

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA-PATNA 'e-COURT', KOLKATA
[Virtual Court Hearing]**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Dr. Manish Borad, Accountant Member**

**I.T.A. No. 97/PAT/2021
Assessment Year: 2014-2015**

***Assistant Commissioner of Income Tax,..... Appellant
Central Circle-3, Patna,
6th Floor, C.R. (Annexe) Building,
Bir Chand Patel Marg, Patna-800001,
Bihar***

-Vs.-

***Subhash Pd. Yadav,.....Respondent
Nariyalghat,
Takiyarpur, Near Gandhi Murti Digha,
Danapur-801503, Bihar
[PAN:AAUPY6856E]***

Appearances by:

*Smt. Rinku Singh, CIT, D.R., appeared on behalf of the
Revenue*

*Shri Nishant Maitin, CA, appeared on behalf of the
assessee*

Date of concluding the hearing : May 31, 2023

Date of pronouncing the order : June 2, 2023

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The Revenue is in appeal before us against the order of Id. Commissioner of Income Tax (Appeals)-3, Patna dated 20.07.2021 passed for Assessment Year 2014-15.

2. The Registry has pointed out that the appeal is time-barred. However, the time consumed by the Revenue for filing the appeal is a COVID period and, therefore it is to be treated being not time-barred.

3. The solitary grievance of the Revenue is that the ld. CIT(Appeals) has erred in deleting the penalty of Rs.2,79,00,000/-, which was imposed by the ld. Assessing Officer under section 271AAB(1A).

4. Brief facts of the case are that a search under section 132(1) and survey operation under section 133A of the Income Tax Act was conducted at various premises of Subhash Prasad Yadav Group of cases on 23.02.2018. A notice under section 153A of the Income Tax Act for A.Y. 2014-15 was issued on 20.02.2019. In response to this notice, the assessee has filed return of income on 06.12.2019 declaring total income of Rs.4,74,85,650/-. An assessment order was passed on 27.12.2019 under section 153A of the Income Tax Act. The ld. Assessing Officer did not make any addition. He accepted the returned income and assessed the assessee at Rs.4,74,85,650/-. In paragraph no. 3 of the assessment order, ld. Assessing Officer has observed as under:-

“Office may please issue DN/refund and challan accordingly. Penalty proceedings

under section 271(1)(c) of the Act are initiated for concealment of income”.

5. Ld. Assessing Officer thereafter imposed a penalty under section 271AAB(1A) of the Income Tax Act. The penalty order is a very brief order, which reads as under:-

“A search and seizure operation u/s 132(1) and Survey Operations u/s 133A of the Income Tax Act, hereinafter called the Act, were conducted at various premises of the Subhash Prasad Yadav Group of cases on 23.02.2018, Consequently, the case of the assessee was centralized with the ACIT, Central Circle-3, Patna. Subsequently, the notice dated 14/06/2019 u/s 153A of the Act was issued for filing return of income for AY 2014-15. In compliance, the return of income was filed on 06.12.2019 showing a total income of Rs. 4,74,85,650/-. The assessee is seen to be deriving his income from the business of a Milk production Unit and is also a Director in companies such as, M/s Banshidhar Construction Private Limited, M/s Mor Mukat Marketing Private Limited, M/s Radharaman Marketing Private limited and is a partner in M/s Murlidhar Indane Gas Agency. During the assessment proceedings, it was found that the assessee had filed the original return for AY 2014-15 u/s 139 on 17/11/2014 showing a total income of Rs. 9,85,650/-. In view of this, the difference of Rs. 4,65,00,000/- was treated as undisclosed income of the assessee and total income was assessed u/s 153A at Rs. 4,74,85,650/- as per disclosed income of the assessee. Accordingly, penalty proceedings u/s 271AAB(1A) was initiated for additional disclosure of income in the return filed u/s 153A. The compliance date 14/01/2020 was given to appear personally or through authorized representative and submit his submission why penalty u/s 271AAB(1A) should not be imposed in his case. No compliance was made by the assessee on the given date. Final opportunity was given to the assessee for his compliance by 05/10/2020 but no compliance was made within the stipulated time. Final opportunity was given to the assessee for his compliance by 05/10/2020 and the assessee has filed his submission on 04/12/2020.

The undersigned has perused through submission of the assessee filed in response to the penalty notice.

Hence, keeping in view facts of the case and time limitation involved in the penalty proceeding as per provision of section 275 of the Act, the undersigned is constrained to impose penalty u/s 271AAB(1A) of the Act on the assessee for the said year for the said default.

