

IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES 'B' JAIPUR
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

ITA No. 113/JP/2018
Assessment Year :2015-16

M/s Sumangal Gems Jaipur	बनाम Vs.	DCIT, Central Circle-02, Jaipur
PAN/GIR No.: AAFFS8731B		
Appellant		Respondent

निर्धारिती की ओर से / Assessee by : Sh. S. R. Sharma (CA) &
Sh. R. K. Bhatra (CA)
राजस्व की ओर से / Revenue by : Sh. B. K. Gupta (CIT) &
Smt. Runi Pal (JCIT)

सुनवाई की तारीख / Date of Hearing : 22/01/2020
उदघोषणा की तारीख / Date of Pronouncement: 24/02/2020

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A)-4, Jaipur dated 20.11.2017 wherein the assessee has taken the following grounds of appeal:-

"1. That the notice issued by assessing officer for initiating the penalty u/s 271AAB of the I.T. Act, 1961 is not in accordance with law not being specifically pointing out the default for which the Ld. AO sought to impose penalty u/s 271AAB.

2. That without prejudice to the ground No. (1) above on the facts and in the circumstances of the case the Ld. CIT(A) is wrong, unjust and has erred in law in confirming penalty of Rs. 14,49,248/- imposed by the Ld. Assessing Officer u/s 271AAB of the I.T. Act, 1961."

2. Briefly stated, the facts of the case are that a search and seizure action u/s 132 of the Act was carried out on Surana Group on 15.10.2014 and

assessee is one of the members of the said Group. During the course of search, the statement of the partner of the assessee firm was recorded u/s 132(4) wherein he surrendered additional business income on account of stock amounting to Rs. 1,44,92,480/-. Thereafter, the assessee firm filed its return of income on 20.09.2015 declaring total income of Rs. 1,44,92,480/- which represents the additional income surrendered during the course of search. The assessment u/s 143(3) read with section 153B(1)(b) was completed on 14.12.2016 accepting the returned income. Separately, the penalty proceedings u/s 271AAB were initiated by way of issuance of notice u/s 274 read with section 271AAB of the Act and thereafter, the AO levied the penalty u/s 271AAB vide his order dated 14.06.2017 @ 10% of Rs. 1,44,92,480/-, being the undisclosed income of the specified previous year.

3. In the aforesaid penalty order, the Assessing Officer referred to the assessment order and stated that the assessee has not filed any further appeal against the said order. Further, the Assessing officer held that in view of the provisions of section 271AAB, it is clear that there is no scope of escapement for levy of penalty rather the provisions provides for the quantum for levy of penalty depending upon facts and circumstances of the each case and the assessee contentions that he had made bonafide disclosure were not found acceptable.

4. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) who noted that the assessee has made disclosure of additional income and same was also offered in the return filed u/s 153A of the Act. It was further stated that intention of legislature was very clear that section 271AAB provides for mandatory levy of penalty on surrender of undisclosed income though quantum thereof may vary subject to fulfillment of certain conditions and thus, unlike section 271AAA, wherein immunity from imposition of penalty

is possible subject to fulfillment of conditions, there is no immunity clause provided from penalty u/s 271AAB. It was accordingly held that the penalty u/s 271AAB is mandatory in nature and there is no discretion with the AO and the penalty so levied by the Assessing Officer was confirmed. Against the said findings, the assessee is now in appeal before us.

5. During the course of hearing, the Id. AR submitted that the penalty notice dated 14.12.2016 does not specify the specific limb of section 271AAB under which the penalty was sought to be levied. Similarly, the second show cause notice dated 15.05.2017 also does not specify the limb under which the Assessing Officer seek to levy penalty u/s 271AAB of the Act. It was submitted that both the notices were issued in a routine manner without mentioning under which clause of section 271AAB of the Act, the assessee is liable for penalty. The assessee should know the grounds which he has to meet specifically, otherwise, the principles of natural justice are violated and on the basis of such proceeding, no penalty could be imposed on the assessee. Thus, there is no application of mind at the time of issuing the show cause notice by the AO. It was submitted that the Assessing Officer has finally levied penalty as per clause (a) of section 271AAB of the Act, however, no such ground was specified in the show cause notice issued u/s 271AAB read with section 274 of the Act.

6. It was further submitted that the AO and the Id CIT(A) are not correct in stating that the levy of penalty u/s 271AAB is mandatory in nature as the provisions of section 271AAB states that the Assessing Officer may levy penalty which thus permits the Assessing Officer to use his discretion to levy or not to levy a penalty depending upon facts and circumstances of the case. It was further submitted that the legislature has included the provisions of section 274 and 275 of the Act in context of section 271AAB of the Act with clear intention

to consider the imposition of penalty judicially. Therefore, 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 facts and merits placed before the AO. Once the AO 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. It was further submitted that the penalty order u/s 271AAB is an appealable order u/s 246A before CIT(A) and therefore, it is not correct to hold that the penalty u/s 271AAB is mandatory in nature and had that being the intention of legislature, there would not have been any provision of appeal against the said levy of penalty.

7. It was further submitted that during the course of search, in the statement recorded u/s 132(4) of the I.T. Act, 1961, the partner of assessee firm surrendered a sum of Rs.1,44,92,480/- on account of alleged excess stock. In the course of search the departmental Valuer had valued the total value of stock of Emerald Rough, semi precious stones and Emerald Finished found at this premises at Rs.1,80,61,660/- whereas as per books of accounts of assessee firm, the value of stock was Rs.35,69,180/-. It was submitted that the deferential value of stock of Rs.1,44,92,480/- offered by assessee firm as additional business income was nothing but the difference in valuation of stock. Thus no excess stock was found during the course of search survey. It is only difference in valuation of stock valued by registered valuer. It was submitted that it is an admitted fact that there is no identifiable/separable stock found which can be said as undisclosed. More particularly, assessee firm has no unexplained purchases or sales. There is no real income and no real excess stock. Without establishing real income, no penalty can be imposed presuming the hypothetical income. In the instant case, the surrender has been made on account of excess value of stock, it is not a case where during search,

unaccounted sales or unexplained purchases have been found. Therefore, whenever the assessee will sell these stocks, the resulted profit will automatically get incorporated in its taxable profits. Under the facts and circumstances, in no case there would be any undisclosed income of the assessee, therefore, provision of section 271AAB is not attracted in the instant case. Accordingly it was submitted that it is not a case where Department either found any income or any assets or any expenses not recorded in the regular books of accounts or documents, hence, the amount surrendered by way of excess value of stock does not meet the definition of "undisclosed income" given in Section 271AAB and merely basis the surrender made in the statement recorded u/s 132(4), no penalty can be levied. In support, the reliance was placed on the Co-ordinate Bench decision in case of *M/s Rambhajo vs ACIT (ITA No. 991/JP/17 dated 11.01.2019)*, *M/s Silver Art & Palace (ITA no. 236/JP/18 dated 11.02.2019)* and *Shri Padam Chand Pungliya, Jaipur vs. ACIT, Jaipur (ITA No. 112/JP/2018 dated 05/04/2019)*.

8. Per contra, the Id. DR is heard who has relied on the order of the lower authorities and submitted that once the assessee has surrendered the amount during the course of search in the statement recorded u/s 132(4) of the Act of the one of the partners of the assessee firm, therefore, there is no basis to state that there is no undisclosed income found during the course of search. It was further submitted that the provisions of section 271AAB are clear in contrast to section 271AAA wherein there is no mechanism for immunity from levy of penalty and the only discretion which lies with the Assessing Officer is in terms of quantum of levy of penalty and that to, depends upon the satisfaction of the specific terms and conditions as provided in the said provisions. The Id DR accordingly supported the findings of the lower authorities.

9. We have heard the rival contentions and perused the material available on record. Firstly, the question that arises for consideration is the nature of

charge(s) specified under section 271AAB of the Act. Whether it provides for a singular charge of undisclosed income for the specified previous year found during the course of search initiated under section 132 on or after the 1st day of July, 2012 or it provides for multiples charges as so contended by the Id AR in terms of clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB of the Act. On close reading of provisions of Section 271AAB, we find that the primary condition or charge for levy of penalty is the existence of undisclosed income for the specified previous year found during the course of search in the case of assessee. Once the said primary condition or charge is satisfied, for the purposes of quantifying the penalty, the Assessing officer has to examine the satisfaction of ancillary conditions as specified under clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB. Merely because the quantum of penalty varies from 10% to 30% subject to compliances with the ancillary conditions, it cannot be said that where the AO has initiated the penalty under section 271AAB, there is any ambiguity in the charge or there is any lack of application of mind on part of the Assessing officer. Further, the levy of penalty under Section 271AAB is not based on addition made and investigation/enquiry conducted during the course of assessment proceedings, rather it is based on search conducted on the assessee on or after the 1st day of July, 2012, in such a situation, where the penalty show-cause notice is issued u/s 271AAB, the Assessing officer is making the assessee aware of the charge against him in terms of undisclosed income found during the course of search and thus, the assessee is granted an opportunity to refute such charge and file its explanations/submissions. Unlike provisions of section 271(1)(c) which provides for separate charge of "concealment of particulars of income" or "furnishing of inaccurate particulars of income", there is a singular charge under section 271AAB in terms of the existence of undisclosed income for the specified previous year found during the course of search. Therefore, in the instant case, where the notice dated 14.12.2016 is issued to the assessee firm

