

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“B” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.736/Bang/2023
Assessment Year: 2018-19

Simplex TMC Pvt. Ltd. No.116-C/1 KHB Colony 5 <sup>th</sup> Block, Koramangala Bangalore 560 034  <b>PAN NO : AADCS5669M</b>	<b>Vs.</b>	DCIT Circle-1(1) Bangalore
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri Rakesh Joshi, A.R.
<b>Respondent by</b>	:	Shri Subramanian S., D.R.

<b>Date of Hearing</b>	:	30.11.2023
<b>Date of Pronouncement</b>	:	01.12.2023

**O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

This appeal by assessee is directed against order of CIT(A)-11 Bangalore dated 4.8.2023. The assessee has raised following grounds of appeal:

- 1. On the facts and circumstances of the case as well as in law, the Ld. CIT(A) has erred in confirming the action of the ld. AO in passing the penalty order u/s 271AAB without issuing proper notice u/s 274 of the Act, without considering the facts & circumstances of the case.*
- 2. On the facts and circumstances of the case as well as in law, the Ld. CIT(A) has erred in confirming the action of ld. AO in passing the penalty order u/s 271AAB assuming income offered by the appellant as undisclosed income, without considering the facts & circumstances of the case.*
- 3. On the facts and circumstances of the case as well as in law, the Ld. CIT(A) has erred in confirming the action of the ld. AO in levying a penalty of Rs.1,11,75,000/- on income offered by the appellant in the return of income*

*without initiating any penalty proceedings in the assessment order passed u/s 143(3) r.w.s. 153D of the Act, without considering the facts & circumstances of the case.*

4. *On the facts and circumstances of the case as well as in law, the Ld. CIT(A) has erred in confirming the action of the ld. AO in levying a penalty of Rs.1,14,75,000/- u/s 271AAB(1A) of the Act, without considering the facts & circumstances of the case.*
5. *On the facts and circumstances of the case as well as in law, the Ld. CIT(A) has erred in confirming the action of the ld. AO in imposing a penalty of Rs.1,11,75,000/- u/s 271AAB (1A)(a) of the Act being 30% on cash seized of Rs.3,72,50,000/-, without considering the facts & circumstances of the case. On the facts and circumstances of the case as well as in law, the ld. CIT(A) has erred in confirming the action of the ld. AO in imposing a penalty of Rs.1,11,75,000/- u/s 271AAB(1A)(a) of the Act, being 30% on cash seized of Rs.3,72,50,000/-, without considering the facts & circumstances of the case.*
6. *On the facts and circumstances of the case as well as in law, the Ld. CIT(A) has erred in confirming the action of the ld. AO in imposing a penalty of Rs.3,00,000/- u/s 271AAB(1A)(b) of the Act being 60% on the disallowance of commission of Rs.5,00,000/- made in the assessment order, without considering the facts & circumstances of the case.*
7. *The appellant craves leave to add, amend, alter or delete the said ground of appeal.”*

**2.** Facts of the case are that the assessee filed its original return on 30.10.2018 by declaring total income of Rs.3,02,22,110/-. A search and seizure action u/s 132 of the Act was conducted in the case of assessee on 14.11.2017, during the course of search, cash of Rs.3,72,50,000/- was found and seized from the office premises of the assessee. The managing director of the company admitted in the statement recorded u/s. 132 of the Act, that the said cash is part of sale consideration which was received from the sale of an immovable property situated at Koramangala Bangalore, which is over and above the consideration as per sale deed agreement dated 04.10.2017.

**2.1** During the course of search proceedings, in the statement dated 14.11.2017 recorded on oath u/s. 132(4) of the Act of Shri Kapil N R Shah, the Managing Director of the assessee company, M/s. Simplex TC Private Limited, has admitted that the assessee company has sold a property measuring 4,111 sq. ft, situated at No. 152, 1<sup>st</sup> Block, Koramangala, Bangalore for a total consideration Rs.8,20,00,000/- on 04.10.2017. Out of this consideration, the assessee has accepted cash of Rs.4,25,35,000/- and the remaining amount of Rs.3,94,65,600/- was received by way of cheque. Further, he stated that out of this sale consideration received in cash, Rs. 4 Crore was kept in the locker held in Karur Vysya Bank, Koramangala Branch and the remaining cash was utilised for various expenses. The same has been reiterated and confirmed by Shri Kapil N R Shah in the statement dated 12.03.2018 recorded u/s. 131(1A) of the Act.

**2.2** During the course of the search proceedings, cash of Rs. 3,72,50,000/- was seized. The cash seized was admitted by the assessee and the same has been declared by the assessee in its ROI for the AY 2018-19 and paid the applicable tax thereon before due date. Therefore, considering the facts and merit of the case, as the undisclosed income is covered by the provisions of clause (a) of section 271AAB(1) of the Act, the AO levied penalty of Rs. 1,11,75,000/-, (30% of 3,72,50,000) u/s. 271AAB(1A) of the Act.

**2.3** Further during the course of the assessment proceedings, the assessee was not able to furnish proof of the commission paid of Rs. 5,00,000/- claimed in the computation of Long term capital gains on sale of property. Therefore, the same was disallowed and added to the income of the assessee as Long Term Capital Gains. The AO further held that as the assessee had not offered the amount of Rs. 5,00,000/- as income, the undisclosed income is covered by provision of clause(b)

of Section 271AAB(1A) of the Act and accordingly a penalty of Rs. 3,00,000/- (60% of Rs 5,00,000/-) was levied. Thus, the AO levied a total penalty of Rs 1,14,75,000/-.

**2.4.** Against this assessee went in appeal before ld. CIT(A), who has confirmed the penalty order. Against this assessee is in appeal before us.

**3.** First ground for our consideration is as follows:

*“On the facts and circumstances of the case as well as in law, the ld. CIT(A) has erred in confirming the action of the ld. AO in passing the penalty order u/s 271AAB without issuing proper notice u/s 274 of the Act, without considering the facts & circumstances of the case.”*

**3.1** The ld. A.R. submitted that the notice issued by ld. AO u/s 274 of the Act so as to levy penalty u/s 271AAB of the Act is not in conformity with the provisions of the Act and there he has not specified whether the assessee shall pay penalty under clause (a), (b) or (c) of section 271AAB of the Act. According to ld. A.R., the ld. AO without mentioning specific default of the assessee in terms of clause (a), (b) or (c) of section 271AAB of the Act, the show cause notice issued cannot be considered as valid notice in the eye of law and accordingly levy of penalty against the assessee is void-ab-initio.

**4.** The ld. D.R. relied on the order of lower authorities.

**5.** We have heard the rival submissions and perused the materials available on record. There was no initiation of the penalty proceedings u/s 271AAB of the Act in the assessment order dated 28.12.2019. On the other hand, the same has been initiated vide penalty notice dated 28.12.2019. The penalty notice issued to the assessee, which reads as follows:

Appeal No. CIT(A)-11/BNG/10457/2017-18  
M/s Simplex TMC Pvt. Ltd.  
A.Y. 2018-19



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE | INCOME TAX DEPARTMENT  
OFFICE OF THE DEPUTY COMMISSIONER OF INCOME-TAX,  
Central Circle-1(1), BENGALURU  
III Floor, C.R. Building, Queen's Road, Bengaluru-560001.  
Phone: 080-22867721, email: [bangalore.dcit.cen1.1@incometax.gov.in](mailto:bangalore.dcit.cen1.1@incometax.gov.in)

To,  
M/s Simplex TMC (P) Ltd  
No.54,Mudra,3<sup>rd</sup> Floor,12<sup>th</sup> Main,3<sup>rd</sup>  
Block(East),Jayanagar,  
Bengaluru-560011

PAN: AADCS5669M	A.Y 201 8-19	Date: 28.12.2019	Notice No: ITBA/AST/M/143(3)/2019-20/1023319902(1)
--------------------	-----------------	---------------------	---

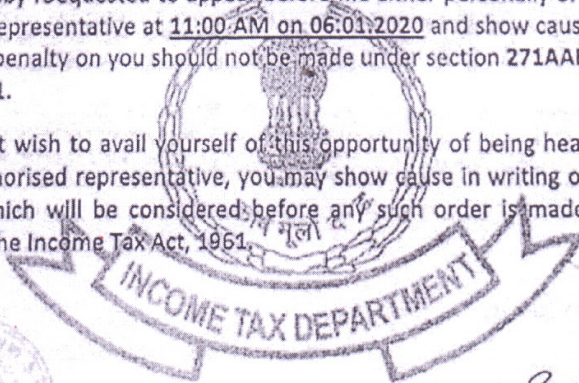
Notice under section 274 read with section 271AAB of the Income-Tax Act, 1961

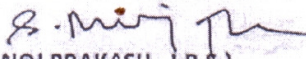
Sir/Madam,

Whereas in the course of proceedings before me for the Assessment Year 2018-19, it appears to me that you have Undisclosed Income.

you are hereby requested to appear before me either personally or through a duly authorised representative at 11:00 AM on 06:01:2020 and show cause why an order imposing a penalty on you should not be made under section 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 authorised 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 Income Tax Act, 1961.



  
(S MANOJ PRAKASH., I.R.S.)  
Deputy Commissioner of Income tax,  
Central Circle-1(1), Bengaluru.



**5.1** As seen from the penalty order passed by the ld. AO, he has levied penalty u/s 271AAB of the Act in respect of following:

1. Unexplained cash found and surrendered by the assessee before AO – Rs.3,72,50,000/- at 30% Rs.1,11,75,000/-
2. Non-substantiation of the commission payment – Rs.5,00,000/- at 60% Rs.3,00,000/-

**5.2** From a plain reading of 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 subsection (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 subsection (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 subsection 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."*

**5.3** Further, as seen from the provisions of the Act section 271AAB of the Act, the words used are "Assessing Officer.....may direct" and again ".....the assessee shall pay by way of penalty.....". Thus, the word "May" directly indicate, the discretion of the AO. A conjoint reading of section 271AAB and section 271 of the Act indicate that imposition of penalty under section 271AAB of the Act is not mandatory but discretionary. Hence, in our view, the penalty under section 271AAB be imposed n merits of each case.

**5.4** In case of Shri Padam Chand Pungliya Vs. ACIT reported in 201 TTJ 307 (JP), the coordinate bench has held at para 5 page 7 of its order as under:

*"It is pertinent to note that the disclosure of additional income in the statement recorded under section 132(4) itself is not sufficient to levy the penalty under section 271 AAB of the Act until and unless the income so disclosed by the assessee falls in the definition of undisclosed income defined in the explanation to section 271AAB(1) of the Act. Therefore, the question whether the income disclosed by the assessee Is undisclosed income in terms of the definition under section 271 AAB of the Act has to be considered and decided in the penalty proceedings. Since the assessee has offered the said income in the return of income filed under section 139(1) of the Act, therefore, the question of taking any decision by the AO in the assessment proceedings about the true nature of surrender made by the assessee does not arise and only when the AO has proposed to levy the penalty then it is a precondition for invoking the provisions of section 271AAB that the said income disclosed by the assessee in the statement under section 132(4) is an undisclosed income as per the definition provided under section 271AAB, Therefore, the AO in the proceedings under section 271 AAB has to examine all the facts of the case as well as the basis of the surrender and then arrive to the conclusion that the income disclosed by the assessee falls in the definition of undisclosed income as stipulated in the explanation to the said section. Therefore, we do not agree with the contention of the Id. D/R that the levy of penalty under section 271 AAB is mandatory simply because the AO has to first issue a show cause notice to the assessee and then has to make a decision for levy of penalty after*

*considering the fact that all the conditions provided under section 271 AAB are satisfied,"*

**5.5.** Further, in the case of PCIT Vs. R. Elangovan in TCA No.770 & 771 of 2018 dated 30.3.2021, the Hon'ble Madras High Court has held as under:

*"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."*

**5.6** Further, Hon'ble Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory reported in 359 ITR 565 (Karn.) and in the case of SSA's Emerald Meadows reported in 73 taxmann.com 241 (Karn.) has taken a similar view.

