

*IN THE INCOME TAX APPELLATE TRIBUNAL
PATNA BENCH "SMC" AT KOLKATA*

Before **Shri Sanjay Garg, Judicial Member**

आयकर अपील सं.य/ ITA No.194/Pat/2019 Assessment Year:2015-16
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Shiv Bhagwan Gupta S/o Lt. Badri Prasad Gupta, House No. 237, Nirwan, Patliputra Colony, Patna- 800 013 [PAN No.AGTPG 7192 E]	बनाम/ V/s.	Asst. Commissioner of Income-tax, Central Circle-1, Patna
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

Hearing through video Conferencing

अपीलार्थी की ओर से/By Appellant	Shri Nishant Maitin, CA
प्रत्यर्थी की ओर से/By Respondent	Shri Indrjit Singh, CIT-DR
सुनवाई की तारीख/Date of Hearing	21-01-2021
घोषणा की तारीख/Date of Pronouncement	11-02-2021

आदेश /O R D E R

The present appeal has been preferred by the assessee against the order dated 16.05.2019 of the Commissioner of Income-tax (Appeals)-3, Patna [hereinafter referred to as 'CIT(A)'] agitating the action of the Ld. CIT(A) in confirming the penalty levied by the Assessing Officer u/s 271AAB of the Income Tax Act, 1961 (in short 'the Act').

2. The brief facts relating the issue are that a search action u/s 132 of the Act was carried out at the premises of the assessee/appellant on 07.08.2014. During the search action jewelry in the shape of gold bars, coins was found from the locker of the assessee. The assessee could explain about the source of investment in respect of the part of the said bullion and jewelry. The assessee could not explain the source of assets worth Rs.21,97,221/- with bills and vouchers. The assessee, however,

explained that the said jewelry was accumulated out of gifts received by the assessee on the eve of marriage and other ceremonies/occasions from time to time. The assessee, thereafter, included the value of the above stated jewelry in the computation of income and offered the same for taxation. The Assessing Officer in the assessment proceedings noted that the assessee in the return of income has disclosed income of Rs.21,79,222/- on account of undisclosed jewelry. He, therefore, initiated penalty proceedings u/s.271AAB of the Act and levied the minimum penalty @ 10% of the said declared income of the assessee.

3. Being aggrieved by the above order of the Assessing Officer, the assessee preferred appeal before the Ld. CIT(A). The ld. CIT(A), however, observed that the levy of penalty under the provisions of section 271AAB was mandatory. He accordingly confirmed the penalty so levied by the AO.

4. Before us, the Ld. Counsel for the assessee has submitted that though, the assessee has offered the value of the jewelry as additional income in the return of income, but the same does not fall in the definition of “*undisclosed income*” as defined under the relevant provisions of section 271AAB of the Act. The Ld. counsel for the assessee has pointed out that penalty u/s 271AAB of the Act could have been levied only in respect of the ‘*undisclosed income*’ of the assessee as defined in the section itself. The term ‘*undisclosed income*’ has been defined in Explanation- (c) to the said section 271AAB, which read as under:

“(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.

5. The Ld. counsel for the assessee has contended that for the purpose of levy of penalty, the income surrendered during search has to qualify as undisclosed income as defined above, which means that it should be represented either by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or documents or transaction found during the course of search, which either have not been recorded before the date of search in the books of accounts or not disclosed to the Principal Chief Commissioner of Income Tax or Chief Commissioner of Income Tax before the date of search. The Ld. Counsel in this respect has submitted that the assessee is an individual and has earned income from partnership firm and interest income. The assessee has neither earned any business income nor earned any income exceeding Rs.50 lakhs so as to require mandatory filing of details of personal assets and liabilities. Since the assessee was not under any obligation to file the details of assets and liabilities, hence, the conditions of recording the same in the books of accounts was not applicable to the assessee, therefore, the assets/jewelry so found/offered in return of income does not fall in the definition of

undisclosed income as defined under the provisions of section 271AAB of the Act. That even the assessee has not made any surrender of such income in his statement recorded u/s 132(4) of the Act during the search action. He has further submitted that even otherwise, the levy of penalty u/s 271AAB is not mandatory.

