

**IN THE INCOME TAX APPELLATE TRIBUNAL "DB" BENCH, PATNA
(Through virtual hearing at Kolkata)**

**BEFORE SHRI RAJPAL YADAV, VP
AND
SHRI DR. MANISH BORAD, AM**

**ITA Nos. 184 & 185/PAT/2023
(Assessment Year: 2014-15,2016-17)**

**Nand Kumar Prasad Sah
Saraiyaganj, Bihar-842001** Vs. **CIT (A)
Lok Nayak Bhawan
Muzaffarpur, Bihar,**
(Appellant) **(Respondent)**
PAN No. AJNPS7052G

**ITA Nos. 161 & 162/PAT/2023
(Assessment Year: 2015-16,2016-17)**

**Bishwanath Prasad,
Muzaffarpur, Bihar-842001** Vs. **CIT (A)
Lok Nayak Bhawan
Muzaffarpur, Bihar,**
(Appellant) **(Respondent)**
PAN No. AJNPS7052G

Assessee by : Shri SK Tulsian, &
Ms. Puja Somani, Ars
Revenue by : Shri Ashwani Kr. Singal, DR

Date of hearing: 20.06.2024
Date of pronouncement: 29.08.2024

ORDER

PER BENCH:

These appeals at the instance of two different assessee(s) are directed against the orders of Commissioner of Income-tax (Appeals) [learned CIT (A)] dated 24.04.23, 22.05.2023 for A.Ys. 2014-15, 2015-16, 2016-17 arising out of the order of AC/DCIT levying penalty under section 271(1)(c) of the Income-tax Act, 1961 (the

Act) vide orders dated 22nd August, 2022, 23rd August, 2022 for A.Ys. 2014-15, 2016-17, respectively.

02. As the common issue raised in all these appeals are against the levy of penalty under Section 271(1)(c) of the Act, we for the purpose of adjudication taken up the facts of ITA No. 184/PAT/2023, for A.Y. 2014-15 in the case of Nand Kumar Prasad Sah and our decision shall apply *mutatis mutandis* to all the remaining captioned appeals.

03. Assessee has raised following grounds of appeal: -

"1. For that the Ld. CIT(A) has erred in passing penalty order u/s 271(1)(c) and levied penalty of Rs.1093704/-.

2. For that the Ld. CIT(A) has only relied upon the A.O. order

3. For that the Ld. CIT(A) has erred in applying the Apex Court order in the case of CIT vs. Prasanna Dugar. The Apex Court order is not applicable in the present case as no disclosure statement u/s 132(4) was made during the course of search and seizure.

4. For that the Ld. CIT(A) has erred in passing the order without giving the opportunity of being heard which is against the principle of natural justice. The appellant has filed a time petition on 24.04.2023. The Ld. CIT(A) was in hurry to pass the order on the same date on which the time petition was filed. The order was passed on after 8.00 pm.

5. For that whole order is bad in fact and the law of the case and is fit to be quashed.

6. For that other grounds, if any, shall be urged at the time of hearing of the appeal."

04. Facts in brief are that the assessee who is engaged in the business of hardware shop is regular filer of the return and declared his income of ₹6,97,746/- for A.Y. 2014-15 under presumptive taxation scheme under Section 44AD of the Act calculated at the rate of 8% of the gross turnover of ₹87,21,288/-. After the assessee being subjected to search under Section 132 of the Act, survey action under Section 133A of the Act conducted on 17th September, 2020, certain information's were gathered from the computer system indicating that the gross turnover of the assessee is ₹6,02,55,626/-. The assessee accordingly filed return under Section 148 of the Act and offered income on the suppressed turnover at the rate of 8% and the same was accepted. However, the learned Assessing Officer initiated the penalty proceedings under Section 271(1)(c) of the Act for concealment of particulars of income and finally, levied the penalty under Section 271(1)(c) of the Act at ₹9,25,276/-.
05. Aggrieved assessee filed appeal to learned CIT (A) challenging the levy of penalty but failed to get any relief.
06. Now the assessee is in appeal before this Tribunal.
07. The learned Counsel for the assessee referring to the written submissions submitted that the assessee has been subjected to levy of penalty on a wrong charge. He submitted that though the penalty has been levied for

concealment of particulars of income but actually the case of the assessee is of furnishing of inaccurate particulars of income. Since, the learned Assessing Officer has levied the penalty on a wrong charge, same deserves to be deleted and in support reliance placed at following decisions: -

"1. *New Sorathia Engg. Co. Ltd., Vs. CIT (2005) 282 ITR 642/155 Taxmann 513(Guj.)*,

2. *Chandra Prakash Bubna Vs. ITO (2015) 64 taxmann.com 155 (Kolkata-Trib.)*

3. *CIT Vs. Manjunatha Cotton & Ginning Factory (2013) 35 taxmann.com 250 (Karnataka)*

4. *CIT vs. SSA's Emerald Meadows (2016) 73 taxmann.com 248 (SC).*"

08. As regards to the decision of Hon'ble Calcutta High Court in case of *CIT vs. Prasanna Dugar (2015) 59 taxmann.com 99 (Calcutta)*, relied by the Revenue authorities, he submitted the same is not applicable on the facts of the assessee as they are distinguishable and that in the case of *Prasanna Dugar (supra)*, the voluntary disclosure was not recorded in the regular return of income filed for the year and therefore, was purely a case of concealment of particulars of income.

09. On the other hand, the learned Departmental Representative vehemently argued supporting the orders of the lower authorities.

010. We have heard the rival contentions and perused the records placed before us. The assessee is aggrieved with the levy of

penalty under Section 271(1)(c) of the Act on the charge of concealment of particulars of income. Perusal of the records suggests that the assessee is engaged in the business of running of hardware shop. He disclosed certain turnover in the original return but after the information being gathered during the course of search & search action about the suppressed sales in the return of income filed post search, assessee declared the income on the remaining amount of suppressed sales. Before us, learned counsel for the assessee based on catena of judgement has submitted that the case of the assessee is of furnishing of inaccurate particulars of income but the learned Assessing Officer has initiated the penalty proceedings by levying charge against the assessee for concealment of particulars of income. Before us, it is also submitted by the learned Counsel for the assessee that if the penalty proceedings are carried out on a wrong charge then such proceedings are bad in law and liable to be quashed. For the above proposition the learned counsel for the assessee has placed reliance on many judgement/ decisions and the same are discussed in subsequent Paras.

011. The Hon'ble Gujarat High Court in case of *New Sorathia Engg. Co. Ltd (supra)* held as under: -

"It is incumbent upon the Assessing Officer to state whether the penalty was being levied for concealment of particulars of income by the assessee or whether any inaccurate particulars of income had been furnished by the assessee

Held, that the penalty order and the order of the Commissioner (Appeals) showed that no clear-cut finding had been reached.

The Tribunal had failed to appreciate this legal issue. The ratio in CIT vs. Manu Engineering Works (1980) 22 ITR 306 (Guj.) was applicable and the order of penalty could not be upheld by the Tribunal. The order was invalid.'

012. We also observe This Tribunal in case of *Chandra Prakash Bubna (supra)* held as under: -

"the word 'conceal' as per Websters Dictionary means 'to hide, withdraw, or remove from observation; cover or keep from sight; to keep secret; to avoid disclosing or divulging. That means non-disclosure of particulars of income. On the other hand, where particulars are disclosed by such disclosure is not correct, true or accurate, it would amount to furnishing of inaccurate particulars of income. For example, in case of businessman, if a particular transaction of sale is not shown in the books, it would amount to concealment of particulars of income while sale is shown but at a lesser value, it would amount to furnishing of inaccurate particulars of income."

013. Further, Hon'ble Karnataka High Court in case of *Manjunatha Cotton & Ginning Factory (supra)*, held as under: -

"Penalty under section 271(1)(c) is a civil liability. Therefore, mens rea is not an essential element for imposing penalty for breach of such civil obligations or liabilities. Wilful concealment is not an essential ingredient for attracting civil liability. [para 63]

Existence of conditions stipulate din section 271(1)(c) is a sine qua non for initiation of penalty proceedings under section 271. The existence of such conditions should be discernible from the assessment order or order of the Appellate Authority or

Revisional Authority. Even if there is no specific finding regarding the existence of the conditions mentioned in section 271(1)(c), at least the facts set out in Explanation 1(A) and (B) should be discernible from the said order. which would, by a legal fiction, constitute concealment because of deeming provision. Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under section 271(1)(c) is a sine qua non for the Assessing Officer to initiate the proceedings because of the deeming provision contained in section 1(B). The said deeming provisions are not applicable to the orders passed by the Commissioner (Appeals) and the Commissioner. [Para 63]

The imposition of penalty is not automatic, i.e., imposition of penalty even if the tax liability is admitted, is not automatic. Even if the assessee has not challenged the order of assessment levying tax and interest and has paid the same, that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is account of such unearthing or enquiry concluded by authorities which has resulted in payment of such tax or such tax liability came to be admitted, and if not, it would have escaped from tax net as opined by the Assessing Officer in the assessment order. Only when no explanation is offered or the explanation offered is found to be false or when the assessee falls to prove that the explanation offered is not bona fide, an order imposing penalty can be passed. If the explanation offered, even though not substantiated by the assessee, is found to be bona fide and all facts relating to the same and material for the computation of his total income have been disclosed by him, no penalty can be imposed. [Para 63]

The direction referred to in Explanation 18 to section 271 should be clear and without any ambiguity. If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings in appeal, but the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.