Computation of Penalty u/s 271AAB(1A) is as under:-

1.	<i>Assessed income</i>	<i>:</i>	<i>Rs. 4,74,85,650/-</i>
2.	<i>Returned income filed by the assessee</i>		<i>Rs. 9,85,650/-</i>
3.	<i>Additional disclosure:</i>		<i>Rs. 4,74,85,650/-</i>
3.	<i>Penalty @60% of additional income Disclosed:</i>		<i>Rs. 2,79,00,000/-</i>

In the light of the facts and circumstances discussed in foregoing paras, penalty of Rs.2,79,00,000/- being 60% of income disclosed at assessment stage, is hereby imposed u/s 271AAB(1A).

The penalty order is passed with prior approval of Joint Commissioner of Income Tax, Central Range-1, Patna vide letter no. JCIT/CR-1/Pat/Penalty Approval/2020-21/1481 dated 07.01.2021.

Office may please issue penalty order, demand notice and challan to the assessee”.

6. Dissatisfied with this order, the assessee carried the matter in appeal before the Id. CIT(Appeals). The Id. CIT(Appeals) has deleted the penalty by observing as under:-

“I have perused the submissions made by the appellant grounds taken in appeal and the penalty order passed u/s 21.7AAB(1A). In this group a search & seizure operation and survey operations were conducted at various premises on 23.02.2018. Subsequently, notice u/s 153A of the Act was issued. In compliance of the notice u/s 153A of the Act appellant filed return of income. In this group the original return u/s 139 of

the Act were also filed. Appellant has disclosed certain income and the total income in the return filed u/s 153A of the Act was more than the total income shown in the original return filed u/s 139 of the Act. The Assessing Officer has completed assessment u/s 153A of the Act accepting the total income shown in the return filed u/s 153A of the Act. On perusal of the assessment orders, it is seen that the Assessing Officer has initiated penalty u/s 271 (1)(c) of the Act for concealment of income. In this group the search was conducted on 23.02.2018 and during the course of assessment proceedings the Assessing Officer has accepted the total income disclosed by the Appellant in the returns filed in response to notice u/s 153A of the Act. The returns filed u/s 153A of the Act in this group and total income assessed by the Assessing Office is given in tabular form as under:

SI. No.	A.Y.	Total income declared in Return filed u/s 153A	Total income assessed by the A.O.	Date of passing the Assessment order.
1.	2013-14	69,37,940	69,37,940	27.12.2019
2.	2014-15	4,74,85,650	4,74,85,650	27.12.2019
3.	2015-16	13,55,910	16,90,910* * Addition deleted by appeal order no. ITBA/APL/S/250/2020-21/1031648645(1) dated 22.03.2021	27.12.2019

On perusal of the above table, it is ample clear that the Assessing Officer has accepted the total income declared in the returns filed u/s 153A of the Act. Therefore, no occasion for Assessing Officer arises to initiate penalty proceedings u/s 271(l)(c) for concealment of income. Appellant has disclosed total income voluntarily and during the course of assessment proceedings Assessing Officer could not deviate from the same. Several Jurisdictional Pronouncement have established that the provisions of the section 271(l)(c) o the Act can be invoked only for the concealment of income or for filing inadequate particulars. The assessment orders passed clearly revealed that Assessing Officer has neither mentioned about the filing of inadequate particulars nor detected any concealment of income and simply accepted the total income disclosed by the appellant. In this group of case the notice u, 274 r.w.s. 27.1(l)(c) of the Act was issued by the Assessing Officer dated 27.12.2019 in a letter form not in the prescribed format. On perusal of the Sc notice it is found that Assessing Officer had not mentioned the

fact that weather such notice was for concealment of income or for filing inadequate particular. Further, it is also observed that the said notice was issued without DIN, which makes the initial notice issued is itself invalid and non-est. Appellant during the course of assessment proceedings as well as in appellate proceedings filed the submission stating that the notice issued for imposition of penalty u/s 271(l)(c) was itself invalid because DIN was not generated for the said notice and also challenged the initiation of penalty proceedings u/s 271(l)(c) of the Act. Assessment in this group were completed on 27.12.2019. Subsequently, considering the reply of the appellant Assessing Officer modified the penalty notice u/s 271(1)(c) of the Act by stating that: -

“It has come to our notice that penalty proceedings in your case were initiated because of the difference of the returned income u/s 139(1)/139(4) and the returned income u/s 153A. However, on perusal of assessment records, it was found that instead of issuing notice u/s 271AAB(1A) of the Act, notice u/s 271(l)(c) was issued due to a typographical error. As such, the notice should read as penalty notice u/s 271AAB(1A) in place of 271(l)(c).

This letter may kindly be treated as a notice u/s 292B of the Act.

