

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH : NAGPUR

[THROUGH VIRTUAL HEARING AT
INCOME TAX APPELLATE TRIBUNAL : PUNE BENCHES : PUNE]

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
DR. DIPAK RIPOTE, ACCOUNTANT MEMBER

I.T.A.No.69/NAG./2021
Assessment Year – 2016-2017

Shri Jagdish S. Agrawal, 23, Behind Sudhanshu Hall, Abhang Survie Layout, Bhagyashree Housing Society, Ayodhya Nagar, Nagpur - 440 024 Maharashtra. PAN AEWPA3791G	vs.	The ACIT, Central Circle – 1(2), 2 nd Floor, Aayakar Bhavan, Civil Lines, Nagpur – 440 001 Maharashtra.
(Appellant)		(Respondent)

I.T.A.No.71/NAG./2021
Assessment Year – 2016-2017

Smt. Preeti Jagdish Agrawal, 23, Behind Sudhanshu Hall, Abhang Survie Layout, Bhagyashree Housing Society, Ayodhya Nagar, Nagpur - 440 024 Maharashtra. PAN AFVPA1153J	vs.	The ACIT, Central Circle – 1(2), 2 nd Floor, Aayakar Bhavan, Civil Lines, Nagpur – 440 001 Maharashtra.
(Appellant)		(Respondent)

For Assesseees :	-None-
For Revenue :	Smt. Rashmi Mathur, Sr. DR

Date of Hearing :	25.10.2023
Date of Pronouncement :	31.10.2023

ORDER

PER SATBEER SINGH GODARA, J.M. :

These twin assesseees' as many appeals, for assessment year 2016-17, arise against the CIT(A)-3, Nagpur's separate orders in case No.CIT(A)-3/10063/2018-19 and No.CIT(A)-3/10068/2018-

19, both dated 12.11.2020, involving proceedings u/s.271AAB of the Income Tax Act, 1961 (in short “the Act”); respectively.

Cases called twice. None appears at assesseees’ behest. The very position has been continuing since all earlier hearings as well. We thus proceed ex-parte against both these assesseees.

2. It emerges at the outset that these twin assesseees’ as many appeals suffer from 223 days delay each since preferred against the CIT(A)'s order dated 12.11.2020 and instituted on 23.08.2021. The same admittedly fall within Covid-2019 pandemic outbreak period between 15.03.2020 to 28.02.2022 as per hon’ble apex court’s directions in Cognizance for Extension of Limitation, In re 438 ITR 296 (SC) read with judgment in Cognizance for Extension of Limitation, In re 432 ITR 206 (SC) dated 08-03-2021 and 421 ITR 314, excluding the covid-19 pandemic outbreak period from for all intents and purposes under the limitation law. We thus condone the impugned delay of 223 days in both these appeals in very terms.

3. We now advert to both these assesseees’ identical sole substantive grievance that the learned lower authorities have erred in law and on facts in levying the impugned sec.271AAB penalties of Rs.2,05,000/- each i.e., @ 10% of the undisclosed income of Rs.20,50,000/- in their cases, respectively. The department taken us to the CIT(A)'s detailed discussion affirming Assessing Officer’s action in this respect as under :

(18)

Shri Jagdish S. Agarwal A.Y. 2016-17,
Appeal No. CIT(A)-3/10063/2018-19

5. Discussion and decision

5.1 The undersigned has carefully gone through the penalty order, written submission of the appellant which was received in official mail-id of this office. Ground No. 1,2 & 3 relates to levy of the penalty by the AO. Brief facts of the case as gathered from the records are as follows.

