

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA**

(Before Sri J. Sudhakar Reddy, Hon'ble Accountant Member & Sri Aby T. Varkey, Hon'ble Judicial Member)

ITA No. 326/Kol/2020

Assessment Year: 2013-14

Smt. Rashmi Jalan.....Appellant

4A, Hastings Park Road

Hastings, 1st Floor

Kolkata – 700 027

[PAN : ACVPJ 0776 B]

Vs.

Asstt. Commissioner of Income Tax, Circle-12(2), Kolkata.....Respondent

Appearances by:

Shri S.M. Surana, Advocate, appeared on behalf of the assessee.

Smt. Ranu Biswas, Addl. CIT D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : September 15th, 2020

Date of pronouncing the order : September 30th, 2020

ORDER

Per J. Sudhakar Reddy, AM :-

This appeal filed by the assessee is directed against the order of the Learned Commissioner of Income Tax (Appeals) – 20, Kolkata, (hereinafter the “Id.CIT(A)”), passed u/s. 250 of the Income Tax Act, 1961 (the ‘Act’), dt. 26/02/2020, for the Assessment Year 2013-14.

2. Facts in brief:-

A search and seizure operation was conducted u/s 132 of the Act on 13/12/2012 by the Investigation Wing, Kolkata, at the residences and various business premises of Ramkrishna Forging Ltd. and others. A search and seizure operation u/s 132 of the Act was conducted at the residence of Smt. Rashmi Jalan, the assessee at Flat No. 6A, Belmont Apartment, 6th Floor, 18/2, Alipore Road, Kolkata – 700 027. Notice u/s 142(1) of the Act was issued to the assessee. In response, the assessee filed a return of income declaring income of Rs.3,17,25,160/-. Income was declared under the heads ‘salary’, ‘house property’ and ‘other sources’. The Assessing Officer records at para 4 & 5 of his order as follows:-

- “4.They produced relevant evidences in support of the return of income which were seen and placed on record.
5. It is seen from the computation of total income filed along with the return of income that the assessee during the year under consideration had disclosed an amount of Rs.3,10,00,000/- as commodity profit which was duly included in the Profit & Loss Account and computation of total income. Penalty proceeding u/s 271AAB of the IT Act, 1961 is initiated separately.”

2.1. The assessment was completed u/s 143(3) of the Act, accepting the returned income. Later a notice was issued u/s. 274 r.w.s. 271 of the Act on 31/03/2015 proposing to levy penalty. The notice reads as follows:-

“

NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF THE I.T. ACT, 1961.

P.A.No. AACHM0965N

Office of the DCIT, CC-1(1), Kolkata.
AayakarBhavanPoorba, 110, Shanti Pally, 3rd Floor,
E.M. Bye Pass, Kolkata-700 107

Date:- 31.03.2015

To,
Smt. Rashmi Jalan,
Belmot Apartment, Flat No.-6A,
6th Floor, 18/2, Alipore Road,
Kolkata-700 027.

Whereas in the course of proceedings before me for Assessment Year 2013-14, it appears to me that you have not satisfied the conditions of the provisions of section 271AAB of the Income tax Act, 1961.

You are hereby requested to appear before me at 11.30 A.M. /P.M. on 15.06.2015 and show cause why an order imposing a penalty or you should not be made under section 271 of the Income Tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through 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 271.



[S. Biswas]
Deputy Commissioner of Income Tax,
Central Circle-1(1), Kolkata
एस. बिस्वास
S. BISWAS
आयकर उपपातक, केन्द्रीय सर्कल-1(1), कोलकाता
Dy. Commissioner of Income Tax
Central Circle-1(1), Kolkata

2.1.1. The assessee filed a written submission on 14/09/2015. Thereafter the Assessing Officer passed an order u/s 271AAB/274 of the Act on 22/09/2015, for the Assessment Year 2013-14 imposing a penalty of Rs.31,00,000/-

3. Aggrieved the assessee carried the matter in appeal. Before the Id. First Appellate Authority, the assessee contended that the three conditions specified in Section 271AAB of the Act for levy of penalty have not been satisfied. He also raised other contentions that

- a) Commodity profit/income was not discovered as a result of any incriminating material and that these were duly recorded in other documents which would have been disclosed by the assessee.
- b) The paper containing the commodity trading profit was not found during the course of search as evident from the *panchanama* drawn up in the name of the assessee.
- c) That the assessment itself is bad in law since it does not record that incriminating document was found during the course of search based on which the assessment was made.

3.1. The Id. CIT(A) rejected the contentions of the assessee and submitted that:-

- a) The entries relating to commodity trading profit was not maintained in the regular books of accounts of the assessee.
- b) From the document seized, it is evident that only net earnings were recorded therein and that there were several such transactions in the month.
- c) All these transactions in commodity trading were made in cash.

