आयकर अपीलीय अधिकरण 'सी' न्य□यपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI

म□नीय श्री मनोज कुम□र अग्रव□ल ,लेख□सदस्य एव□
म□नीय श्री मनोमोहन दास, न्यायिक सदस्य क□समक्ष।
BEFORE HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM,
AND HON'BLE SHRI MANOMOHAN DAS, JUDICIAL MEMBER

आयकर अपील सं./ **ITA No.648/Chny/2022**

(**निर्धारण वर्ष /** Assessment Year: 2015-16)

M/s.Summit Online Trade Solutions Pvt. Ltd. No.6, Back Portion Ground Floor, Parasu Pillai Street, Kilpauk, Chennai-600 010.	**बनाम**/ Vs.	**DCIT** Central Circle-1(3) Chennai.
स्थायी लेखा सं./जीआइ आर सं./**PAN/GIR No. AALCS-8098-J**		
(□पीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओरसे/ **Appellant by**	:	Shri N.V. Balaji (Advocate)-Ld. AR
प्रत्यर्थी की ओरसे/**Respondent by**	:	Shri P. Sajit Kumar,(JCIT) –Ld. Sr. DR
सुनवाई की तारीख**/Date of Hearing**	:	30-11-2023
घोषणा की तारीख **/Date of Pronouncement**	:	01-02-2024

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aggrieved by confirmation of penalty u/s 271AAB for Rs.82.56 Lacs for Assessment Year (AY) 2015-16, the assessee is in further appeal before us. The impugned order has been passed by learned Commissioner of Income Tax (Appeals)-18, Chennai [CIT(A)] on 29-06-2022 in the matter of penalty levied by Ld. Assessing Officer [AO] u/s. 271AAB of the Act vide order dated 23-03-2020.

2. In the penalty order, Ld. AO, considering the decision of Tribunal in quantum appeal ITA No.1081/Chny/2019 dated 27-09-2019,

observed that total additions were made in the hands of the assessee in the assessment order for Rs.80.83 Crores. Accordingly, penalty proceedings were initiated u/s 271AAB which were kept pending till pendency of appeal before Ld. CIT(A). The Ld. CIT(A) reduced the additions to Rs.80.53 Crores. Upon further appeal, Tribunal deleted additions of Rs.77.80 Crores on account of service tax refund. The total additions thus sustained in assessee's case were for Rs.275.21 Lacs which would be subjected to penalty u/s 271AAB. The assessee submitted that there was no undisclosed income and therefore, the penalty could not be levied u/s 271AAB. However, Ld. AO held that the assessee failed to furnish the details of the returned or unsold paper lottery tickets and also the details of recipients of the prize winning money in the online lottery. There was lapse on the part of the assessee. The case was held to be falling under Clause (c) of Sec.271AAB. Accordingly, Ld. AO levied impugned penalty @30% of Rs.275.21 Lacs which worked out to be Rs.82.56 Lacs.

3. During appellate proceedings, the assessee prayed for keeping the appeal in abeyance till disposal of assessee's quantum appeal by Hon'ble High Court. However, Ld. CIT(A) held that the assessee did not adduce any valid grounds on merits against levy of penalty. Accordingly, the penalty was confirmed against which the assessee is in further appeal before us with following grounds of appeal: -

1. The orders of the learned Commissioner of Income Tax (Appeals) ('CIT(A)') is against the law, the facts and circumstances of the case and the principles of equity and natural justice.

2. The CIT(A) erred in completing the proceedings in an arbitrary manner without considering the submissions made by the Appellant. The CIT(A) failed to appreciate that the Ld AO has failed to give sufficient opportunity of being heard to the appellant and merely upheld the order of the AO. The order of the AO and the CIT(A) is in gross violation of principles of equity and natural justice.