The return of income was filed by the appellate u/s 139 of the Income tax act,1961, on 02.09.2017 for A.Y 2016-17 declaring the income of Rs. 20,14,728. The appellant derive its income from various tuition classes from certain educational institutions. Search & seizure action u/s 132 of the act was conducted on 05/08/2015. During the course of search, books of accounts and incriminating documents were found and seized. It was observed during the course of search that the appellant and his wife Ms. Preeti Agrawal has suppressed the tuition receipt grossly amounting to Rs. Rs. 41,00,000/- for this relevant A.Y. 2016-17. Confronted with the hard evidence found regarding suppression of receipt, appellant, in sworn statement u/s 132(4) of the Act declared the same as belonging to his wife @ 50% and to himself @ 50%. Consequently, appellant disclosed Rs. 20,50,000/- u/s 132(4) of the act, as suppressed receipt from tuition classes for A.Y 2016-17. Subsequently AO completed the assessment u/s 143(3) r.w.s. 153A of the act on 29.12.2017. AO recorded the satisfaction during assessment and initiated penalty proceeding u/s 271AAB of the income tax act. AO also issued penalty notice u/s 271AAB of the income tax act on 29.12.2017 and another notice on 14.06.2018. AO has imposed the penalty u/s 271 AAB at Rs. 2,05,000/-on undisclosed income of appellant.

5.2 The contention of the appellant that, the penalty notice issued by the AO u/s 271AAB is illegal, invalid, and defective is not acceptable because of the following reason.

(i) It is an undisputed fact for this relevant A.Y. 2015-16 that, appellant has disclosed Rs. 20,50,000/- as suppressed tuition class receipt during search action. The relevant observation of the AO in her assessment order dated 29.12.2017 in para 04 is reproduced is as under:

Page 9 of 18

CIT(A)3, Nagpur

(19)

Shri Jagdish S. Agarwal A.Y. 2016-17,
Appeal No. CIT(A)-3/10063/2018-19

"During the course of assessment proceedings, the assessee was asked to explain the above said suppression of receipts. It was submitted that the amount of Rs. 41,00,000/- has been disclosed during the search and the same has been offered to tax, Rs. 21,50,000/- i.e. 50% of Rs. 41,00,000/- in the hands of the assessee and the balance Rs. 20,50,000/- has been offered in the hands of his wife, Smt Preeti Agrawal. On perusal of return of income, it is seen that the assessee has offered the amount of Rs. 20,50,000/- out of total disclosure at Rs. 41,00,000/- and paid tax on the same. Since the amount of Rs. 20,20,000/- has been offered as additional income, no separate addition is made in this regard. The assessee has disclosed this amount as undisclosed income only on account of the search u/s 132 and the documents found and seized during the search. Therefore, penalty proceeding u/s 271BBA is separately initiated."

From the above observation of the AO it is evident that, AO has precisely noted the satisfaction for initiation of penalty proceeding u/s 271AAB of the act and issued penalty notice accordingly on 29.12.2017 and 14.06.2018.

(ii). It is a settled law that, provision of section 271AAB are the specific provisions which are automatically attracted if any discloser is made u/s 132(4) of the act during the course of search action in relation to the specified assessment year. For the sake of convenience, provision of section 271AAB of the act and the definition of specified A.Y. and undisclosed income is reproduced is as under.

"Section 271AAB Penalty where search has been initiated.

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 2 [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—



CIT(A)-3, Nagpur

20

Shri Jagdish S. Agarwal A.Y. 2016-17,
Appeal No. CIT(A)-3/10063/2018-19

(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 [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)

(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—



CIT(A)-3, Nagpur

(21)

Shri Jagdish S. Agarwal A.Y. 2016-17,
Appeal No. CIT(A)-3/10063/2018-19

(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 3 [Principal Chief Commissioner or Chief Commissioner] or 4 [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.]

From the plane reading of the provision of u/s 271AAB of the act it is crystal clear that, case of the appellant is squarely covered by provision of section 271AAB (a) as appellant has satisfied all the condition for levy of minimum penalty @ 10% of undisclosed income.

(iii). The contention of the appellant that, the notice is defective as it does not specifically mention the subclause of provision of 271AAB of the act, would also not help the case of the appellant in view of the specific provision of 292BB of the act which is extracted and reproduced here in under

[292BB. Notice deemed to be valid in certain circumstances.—

Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was— (a) Not served upon him; or

(b) Not served upon him in time; or

(c) Served upon him in an improper manner:

Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment.]

In the present case specific notice u/s 271AAB was served on 29.12.2017, which was complied by the appellant without any objection being raised for specific limb of the penalty notice. Penalty notice dated 29.12.2017 is scanned and reproduced is below,

CIT(A)-3 Nagpur

Shri Jagdish S. Agarwal A.Y. 2016-17,
Appeal No. CIT(A)-3/10063/2018-19

1111111 ITNS-29



Office of The
ASST. COMMISSIONER OF INCOME-TAX,
CENTRAL CIRCLE-1(2), NAGPUR
Room No. 208, 2ND Floor, Aayakar Bhawan, Telangkhedi Road,
Civil Lines, Nagpur-440 001

No. ACIT, CC-1(2)/Pen/271AAB/2017-18

Dated : 29.12.2017

PAN. NO. AEWPA3791G

DCR.NO. 22/A 2/17-18

To

SHRI JAGDISH S. AGRAWAL
Backside of Sanjuba School, Rajeraghuj Nagar,
Near NIT Garden, Chakradhar Nagar, Nagpur.

Sir/Madam,

Sub : Show-cause notice u/s 271AAB r.w.s.274
of the Income-tax Act, 1961 - Reg.

Whereas in the course of assessment proceedings before me for the AY : 2016-17, it is seen that, on the basis of incriminating seized material, undisclosed income as per assessment order has been assessed. Therefore you have committed default within the meaning of provision of section 271AAB of the I.T Act. You are therefore, liable to pay, by way of penalty, a sum computed at the prescribed rates as applicable to the undisclosed income of the year.

You are requested to appear before me at 11.15 a.m. on 23.01.2018, and show-cause why an order imposing a penalty on you, as above should not be made under 271AAB of the Income-tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through an authorized representative, you may show-cause in writing on or before the said date, which will be considered before any such order is made under section 271AAB of the Act.

Yours faithfully,

[Ms. J. M. Thakur]

Asstt. Commissioner of Income tax,
Central Circle 1(2), Nagpur



Page 13 of 18

CIT(A)-B, Nagpur

(10)

Shri Jagdish S. Agarwal A.Y. 2016-17,
Appeal No. CIT(A)-3/10063/2018-19

Appellant has duly received the notice and replied to AO without raising any objection regarding the content of the notice. Hence, as per specific provision of 292BB of the act appellant is now precluded from raising any objection regarding defect in notice u/s 271AAB of the act. In this regard Hon'ble Supreme court in the case of CIT v/s Laxmandas Khandelwal (2019)108/Taxmann.com183(SC) has held as under:

" If the assessee had participated in the proceeding, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself."

It may be mentioned here that notice u/s. 271AAB r.w.s. 274 of the IT Act was issued to the appellant by the Assessing Officer on 29.12.2017 and 14.06.2018 after recording the satisfaction for suppressing tuition receipt. Notice was duly complied by the appellant. This sufficiently prove that appellant has not objected to the notice u/s 271AAB of the Act during penalty proceedings. Hence no prejudice is caused to the appellant. Therefore plea of the appellant that principal of natural justice is not followed in view of cited judgement of Karnataka High Court in Manjunath Cotton and other judgment of Apex Court & ITATs are not applicable to present facts of the case. Further, in the judgement of the Hon'ble Madras High Court delivered on 23.04.2018 in the case of **M/s. Sundaram Finance Ltd Vs ACIT (2018-TTOL-813-HC-MAD-IT)**, it was held after discussing the judgement of Manjunath Cotton and Ginning Factory, that, there is no violation of principles of natural justice if one limb of the reasons is not specified by Assessing Officer in the penalty notice.

Further, in the land mark judgement of the **Hon'ble Supreme Court in the case CST V Subhash and Company (2003) 130STC 97, 106 (SC)**,

Page 14 of 18

(24)

Shri Jagdish S. Agarwal A.Y. 2016-17,
Appeal No. CIT(A)-3/10063/2018-19

their Lordship has observed the emerging principle in relation to issue of notice, which is as under:

"Non-issue of notice or mistake in the issue of notice or defective service of notice does not affect the jurisdiction of the Assessing Officer, if otherwise reasonable opportunity of being heard has been given. (2) Issue of notice as prescribed in the statute constitutes a part of reasonable opportunity of being heard. (3) If prejudice has been caused by non-issue or invalid service of notice the proceeding would be vitiated. But irregular service of notice would not render the proceedings invalid; more so, if assessee by his conduct has rendered service impracticable or impossible. (4) In a given case when the principles of natural justice are stated to have been violated it is open to the appellate authority in appropriate cases to set aside the order and require the Assessing Officer to decide the case"

In the present facts of the case no prejudice is caused to the appellant by the clerical mistakes committed by the Assessing Officer in the penalty notice u/s. 271AAB of the Act. Further, **jurisdictional Mumbai High Court in the case of Ventura Textile Ltd. Vs CIT/(ITA No. 9580F2017) in its recent judgement on 12th June 2020 has held that mere non-striking of one limb in penalty notice would not invalidate the penalty notice/proceedings.** The decision of the Madras High Court in Sundaram Finance and Jurisdictional Bombay High Court in the case of Ventura Capital was delivered after considering the case laws relied by the appellant in the case of Munjnatha Cotton and SSA Emeralt and others. Hence considering the factual matrix of the case and judicial pronouncement cited here in above, it is concluded that the notice issued by AO u/s 271AAB is valid and legally sustainable. Therefore, this legal ground of appeal of the appellant is hereby **dismissed**.

5.3 Further, it is a trite law that disclosure of additional income consequent to the filing of return cannot be treated as voluntary on the part of the appellant. Had there been no incriminating seized material, appellant would not have surrendered additional income. Appreciation of totality of factual Matrix of the case, would reveal that, additional income admitted by the appellant, is as a result of incriminating evidences found, during search action by the revenue authorities and cannot be treated as voluntary disclosure on the part of the appellant. Hence, penalty u/s 271AAB of the

Page 15 of 18

CIT(A)-3, Nagpur

Shri Jagdish S. Agarwal A.Y. 2016-17,
Appeal No. CIT(A)-3/10063/2018-19

Act is clearly attracted for suppressing the tuition receipts. **Jurisdictional Bombay High Court in the case of Rahul Shantaram Sawle Vs CIT ITA No. 1469 (2019-TIOL-614-HC-MUM-IT) has held that declaration of additional income in return filed after the date of search, would deemed to be a case of concealing particulars or furnishing inaccurate particulars of income warranting levy of penalty.** It may kindly be noted the provision of section 271AAB and section 271(1)(c) are para materia the only difference being 271AAB is attracted for specified assessment year and for other A.Y. 271(1)(c) are attracted.

5.4 Another contention of the appellant that **absence of "mens rea"** does not entitled jurisdiction to AO for levying penalty u/s 271AAB of the Act, is not acceptable. By this time it is a trite law that **"willful concealment"** is not an essential ingredient for attracting penalty provision as is the case in the matter of prosecution. **H'ble Apex Court in the case of Dharmendra Textile Processor Vs CIT(219 CTR 617 (SC)) has held as below.**

"The Explanations appended to section 271(1)(c) entirely indicate the element of strict liability on the assessee for concealment or for giving inaccurate particulars of income while filing return. The penalty under that provision is a civil liability. Willful Concealment is not an essential ingredient for attracting civil liability, as is the case in the matter of prosecution. It is a well settled principle of the law, that the Court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of the legislative intent."

5.5 Another contention of the appellant that discloser of additional income was made for **purchasing peace of mind and to avoid penal consequences** is very fanciful and fantastic but unacceptable due to settled legal position.

The Supreme Court in the case of MAK Data P. Ltd. (358 ITR 593) has held that

"AO should not be carried away by the plea of the assessee like voluntary disclosure, buy peace, avoid litigation, amicable settlement to explain away its conduct and the assessee had to

(20)

Shri Jagdish S. Agarwal A.Y. 2016-17,
Appeal No. CIT(A)-3/10052/2018-19

offer a proper explanation for the concealment of income or furnishing inaccurate particulars of income."