The contentions of the assessee that he would have anyhow disclosed these profits in the return of income for the year, was not accepted, as all the settlements were in cash and the assessee has taken care to remove all audit trails of these transactions and that suppression of profits in commodity trading was only detected

due to search. He rejected the contention of the assessee that commodity profits were recorded in other documents which would have been disclosed to the Department.

3.2. The Id. CIT(A) relied on the decision of the Hon'ble Allahabad High Court in the case of *Pr. CIT, Kanpur vs. Sandeep Chandak (2018) 405 ITR 648*, for the proposition that penalty u/s 271AAB of the Act is mandatory where the three conditions as mentioned above are satisfied. He also relied on the decision of the Kolkata Bench of the Tribunal in the case of *DCIT, CC-1(1) vs. Gopal Krishna in ITA No. 2224/Kol/2018, order dt. 05/02/2020*, and confirmed the penalty.

4. Aggrieved the assessee is in appeal before us.

5. The Id. Counsel for the assessee Shri S.M. Surana, submitted that

a) Search warrant was drawn up in the name of the assessee only with regard to her bank locker which was opened on 04/02/2013 and no incriminating document was found nor recorded in the *panchnama*.

(b) The documents found in the office of Ramkrishna Forging Ltd., cannot be considered as incriminating material and it is not the case of the Assessing Officer that the income arising from these documents would not have been declared by the assessee as income in regular returns of income, but for the search.

(c) No statement u/s 132(4) of the Act, was recorded from the assessee and hence the question of the assessee making a disclosure during the course of search did not arise.

(d) The assessee had declared commodity profit in its return of income and the Assessing Officer accepted the same. There is no whisper in the assessment order or the order sheet entry that there was any incriminating material found during the course of search, based on which any income has been assessed. The commodity profit was recorded in other documents found during the course of search which would have been anyhow disclosed to the department even otherwise.

5.1. He further submitted that the notice issued u/s 271AAB is vague as there is no specific charge and hence bad in law. For this proposition, he relied on the following case-law:-

- *Shri Padam Chand Pungliya vs. ACIT in ITA No. 112/JP/2018, Assessment Year 2014-15, order dt. 05/04/2019*
- *Shri Ashok Bhatia vs. DCIT in ITA No. 869/Ind/2018, Assessment Year 2014-15, order dt. 05/02/2020*
- *Shri Ravi Mathur vs. DCIT in ITA No. 969/JP/2017, Assessment Year 2015-16, order dt. 13/06/2018*

5.2. That there is no statement recorded from the assessee u/s 132(4) of the Act. There is no whisper in the assessment of any undisclosed income being assessed. There is no finding in the assessment order that the assessee would not have disclosed the income arising out of the documents found but for the search. Admittedly, these documents were not found during the search of the assessee's bank locker and if at all the documents were found during the course of search of M/s. Ramkrishna Forging Ltd., a third party, were to be used, action u/s 153C of the Act would have to be taken against the assessee. He submitted that action u/s 153C of the Act, was not taken against the assessee. He distinguished the decision of the Hon'ble Allahabad High Court in the case of *Sandeep Chandak (supra)* and the decision of the ITAT in the case of *Gopal Krishna (supra)* relied upon by the Id. CIT(A).

6. The Id. D/R, on the other hand, submitted that:-

- a) Incriminating documents were found during the course of search in the office of Ramkrishna Forgings Ltd., based on which a disclosure was made by Shri Naresh Jalan on 08/02/2017 of commodity profits, which was never intended to be disclosed as income, but for the search. He pointed out that the Id. CIT(A) has recorded that these transactions were done in cash and were not mentioned in any of the regular books of accounts of the assessee.
- b) That the three conditions mentioned in Section 271AAB of the Act were satisfied, as the assessee made a voluntary disclosure based on incriminating material found during the course of search and had filed his return of income and paid taxes together with interest. On the argument that the notice is vague, he submitted that the assessee has not raised this point before the Assessing Officer and that he understood the notice and to take such arguments at this stage, is not maintainable in law.

7. In reply, the Id. Counsel for the assessee submitted that the arguments on the validity of the notice is a legal argument which goes to the root of the matter and hence can be taken up by the assessee at any stage of proceedings. For this proposition he relied on the judgment of the Hon'ble Gujarat High Court in the case of *P.V. Doshi Vs. CIT (Guj)* reported in (1978) 113 ITR 22 (Guj).

8. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

9. The notice issued u/s 274 r.w.s. 271 on 31/03/2015, by the Assessing Officer has been extracted by us above. The charge in this notice is not specified.

