

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'E' BENCH,
NEW DELHI**

**BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER**

ITA No. 4710/DEL/2018 [A.Y. 2014-15]

Shri Mukesh Khurana
B-7/100, Safdarjung Enclave
Extension, New Del

Vs. The Dy. C.I.T
Central Circle
New Delhi

PAN - AMYPK 1514 B

(Applicant)

(Respondent)

Assessee By : None
Department By : Shri Subhra Jyoti Chakraborty, CIT-DR

Date of Hearing : 20.06.2024
Date of Pronouncement : 27.06.2024

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the
Ld. CIT(A) - IV, Kanpur dated 12.04.2018 pertaining to A.Y. 2014-15.

2. The only substantial ground raised by the assessee relates to the upholding of the penalty amounting to Rs. 2,40,000/- levied by the Assessing Officer by the ld. CIT(A).

3. None appeared on behalf of the assessee in spite of notice. Therefore, we decided to proceed exparte.

4. The ld. DR was heard at length. Case records carefully perused.

5. Briefly stated, the facts of the case are that the assessee is proprietor of M/s Classic Spares dealing in trading of spare parts/auto parts. The assessee filed his Return of Income for AY 2014-15 declaring an income of Rs. 20,18,250/.

6. A search and seizure operation u/s 132 of the Income-tax Act, 1961 [the Act, for short] was conducted on 09.10.2013 on the premises of the assessee comprising Shubhkamana Buildtech Pvt Ltd group of cases. During the course of search, cash amounting to Rs. 9,76,190 was found.

7. The assessee was required to explain the source of this cash found. In response, the assessee explained that this cash was a part of the cash balance of Rs 1,11,15,785.94 as per books of M/s Classic Spares.

8. The Assessing Officer observed that the assessee failed to submit any evidence and, therefore, the contention of the assessee cannot be accepted. However, the Assessing Officer found that an amount of Rs. 1,76,190/- was found reasonable and remaining amount of Rs. 8,00,000/- was added to the total income of the assessee assessing the total income of the assessee at Rs. 28,18,250/- u/s 143(3) of the Act. The Assessing Officer also initiated penalty proceedings u/s 271AAB of the Act. The AO considering the entire income assessed at Rs 28,18,250/- as the undisclosed income and levied penalty @ 30% on it which worked out to Rs 9,57,920/.

9. Aggrieved, the assessee went in appeal before the Id. CIT(A) who restricted the penalty to Rs. 2,40,000/- instead of Rs. 9,57,920/- holding that the undisclosed income is only Rs 8,00,000/-.

10. Aggrieved further, the assessee is in appeal before us.

11. The ld. DR, at the very outset, contended that though the assessee explained that the cash amounting to Rs. 9,76,190/- found during search was part of cash balances of Rs 1,11,15,785.94 as per books of M/s Classic Spares, but the assessee could not produce evidences. Therefore, the ld. DR submitted that the Assessing Officer was right in treating the same as undisclosed income of the assessee and correctly levied the penalty u/s 271AAB. The ld DR was fair to submit that the CIT(A) correctly restricted the penalty to 30% of unexplained cash of Rs. 8 lakhs which worked out to Rs. 2,40,000/-.

12. We have heard the rival submissions and have perused the relevant material on record. We find that the assessee during the year under consideration has duly filed the return u/s 139(1) showing an income of Rs. 20,18,250/-. With regard to the cash so found during the search and seizure action, the assessee has submitted that it is a part of cash balance of Rs. 1,11,15,785/- which is reflected in the cash books of

its proprietary concern M/s Classic Spares and therefore, there is no undisclosed income as defined in Explanation (c) of section 271AAB of the Act. Rejecting the assessee explanation, the Assessing Officer considered the entire assessed income as undisclosed income and levied the penalty u/s 271AAB. The CIT(A), however, restricted the penalty to 30% of unexplained cash of Rs. 8 lakhs which worked out to Rs. 2,40,000/-.

13. From the perusal of the record, we find that the assessee had submitted that the enhancement of income was to the extent of Rs 8,00,000/- only however, for the purpose of calculating penalty, the entire assessed income has been considered as undisclosed income rendering the penalty order illegal and invalid. The assessee also took a legal ground no. 6 assailing that “order levying penalty under section 271AAB, lacks in vital ingredients of a valid penalty order and the same could not have been upheld/sustained by the CIT(A)”. To substantiate this ground the assessee has submitted in the statement of fact that notice u/s 274 read with section 271 of the Act dated 31.03.2016 was issued

requiring the assessee to show cause as to “why penalty u/s 271(1)(c) of the IT Act may not be imposed upon you/why penalty u/s 271AAB may not be imposed upon you”. It is pleaded by the assessee that the show cause notice is based on ambiguous grounds and is fatal to the very survival of the penalty proceedings u/s 271AAB of the Act.

14. We are of the considered view, supported by a catena of cases that a proper notice u/s 274 r.w.s 271AAB is a vital ingredient for a valid penalty order. On the issue of valid notice, the coordinate bench of Delhi ITAT in the case of Jaina Marketing & Associates Vs DCIT reported in [2024] 162 taxmann.com 439 (Delhi - Trib.) had the occasion to deliberate on this issue with reference to penalty u/s 271AAB. Its deliberation is reproduced as under:

“21. As could be seen from the above the notice issued u/s 271AAB of the Act, it does not depict the charge against the assessee as to under which Clause (a), (b) or (c) or Section 271AAB (1) or Clause (a) or (b) of 271 AAB (1A) of the Act penalty is leviable on the assessee. Therefore, we are of the opinion that the notice initiating penalty u/s 271AAB of the Act is vague and the assessee was not made aware of the actual charge

on which the penalty proceedings will be initiated on the assessee. The various judicial precedents have held that the penalty notice should be clear enough to convey the assessee about the charge which is to be levied against him/her/it for levying penalty for the contravention of the related provisions of the Act.

22. An Identical question came for consideration before the Jaipur bench of the Tribunal in the case of Sri. Mahaveer Prasad Agarwal v. DCIT in ITA No.1218/JP/2019 vide order dated 02-06-2022, wherein the similar notice has been issued to the Assessee therein and the Tribunal held as under:

"5.1 In case of Shri Padam Chand Pungliya v. ACIT (supra), 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 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. 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 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 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 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."

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 (a), (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. In view of the above, considering the peculiar facts, the grievance of the assessee is accepted as genuine and as such the order of the Id. CIT (A) sustaining the penalty is hereby quashed.

7. In the result, appeal of the assessee is allowed."

22. The Indore Bench of the Tribunal in ITA No. 869/1nd/2018 in the case of Shri Ashok Bhatia v. DCIT vide order dated 05.02.2020 held as under:-

"8. From perusal of the above provision we observe that sub section 3 of Section 271AAB of the Act talks about issuing the notice u/s 274 of the Act. So for initiating the penalty proceedings u/s 271AAB of the Act the first step to be taken by 1.d. A.O is to issue a valid notice u/s 274 of the Act. Sub- section (1) to Section 274 of the Act provides a procedure that "No order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard". To comply with this requirement the notice

u/s 274 should be clear enough to convey the assessee about the charge which is to be leveled against him/her/it for levying the penalty for the contravention of the related provisions of the Act which in the instant case relates to not surrendering of undisclosed amount during the course of search which is subsequently admitted during the course of assessment and not challenged before the Ld. CIT(A). So it was incumbent for Ld. A.O that in the notice issued u/s 274 of the Act he should have mentioned that penalty u/s 271AAB of the Act may be levied @ 10/20/30% since the assessee falls in Clauses (a)/(b)/(c) of section 271AAB of the Act. He should have further mentioned that as the assessee's case falls under clause-c of section 271AAB of the Act, why she should not be visited by penalty 30% of the undisclosed income. Against this charge the assessee should have been given a reasonable opportunity of being heard."