to show-cause why penalty should not be levied u/s 271AAB of the Act, the assessee is made aware of the specific charge against it and an opportunity has thus been given to rebut such charge and therefore, we do not see any infirmity in the initiation of the penalty proceedings and consequent penalty order so passed by the AO on this account. Further, even for sake of argument, if it is assumed that primary charge of undisclosed income has to be read along with ancillary conditions and thus multiples charges have been prescribed in terms of clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB and where the Assessing officer has not stated the specified charge at the time of initiation of penalty proceedings, in our considered view, such uncertain charge at the stage of initiation of penalty proceedings can be made good with a clear-cut charge in the penalty order. In any case, existence of a clear-cut charge in penalty order is a must so as to validate any penalty order and so long as there is a clear finding in the penalty order, no infirmity can be said to arise in the penalty order. In the instant case, the AO has recorded his satisfaction while passing the assessment order that there is undisclosed income found during the course of search and other conditions being satisfied and therefore, the assessee is liable for penalty u/s 271AAB, thereafter the notice initiating the penalty proceedings U/s 271AAB was issued to the assessee. Thereafter, the Assessing officer has given a specific finding as reflected in the penalty order that the assessee is liable for penalty U/s 271AAB(1)(a) which provides for levy of penalty @ 10% on the undisclosed income found during the course of search and admitted in statement recorded u/s 132(4) of the Act. Therefore, we do not see any infirmity in the initiation of penalty proceedings and consequent penalty order so passed by the Assessing officer on this account and the contentions so raised by the Id AR in this regard cannot be accepted.

10. Now coming to another contention of the Id AR where he has challenged the findings of the lower authorities that penalty U/s 271AAB is mandatory in nature and there is no discretion with the Income tax authorities. In this regard, we again refer to the provisions of Section 271AAB which 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 may be 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. Further, the order levying the penalty is an appellable order and therefore, the fact that the statute has provided for an appellate remedy against the levy of penalty, the levy of penalty cannot be held as mandatory but the same will depend upon facts and circumstances of each case. Thus, we agree with the contentions of the Id AR that the levy of penalty is not mandatory in all cases but the Assessing officer has to decide based on facts and circumstances of the case. In fact, it is a consistent view of this Tribunal across various Benches that levy of penalty u/s 271AAB is not automatic in nature but the AO has the discretion and has to take a decision after arriving at the conclusion that the income disclosed by the assessee in the statement recorded U/s 132(4) of the Act is an "undisclosed income" in terms of Section 271AAB(1) r/w. explanation defining the undisclosed income. Further, where the discretion so applied by the Assessing officer has been rightly exercised or not in a particular case can be reviewed and subject to appellate remedy as so provided in the Act.

11. This now takes us to next contention of the Id AR regarding amount surrendered during the course of search not qualifying as an "undisclosed income" u/s 271AAB r/w explanation thereto and merely surrender made in the

statement recorded u/s 132(4) is not sufficient for levy of penalty. It is a settled legal proposition that the penalty provisions needs to be construed strictly. Therefore, where the statute has provided for a charge for levy of penalty which is "undisclosed income for the specified previous year found during the course of search in the case of assessee" and has also defined the meaning of undisclosed income, for the purposes of levy of penalty, what has to be seen is whether the surrender so made, in terms of statement of the partner of the assessee firm recorded u/s 132(4) during the course of search, falls in the definition of "undisclosed income" which has been specifically defined and laid down in terms of clause (c) of explanation to section 271AAB which reads 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.”