The Jaipur Bench of the Tribunal in the case of *Padam Chand Pungliya (supra)* held as follows:-

"We further note that in the case in hand, the AO in the show cause notice has neither specified the grounds and default on the part of the assessee nor even specified the undisclosed income on which the penalty was proposed to be levied. For ready reference we reproduce the show cause notices issued by the AO under section 274 read with section 271AAB on 30th March, 2016 and 16th August, 2016 as under :—

"No. ACIT/CC-I/JPR/2015-16

Dated : 30.03.2016.

PENALTY NOTICE UNDER SECTION 274 READ WITH SECTION 271AAB OF THE INCOME TAX ACT. 1961.

PAN - ABDPP 7196A

To,

Sh. Padam Chand Pungalia,

2372, MSB Ka Rasta, Johari Bazar,

Jaipur.

Whereas in the course of assessment proceedings before me for the A.Y. 2014-15, it appears to me that as per sections 274 and 275 read with section 271AAB of the Income-tax Act you are liable for penalty on assessed undisclosed income.

You are hereby requested to appear before me at my office Room No. 103 (NA), N.C.R.B., Jaipur at 11.00 A.M. on 28.04.2016 and show cause why an order imposing penalty on you should not be made u/s 271AAB r.w.s. 274 of the Income tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through Authorized Representative, you may reply to show cause in writing on or before the said date which will be considered before any such order is made.

Yours faithfully,

Sd/-

(Sushil Kumar Kulhari)

Asstt. Commissioner of Income-tax,

Central Circle-1, Jaipur.

"No. ACIT/CC-1/JPR/2016-17/928

Dated : 16.08.2016.

**PENALTY NOTICE UNDER SECTION 274 READ WITH SECTION 271AAB OF THE
INCOME TAX ACT, 1961.**

PAN - ABDPP 7196A

To,

Sh. **Padam Chand** Pungalia,

2372, MSB Ka Rasta, Johari Bazar,

Jaipur.

Whereas in the course of assessment proceedings before me for the A.Y. 2014-15, it appears to me that as per sections 274 and 275 read with section 271AAB of the Income-tax Act you are liable for penalty on assessed undisclosed income.

You are hereby requested to appear before me at my office Room No. 103 (NA), N.C.R.B., Jaipur at 11.00 A.M. on 25.08.2016 and show cause why an order imposing penalty on you should not be made u/s 271AAB r.w.s. 274 of the Income tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through Authorized Representative, you may reply to show cause in writing on or before the said date which will be considered before any such order is made.

Yours faithfully,

Sd/-

(Devangi Swarnkar)

Asstt. Commissioner of Income-tax,

Central Circle-1, Jaipur.'

Thus it is clear that both the show cause notices issued by the AO for initiation of penalty proceedings under section 271AAB are very vague and silent about the default of the assessee and further the amount of undisclosed income on which the penalty was proposed to be levied. Even the Hon'ble Jurisdictional High Court in case of Shevata Construction Co. (P.) Ltd in DBIT Appeal No. 534/2008 dated 06.12.2016 has concurred with the view taken by Hon'ble Karnataka High Court in case of Manjunatha Cotton & Ginning Factory (supra) which was subsequently upheld by the Hon'ble Supreme Court by dismissing the SLP filed by the revenue in the case of SSA's Emerald Meadows (supra). Accordingly, following the decision of the Coordinate Bench as well as Hon'ble Jurisdictional High Court, this issue is decided in favour of the assessee by holding that the initiation of penalty is not valid and

consequently the order passed under section 271AAB is not sustainable and liable to be quashed."

10. Similarly, the Indore Bench of the ITAT in the case of *Shri Ravi Mathur (supra)* has held as follows:-

"7. As regards the validity of notice under [section 274](#) for want of specifying the ground and default, we find that when the basic condition of the undisclosed income not recorded in the books of accounts does not exist, then the same has to be specified by the AO in the show cause notice and further the AO is required to give a finding while imposing the penalty under [section 271AAB](#). Even if the AO is satisfied and come to the conclusion that the assessee has not recorded the undisclosed income in the books of accounts or in the other documents / record maintained in normal course relating to specified previous year, the show cause notice shall also specify the default committed by the assessee to attract the penalty @ 10% or 20% or 30% of the undisclosed income. There is no dispute that the AO has not specified the default and charge against the assessee which necessitated the levy of penalty under [section 271AAB](#) of the Act. Consequently, the assessee was not given an opportunity to explain his case for specific default attracting the levy of penalty in terms of clauses (a) to (c) of [section 271AAB\(1\)](#) of the Act. The Chennai Bench of the Tribunal in the case of [DCIT vs. Shri R. Elangovan \(supra\)](#) at pages 7 to 10 has held as under :-