3. The CIT(A) erred in upholding the order of the AO imposing penalty under section 271AAB of the Act without appreciating that income assessed as disallowance / addition does not fall within the purview of undisclosed income as defined in explanation (c) to section 271AAB of the Act.
4. The CIT(A) failed to appreciate that the purported income of variation in additional income admitted by an Appellant on estimate basis is the bonafide surrender and it is the settled principle that assessment made merely on the basis of such surrender cannot result in levy of such penalty.
5. The CIT(A) failed to appreciate that penalty contemplated under section 271AAB of the Income Tax Act is not mandatory rather the imposition of penalty under the said section is upon the discretion of the AO and the AO exercised his discretionary powers in an arbitrary manner.
6. The CIT(A) erred in upholding the order of AO without appreciating that the AO failed to specify under which limb of section 271AAB of the Act Appellant's case falls, in his show cause notice under section 271AAB(1) of the Act dated 28.02.2020. The penalty levied on the basis of such defective notice is required to be quashed.
7. The CIT(A) ought to have appreciated that when the question of law in quantum appeal of the Appellant is admitted by Hon'ble Madras High Court in TCA No.164 of 2021, it is clearly evident that the issue relating to quantum appeal is debatable and it is the settled principle of the law that there is no jurisdiction to impose penalty on the debatable issues.

4. The Ld. AR advanced arguments and assailed penalty on legal grounds as well as on merits. Reliance has been placed on various judicial pronouncements to support the arguments, the copies of which have been placed on record. The Ld. AR submitted that the additions have been made merely on estimated basis without there being any incriminating material on record. The Ld. AR also submitted that show-cause notice was defective and barred by limitation u/s 275(1). The Ld. Sr. DR controverted the arguments of Ld. AR and submitted that the additions were based on incriminating material and to buy peace, the assessee declared the same in sworn statement recorded u/s 132(4). The specific limb of Sec.271AAB was clearly applicable and the levy of penalty would be mandatory in nature. The Ld. Sr. DR submitted that firstly, no notice is required to levy the penalty and secondly, the show-cause notice is not a statutory notice. It was sufficient enough if an opportunity of hearing was given to the assessee. The decision of

Tribunal in quantum additions has also been placed on record to support the submissions. Having heard rival submissions, oral as well as written and upon perusal of case records, our adjudication would be as under.

5. Upon perusal of Tribunal's quantum order in ITA No.1081/Chny/2019 dated 27-09-2019, it could be seen that the assessee group was searched u/s 132 on 20-11-2014 and an assessment was framed u/s 143(3) r.w.s. 153B(1)(b) of the Act on 29-12-2017. The assessee was engaged in Lottery business. In para-3 of the assessment order, it was noted by Ld. AO that the assessee did not maintain details of winners of prize money of less than Rs.10,000/- and also did not keep unsold tickets of paper lotteries. Sri Prasan Chand Jain, Sr. Executive, in his deposition recorded on 22-11-2014 stated that record for this data was not kept and it was not possible to keep such record. Various other statements were recorded wherein discrepancies were admitted. The key persons of the assessee, in statement recorded u/s 132(4), agreed to disclose additional amount of Rs.203 Crores for the group over and above the regular income. During post search investigation on 16-01-2015, Shri Naresh C. Mangal, Director submitted a letter in which he agreed to offer Rs.200 Crores in the hands of the assessee and another Rs.3 Crores in the hands of the individual.

6. However, in the return of income, the assessee declared income of Rs.273.46 Crores as against regular income of Rs.354 Crores and accordingly, there was deficit of Rs.80.53 Crores vis-à-vis income admitted at the time of search operation u/s 132(4). The Ld. AO rejected the explanations furnished by the assessee and added the

same in the hands of the assessee. Against the same, Ld. AO, in para 4.3 of the assessment order, initiated penalty proceedings u/s 271AAB.

