

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH : KOLKATA

[Before Hon’ble Shri M.Balaganesh, AM & Shri S.S.Viswanethra Ravi, JM]

I.T.A No. 1471/Kol/2015

Assessment Year : 2013-14

DCIT, Central Circle-2(2), Kolkata -vs- Shri Amit Agarwal  
(Appellant) [PAN: ABWPA 7376 C]  
(Respondent)

I.T.A No. 1475/Kol/2015

Assessment Year : 2013-14

DCIT, Central Circle-2(2), Kolkata -vs- Shri Madan Lal Beswal  
(Appellant) [PAN: ADBPB 8910 G]  
(Respondent)

I.T.A No. 1476/Kol/2015

Assessment Year : 2013-14

DCIT, Central Circle-2(2), Kolkata -vs- Shri Manoj Beswal  
(Appellant) [PAN: ADBPB 8909 P]  
(Respondent)

For the Appellant : Shri G. Hangshing, CIT

For the Respondent : None

Date of Hearing : 06.11.2017

Date of Pronouncement : 10.11.2017

**ORDER**

**Per M.Balaganesh, AM**

1. These appeals are preferred by the Revenue against the independent appellate orders passed by the Ld. Commissioner of Income Tax (Appeals)-20, Kolkata [in short ‘Ld. CIT(A)'] in Appeal Nos. 1196,1202 & 1198/CIT(A)-20/CC-2(2)/14-15 dated

14.09.2015 in the hands of Shri Amit Agarwal, Shri Madan Lal Beswal and Shri Manoj Beswal respectively against the order levying penalty u/s 271AAB of the Income Tax Act, 1961 [in short the 'Act'] passed by the DCIT, CC-2(2), Kolkata [hereinafter referred to as 'Ld. AO'] for the assessment year 2013-14 dated 24.02.2015. As the issues involved in all these appeals are identical, they are taken up together and disposed off by this common order for the sake of convenience.

2. The only issue to be decided in these appeals is as to whether the Ld. CIT(A) was justified in deleting the penalty levied u/s 271AAB of the Act, in the facts and circumstances of the case.

3. The facts pertaining to Shri Amit Agarwal (I.T.A. No. 1471/Kol/2015) are considered herein for adjudication and the decision rendered thereon would apply with equal force to remaining two assesseees also in view of identical facts except with variance in figures.

4. The brief facts of this issue is that the search & seizure operation was conducted u/s 132 of the Act in respect of "Nezone Group" on 01.08.2012. The assessee is one of the key persons of the said group. During the course of search, the assessee disclosed an income of Rs. 3crores towards his undisclosed income for the assessment year 2013-14 vide disclosure petition and the same was also duly declared in the return of income filed for the assessment year 2013-14 on 30.09.2013 among other income. The assessment thereon was completed u/s 143(3) of the Act on 29.08.2014 accepting the said additional income of Rs. 3 crores. The assessee also paid due taxes with interest on this additional income of Rs. 3 crores by way of advance tax before the end of the previous year ended on 31.03.2013 relevant to assessment year 2013-14. The Ld. AO initiated penalty proceedings u/s 271AAB of the Act on completion of the assessment.

5. The Ld. AO during the course of penalty proceedings u/s 271AAB of the Act, observed that the assessee's case falls under Clause (a) of Section 271AAB(1) of the Act as admittedly the assessee has complied with all the conditions stipulated thereon, i.e.

- (i) the assessee made a disclosure statement u/s 132(4) of the Act offering the undisclosed income of Rs. 3 crores ;
- (ii) The assessee substantiated the manner in which such income was derived ;
- and
- (iii) The assessee declared the said income in the return of income filed within the time limit prescribed u/s 139(1) of the Act and paid the due taxes thereon.

The Ld. AO observed that since all the aforesaid cumulative conditions were duly satisfied by the assessee, the assessee would be invited with penalty calculated at 10% undisclosed income amounting to Rs. 30lakhs ( 10% of 3 crores) as per provisions of Section 271AAB(1)(a) of the Act. The assessee submitted that it has engaged in commodities trading during the year under appeal and was not required to maintain books of accounts as per Section 44AA of the Act as commodity profit derived was sort of windfall gain and more of a speculative nature. Hence the same would not be covered under the ambit of business income. Since there is no business income, the assessee is not required to maintain books of accounts u/s 44AA of the Act. The assessee sought to explain this as the reason for not entering the profits derived from commodities trading transactions in the books of accounts maintained by the assessee. The assessee also pleaded that it is the mistake of Accountant for not entering the commodity transaction in the books of accounts maintained by him. It specifically stated as an alternative argument that the assessee is not required to maintain books of accounts in terms of Section 44AA of the Act for the reason stated hereinabove. Hence the present case, according to the assessee does not fall under the ambit of undisclosed income as defined in Explanation C to Section 271AAB of the Act. The Ld. AO did not

heed to the aforesaid contentions of the assessee and observed that the Explanation C of Section 271AAB of the Act defines undisclosed income as follows:

“(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 accounts or other documents or transactions found in the course of 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.”*

Based on the aforesaid definition, the Ld. AO observed that since the assessee has not entered the commodity transaction in the books of accounts, the same takes the character of undisclosed income of the assessee and hence, the penalty is automatically exigible u/s 271AAB of the Act and accordingly proceeded to levy penalty thereon amounting to Rs. 30lakhs.

6. The Ld. CIT(A) however deleted the penalty by making the observations:-

*“I have considered the finding of the AO in the penalty order and the written submission as well as oral submission made by the AR during the appellate proceedings. I find that the AO has arrived at the conclusion that had there been no search operation u/s 132 of the I.T. Act, 1961, the assessee would not have disclosed income which was found recorded on papers and related documents in the office premises of the assessee (but not recorded in the regular books of accounts on day to day basis). The AO has not brought on record anything to prove the intention of the assessee to do so. On the other hand, the AR has emphasized that keeping papers/documents containing assessee’s income in the*

*safe custody in the office premises shows that the assessee had no intention to conceal his income. The incidence of not making entries in the regular books of accounts on day to day basis is a bonafide mistake on the part of the accountant for which assessee could not be penalized. I think, there is no doubt that not making entries in the regular books of accounts of the income earned by the assessee, is a mistake on the part of the accountant. But for this, imposition of the penalty u/s 271AAB of the IT Act, 1961, (in a situation when there was enough time late in the FY to make entries of such income in the regular books of accounts) is not justified. It is so, because it does not prove the guilty mind and intention to conceal the income on the part of the assessee. It also does not prove that had there been no search operation, the assessee would not have declared such income in the return of income. Accordingly, assessee's appeal on grounds no. 1 and 2 are allowed."*

7. Aggrieved, the Revenue is in appeal before us on the following grounds:

1. *That on the facts and circumstances of the case, the Ld. CIT(A) has not at all understood the new provision of Section 271AAB and has erroneously deleted the penalty imposed u/s 271AAB of the IT Act, 1961.*
2. *That as per the provisions of Section 271AAB of the Income Tax Act, 1961 newly introduced by Finance Act, 2012 w.e.f. 01.07.2012 and applicable from A.Y. 2013-14 onwards, penalty u/s 271AAB of the Income Tax Act, 1961 is mandatory.*
3. *That the Ld. CIT(A) has erroneously tried to interpret the intention of the assessee to evade payment of tax instead of interpreting the provisions of law.*
4. *That the order of the Ld. CIT(A) is perverse and is bad in law as well as on facts of the case, hence, the same needs to be deleted.*
5. *That the appellant craves leave to add and/or amend the grounds of this appeal.*

8. None appeared on behalf of the assessee. The assessee's authorized representative had filed an adjournment letter when the case was listed for hearing on 12.09.2017 and adjournment was granted thereon by this Tribunal. The case was further adjourned to 18.09.2017 and none appeared on behalf of the assessee and the case was adjourned to

06.11.2017 i.e. today. Even on 06.11.2017 none appeared on behalf of the assessee. Hence, we proceed to dispose off these appeals by hearing the Ld. DR.

9. We have heard the Id. DR and perused the materials available on record. It is not in dispute that the assessee's case falls within the ambit of 271AAB(1)(a) of the Act as admittedly the assessee had satisfied the cumulative conditions prescribed thereon. We are not inclined to accept arguments of the assessee that he is not required to maintain books of accounts u/s 44AA of the Act for his commodities transactions, in view of the fact that the assessee himself had considered his case to be eligible for tax audit and had accordingly, filed the return of income u/s 139(1) of the Act on 30.09.2013 for the assessment year 2013-14. It is not in dispute that the due date for filing return of income for non-tax audit assessee is 31.07.2013 for the assessment year 2013-14. In the instant case, the assessee himself had accepted the fact that he is engaged in commodities trading business and accordingly, he is mandated to maintain books of accounts u/s 44AA of the Act. It is not in dispute that as on date of search i.e. 01.08.2012, the assessee had not entered the commodities transaction in its books of accounts. Hence, as per the definition of undisclosed income given in Explanation C to Section 271AAB of the Act, the additional income disclosed by the assessee indeed takes the character of undisclosed income. We also find that the legislature in its wisdom had consciously omitted to include Section 271AAB of the Act in the provisions of section 273B of the Act. Hence there is no requirement to look into any reasonable cause adduced by the assessee warranting grant of any immunity from levying of penalty u/s 271AAB of the Act. Hence, even assuming that the mistake lies on the part of the Accountant by not entering the entries in the books of accounts regarding the commodities transaction, which might tantamount to reasonable cause, the assessee would still be exigible for levy of penalty as no immunity could be claimed in terms of Section 273B of the Act. We find that the Ld. CIT(A) had looked into irrelevant circumstances for deleting the levy of penalty in the instant case forgetting the fact that the levy of penalty u/s

271AAB of the Act is automatic in nature as per the plain reading of the provisions of the Act. Hence, we hold that the Ld. AO had rightly levied penalty at 10% of undisclosed income amounting to Rs. 30lakhs in the instant case. Accordingly, the grounds raised by the Revenue are allowed.

10. The said decision would apply with equal force for Madan Lal Beswal in I.T.A. No. 1475/Kol/2015 and Manoj Beswal in I.T.A. No. 1476/Kol/2015.

11. In the result, all the appeals of the Revenue are allowed.

**Order pronounced in the Court on 10.11.2017**

Sd/-  
[S.S. Viswanethra Ravi]  
Judicial Member

Sd/-  
[ M.Balaganesh ]  
Accountant Member

Dated : 10.11.2017

SB, Sr. PS

Copy of the order forwarded to:

1. DCIT, Circle-2(2), Kolkata, Aayakar Bhawan Poorva, 110, Shanti Pally, 4<sup>th</sup> Floor, Kolkata-700107.
2. (i) Amit Agarwal, DD Tower, GS Road, Christian Basti, Guwahati-781001.  
(ii) Madan Lal Beswal & Manoj Beswal, Flat No. 6N, Lake Tower, 87, Southern Avenue, Kolkata-700029.
- 3..C.I.T.- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary  
Head of Office/D.D.O., ITAT, Kolkata Benches

