

**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA**

**SHRI SANJAY GARG, JUDICIAL MEMBER  
SHRI RAKESH MISHRA, ACCOUNTANT MEMBER**

**I.T.A. No. 1408/Kol/2024  
Assessment Year 2013-14**

**Sushil Kumar Agarwal,**  
14A, Rowland Road, Villa No. 6,  
Kolkata - 700020  
[PAN: ACZPA5444M] ..... **Appellant**

vs.

**DCIT, Central Circle 2(2), Kolkata,**  
Aayakar Bhawan, Poorva,  
110, Shantipally, E M By-Pass,  
Kolkata - 700107 ..... **Respondent**

Appearances by:

Assessee represented by : Vikash Chand Shaw, FCA

Department represented by : Sailen Samadder, Addl. CIT, Sr. DR

Date of concluding the hearing : 05.12.2024

Date of pronouncing the order : 31.01.2025

**ORDER**

**Per Sanjay Garg, Judicial Member:**

The present appeal has been preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as "the Ld. CIT(A)] passed u/s 250 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") dated, 29.04.2024.

2. The assessee in this appeal is aggrieved by the action of the Ld. CIT(A) in sustaining the penalty of Rs. 1,95,00,000/- imposed by the Ld. Assessing Officer (in short "the AO") of the assessee u/s 271AAB of the Act. The brief facts of the case are that a search and seizure action was carried out in the case of the assessee on 20.12.2012. During the course of search

action, statement of the assessee u/s 132(4) of the Act was recorded wherein, the assessee offered for taxation an amount of Rs. 1,95,00,000/-. The assessee, keeping its promise, filed return u/s 139(4) of the Act on 29.03.2014 at income of Rs. 2,38,03,590/- which included the aforesaid income disclosed during the search action. Thereafter, the assessment order was passed u/s 143(3) of the Act on 06.06.2014 accepting the return income of the assessee. In the meantime, the AO initiated the penalty proceedings u/s 271AAB of the Act and imposed penalty @ 10% on the suo moto income offered by the assessee u/s 271AAB of the Act. Being aggrieved against the said levy of penalty, the assessee preferred an appeal before the Ld. CIT(A) on 27.04.2015, however, during the pendency of the appeal before the Ld. CIT(A), the Ld. Principal Commissioner of Income Tax (in short "the Ld. PCIT") exercising his revision jurisdiction u/s 263 of the Act and issued notice to the assessee dated 22.07.2017 show causing the assessee as to why the penalty imposed by the Ld. AO @ 10% be not revised and imposed @ 30% as the assessee had filed return of income u/s 139(4) of the Act, whereas, the specified date as per the provision of section 271AAB of the Act was the due date for furnishing the return of income u/s 139(1) of the Act. The Ld. PCIT accordingly, set aside the aforesaid penalty order dated 27.03.2015 and restored the matter to the file of the AO for passing afresh penalty order. In the meantime, the Ld. CIT(A) decided the appeal of the assessee filed against the original penalty order dated 27.03.2015 vide order dated 21.03.2017 and deleted the penalty imposed by the AO. The AO, thereafter, giving effect to the order of the Ld. PCIT dated 10.03.2017, passed afresh penalty order dated 22.09.2017 and imposed penalty @ 30% of the alleged undisclosed income.

3. Being aggrieved by the said order of the AO, the assessee preferred appeal before the Ld. CIT(A). The Ld. CIT(A) vide impugned order dated 29.04.2024 dismissed the appeal of the assessee. The assessee, thus, has come in appeal before us.

4. We have heard the rival contention and gone through the material available on record. At the outset, the Ld. Counsel for the assessee has submitted that the impugned penalty levied by the AO u/s 271AAB of the Act is not sustainable as per law as the income disclosed by the assessee does not fall within the definition and scope of 'undisclosed income' as defined under the relevant provision of section 271AAB of the Act.

5. Before proceeding further, it will be relevant to reproduce the provision of section 271AAB of the Act.

*"271AAB. (1) The Assessing Officer [or the Commissioner (Appeals)] 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 [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-*

*(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 [computed at the rate of sixty per cent] of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).....*

*(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*

*(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 [Principal Chief Commissioner or] Chief Commissioner or [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.]”*

6. On perusal of the aforesaid provision of section 271AAB of the Act would reveal that penalty @ 10% is leviable of the undisclosed income if the assessee has disclosed such income in statement made during search action u/s 132(4) of the Act and substantiated the manner in which the undisclosed income was derived and furnished the return and paid the due tax & interest etc. in respect of such undisclosed income on or before the specified date. Further, ‘undisclosed income’ has been defined as any income of the specified previous year represented by any money, bullion, jewellery or other valuable article or thing or any entry in the books of accounts or other documents or transaction found in the course of search action u/s 132 of the Act, which has not been recorded in the books of accounts on or before the date of search or in other documents maintained in normal course relating to previous year or otherwise has not been disclosed to the Ld. PCIT or other authorities as mentioned above before the due date of search or the assessee has incurred any such expenditure which has not been disclosed in the books of accounts or other documents etc. In the case in hand, the plea of the Ld. Counsel for the assessee is that