**5.7** Further, in the case of PCIT Vs. Industrial Safety Products (P) Ltd. (2023) 154 taxmann.com 433 (Calcutta), the Hon'ble Calcutta High Court has held as under:

*"The show cause notice issued under section 274 read with section 271 did not furnish any particulars and all the relevant columns have been left blank. Thus the show-cause notice was bad in law and consequently the initiation of the penalty proceedings is vitiated. (para 13)."*

**5.8** In the case of Shri Mahendra B. Chowhan Vs. ACIT, the Bangalore bench of Tribunal in ITA Nos.1590 to 1596/Bang/2019 for the assessment years 2009-10 to 2014-15 vide order dated 19.10.2020 has held as under:

*"12. In the order imposing penalty, the AO has imposed penalty on the assessee for 'concealing particulars of income'. The Hon'ble High Court of Karnataka in Manjunatha Cotton and Ginning Factory (supra) has laid down principles with*

regard to imposition of penalty u/s. 271(1)(c) of the Act. [The same will be applicable to imposition of penalty u/s. 271AAB of the Act]. The Hon'ble Karnataka High Court has held that notice u/s. 274 of the Act should specifically state as to whether penalty is being proposed to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income. The Hon'ble High court has further laid down that sending printed form where all the grounds given in section 271 are given would not satisfy the requirement of law. The Court has also held that initiating penalty proceedings cannot be on one limb and finding the Assessee guilty cannot be on the basis of another limb of Sec.271(1)(c) of the Act. The Hon'ble High Court has laid down the following principles to be followed in the matter of imposing penalty u/s.271(1)(c) of the Act:-

**“NOTICE UNDER SECTION 274**

59.As the provision stands, the penalty proceedings can be initiated on various ground set out therein. If the order passed by the Authority categorically records a finding regarding the existence of any said grounds mentioned therein and then penalty proceedings is initiated, in the notice to be issued under Section 274, they could conveniently refer to the said order which contains the satisfaction of the authority which has passed the order. However, if the existence of the conditions could not be discerned from the said order and if it is a case of relying on deeming provision contained in Explanation-1 or in Explanation1(B), then though penalty proceedings are in the nature of civil liability, in fact, it is penal in nature. In either event, the person who is accused of the conditions mentioned in Section 271 should be made known about the grounds on which they intend imposing penalty on him as the Section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in Section 271(1)(c) do not exist as such he is not liable to pay penalty. The practice of the Department sending a printed farm where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law when the consequences of the assessee not rebutting the initial presumption is serious in nature and he had to pay penalty from 100% to 300% of the tax liability. As the said provisions have to be held to be strictly construed, notice issued under Section 274 should satisfy the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended if the show cause notice is vague. **On the basis of such proceedings, no penalty could be imposed on the assessee.**

60.Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty

*of another offence or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet those grounds. After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the grounds on which he is called upon to answer. It is not open to the authority, at the time of imposing penalty to impose penalty on the grounds other than what assessee was called upon to meet. Otherwise though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would offend principles of natural justice and cannot be sustained. **Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order was passed and further discovery of facts subsequent to the imposition of penalty cannot validate the order of penalty which, when passed, was not sustainable.***

61. The Assessing Officer is empowered under the Act to initiate penalty proceedings once he is satisfied in the course of any proceedings that there is concealment of income or furnishing of inaccurate particulars of total income under clause (c). Concealment, furnishing inaccurate particulars of income are different. Thus the Assessing Officer while issuing notice has to come to the conclusion that whether is it a case of concealment of income or is it a case of furnishing of inaccurate particulars. The Apex Court in the case of Ashok Pai reported in 292 ITR 11 at page 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujarat High Court in the case of MANU ENGINEERING reported in 122 ITR 306 and the Delhi High Court in the case of VIRGO MARKETING reported in 171 Taxman 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. Therefore, when the Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind.”