On perusal of the modified notice which contains DIN it is found that it was issued dated 24.12.2020 however assessment orders were passed dated 27.12.2019. The said modified notice was issued almost after a lapse of one year from the date of passing assessment orders. Further, in the assessment orders itself the penalty proceedings were initiated u/s 271(l)(c) of the Act which is mentioned in the assessment orders. Here question arises that whether Assessing Officer is authorized to change the section of the notice initiated and issued during the course of assessment proceedings in later date. In my opinion the Assessing Officer is not authorized to do so as per the provisions of the Act. The initiation of proceedings is itself illegal and subsequently the modification done by the Assessing Officer vitiates the legal proceedings initiated u/s 271AAB(1A) of the Act. It is seen that the submission filed by the Appellant dated 04.12.2020 during the course of penalty proceedings was simply perused by the Assessing Officer and no conclusion on the submission made by the appellant has been discussed. Assessing Officer simply states that keeping in view fact of the case and time limit involved in the penalty proceeding as per provision of section 275 of the Act the undersigned is constrained to imposed penalty u/s 271AAB(1A) of the Act on the assessee for the said default. Here it is pertinent to mentioned that the Assessing Officer is failed to elaborate the “said default”. Penalty u/s 271AAB(1A) is being imposed in the cases where Assessing Officer has found that certain income included in the total income of the assessee is undisclosed. In cases of this

group the additional income included in the returns of income filed in response to the notice u/s 153A is part of surrendered income which cannot be considered undisclosed income defined under explanation to section 271AAB of the Act. Hon'ble Jurisdictional ITAT, Patna, Bench has also propounded the principal and allowed the appeal in ITA no. 194/PAT/2019 in the case of Shiv Bhagwan Gupta Vs ACIT, Central Circle-1, Patna on such ground. Keeping in view the facts of the case and the decision of the Hon'ble Jurisdictional ITAT, Patna, Bench it is held that the Assessing Officer is squarely on illegal footing in initiating the penalty proceeding u/s 271(l)(c) of the Act and subsequently modifying such notice u/s 271AAB(1A) of the I.T. Act.

In view of the above penalty orders passed u/s 271AAB(1A) are hereby quashed and accordingly the penalty imposed is deleted.

3.2. In the result, the appeal is allowed”.

7. The ld. CIT(DR) relied upon the order of the ld. Assessing Officer, whereas the ld. Counsel for the assessee relied upon the order of ld. CIT(Appeals). Since the penalty has been levied under section 271AAB(1A), therefore, it is imperative upon us to take note of this clause. It reads as under:-

“271AAB: (1A) The Assessing Officer (or the Commissioner (Appeals) 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 date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, 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 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 sixty per cent of the undisclosed income of the specified previous year, if it is not covered under the provisions of clause (a).

(2) No penalty under the provisions of (section 270A or] 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) [or sub-section (1A).

(3) The provisions of section 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.

Explanation:— For the purpose 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 148 or under section 153A, as the case may be,] 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 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”.

8. A perusal of this clause would reveal that this penalty could be imposed upon an assessee, who has been searched under section 132 of the Income Tax Act within the time framed given in sub-clause (1). It should

relate to specified previous year. In the Explanation appended to the Section, this specified year is defined under clause (b) of the Explanation. According to this definition, “specified previous year” means the previous year, which has ended before the date of search but the date of furnishing the return of income under sub-section (1) of section 139 or for such year has not expired before the date of search and the assessee has not furnished the return of income from the previous year before the date of search. In the present case, the search has been carried out on 23.02.2018. The assessment year involved herein is A.Y. 2014-15. This year does not fall within the specified previous year as per clause (b) of Explanation appended to section 271AAB(1A). The penalty is not imposable upon the assessee under this section. It could have been possible under section 271(1)(c) at the most. Even otherwise, the penalty was initiated for imposing under section 271(1)(c) but that was not imposed upon the assessee. The penalty has been imposed under section 271AAB(1A). The ld. 1st Appellate Authority has considered these accepts in detail and thereafter deleted the penalty.

9. After going through the order of the ld. CIT(Appeals), we do not find any error in it. Accordingly, the appeal of the Revenue is dismissed.

10. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on
02.06.2023.

**Sd/-
(Manish Borad)
Accountant Member**

**Sd/-
(Rajpal Yadav)
Vice-President**

Kolkata, the 2nd day of June, 2023

*Copies to :(1) Assistant Commissioner of Income Tax,
Central Circle-3, Patna,
6th Floor, C.R. (Annexe) Building,
Bir Chand Patel Marg, Patna-800001,
Bihar*

*(2) Subhash Pd. Yadav,
Nariyalghat,
Takiyarpur, Near Gandhi Murti Digha,
Danapur-801503, Bihar*

*(3) Commissioner of Income Tax (Appeals)-3,
Patna,*

(4) Commissioner of Income Tax- ,

(5) The Departmental Representative

(6) Guard File

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By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.