12. In the instant case, therefore, what has to be determined is the income of such previous year which is represented by such stock of goods which is not found recorded in the books of accounts maintained by the assessee in the normal course relating to such previous year. Where the stock which is recorded in the books of accounts and the stock physically found during the course of search have no discrepancy in terms of quantity, then any difference in valuation done by the Department Valuer would not amount to undisclosed income as so defined in the explanation to Section 271AAB of the Act. Further, the valuation of such undisclosed stock is required to determine the investment which has been made in such stock and which has remained undisclosed to the Revenue authorities. The investment in stock is the function of price or cost at which stock has been purchased by the assessee and therefore, what is to be determined is the purchase price/cost of such stock and not the market price. Where such stock is ultimately sold, any profit arising therefrom would be brought to tax in regular course and the determination of market price would be relevant at that point in time.

13. In the instant case, stock of emerald rough, semi-precious and emerald finished gemstones was found during the course of search and these are stock-in-trade of the assessee firm in which it regularly deals as part of its business. What is therefore relevant for the present purposes is firstly, whether there is any excess stock physically found which is not recorded in the books of accounts and secondly, the cost at which such excess undisclosed stock has been acquired alongwith the cost of cutting and polishing such rough gemstones into finished gemstones and not the value at which such stock can fetch in the market or the fair market value of such stock. We note that in the entire valuation report and in the proceedings of search and seizure, the

Department has not made any allegation that there was any discrepancy in the quantity of stock found during the course of search and stock recorded in the books of account. Further, the valuation of the stock has been made by the Department Valuer basis the market value as on the date of search and the Assessing officer has merely gone by the surrender made during the course of search and there is thus no exercise which has been undertaken by the Assessing officer to determine the cost of the goods so found during the course of search. In our view, given that the assessee has disclosed the whole of the amount surrendered during the course of search in its return of income, the amount so surrendered and disclosed in the return of income is subject matter of assessment and has rightly been brought to tax in the quantum proceedings which has since attained finality. However, as far as present penalty proceedings u/s 271AAB are concerned which is solely based on the search proceedings and anyways independent of the assessment proceedings, the Assessing officer is required to give a specific finding that there is an undisclosed income found during the course of search in terms of undisclosed stock and which has not been recorded in the books of account. The undisclosed stock could be in terms of physically identifiable stock not found recorded in the books of accounts or the stock not found recorded at the appropriate value so determined by the Assessing officer. In the instant case, we find that the Assessing officer has merely gone by the surrender statement where the stock has been valued at market price prevailing as on the date of search and has not examined the matter from the perspective of determining any excess stock and the cost of such stock which is not recorded in the books of accounts. There is no finding that there is any excess stock which has been physically found and which has not been recorded in the books of accounts as on the date of search. In light of above discussions, it is thus clear that difference in stock of goods as per books and as found at the time of search is on account of valuation of such stock at the market value instead of cost and

the same cannot be a basis to hold that it represent undisclosed income so defined in explanation to section 271AAB of the Act. The Co-ordinate Bench in case of Shri Padam Chand Pungliya, Jaipur vs. ACIT, Jaipur (*supra*) has dealt with an identical issue and relevant findings are contained at para 9 of the said decision wherein the Co-ordinate Bench has held as under:-

"9. As regards the undisclosed income on account of excess stock, we note that during the course of search and seizure action the department has got valued the stock of the assessee from the departmental valuer. We find that in the valuation report the valuer has not made any attempt to find out the net weight but all the articles are taken at gross weight on which the prevailing market prices as on the date of search were applied. Thus it is clear that the difference in the closing stock was due to the valuation determined by the departmental valuer based on the gross weight and prevailing market prices in comparison to the value recorded by the assessee in the books of account. We further note that in the entire valuation report and in the proceedings of the search and seizure, the department has not made any allegation that there was any discrepancy in the quantity of the stock found during the course of search and seizure and the stock recorded by the assessee in the books of account. Once the stock which is recorded in the books of account of the assessee and the stock physically found at the time of search has no discrepancy in terms of quantity, then only because of difference in valuation done by the departmental valuer would not amount to undisclosed income based on the definition as per explanation to section 271AAB of the Act. Therefore, once the stock is found recorded in the books of account, it does not fall in the category of valuable article or things which has 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. For ready reference, we quote the

definition as provided in clause (c) of explanation to section 271AAB of the Act as under :-

" (a) Xxxx xxxxx xxxxx

(b) Xxxxx xxxxx xxxxxx

(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 54[Principal Chief Commissioner or] Chief Commissioner or 54[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."