13. The final conclusion of the Hon'ble Court was as follows:-

“63. In the light of what is stated above, what emerges is as under:

- a. Penalty under Section 271(1)(c) is a civil liability.
- b. Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.
- c. Willful concealment is not an essential ingredient for attracting civil liability.
- d. Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings under Section 271.
- e. The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.
- f. Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(1)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.
- g. Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(1)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).
- h. The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.
- i. The imposition of penalty is not automatic.
- j. Imposition of penalty even if the tax liability is admitted is not automatic.
- k. Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.
- l. Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.
- m. If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.
- n. The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.
- o. If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the

- penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.
- p. Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income
  - q. Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.
  - r. The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.
  - s. Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.
  - t. The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.
  - u. The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings.

*The assessment or reassessment cannot be declared as invalid in the penalty proceedings."*

*(emphasis supplied)*

14. It is clear from the aforesaid decision that on the facts of the present case that the show cause notice u/s. 274 of the Act is defective as it does not spell out the grounds on which the penalty is sought to be imposed. The AO has not applied his mind to the specific charge against the Assessee. The mentioning of furnishing of inaccurate particulars of income in the show cause notice issued u/s.274 of the Act was fatal to the case. The Hon'ble Karnataka High Court in the case of CIT vs. SSA's Emerald Meadows in ITA No.380 of 2015 dated 23.11.2015 wherein the Hon'ble Karnataka High Court following its own decision in the case of CIT vs Manjunatha Cotton and Ginning factory (2013) 359 ITR 565 took a view that imposing of penalty u/s 271(1)(c) of the Act is bad in law and invalid for the reason that the show cause notice u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealment of particulars of income or furnishing of inaccurate particulars of income. The ld. Counsel further brought to our notice that as against the decision of the Hon'ble Karnataka High Court the revenue preferred an appeal in SLP in CC No.11485 of 2016 and the Hon'ble Supreme Court by its order dated 05.08.2016 dismissed the SLP preferred by the department.

15. We have already observed that the show cause notice issued in the present case u/s 274 of the Act does not specify the charge against the assessee as to whether

*it is for concealing particulars of income or furnishing inaccurate particulars of income. The show cause notice u/s 274 of the Act does not strike out the inappropriate words. In these circumstances, we are of the view that imposition of penalty cannot be sustained. The plea of the ld. Counsel for the assessee which is based on the decisions referred to in the earlier part of this order has to be accepted. We therefore hold that imposition of penalty in the present cases cannot be sustained and the same is directed to be cancelled. The above discussion will equally apply to imposition of penalty u/s.271AAB for AY 2015-16 because in terms of section 271AAB(3) of the Act, provisions of Sec.274 of the Act are applicable to imposition of penalty u/s.271AAB of the Act also.*

16. *We are of the view that the argument of the department that the provisions of section 292B of the Act will cure the defect, if any, in the show cause notice cannot be accepted because the non-mentioning of the charge against the assessee in the show cause notice cannot be considered as a mistake, omission or defect, which is in substance and effect in conformity with or according to the intent and purpose of this Act. We therefore hold that the CIT(Appeals) was not right in rejecting the plea of assessee in this regard. We are, therefore, of the view that the penalty imposed in all these assessment years are liable to be cancelled.”*

**5.9** Further, in the case of Shri Mahaveer Prasad Agarwal in ITA No.1218/JP/2019 dated 2.6.2022, the coordinate bench of Jaipur has placed reliance in the case of Shri Padam Chand Pungliya Vs. ACIT (201 TTJ 307) wherein held as under:

*“ It is pertinent to note that the disclosure of additional income in the statement recorded under section 132(4) itself is not sufficient to levy the penalty under section 271AAB of the Act until and unless the income so disclosed by the assessee falls in the definition of undisclosed income defined in the explanation to section 271AAB(1) of the Act. Therefore, the question whether the income disclosed by the assessee is undisclosed income in terms of the definition under section 271AAB of the Act has to be considered and decided in the penalty proceedings. Since the assessee has offered the disclosed income in the return of income filed under section 139(1) of the Act, therefore, the question of taking any decision by the AO in the assessment proceedings about the true nature of surrender made by the assessee does not arise and only when the AO has proposed to levy the penalty then it is a pre-condition for invoking the provisions of section 271AAB that the said income disclosed by the assessee in the statement under section 132(4) is an undisclosed income as per the definition provided under section 271AAB. Therefore, the AO in the proceedings under section 271AAB has to examine all the facts of the case as well as the basis of the surrender and then arrive to the conclusion that the income disclosed by the assessee falls in the definition of undisclosed income as stipulated in the explanation to the said section. Therefore, we do not agree with the contention of the ld. D.R. that the levy of penalty under section 271AAB is mandatory simply because the AO has to first issue a show cause notice to the assessee and then has to make a decision for levy of penalty after considering the fact that all the conditions provided under section 271AAB are satisfied.”*

**5.9.1** Thereafter, the Jaipur bench of Tribunal has observed as under:

*“It is evident from the show cause notice issued under section 274 read with section 271AAB (APB Page 1) that the AO was not clear as to on what precise charge the appellant was asked to show cause, whether the assessee shall pay by way of penalty under clause (a), (b) or (c) of section 271AAB. The AO has just mentioned "deliberately concealed the true income". Thus the AO without mentioning specific default of the assessee in terms of clause (3), (b) or (c) of section 271AAB of the Act, the show cause notice issued in routine manner cannot be considered a valid notice in the eyes of law and accordingly the levy of penalty against the assessee is held to be void ab initio. Further, the assessee has substantiated the undisclosed cash available, as to the extent of surrendered income of Rs.8,73,000/-.*

6. *It view of the above, considering the peculiar facts, the grievance of the assessee is accepted as genuine and as such the order of the ld. CIT(A) sustaining the penalty is hereby quashed.”*

**5.10** Further, the Hon’ble Bombay High Court in the case of Mohd. Farhan A. Shaikh (280 Taxman 334) (Bombay) wherein held as under:

*“It does. The primary burden lies on the revenue. In the assessment proceedings, it forms an opinion, prima facie or otherwise, to launch penalty proceedings against the assessee. But that translates into action only through the statutory notice under section 271(1)(c), read with section 274. True, the assessment proceedings form the basis for the penalty proceedings, but they are not composite proceedings to draw strength from each other. Nor can each cure the other’s defect. A penalty proceeding is a corollary; nevertheless, it must stand on its own. These proceedings culminate under a different statutory scheme that remains distinct from the assessment proceedings. Therefore, the assessee must be informed of the grounds of the penalty proceedings only through statutory notice. An omnibus notice suffers from the vice of vagueness (para 181)*

*More particularly, a penal provision, even with civil consequences, must be construed strictly. And ambiguity, if any, must be resolved in the affected assssee’s favour (para 182).”*

**5.11** Further, it is evident from the show cause notice issued under section 274 read with section 271 AAB of the Act that the AO was not clear as to on what precise charge the assessee was asked to show cause, whether the assessee shall pay by way of penalty under clause (a), (b) or (c) of section 271AAB of the Act. The AO has just mentioned that the assessee is having “undisclosed income”. Thus, the AO without

mentioning specific default of the assessee in terms of clause (a), (b) or (c) of section 271 AAB of the Act, the show cause notice issued in routine manner cannot be considered a valid notice in the eyes of law and accordingly the levy of penalty against the assessee is held to be void-ab-initio. Further, the assessee has substantiated the undisclosed cash available, as to the extent of surrendered income of Rs.3,72,50,000/-. Accordingly, we quash the penalty order passed u/s 271AAB of the Act. Since we have quashed the penalty order itself, the other grounds raised by assessee at this stage becomes infructuous.

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

Order pronounced in the open court on 1<sup>st</sup> Dec, 2023

**Sd/-**  
**(Beena Pillai)**  
**Judicial Member**

**Sd/-**  
**(Chandra Poojari)**  
**Accountant Member**

Bangalore,  
Dated 1<sup>st</sup> Dec, 2023.  
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5. Guard file

By order

**Asst. Registrar,**  
**ITAT, Bangalore.**