Notice under section 274 should specifically state the grounds mentioned in section 271(1)(c). Le., whether it is for concealment of income or for furnishing of incorrect particulars of income. Sending printed form, where all the grounds mentioned in section 271 are mentioned, would not satisfy requirement of law. The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee. Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law. [Para 63]

The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty, though emanate from proceedings of assessment, are independent and separate aspect of the proceedings. The findings recorded in the assessment proceedings in so far as 'concealment of income' and 'furnishing of incorrect particulars' would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings." [Para 63]."

014. Hon'ble Supreme Court in the case of CIT vs SSA'S Emerald Meadows [2016] 73 taxmann.com 248 (SC) has held as under: -

"(Calcutta) wherein it was held that "Even where subsequent to search, assessee voluntarily disclosed a sum and offered said sum to tax, since said amount was not disclosed in o penalty levied under section 271(1)(e) for concealment of income was justified."

015. Now, examining the facts of the instant case, in the light of the above judgment/ decisions, we first take note of the notice issued under Section 274 read with section 271(1)(c) of the Act issued on 21st February, 2022, for A.Y. 2014-15 to the assessee. In the said notice, the charge levelled against the assessee is of concealment of particulars of income. However, considering the ratio laid down by this Tribunal in case of *Chandra Prakash Bubna (supra)*, where it was held that charge for suppressing the sales figure is of furnishing of inaccurate particulars of income. It was also held in the case of *Chandra Prakash Bubna (supra)* that not showing of transactions of sale would amount to concealment of income but showing of sale at a lesser value would amount to furnishing of inaccurate particulars of income. Since, we are bound by the judicial precedents, therefore, taking note of the decision of this Tribunal in the case of *Chandra Prakash Bubna (supra)* and examining the facts in the light thereof, we find that in the show cause notice issued under Section 274 of the Act, the assessee should have been levelled with the charge of furnishing of

inaccurate particulars of income. However, in the show cause notice, the charge levelled against the assessee is of concealment of particulars of income and therefore, in our considered view, the penalty proceedings have been initiated on wrong charge therefore, the ratio is laid down by the decision of Hon'ble Gujarat High Court in case of *New Sorathia Engg. Co. Ltd (supra)*, Hon'ble Karnataka High Court in case of *Manjunatha Cotton & Ginning Factory (supra)* could be squarely applicable in favour of the assessee.

016. As far the decision of Hon'ble High Court of Calcutta High Court in case of *Prasanna Duggar (supra)*. We are satisfied that the facts of the instant case, which are distinguishable with the facts in the *Prasanna Duggar (supra)* and therefore, judgements of Hon'ble Calcutta High Court in case of *Prasanna Duggar (supra)* will not be applicable on the facts of the instant case.
017. Under this facts and circumstances and respectfully following the ratio laid down by the Hon'ble courts in case of *New Sorathia Engg. Co. Ltd. (supra)*, and others (*supra*) we hold that the penalty proceedings have been initiated against the assessee on a wrong charge and therefore, such penalty proceedings are illegal and void-ab-initio. We accordingly, set aside the findings of the learned CIT (A) and delete the impugned penalty levied under Section 271(1)(c) of the Act and allow the effective ground of appeal raised by the assessee.



018. As far as remaining appeal in ITA nos. 185, 161 & 162, for A.Ys. 2015-16,2016-17 are concerned, since the issue raised and facts are verbatim similar, except the change in figures and this fact being not controverted by both the sides, we apply our decision of ITA No. 184/PAT/2023 *mutatis mutandis* on the remaining appeals in ITA Nos. 185, 161 & 162/PAT/2023 and delete the penalties levied under Section 271(1)(c) of the Act and allow the effective grounds of appeal raised in all the appeals.

019. In the result, all the appeals of the both the assessee in ITA No. 184, 185, 161 & 162/PAT/2023, are allowed

Order pronounced in the open court on 29.08.2024.

Sd/-
(RAJPAL YADAV)
(JUDICIAL MEMBER)

Sd/-
(DR. MANISH BORAD)
(ACCOUNTANT MEMBER)

Kolkata, Dated: 29.08.2024

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT,
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Kolkata