7. The quantum appeal reached up-to the level of Tribunal wherein the adjudication of Tribunal was as under: -

4. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. During the course of post search investigation, Shri Naresh C. Mangal, the Director of the assessee company has submitted a letter in which the disclosed amount was bifurcated as ₹.200 Crores in the hands of M/s. Summit Online Trade Solutions Pvt. Ltd. and ₹. 3.00 crores in the hands of individuals. The returned income of the assessee was ₹.273,46,73,260/-. Since the Assessing Officer observed that the regular income of the assessee was ₹.354 crores, he called the assessee to explain towards the deficit of ₹.80,53,26,740/- in the income admitted in the return filed with reference to the income admitted at the time of search operation under section 132(4) of the Act. After considering the submissions of the assessee, the Assessing Officer observed that since, the day on which the additional income of ₹.203 crores was admitted on 09-01-2015, the assessee has brought nothing on record regarding the existence of the decision of the Hon'ble Supreme Court and its presumption or expectation on receipt of the refund during the year under consideration. The said order of the Hon'ble Court was delivered on 24.10.2013. As such, the fact of the Service Tax Refund of ₹.77.80 Crores was very much known to the assessee even at the time of the search operation and admission of income but, nowhere this was mentioned before the search authorities or in the depositions admitting the unaccounted income. The said sum of ₹.203 crores was admitted as additional income but, the Service Tax Refund is assessable to tax under section 41(1) of the Act and cannot be acceptable as additional income offered to tax at the time of search operation. As stated earlier, the said sum of ₹.203 crores was admitted as additional income voluntarily expressing its inability to explain the issues that were raised in respect of accounting for of the returned or unsold paper lottery tickets and the recipients of the prize winning money in the online lottery. Thus, further investigation was thwarted and in the circumstances, it appears that the assessee has acted in with a preconceived plan to take the situation to its advantage. Further, Service Tax Refund of ₹.77.80 Crores whereas the variation in income admission is at ₹.80,53,26,740/- and the assesse has failed to explain reasons for this variation. Hence, by rejecting assessee's explanation the deficit amount of ₹.80,53,26,740/- not admitted during the course of search was brought to tax. On appeal, the ld. CIT(A) confirmed the addition.

4.1 In this case, it is an admitted fact that during the course of search under section 132 of the Act, the Department has not impounded any incriminating documents or materials against the assessee. The Director of the assessee company voluntarily admitted additional income of ₹.203 crores, that would cover up all issues arising on account of stock, cash in hand, various omissions, commissions, assets, jewellery valuable, documents and on any instances where the search party is not satisfied on the

explanations and clarifications given by us on any issues may be on account of large number of whole-sellers, agents, distributors, sub-agents, retailers in their own capacity and enormous volume of transactions, etc. Moreover, it was made it clear before the investigating authorities that the above admission of additional income was declared in good faith with a spirit of cooperation with the department and to buy peace of mind with the clear understanding that no penalty shall also be imposed and no prosecution proceedings will be initiated against any of their group concerns or any of the family members.

4.2 If the Department is prompted to bring to tax of the Service Tax Refund of ₹.77.80 crores in view of the decision of the Hon'ble Supreme Court, which was delivered on 24.10.2013, the same should have been taxed in the relevant to the assessment year 2014-15 or it can be taxed as and when the said sum or any part thereof is actually received by way of refund from the concerned authorities. In fact, it was the argument of the ld. Counsel that before completion of the assessment on 29.12.2017, the assessee has given an undertaking in the form of an affidavit dated 28.12.2017 to offer for taxation of the receipt of service tax refund as and when it was actually received. Moreover, despite the Hon'ble Supreme Court delivered the judgement on 24.10.2013, the assessee could not get the refund till the date of passing assessment order or the Assessing Officer has not given any findings that the assessee has received the service tax refund. Further, the Assessing Officer has not discussed anything in the assessment order of receipt of service tax refund during the assessment year under consideration. Further, the service tax refund was not accrued to the assessee in the assessment year under consideration in lieu of the Hon'ble Supreme Court's decision. The provisions of section 41(1) of the Act warrant taxation of the benefit obtained, whether in cash or in any other manner whatsoever or accrued. By virtue of the judgment of the Hon'ble Supreme Court delivered on 24.10.2013 towards service tax refund, the Assessing Officer cannot held that the benefit of service tax refund accrues to the assessee in the assessment year 2015-16 automatically. Moreover, the assessee also filed an undertaking before the Assessing Officer by way of an affidavit that the actual receipt of the service tax refund will be offered to tax, we are of the considered opinion that the Assessing Officer was not factually and legally correct to bring the same to tax in the assessment year in which the assessee has not actually received the refund or accrued. Under the above facts and circumstances, the addition to the extent of ₹.77.80 crores made by the Assessing Officer to bring the service tax refund under tax net stands deleted.

4.3 With regard to the balance addition of ₹.2,73,26,740/- [₹.80,53,26,740-₹.77,80,00,000], towards variation in additional income admitted, the ld. Counsel for the assessee has not advanced any argument or the assessee has furnished any material evidence on record. When the assessee was asked to explain with regard to the short fall in income that was admitted under section 132(4) of the Act being ₹.80,53,26,740/-, before the ld. CIT(A), the assessee has explained about service tax refund of ₹.77.80 crores only and no reply was given on the difference amount of ₹.80,53,26,740-₹.77,80,00,000. Accordingly, the balance addition of ₹.2,73,26,740/- stands confirmed.

5. In the result, the appeal filed by the assessee is partly allowed.

8. Upon perusal of para 4.3 of the Tribunal order, it could be seen that the bench confirmed the remaining addition on the ground that no reply was given by the assessee to explain the differential amount of Rs.273.26 Lacs. The assessee could not offer any explanation against the same. In view of such a finding by the Tribunal, it could not be said that the additions were merely estimated additions. The additional income was surrendered by the assessee, a part of which was admitted in the return of income whereas a part of the same was not disclosed in the return of income. The Ld. AO added the differential to the income of the assessee and finally, the additions to the extent for which reply could not be furnished by the assessee, was confirmed. Therefore, the plea of Ld. AR that this was merely estimated addition stand rejected. The penalty order is based on the findings rendered by the Tribunal in quantum appeal. The differential so added to the income of the assessee would be an undisclosed income within the meaning of Sec.271AAB.

9. The assessee's case, in our considered opinion, would squarely fall within Clause (c) of Sec.271AAB(1) since the admission made by the assessee was not honored in the return of income and clause (a) and (b) would have no application in such a case. The only clause which would apply to the assessee's case would be clause (c) which has correctly been invoked by Ld. AO in the present case. We also concur with the submissions of Ld. Sr. DR that adequate opportunity of hearing was given to the assessee to assail the penalty. The same is as per the provisions of Sec. 274(1) of the Act. Whether the same was

through statutory notice or a non-statutory notice would be immaterial. The only requirement is that opportunity of hearing should be given specifically mentioning the ground which the assessee has to meet. The same has been done in the present case. The various case laws as referred to by Ld. AR would have no application to the facts of the present case since the limb which would apply to assessee's case has clearly been spelt by Ld. AO in the penalty order. No other limb could have been invoked against the assessee. The arguments of Ld. AR, in this regard, stand rejected.

10. The case law of Hon'ble High Court of Madras in **Pr. CIT vs. Shri R. Elangovan (TCA No.770 & ors. dated 30-03-2021)** is distinguishable. Upon perusal of para 15 of the order, it is clear that Ld. AO did not mention the specific limb which would apply to the case of the assessee. Further, the assessee was strenuously canvassing the jurisdictional issue from the inception. The same is not the case here. In the present case, the limb was clearly spelt out and the assessee could not offer any explanation against the impugned addition. The assessee never raised any grievance against notices of penalty before lower authorities and merely pleaded to keep the proceedings in abeyance till the disposal of quantum appeals by Hon'ble High Court of Madras. Therefore, this case law renders no support to the case of the assessee. Similarly, the other case laws have also been found to be not applicable to the facts of the present case and therefore, not specifically dealt with.

11. The Ld. AR has argued that the penalty order is barred by limitation u/s 275(1). The extant statutory provision provides that in case the assessment order is subject matter of appeal before

appropriate authorities including Tribunal, no order shall be passed after the expiry of financial year in which the relevant proceedings in which penalty is initiated are completed or within one year from the end of the month in which the appellate order is received, whichever is later. In the present case Tribunal has passed order in quantum appeal on 27-09-2019. Considering the same, penalty order has been passed by Ld. AO on 23-03-2020. Therefore, the penalty order is well within the prescribed time limits. The arguments of Ld. AR, in this regard, stand rejected.

12. In Ground No.1 & 2, the assessee has raised plea of violation of principle of natural justice. The facts on record do not show any such violation. Adequate opportunity of hearing has already been afforded to the assessee. Ground No.3 & 4 stand dismissed since the income surrendered but not admitted would fall under the purview of undisclosed income. Ground No.5 to 7 stands dismissed since the same as appropriately been dealt in the order.

13. Considering the facts and circumstances of the case, we find no reason to interfere in the orders of lower authorities.

14. The appeal stand dismissed.

Order pronounced on 1st February, 2024

Sd/-	**Sd/-**
(MANOMOHAN DAS)	**(MANOJ KUMAR AGGARWAL)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

चेन्नई / Chennai; दिनांक / Dated : 01-02-2024

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आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त/CIT 4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF