IN THE INCOME TAX APPELLATE TRIBUNAL
*RANCHI BENCH "**E**" Court at KOLKATA*

Before **Shri J.Sudhakar Reddy, Accountant Member** and **Shri S.S.Godara, Judicial Member**

IT(SS)A No.12/Ran/2019
Assessment Year :2014-15

Dy. Commissioner of Income Tax, Central Circle, 3rd Floor, Aaykar Bhawan, L.C. Road, Dhanbad-826001	बनाम **V/s.**	M/s Jai Jagdamba CerealUdyog Pvt. Ltd., Vill. Chalbalpur, Salanpur, Asansol, West Bengal-713559 [**PAN No.AABCJ 5161 D**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Indrajit Singh, CIT-DR
प्रत्यर्थी की ओर से/By Respondent	Shri R.R. Mittal, FCA
सुनवाई की तारीख/Date of Hearing	01-09-2020
घोषणा की तारीख/Date of Pronouncement	01-09-2020

आदेश /O R D E R

PER BENCH :-

This Revenue's appeal for assessment year 2014-15 arises against the Commissioner of Income Tax (Appeals)-3 Patna's order dated 11.10.2018 passed in case No.113/CIT(A)-3/PAT/18-19/ITBA Appeal No.1008/2017-18 imposing penalty of ₹1,12,50,200/-u/s 271(1)(c) the Income Tax Act, 1961; in short 'the Act'.

2. The CIT(A) first deleting the sec. 271(1)(c) penalty of ₹1,12,50,200/- imposed by the Assessing Officer vide order dated 29.06.2017.

Heard both the parties. Case file perused.

3. Both the learned representatives invited our attention to the CIT(A)'s order deleting impugned penalty vide its detailed discussion:-

"3. Ground No.1: This ground relate to the objection of the appellant to levy of penalty of Rs.l,12,OS,200/- u/s.271(l)(c) of the Act.

3.1. **Findings of the AO**:
As stated earlier the appellant in response to notice u/ s.153A filed return of loss at Rs.1,43,05,649/-. Subsequently the appellant revised its return of income from loss of Rs.1 ,43,05,649/ - to income of Rs.29,62,330/ -. The AO passed order ujs.153A/143(3) on 27.12.2016 determining total income at Rs.29,62,330/-. However, in the assessment order the AO noted that that the appellant has concealed the income to the tune of Rs.1,72,67,982/- on account loss being converted to positive income. Accordingly, the AO initiated penalty proceedings for concealment of income u/s 271(1)(c) on 29.06.2017 levying a penalty of Rs.1,12,05,200 at the rate of 200% of the tax sought to be evaded.

3.2 **Appellant's contention**:

During the course of appellate proceeding, the appellant has filed submission as under:
a) Facts of the Case

- A search was conducted in the premises of appellant on 03.09.2014.
- The search team has not found any incriminating material! documents against your appellant for the year under consideration .
- On 30.11.2014 your appellant has submitted tax audit report along with audited financial statement showing net profit of Rs. 33,73,373/- (**taxable income Rs. 29,62,333/-**) uploaded with income tax department vide acknowledgement no. 43244151130111.
- On 19.03.2016, the newly appointed accountant of assessee has filed a wrong return on the basis of unaudited, unsigned & incomplete Profit and Loss Account showing loss of Rs. 1,43,05,649/- due to inadvertent or due to work pressure or due to human error. We draw your kind attention to relevant page of ITR-6 filed by assessee on 19.03.2016 showing loss of Rs.1,43,05,649 from which your honour will kindly appreciate that the assessee has informed the department that they have already filed Tax Audit Report along with Audited Financial Statements uploaded on 30.11.2014.
- On 21.11.2016 your petitioner has filed revised return on the basis of audited profit and loss account showing net profit of Rs.33,73,373/- (**taxable income of Rs. 29,62,333/-**) before the mistake was detected by Income Tax Department.
- On. 27. 12.2016 the ld. A.O accepted the revised return and completed the assessment on Rs. 29,62,330/- .

- On 29.06.2017 the Ld. A.O. has imposed a penalty of Rs.1,12,05,200/- u/s 271(1) (c)
- Your appellant being aggrieved, hence this appeal.

OUR SUBMISSION
1. We draw your kind attention to the definition of "**Specified Previous Year**" as given in sec. 271AAB which is as follows:-
Explanation - For the purpose of this section,--
(b) "**Specified Previous Year**" means the previous year-

(i) which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or,
(ii) in which search was conducted.

In the instant case the facts are as follows-

(i) Search was conducted on 03.09.2014.

(ii) On the date of search the date of furnishing the Return of Income under sub-section (1) of section 139 for AY 14-15 was not expired as it was extended up to 30.11.2014 m terms of CBDT Notification dated 20.08.2014.

(iii) Further your Appellant has not furnished their Income Tax Return for the AY 14-15 upto 03.09.2014 i. e on the date of search.

(iv) Your Petitioner has submitted the Income Tax Returns for the AY 14-15 on 19.03.2016.

Thus from the above facts, your honour will kindly appreciate that A. Y. 2014-15 comes under the purview of definition of "**Specified previous year**" as given in explanation - (b) of section 271AAB which is applicable to the company and section 271(1)(c) is not applicable. But ignoring the above section the Ld. A. O. has imposed penalty under section 271 (l)(C) without any legal sanction hence the same is void and illegal and deserve to be quashed off"

3.3 **Appellate finding and decision**:

I have gone through the penalty order, assessment order and submission of the appellant. The undisputed fact is that a search & seizure action u/s 132(1) was carried out at the business and residential premises of Jagdmba group of cases on 03.09.2014. The appellant is one of the members of the said group. The appellant submitted that in a case where a search has been initiated under section 132(1) on or after the 1st day of July, 2012 the penalty if any that need to be levied is u/s.271AAB and not u/s.271(1)(c) as its case falls under the specified previous year. Accordingly, the appellant urged to quash the order passed ujs.271(1)(c). In this regard, it would be of particular relevance to look into the provisions of section 271AAB of the Act.

'**271AAB**. Penalty where search has been initiated.-(l) 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 the 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 sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.

Explanation.-For the purposes of this section,-

(a) "**specified date**" means the due date of furnishing of return of income under sub-section (1) of section 139 or the date on which the period specified in the notice issued under section 153A for furnishing of return of income expires, as the case may be;

(b) "***specified previous year***" means the previous year-

(i) which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or

(ii) in which search was conducted;

(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 Chief 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.'

From the plain reading of Sec.271AAB, it is clear that where a search u/s.132(1) was initiated on or after the **1st day of July, 2012** penalty is leviable on the undisclosed income at the rate and conditions specified u/s.271AAB(1) for the specified previous year. Further, the section also defines the term "**undisclosed income**" and "***specified previous year***". Moreover, the section starts with non abstante clause and excludes the applicability of section 271 (l)(c), if the undisclosed income pertain to the specified previous year. Viewed from the above, the facts of the appellant's case are squarely covered by section 271AAB. In the appellant's case a search was conducted on 03.09.2014 i.e on or after 01/07/2012. On the date of search the due date to furnish the return for A.Y.2014-1S has not expired and the appellant has furnished the return on 30.11.2014. Further the appellant has not admitted any undisclosed income in a statement recorded u/s.132(4) nor paid any taxes on the admitted income. Therefore the case of the appellant is not governed by sec.271AAB(1)(a) and 271AAB(1)(b). The appellant's case clearly falls u/s.271AAB(1)(c) where the minimum penalty prescribed is 30% and maximum penalty is 90% of undisclosed income. Further, as per clause (2) of sec. 271AAB. 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) of sec.271AAB. Accordingly, the AO should have initiated and levied penalty u/s.271AAB(1)(c) instead of 271(I)(c). In this regard reliance is placed on the decision of the Hon'ble ITAT **Lucknow Bench** in the case of Sandeep Chandk Vs. ACIT reported in (2017) 88 taxmann.com 815 wherein it was held that - The provisions of section 271(1) (c) and the provisions of section 271AAB are entirely different. Issuing the notice under section 271(1)(c) will not automatically deem that the Assessing Officer has initiated the proceedings for imposition of penalty under section 271AAB and accordingly, give an opportunity to the assessee. There is no provision under section 271AAB that the penalty has to be initiated during the assessment proceeding but, it is essential to initiate the penalty proceedings under section 271AAB. Where the notice did not relate to the provision of section 271AAB, the notice issued under section 271 (1)(e) cannot be said to be valid for initiation of proceedings under section 271AAB.

Further, there is no material difference with regard to levy of penalty u/s.271AAA and u/s.271AAB except the date of initiation of search. In following decisions it was held that where the assessee is covered by sec.271AAA, initiation and levy of penalty vi] s.271 (l)(c) was held to be bad in law.

(i) The The Hon'ble ITAT Delhi Bench in the case of Aswani Kumar Arora Vs. ACIT reported in (2016) 50 ITR (Trib) 37 dated 19/05/2016. The relevant portion is reproduced hereunder:

"13. When aforesaid undisputed facts are examined in the light of the amended provisions contained under sub-section (2) and (3) of section 271 AAA, the penalty in this case, if at all leviable, it should have been levied under section 271AAA(1) and not u/s 271(1)(c) as has categorically been provided in sub-section (3) of section 271AAA. Intention of the legislative in incorporating the provisions contained u/s 271AA effective during the period 1st June, 2007 to 1st July, 2012 is to provide general amnesty in search and seizure cases, and the case of the assessee undisputedly falls u/s 271 AAA and cannot be dealt with u/s 271(1)(c) by any stretch of imagination even.

14. So, we are of the considered view that the very initiation of the penalty proceedings against the assessee u/s 271(1)(c) are vitiated In view of the amended provisions of

law applicable effective from 1.6.2007 till 1.7.2012, as the additional income to the tune of Rs.36,80,520/- was disclosed by the assessee on the basis of search operation conducted on 10.02.2009. So, without going into the merits of the case, we are of the considered view that initiation of penalty proceedings as well as penalty orders and impugned order passed by the ld. CIT(A) are not sustainable in the eyes of law. Hence, present appeal is allowed and penalty imposed in this case to the tune of Rs.12,24,600/- is hereby deleted."

(ii) The Hon'ble ITAT Kolkata Bench in the case of ACIT v. Kailash Courier P Ltd reported in (2015) Tax Pub (DT) 4861 dated 16/12/2014. The relevant portion is reproduced hereunder:

"**6**. We have carefully considered the submissions and records. It is apparent that search in this case was carried on 5-8-2008 and the income upon which penalty under section 271(1)(c) of the Act has been levied is undisclosed income as claimed by the Revenue arising out of the said search. As per the mandate under section 271 AAA of the Act after search initiated under section 132 on or after 1-6-2007 but before 1-7-2012 penalty was leviable under section 271AAA of the Act. Sub-section (3) of 271AAA clearly provides that in such case no penalty under section 271(1)(c) of the Act can be imposed. In this view of the matter we agree with the learned counsel of the assessee that no penalty under section 271 (1)(c) of the Act was leviable, in as much as the case comes under the purview of section 271AAA of the Act. There is no ambiguity in this regard, and the view is also supported by the tribunal decision in the case of Cario International (supra). Accordingly without adverting to the plank on which the learned Commissioner (Appeals) deleted the penalty, we hold that the assessee in this case cannot be visited for the penalty under section 271(1)(c) of the Act in as much as the case falls under 271AAA of the Act. Accordingly we uphold the deletion of penalty levied under section 271(1)(c) of the Act."

In view of the above discussion and relying on the judicial pronouncements, I hold that the appellant for the assessment year under appeal, cannot be visited with penalty under section 271(1)(c) of the Act, as the appellant's case falls under section 271AAB. I further hold that the mistake being so grave and fatal the same cannot be cured by resorting to section 292B of the Act. Accordingly the AO is directed to delete penalty levied under section 271(1)(c) of Rs.1,12,05,200/-."

It is thus clear from a perusal of the foregoing extracted lower appellate discussion that the CIT(A) has reversed Assessing Officer's action for the sole reason that since the instant *lis* involves a search case covered under a specific provision u/s 271AAB of the Act, the impugned proceedings u/s. 271(1)(c) ought not to have been initiated. This clinching aspect has gone unrebutted from the Revenue side that the Assessing Officer had indeed involved sec. 271(1)(c) proceedings only. The tribunal's co-ordinate bench decision(s) (supra) have already made it clear that the specific provision dealing with such penalty i.e. sec. 271AAB has overriding effect over the general one that the sec. 271(1)(c) in other words. We adopt the same reasoning *mutatis mutandis* and confirm the CIT(A)'s action deleting the impugned penalty.

4. This Revenue's appeal is dismissed.

Order pronounced in open court at the close of hearing on Tuesday 1st September, 2020

Sd/-	Sd/-
(लेखा सदस्य)	(न्यायिक सदस्य)
(J.Sudhakar Reddy)	(S.S.Godara)
(Accountant Member)	(Judicial Member)

*Dkp Sr.P.S.

दिनांकः- 01/09/2020 **कोलकाता ।**

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

1. अपीलार्थी/Appellant-ACIT, Cir-1(1), 1st Floor, Aaykar Bhawan, L.C. Road, Dhanbad-826001
2. प्रत्यर्थी/Respondent-Shri Gopal Baran Chattopadhyay 505, 5th Floor, Shanti Bhawan, Bank More, Dhanbad-876001
3. संबंधित आयकर आयुक्त / Concerned CIT Ranchi
4. आयकर आयुक्त- अपील / CIT (A) Ranchi
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, / DR, ITAT, Ranchi
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Sr. Private Secretary,
आयकर अपीलीय अधिकरण, **कोलकाता ।**