no incriminating material, whatsoever, was found during the course of search action. That neither the income disclosed by the assessee was found in the shape of any money bullion, jewellery, article or thing nor any accounting entry recorded in the books of accounts or other documents was found during the course of search action to bring the said disclosed income by the assessee in the definition of 'undisclosed income' as defined u/s 271AAB of the Act. The Ld. Counsel in this respect has also relied upon the copy of the Panchnama, wherein there is no mention of any incriminating material either in the shape of money bullion, or jewellery or article or in the shape of any accounting entry which shows that any undisclosed income of the assessee was unearthed during the course of search action. Further, the Ld. Counsel for the assessee has invited our attention to page 1 to 7 of the paper book which is the copy of the statement recorded of the assessee u/s 132(4) of the Act dated 11.12.2013. A perusal of the said statement would reveal that the assessee offered the said amount of Rs. 1,95,00,000/- as additional income in his hands for AY 2012-13 and duly explained the manner of earning of the same. However, there is no mention in the statement that any money bullion jewellery, article or thing or any incriminating accounting entry was found during the course of search action. Under the circumstances the income disclosed by the assessee at his own volition would not fall in the definition of 'undisclosed income' as defined u/s 271AAB of the Act. The Ld. Counsel for the assessee has also relied upon the following case laws in this respect:

*"i.) While dealing with the issue similar to the issue in the present case, the jurisdictional Kolkata ITAT in the case of M/s Rashmi Metaliks Ltd [I.T.A. Nos. 1608/Kol/2017] has observed in para 23 of the Order as \*Respectfully following the decisions in the foregoing and having regard to our finding that the income of Rs.69 crores voluntarily offered to tax was not in the nature of 'undisclosed income' defined in clause (c) of Explanation to Section 271AAB, we hold that the Ld. CIT(A) was justified in cancelling the penalty levied u/s 271AAB of the Act. Accordingly the order of the Ld. CIT(A) is upheld for the reasons discussed above and the Revenue's appeal stands rejected." (page nos. 51 to 73 of Paper Book)*

*ii The Hon'ble Jaipur ITAT in the case of Padam Chand Pungliya [2020] 113 taxmann.com 446 (Jaipur Trib.) had held that Disclosure of additional income in statement recorded under section 132(4) itself is not sufficient to levy penalty under*

*section 271AAB until and unless income so disclosed by assessee falls in definition of undisclosed income defined in Explanation to section 271AAB. (page nos. 74 to 91 of Paper Book)*

*iii) In the similar line, the Jaipur ITAT in the case of Shri Dinesh Kumar Agarwal [ITA No. 855 & 856/JP/2017] deleted the penalty imposed / confirmed by the CIT(A) u/s 271AAB of the Act on the ground that the offering made by the assessee does not fall within the definition of undisclosed income as stipulated in clause (c) of Section 271AAB. (page nos. 92 to 142 of Paper Book)*

*n) Further, the judicial authorities have also upheld in various case that in case of an offering made by the assessee to buy peace and to avoid long drawn litigation or for other similar reason, surrender cannot amount to admission, constituting evidence of concealment in penalty proceedings. Some such decisions are discussed below and the text of the case decisions are enclosed in the Paper Book:-*

*i) The Hon'ble High Court of Gujarat in the case of Girish Devchand Rajani [2013] 33 taxmann.com 174 (Gujarat) had held that where assessee to buy peace and to avoid protracted litigation filed revised return disclosing additional income, imposition of penalty under section 271(1)(c) upon assessee on plea that he had furnished inaccurate particulars of income was not justified. (page nos. 143 to 145 of Paper Book)*

*ii) Further, in the case of Punjab Tyres [1986] 162 ITR 517 (Madhya Pradesh), the Hon'ble High Court of Madhya Pradesh also held that when surrender is made to purchase peace or for other similar reason, surrender cannot amount to admission, constituting evidence of concealment in penalty proceedings. (page nos. 146 to 148 of Paper Book)*

*iii) In the case of Sudharsan Silk and Sarees [300 ITR 205 (Supreme Court)], the Hon'ble Supreme Court has held that if the appellant offers any amount for taxation for the purpose of purchasing peace and assessment has been made based upon the aforesaid offerings, even if no assurance in writing is given by the searching party, it may be clearly inferred that such an inducement must have been given by the searching party. When only partial evidence or no evidence in support of concealment was detected during the search, why would a person go to offer a higher amount unless he was promised some reciprocal benefits like not being visited by penalty. Thus, it was held that where additions have been made based on assessee's own offerings, penalty provision shall not lie. (page nos. 149 to 154 of Paper Book)*

*o) In consideration of the fact and the submission, the said action of the Assessing Officer of allegedly considering the suo moto offering of Rs. 1,95,00,000/- made by the Appellant as undisclosed income for the purpose of invoking penalty u/s 271AAB cannot be sustained. Thus, it is requested that the penalty-imposed u/s 271AAB may be deleted in full.”*

7. In view of the above discussion and leal position, the penalty levied by the AO in this case is not sustainable and the same is accordingly ordered to be deleted.

8. In the result, appeal filed by the assessee is allowed.

Order pronounced in the court on 31.01.2025

Sd/-  
(Rakesh Mishra)  
Accountant Member

Sd/-  
(Sanjay Garg)  
Judicial Member

Dated: 31.01.2025  
AK, P.S.

*Copy of the order forwarded to:*

1. Sushil Kumar Agarwal
2. DCIT, Central Circle 2(2), Kolkata
3. CIT(A)-
4. CIT-
5. CIT(DR)

//True copy//

By order

Assistant Registrar, Kolkata Benches