6. On the other hand, the Ld. DR has submitted that the assessee himself offered the undisclosed income in the return of income and has paid due taxes. He, therefore, has submitted that the levy of penalty by the Assessing officer on such undisclosed income was justified.

7. I have considered the rival contentions and gone through the record. I have also examined the relevant provisions of the Act and case laws on the issue. For the sake of ready reference, the relevant provisions of section 271AAB and section 274 of the Income Tax Act are reproduced as under:

“Penalty where search has been initiated

271AAB: (1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of July, 2012, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him—

(a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived.

(ii) Substantiates the manner in which the undisclosed income was derived; and

(iii) On or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income;

and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, does not admit the undisclosed income; and

(ii) on or before the specified date—

(A) declares such income in the return of income furnished for the specified previous year; and

(B) pays the tax, together with interest, if any, in respect of the undisclosed income;

(c) a sum which shall not be less than thirty per cent but which shall not exceed ninety per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).

(2) 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).

(3) The provisions of section 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.

Explanation:--- For the purpose of this section, __

(a).....

(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.

Section 274

Procedure

274 (1) *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.*

(2) *No order imposing a penalty under this Chapter shall be made-*

(a) by the Income- tax Officer, where the penalty exceeds ten thousand rupees;

(b) by the Assistant Commissioner, where the penalty exceeds twenty thousand rupees, except with the prior approval of the Deputy Commissioner.]

(3) *An income- tax authority on making an order under this Chapter imposing a penalty, unless he is himself the Assessing Officer, shall forthwith send a copy of such order to the Assessing Officer.*

8. So far as issue of levy of penalty u/s 271AAB of the Act whether is mandatory or not is concerned, the issue has been dealt with by the Co-ordinate Chandigarh Bench of the Tribunal in the case of '*M/s SEL Textiles Ltd. Vs DCIT*' **ITA No. 695/Chd/2018** order dated 18.04.2019. The Tribunal in the above case has relied upon the decisions of the Coordinate Benches of the Tribunal in the cases of *ACIT Vs. Marvel Associates, ITA No. 147/Vizag/2017* order dated 16.3.2018 (**ITAT Visakhapatnam Bench**); *DCIT Vs. M/s Rashmi Metaliks Ltd. , ITA No.1608/Kol/2017* dated 1.2.2019; (**ITAT Kolkata Bench**); *DCIT Vs. Rashmi Cement Ltd, ITA No.1606/Kol/2017* order dated 28.2.2019 (**ITAT Kolkata Bench**). The co-ordinate Chandigarh bench of the Tribunal (supra) after analyzing the aforesaid decisions, wherein, reliance has also been placed on the decisions of the Hon'ble High Courts has held that levy of penalty u/s 271AAB of the Act is not mandatory. It has also been noted that the Legislature has consciously used the word '*may*' in contradistinction to the word '*shall*' in the opening words of Section 271AAB of the Act. That the choice of the expression '*may*' and not '*shall*' in the opening Section of 271AAB shows that the Legislature did not intend to make the levy of penalty statutory, automatic and binding on the Assessing Officer but the Assessing Officer has been given discretion in the matter of levy of penalty. Further that as per sub section (3) of section 271AAB of the Act, the provisions of section 274 and 275 of the Act have been made applicable in relation to the penalty referred to section 271AAB of the Act. It has been further observed that 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 competent authority. It has also been held that the penalty u/s 271AAB will not be attracted if the surrendered income would not fall in the definition of '**undisclosed income**' as defined under explanation to section 271AAB of the Act.