Therefore, the stock which was found at the time of search and seizure was not disputed by the department that the same has been recorded in the books of accounts of the assessee. Once the stock is recorded in the books of account and no discrepancy is found as far as quantity of stock, then the difference of valuation would not amount to undisclosed income

in terms of definition prescribed in the explanation to section 271AAB of the Act. The Coordinate Bench of the Tribunal in the case of M/s. Rambhajo's vs. ACIT (supra) has considered the identical issue in para 38 as under:-

"38. Firstly, regarding stock of Kundan Meena, and diamond and other gemstones studded jewellery which has been surrendered during the course of search, what has to be determined is the income which is represented by such stock of jewellery which is not found recorded in the books of accounts maintained in the normal course relating to such previous year. In other words, the value at which such stock has been acquired by the assessee and not the value which such stock can fetch in the market or the fair market value of such stock. In the instant case, it has been contended that the valuation of the stock has been done at market rate as on the date of search without considering the cost disclosed in the books of accounts and without considering the well-accepted accounting policy which has been followed by the assessee firm where it values its stock at lower of cost and net realizable value. The cost can be determined on the basis of historical and/or current cost so recorded in the books of accounts. Alternatively, past gross profit percentage can also give a reasonable basis for determining such cost. In the instant case, the Id AR has contended that where gross profit of the past year determined at the rate of 13.92% is used and applied to the stock valued by the Revenue at the current market value, it will result in a scenario where the stock as per books of account is higher than the stock valued at the time of search. As per computation prepared which we have noted above, we find that stock (including stock of silver jewellery) as per books of accounts comes to Rs 35,11,24,031 as against Rs 34,27,22,924 valued by the Department at the time of search and therefore, contention so advanced by the Id AR is found reasonable.

Another aspect which has been submitted by the assessee relates to non-deduction on account of chapadi, wax etc for the Kundan Meena Jewellery while physically weighing the jewellery. It was submitted by the Id AR that the said fact was duly brought to the notice of Assessing officer vide written submission dated 15.12.2015, however, the same has not been considered by the Assessing officer. In our view, given that the assessee has disclosed the whole of the amount surrendered during the course of search in its return of income, the amount so surrendered and disclosed in the return of income has rightly been brought to tax in the quantum proceedings. However, as far as penalty proceedings are concerned, the Assessing officer is required to give a specific finding that there is an undisclosed income found during the course of search and which has not been recorded in the books of account. In the instant case, we find that the Assessing officer has merely gone by the surrender statement and has not examined the matter from the perspective of determining the cost of such stock and the quantification thereof after allowing deduction for Chapadi, wax, etc. which is a well established step as part of valuation methodology of such kind of jewellery and which has been followed at other locations except at Jaipur. There is no finding that there is any excess stock which has been physically found and which has not been found recorded in the books of accounts as on the date of search. In light of above discussions, it is thus clear that difference in stock of jewellery and silver items as per books and as found at the time of search is on account of valuation of such stock at the market value instead of cost and such valuation difference and on account of non-deduction of Chapadi, wax, etc while weighing the Kundan Meena Jewellery and the same cannot be a basis to hold that it represent undisclosed income so defined in explanation to section 271AAB of the Act and the penalty levied thereon is liable to be set-aside.”

Accordingly, in view of the above facts and circumstances of the case and following the earlier order of this Tribunal, we hold that the amount representing the excess stock based on the valuation of the departmental valuer cannot be regarded as undisclosed income in terms of definition provided in the explanation to section 271AAB of the Act. Hence, the penalty levied against such amount is not sustainable.”

In light of aforesaid discussions and in the entirety of facts and circumstances of the case, the penalty levied u/s 271AAB is not sustainable and the orders of the lower authorities are set-aside and the appeal of the assessee is allowed.

Order pronounced in the open Court on 24/02/2020.

Sd/-
(Sandeep Gosain)
Judicial Member

Sd/-
(Vikram Singh Yadav)
Accountant Member

Jaipur

Dated:- 24/02/2020

*Ganesh Kr.

Copy of the order forwarded to:

1. The Appellant- M/s Sumangal Gems, Jaipur
2. The Respondent- DCIT, Central Circle-02, Jaipur
3. CIT
4. CIT(A)
5. DR, ITAT, Jaipur.
6. Guard File {ITA No. 113/JP/2018}

By order,

Asst. Registrar