The Hon'ble jurisdictional High Court in the case of Indus Engineering Company Vs. ACIT(2010) [323 ITR 302 (BOM)] has ruled that additional income disclosed during search and seizure action attracts penalty proceedings. Also the jurisdictional High Court in the case of Jyoti Laxman Konkar Vs. CIT (2007) [292 ITR 163 (BOM)] has held that the additional income offered after detection of discrepancies in action u/s. 132, attracts concealment penalty. The Kerala High Court in the case of D.K.B. & Co. (243 ITR 618) held that there cannot be estoppels against a statute and that there is no principle of universal application that whenever an assessment has been completed by accepting the offer of an assessee, no penalty can be imposed.

5.6 Further, it is settled preposition of law that, if appellant during the course of search if appellant makes an statement u/s 132(4) of the act for specified A.Y. and paid the taxes and interest thereon before furnishing the return then provision of section 271AAB is automatically attracted. It may be mention here that, the **H'ble Supreme Court in the case of Sandeep Chandak vs PCIT (2018255Taxmaan367** has confirmed observation and the findings of **H'ble Allahabad High Court** where in, it was held that provision of section 271AAB is fully applicable as a search is initiated u/s 132 and during the course of search statement of the assessee was recorded u/s 132(4) of the act in which assessee admitted undisclosed income and specified the manner in which such income is driven and AO would get benefit of section 292BB. Undersigned has carefully perused the order of the Supreme court in the case of Sandeep Chandak(Supra) and find that present appeal is squarely covered by the findings given in that case. Therefore, undersign is of the view that, AO has correctly levied the penalty u/s 271AAB of the act which is hereby confirmed. All the case laws quoted by the appellant in his written submission was carefully examined by the undersigned, and it was noted that they exist on their own footings and are distinguishable on the present

Page 17 of 18

CIT(A)-3 Nagpur

facts of the case. On the other hand judicial pronouncement quoted by the undersigned especially in the case Sandeep Chandak(Supra) squarely covers the present facts of the case.

5.7 Therefore, in view of the detailed discussion and judicial pronouncement cited here-in-above, undersigned finds no reason to interfere with the levy of penalty by the Assessing Officer. The same is therefore, confirmed and grounds of appeal No. 1 to 3 of the appellant are hereby **dismissed.**

4. Suffice to say, it has come on record that this is indeed an instance of both these assessee's having derived their undisclosed income in above terms u/sec.271AAB Explanation-(c) (i)(A) of the Act representing their tuition fee in various educational institutions. And also that the department had come across the corresponding seized material during the course of search herein dated 05.08.2015 which made these assessee's to admit additional income of Rs.41 lakhs ÷ 2 coming to Rs.20.50 lakhs each (supra) which stood declared in their respective returns. The assessee's sole substantive grievance appears to be that the Assessing Officer's corresponding show cause notices dated 29.12.2017 (supra) had not been validly issued. We find no merit in the assessee's stand once it has come on record that the impugned penalty has been levied @ 10% since falling in the first and foremost limb u/sec.271AAB(1)(a)(i) to (iii) of the Act in the specified circumstances. Their identical contention therefore, that the Assessing Officer ought to have specified corresponding limb(s) to this effect fails to cut any ice before us. Faced with the situation

and primarily for the reason that these assessee's have been found to have derived their undisclosed income as per the seized incriminating material followed by their search admission(s), we find no reason to interfere with the learned lower authorities action invoking sec.271AAB penalties in their respective cases. These assessee's fail in their respective grounds therefore. Ordered accordingly.

5. These twin assessee's as many appeals are dismissed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open Court on 31.10.2023.

Sd/-
[DR. DIPAK P. RIPOTE]
ACCOUNTANT MEMBER

Sd/-
[SATBEER SINGH GODARA]
JUDICIAL MEMBER

Pune, Dated October, 2023

VBP/-

Copy to

1.	The applicant
2.	The respondent
3.	The CIT(A)-3, 119, Aayakar Bhavan, Telangkhedi Road, Civil Lines, Nagpur – 440 001.
4.	The CIT (Central), Nagpur.
5.	D.R. ITAT, Nagpur Bench, Nagpur.
6.	Guard File.

//By Order//

//True Copy //

Assistant Registrar, ITAT, Pune Benches,
Pune.