9. On a perusal of the provisions of section 271AAB, it is evident that the Section 271AAB is self-contained. There can be no doubt that there is no discretion with the AO as the parameters by which the AO or the tax authorities are bound in regard to the rate of penalty and the circumstances on the basis of which the penal provision can be attracted are self-explanatory. It can be noticed that the Co-ordinate Benches of the Tribunal have categorically held that the expression 'undisclosed income' is given a definite and specific meaning and the word has not been described in an inclusive manner so as to enable the tax authorities to give wider or elastic meaning which enables them to bring within its ambit the species of income not specifically covered by the definition. Moreover, such penal provisions are required to be interpreted in a strict, specific and restricted manner and not in an inclusive manner. If the surrendered income does not fall in the definition of "**undisclosed income**" as defined u/s 271AAB of the Act, the penalty is not warranted. It can be further noted that the penalty under section 271AAB can be initiated in respect of undisclosed income as defined in the section 271AAB itself found during the search action, independent of the assessment proceedings. Though, the fact in a case that the assessee has been able to explain the source of the alleged '**undisclosed income**' may be relevant for final imposition of the penalty, however, for initiation of the penalty proceedings, the provisions of section 271AAB are self contained and are not dependent upon commencement or finalization of the assessment proceedings. It is further pertinent to note here it is not mandatory for the AO to invoke provisions of section 271AAB of the Act in each every case of levy of penalty pursuant to search action.

There is no bar to the assessing Officer to initiate penalty proceedings u/s 271(1)(c) of the Act even in cases involving search actions if in the facts and circumstances of the case, it is so warranted. The only bar is that no penalty under the provisions of section 270A or section 271(1)(c) of the Act shall be imposed in respect of the undisclosed income, as defined u/s 271AAB of the Act, unearthed during the search action carried out u/s 132 of the Act. It is to be noted that the provisions of section 271AAB and section 271(1)(c) of the Act simultaneously existed and were operational till the provisions of section 271AAC become effective from 01.04.2017.

The Assessing Officer has levied penalty @ 10% of the alleged undisclosed income, however, it is a matter of record in this case that the assessee has not made any surrender of any undisclosed income during the search action. The assessing officer has not initiated the penalty proceedings u/s 271AAB of the Act on the basis of or in consequence of the said search action, rather the assessing officer, has initiated the penalty proceedings during the assessment proceedings solely on the ground that the assessee has disclosed certain income from undisclosed sources in the return of income and paid due taxes thereupon. The relevant part of the assessment order in this respect is reproduced as under:

“The assessee has filed return u/s 139 showing income of Rs. 2808270/-The assessee has disclosed income of Rs.2179221/- during the year on account of undisclosed jewellery. Penalty u/s 271AAB is initiated.”

A perusal of the above reproduced relevant part of the assessment order reveals that the assessing officer has not mentioned about unearthing of any undisclosed income as defined u/s 271AAB of the Act during search action carried out at the premises of the assessee. In my view, the income declared by the assessee in the return of income or found or

assessed by the Assessing officer in the assessment proceedings may be relevant for assessment of the income under section 68 /69 and other related provisions of the Act and also for the levy of penalty under section 271(1)(c) of the Act in view of the relevant provisions of section 68/69 and 271(1)(c) of the Act. However, for the levy of penalty u/s.271AAB, the case must fall within the four corners of the definition of expression “**undisclosed income**” as defined u/s 271AAB itself. The assessee in this case is an individual and has earned income from partnership firm and interest income. The assessee has neither earned any business income nor earned any income exceeding Rs.50 lakhs so as to require mandatory filing of personal assets and liabilities or to maintain books of accounts; even the assessee is not required to otherwise disclose any such income to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of search; the alleged income is not any income 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. Assessee has neither made any surrender of any undisclosed income during the search action nor the penalty has been initiated on the basis of undisclosed income found during such search action. In view of the above factual position, the impugned order of the AO imposing the penalty on the assessee under section 271AAB of the Act does not pass the mandate of the provisions of section 271AAB of the Act, therefore, the same being bad in law is hereby quashed.

In the result, the appeal of the assessee stands allowed.

Order pronounced in open court on 11/02/2021

Sd/-
(Sanjay Garg)
Judicial Member

Kolkata,
*Dkp/Sr.PS

दिनांक:- 11/02/2021 कोलकाता

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Shiv Bhagwan Gupta C/o Nirmal & Associates Chartered Accountants Nepali Kothi, Opp Gasoline Petrol Pump, Boring Road, Patna-800 001
2. प्रत्यर्थी/Respondent-ACIT, Central Circle-1, Patna
3. संबंधित आयकर आयुक्त पाटना / Concerned CIT
4. आयकर आयुक्त- अपील पाटना / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण पाटना / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
पाटना ।