the penalty U/s 274AAB(1) is automatic and once any addition made in the specified year it will attract penalty U/s 271AAB(1) at the rate depending upon the category of the case. He has relied upon the penalty order passed under section 271AAB of the IT Act.

7. We have considered the rival submissions as well as the relevant material placed on record. The AO has levied the penalty under section 271AAB of the Act in respect of the income surrendered by the assessee. The question arises whether the

surrender made by the assessee in the statement recorded under section 132(4) will be regarded as undisclosed income without testing the same with the definition as provided under *clause (c)* of *Explanation* to section 271AAB of the Act. There is no dispute that in the statement recorded under section 132(4), the assessee has disclosed the income by confirming statement of the director of valuable group. However, for the purpose of levying the penalty under section 271AAB, the primary condition is that the assessee shall pay the penalty equivalent to 10 percent, 20 percent or 30 percent of undisclosed income of specified previous year depending upon the 'satisfaction' of the condition as provided under section 271AAB. The term "*undisclosed income*" has been defined in *clause (c)* of the *Explanation* to section 271AAB and, therefore, the penalty under the said provision has to be levied only when the income surrendered by the assessee falls in the ambit of 'undisclosed income' as defined under this section. Section 271AAB defines the undisclosed income as under:

*"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 Chief 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. As far as the issue involved in this case is concerned, it falls under *clause (i)* above which envisages that the income in the form of jewellery or cash which has not been recorded in the books of accounts or other documents maintained in the normal course relating to such previous year. Now in the case of assessee entire jewellery and cash was duly recorded in the documents maintained in the normal course and was also explained to the lower authorities. But the same has only been accepted partially. In the penalty order none of the authorities have given any finding that, how the income confirmed in the quantum proceedings falls in the category of 'undisclosed income'. The documents submitted in the form of sales tax return etc. are independently verifiable evidence without having any control or influence of the assessee except the books of account of the assessee which were not disputed by the AO. Further, the revenue has not disputed the correctness of the documentary evidence filed by the assessee, albeit the AO has proceeded on the assumption that the income disclosed by the assessee under section 132(4) is undisclosed income for the purpose of section 271AAB of the Act. Once the assessee has

explained the fact that all the assets found during the course of search have been duly recorded in the documents in the normal course relating to such previous year, then the mere disclosure and surrender of income would not *ipso facto* lead to the conclusion that the amount surrendered by the assessee is 'undisclosed income' in terms of section 271AAB of the Act.

9. In this case one more anomaly is noted, as during the search jewellery of Rs. 1.55 crore and cash of Rs. 27 lakhs were seized but disclosure was taken only for Rs. 66.48 lakhs, which also indicates that the said disclosure don't have any live connection with each other. Therefore, the statement of the assessee recorded under section 132(4) *de hors* any corroborative material or document found would not constitute incriminating material, when assessee later explained the source from the books. Therefore, the said income disclosed by the assessee cannot be considered as undisclosed income in terms of section 271AAB of the Act. The penalty under section 271AAB cannot be treated as automatic but the AO has to take a decision as per the provisions of section 271AAB and particularly in the light of the definition of the undisclosed income as prescribed in the *Explanation* to section 271AAB of the Act.

10. We further note that this Tribunal has considered this issue in case of *Raja Ram Maheshwari v. Dy. CIT* in [IT Appeal No. 992(JP) of 2017, dated 10-1-2019] in paras 12 to 14 as under  
:—

*“12. Now, coming to another contention of the ld AR where he has challenged the findings of the ld. CIT(A) that penalty u/s 271AAB is mandatory in nature and there is no discretion with the Income tax authorities. It was submitted by the ld AR that in section 271AAB, the word 'may' is used instead of 'shall' so it is not mandatory but same is discretionary. It was submitted that it is settled position of law that penalties are not compulsory, not mandatory but are also discretionary considering the overall facts and circumstances of the case. In support, reliance was placed on provisions of section 158BFA(2) wherein similar phraseology has been used by the legislature and decision of Hon'ble A.P High Court in case of Radha Krishna Vihar (ITA No. 740/2011).”*

11. From a plain reading the provisions of Section 271AAB, it can be seen that, it begins with the stipulation that the Assessing officer may direct the assessee and the assessee shall pay the penalty as per clause (a) to (c) so satisfied in sub-section (1) to Section 271AAB. Further, as per sub-section (3) of Section 271AAB, the provisions of section 274 and section 275 as far as maybe applied in relation to penalty under this section which means that before levying the penalty, the Assessing officer has to issue a show cause granting an opportunity to the assessee. Thus, the levy of penalty is not automatic but the Assessing officer has to decide based on facts and circumstances of the case. Similar view has been taken by the various Co-ordinate Benches and useful reference can be drawn to the decision of the Co-ordinate Bench in case of *ACIT v. Marvel Associates* [92 Taxmann.com 109](#) wherein it was held as under:

*"5. We have heard both the parties, perused the materials available on record and gone through the orders of the*

authorities below. During the appeal hearing, the ld. A.R. vehemently argued that the A.O. has levied the penalty under the impression that the levy of penalty in the case of admission of income u/s 132(4) is mandatory. The ld. A.R. further stated that penalty u/s 271AAB of the Act is not mandatory but discretionary. The provisions of section 271AAB of the Act is *pari materia* with that of section 158BFA of the Act relating to block assessment and accordingly argued that the levy of penalty under section 271AAB is not mandatory but discretionary. When there is reasonable cause, the penalty is not exigible. The ld. A.R. has taken us to the section 271AAB of the Act and also section 158BFA (2) of the Act and argued that the words used in section 271AAB of the Act and the words used in section 158BFA(2) of the Act are identical. Hence, argued that the penalty section 271AAB of the Act penalty is not automatic and it is on the merits of each case. For ready reference, we reproduce hereunder section 158BFA (2) of the Act and section 271AAB of the Act which reads as under:

271AAB [Penalty where search has been initiated]: (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 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).*

*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). Section 158BFA(2):*

*The Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Chapter, may direct that a person shall pay by way of penalty a sum which shall not be less than the amount of tax leviable but which shall not exceed three times the amount of tax so leviable in respect of the undisclosed income determined by the Assessing Officer under clause (c) of section 158BC:*

*Provided that no order imposing penalty shall be made in respect of a person if—*

- (i) *such person has furnished a return under clause (a) of section 158BC;*

- (ii) *the tax payable on the basis of such return has been paid or, if the assets seized consist of money, the assessee offers the money so seized to be adjusted against the tax payable.*
- (iii) *Evidence of tax paid is furnished along with the return; and*
- (iv) *An appeal is not filed against the assessment of that part of income which is shown in the return:*

**Provided further** that the provisions of the preceding proviso shall not apply where the undisclosed income determined by the Assessing Officer is in excess of the income shown in the return and in such cases the penalty shall be imposed on that portion of undisclosed income determined which is in excess of the amount of undisclosed income shown in the return.

Careful reading of section 271AAB of the Act, the words used are, '**AO may direct**' and '**the assessee shall pay by way of penalty**'. Similar words are used under section 158BFA(2) of the Act. The word may direct indicates the discretion to the AO. Further, sub-section (3) of section 271AAB of the Act, fortifies this view.

**Sub-section (3)** of section 271AAB:

**The provisions of sections 274 and 275 shall, as far as maybe, apply in relation to the penalty referred to in this section.**

The legislature has included the provisions of section 274 and section 275 of the Act in 271AAB of the Act with clear intention to consider the imposition of penalty judicially. 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 A.O. Once the A.O. is bound by the Act to hear the assessee and to give reasonable opportunity to explain his case, there is no mandatory requirement of imposing penalty, because the opportunity of being heard and reasonable opportunity is not a mere formality but it is to adhere to the principles of natural justice. Hon'ble A.P. High Court in the case of Radha Krishna Vihar in ITA No.740/2011 while dealing with the penalty u/s 158BFA held that 'we are of the opinion that while the words shall be liable under sub-section (1) of section 158BFA of the Act that are entitled to be mandatory, the words may direct in sub-section 2 thereof intended to directory'. In other words, while payment of interest is mandatory levy of penalty is discretionary. It is trite position of law that discretion is vested and authority has to be exercised in a reasonable and rational manner depending upon the facts and circumstances of each case. Plain reading of section 271AAB and 274 of the Act indicates that the imposition of penalty u/s 271AAB of the Act is not mandatory but directory. Accordingly, we hold that the penalty u/s 271AAB is not mandatory but to be imposed on merits of each case."*

12. Thus, we agree with the contentions of the Id Counsel for the assessee that the levy of penalty under section 271AAB is not mandatory or automatic, same needs to be examined, whether there is any basis for levy of penalty or non-levy thereof and the same will depend upon the facts and circumstances of the case.

13. Hence in view of the facts and circumstances as discussed in detail in foregoing paras as well as following the decision of this Tribunal cited supra, we hold that the addition confirmed

does not fall in the ambit of definition of undisclosed income as contemplated in *Explanation* to section 271AAB of the Act. Accordingly, the penalty of Rs. 6,09,244/- levied by the AO and sustained by the Id. CIT (A) is deleted.

**14. In the result, appeal of the assessee is allowed.**

Order pronounced on 30<sup>th</sup> August, 2023.

**Sd/-**  
**(AMARJIT SINGH)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(AMIT SHUKLA)**  
**JUDICIAL MEMBER**

Mumbai; Dated 30/08/2023

KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**

		Date	Initial	
1.	Draft dictated on			Sr.PS
2.	Draft placed before author			Sr.PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/P S
6.	Kept for pronouncement on			Sr.PS
7.	File sent to the Bench Clerk			Sr.PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			
11.	Dictation Pad is enclosed	Yes		