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. Hon'ble Jurisdictional High Court in the case of PCIT V/s Kulwant Singh Bhatia (supra) dealt the issue of defective notice issued u/s 274 r.w.s. 271(1)(c) of the Act and Hon'ble court after relying judgment of Hon'ble Supreme Court in the case of CIT V/s Manjunatha Cotton Ginning Factory and CIT v/s SSA'S Emerald Meadows (supra) held that such show cause notices would not satisfy the requirement of law as notice was not specific. Merely issuing notice in general proforma will negate the very purpose of natural justice. Hon'ble Apex Court in the case of Dilip N Shraf 161 Taxmann 218 held that "the quasi criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice".

15. We, therefore respectfully following the judgment of jurisdictional High Court in the case of PCIT V/s Kulwant Singh Bhatia (supra), decision of Coordinate Bench of Chennai in the case of DCIT V/s R. Elangovan (supra) and Jaipur Bench in the case of Ravi Mathur v. DCIT (supra) and in the given facts and circumstances of the case wherein the matter written in the body of the notice issued u/s 274 of the Act does not refer to the charges of provision of Section 271AAB of the Act makes the alleged notice defective and invalid and thus deserves to be quashed. Since the penalty proceedings itself has been quashed the impugned penalty of Rs.64,22,348/- stands deleted. Thus assessee succeeds on legal ground challenging the validity of notice issued u/s 274 r.w.s. 271AAB of the Act."

15. We find that while arguing the case, the l.d DR has not contested or controverted the statement of fact narrated by the assessee that the notice u/s 274 stated “why penalty u/s 271(1)(c) of the IT Act may not be imposed upon you/why penalty u/s 271AAB may not be imposed upon you”. We now have to decide what is the legal validity of such a notice.

16. The mandate of sub section 3 of section 271AAB stipulates the issuance of a valid notice u/s 274 for initiating the penalty proceedings u/s 271 AAB of the Act. Further, the provision of section 274(1) stipulates that "No order imposing a penalty under this Chapter shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard." The mandate that befalls on the AO is to clearly spell out the charges against the assessee for levying penalty in order to give him reasonable opportunity of being heard and defend himself. It was therefore, incumbent upon the AO to specifically elaborate in the notice u/s 274 of the Act itself that penalty u/s 271AAB of the Act may be levied @ 10/20/30% since the assessee falls in Clauses (a)/(b)/(c) of section 271AAB of the Act. The AO was further required to mention the category in which the assessee was being placed i.e whether the assessee fell under clause (c) of

section 271AAB of the Act and why penalty @ 30% of the undisclosed income should not be levied on him.

17. On going through the statement of fact describing the above notice u/s 274 r.w.s 271AAB issued to the assessee, we find that there is no mention about various conditions provided u/s 271AAB of the Act. The AO has merely and casually issued 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. More fatally, the notice merely mentions section 271AAB of the Act but does not provide the specific charges against the assessee as stipulated in section 271AAB. Such an error in the notice cannot but be considered a fatal legal error rendering the notice as technically not a valid notice in the eyes of law because it intends to penalize an assessee without spelling about the specific charge against the assessee.

18. We, following the principles laid down in the above judicial pronouncements, therefore, hold that the assessee must succeed on the ground taken that the penalty order lacked the vital ingredient of a valid penalty order. On this technical ground, we delete the penalty imposed by the A.O for the Assessment Years 2014-15. Since, penalty is

cancelled on technical ground, the adjudication of levy of penalty on merits becomes academic in nature and are left open. Accordingly, ground 6 of the assessee are allowed and we direct the Assessing Officer to delete the impugned penalty of Rs. 2,40,000/- so sustained by the CIT(A).

19. In the result, the appeal of the assessee in ITA No. 4710/DEL/2018 is allowed.

The order is pronounced in the open court on 27.06.2024.

Sd/-

**[VIKAS AWASTHY]
JUDICIAL MEMBER**

Sd/-

**[NAVEEN CHANDRA]
ACCOUNTANT MEMBER**

Dated: 27th JUNE, 2024.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
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Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
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