*" It is clear from the Sub Section (3) of Section 271 AAB that [Sections 274](#) and [Section 275](#) of the Act shall, so far as may be, apply. Sub Section (1) of [Section 274](#) of the Act mandates that order imposing penalty has to be imposed only after hearing the assessee or giving a assessee opportunity of hearing. Opportunity that is to be given to the assessee should be a meaningful one and not a farce. Notice issued to the assessee reproduced (*supra*), does not show whether penalty proceedings were initiated for concealment of income or for furnishing inaccurate particulars of income or for having undisclosed income within the meaning of [Section 271AAB](#) of the Act. Notice in our opinion was vague. Hon'ble Karnataka High Court in the case of *SSA's Emerald Meadows (supra)* relying in its own judgment in the case of *Manjunatha Cotton and Ginning Factory (supra)* had held as under:-*

"2. This appeal has been filed raising the following substantial questions of law:

(1) Whether, omission if assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the penalty notice under [Section 274](#) r.w.s. 271(1)(c) is bad in law and invalid despite the amendment of [Section 271\(1B\)](#) with retrospective effect and by virtue of

the amendment, the assessing officer has initiated the penalty by properly recording the satisfaction for the same?

(3) Whether on the facts and in the circumstances of the case, the Tribunal was justified in deciding the appeals against the Revenue on the basis of notice issued under [Section 274](#) without taking into consideration the assessment order when the assessing officer has specified that the assessee has concealed particulars of income?

3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under [Section 274](#) read with [Section 271\(1\)\(c\)](#) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify which limb of [Section 271\(1\)\(c\)](#) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of [CIT vs. Manjunatha Cotton and Ginning Factory](#) (2013) 359 ITR 565.

4. In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises in this appeal for determination by this Court. The appeal is accordingly dismissed".

In the earlier case of Manjunatha Cotton and Ginning Factory (supra) their lordship had observed as under:-

"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. Sending printed form where all the grounds mentioned in [section 271](#) are mentioned would not satisfy the requirement of law ;

The assessee should know the grounds which he has to meet specifically. Otherwise, the principles of natural justice are offended. On the basis of such proceedings, no penalty could be imposed on the assessee ;) taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law ; penalty proceedings are distinct from the assessment proceedings : though proceedings for imposition of penalty emanate from proceedings of assessment, they are independent and a separate aspect of the proceedings ;

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 proceedings on the 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 invalid in the penalty proceedings".

View taken by the Hon'ble Karnataka High Court in the above judgment was indirectly affirmed by the Hon'ble Apex Court, when it dismissed an SLP filed by the Revenue against the judgment in the case of SSA's Emerald Meadows (supra), specifically observing that there was no merits in the petition filed by the Revenue. Considering the above cited judgments, we hold that the notice issued u/s.274 r.w.s. 271AAB of the Act, reproduced by us at para 5 above was not valid. Ex-consequenti, the penalty order is set aside.

6. Since we have set aside the penalty order for the impugned assessment year, the appeal filed by the Revenue has become infructuous."

In view of the decision of the Chennai Bench (supra), the show cause notice issued by the AO in the case of the assessee is not sustainable."

10.1. Similar are the decisions in the other case-law relied upon by the assessee.

11. Applying the propositions of law laid down in these case-law to the facts of the case, we have no other alternative but to hold that the penalty in question is bad in law as the showcause notice issued by the Assessing Officer does not specify the charge/s against the assessee for levy of penalty, as required by law. Thus, on this ground, the penalty is quashed.

12. Even otherwise, Section 271AAB of the Act, contemplates imposition of a penalty pursuant to the disclosure of income in statement recorded u/s 132(4) of the Act by the assessee. It is an admitted fact that no such statement has been recorded from the assessee. Thus, on this ground also, the levy of penalty fails. Nowhere in the assessment order it is stated that undisclosed income has been assessed. The assessment was made u/s 143(3) of the Act and the returned income was accepted. Thus, for all these reasons, we quash the penalty levied u/s 271AAB of the Act and allow this appeal of the assessee.

13. In the result, appeal of the assessee is allowed.

Kolkata, the 30th day of September, 2020.

Sd/-
[Aby T. Varkey]
 Judicial Member

Dated : 30.09.2020
 {SC SPS}

Sd/-
[J. Sudhakar Reddy]
 Accountant Member

Copy of the order forwarded to:

1. Smt. Rashmi Jalan
4A, Hastings Park Road
Hastings, 1st Floor
Kolkata – 700 027

2. Asstt. Commissioner of Income Tax, Circle-12(2), Kolkata

3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches