

**IN THE INCOME TAX APPELLATE TRIBUNAL "DB" BENCH, PATNA**

**BEFORE DR. MANISH BORAD, AM  
AND  
SHRI SONJOY SARMA, JM**

**ITA Nos.52 to 57/PAT/2021**

**(Assessment Year: 2009-10 to 2014-15)**

**Patliputra Builders Limited  
301, Maharaja Kameshwar  
Complex, Fraser Road,  
Patna-800001, Bihar**

**Vs.**

**ACIT,  
Central Circle -2,  
Patna-800 001,  
Bihar**

**(Appellant)**

**(Respondent)**

**PAN No. AACCP0629B**

**Assessee by** : Shri Shrawan Kr. Jha, AR  
**Revenue by** : Shri Rinku Singh, DR

**Date of hearing:** 21.08.2024

**Date of pronouncement:** 30.09.2024

**ORDER**

**PER BENCH:**

These appeals at the instance of the same assessee are directed against the orders of Commissioner of Income-tax (Appeals), Patna-3 [learned CIT (A)] evenly dated 15<sup>th</sup> March, 2021 for A.Y. 2009-10 to 2014-15, which are arising from the orders of Id. ACIT Circle-2, Patna levying penalty under section 271(1)(c) of the Act for A.Ys. 2009-10, 2010-11, 2013-14, 2014-15 and u/s 271AAA of the Act for A.Y. 2011-12 to A.Y. 2012-13 vide orders evenly dated 30<sup>th</sup> July, 2018.

02. Since, common grounds have been raised for ITA Nos. 52, 53, 56 & 57/PAT/2021 against levy of penalty u/s 271(1)(c) of the Act for A.Y. 2009-10, 2010-11, 2013-14

and 2014-15 respectively, we reproduce below the ground raised for A.Y. 2009-10.

"1. For that the grounds of appeal hereto are without prejudice to each other.

2. For that the order of the Id. Commissioner of Income-tax (Appeals) and also the learned AO is bad both in law and on facts.

3. For that the order of the learned Commissioner of Income Tax (Appeal) and also the learned Assessing Officer. Is based on presumption, surmises and conjectures."

03. Assessee has further raised additional grounds: -

- i. That the penalty u/s 271(1)(c) of the Act cannot be levied without recording satisfaction and mentioning specific direction of Income Tax Settlement Commissioner (ITSC).
- ii. That the quantum appeal is admitted is admitted by the higher authority, it means that the issue is debatable and therefore, penalty u/s 271(1)(c) of the Act cannot be levied.
- iii. Ld. CIT (A) erred in enhancing the penalty without issuing show cause.

04. So far as in ITA Nos.54 & 55/PAT/2021 are concerned, the assessee has raised common grounds for A.Y. 2011-12 and 2012-13 against levy of penalty u/s 271AAA of the Act and the same reads as under: -

"1. For that the grounds of appeal hereto are without prejudice to each other.



2. For that the order of the learned Commissioner of Income Tax (Appeal) and also the learned assessing officer is bad both in law and on facts.

3. For that the order of the learned Commissioner of Income Tax (Appeal) and also the learned assessing officer is based on presumption, surmises and conjectures.

4. For that the order of the learned Commissioner of Income Tax (Appeal) and also the Id. assessing officer is further violative of the settled principles of natural justice in as much as no opportunity much less adequate opportunity was ever afforded to the appellant to furnish its defence in course of assessment proceedings.

5. For that the learned assessing officer has erred in imposing penalty under section 271AAA of the Act equivalent to 10% of the amount of tax leviable notwithstanding the fact that the default if any, occurred due to reasons beyond the control of the appellant and that the imposition of penalty under the said provision of the Act not automatic.

6. For that the learned Commissioner of Income Tax (Appeal) has erred in dismissing the appeal merely on the ground that the appellant had failed to pay the amount of tax in dispute quantified by the Hon'ble Settlement Commission in its entirety notwithstanding the fact that firstly, the appellant had explained the reason that led to the non-payment of tax in its entirety within the stipulated time and secondly, a request for was made for grant of some time to pay the balance of the amount of tax in dispute as quantified by the Hon'ble Settlement Commission.

7. For that the learned Commissioner of Income Tax (Appeal) has erred in dismissing the appeal on the grounds aforesaid without consideration of the fact that the default in the non-payment were beyond the control of the appellant and that the same was due to a reasonable cause and that the penalty u/s 271AAA is not automatic.

8. For that other various grounds which may be urged at the time of hearing."

05. Brief facts of the case are that search and seizure operation u/s 132 of the Act was conducted on 29<sup>th</sup> July,

2011 at the business and residential premises of Mr. Anil Kumar and his family members including their business concerns namely, Patliputra Builders Ltd., Patliputra Shoppers Plaza Pvt. Ltd. and other group concerns. Instant appeals are by the assessee namely Patliputra Builders Ltd. Which is mainly engaged in the business of real estate, retail chain, entertainment and hospital. Notices u/s 153A of the Act were issued for filing of return of income. However, assessee filed an application before the Id. ITSC on 5<sup>th</sup> June, 2014, for A.Y. 2006-07 to A.Y. 2012-13 but the applications were not allowed to proceed on account of short payment of tax and interest.

06. Subsequently, assessee again filed fresh application on 26<sup>th</sup> June, 2014, before the ITSC (IT & WST) Additional Bench, Kolkata for A.Ys. 2006-07 to 2014-15 (nine Assessment Years) and the same was admitted and the Id. ITSC passed the order u/s 245D (4) of the Act on 31<sup>st</sup> December, 2015. After passing the order of Id. ITSC, the demand was raised but the assessee failed to make the payment of total demand. As a result of which, Id. ITSC withdrawn immunity granted to the assessee vide order dated 31<sup>st</sup> December, 2015. The outstanding amount which remained payable by the assessee in compliance to the order of the Id. ITSC order for A.Y. 2006-07 to 2014-15 amounted to ₹2,74,40,648/-. When the Id. ITSC withdraw the immunity granted to the assessee, the assessee filed a Writ Petition before the Hon'ble High Court and on the date of hearing i.e. 25<sup>th</sup> August, 2021, the Id. counsel for the assessee stated that there was bonafide

reason which prevented the assessee from making the payment and that the assessee is ready and willing to deposit the remaining amount. Hon'ble Court directed the assessee to pay ₹ 1 crore out of the amount of ₹2,72,40,648 on or before 09.09.2021 and the issue was left open. On the next date of hearing on 16<sup>th</sup> September, 2021, the proof of deposit of ₹1 crore was placed before the Hon'ble Court and Hon'ble High Court ordered to deposit the remaining amount. Writ Petition filed by the assessee was disposed off on 24<sup>th</sup> January, 2024 and the Hon'ble High Court held that the delayed payment made would be set off against the demands raised against the assessee either interest or principle due, as the statute mandates.

07. Now, on one hand the assessee has challenged the order of Id. ITSC withdrawing the immunity granted to it before the Hon'ble High Court of Patna and on the other hand, the Id. AO on the basis Id. ITSC order of withdrawing mandate, initiated the penalty proceedings and levied the penalty u/s 271(1)(c) of the Act for concealment of income for A.Ys. 2009-10, 2010-11, 2013-14 and 2014-15 at ₹1,93,52,140/-, ₹1,13,77,978, ₹90,09,772 and 1,33,60,445/- respectively. Penalty u/s 271 AAA of the Act for A.Y. 2011-12 and A.Y. 2012-13 was levied at Rs.36,48,167/- and Rs.25,47,388/- respectively. Perusal of the penalty orders, indicates that there was no compliance by the assessee and even when the assessee challenges the penalty u/s 271(1)(c) of the Act for the reference referred above the assessee failed to succeed as

on account of non-compliance before the Id. CIT (A). Aggrieved, assessee is now in appeal before this Tribunal.

08. As regards to the penalty levied u/s 271(1)(c) of the Act is concerned, the Id. counsel for the assessee who submitted that the Id. AO has levied the penalty without recording the satisfaction as to how the assessee has concealed the income or has furnished the inaccurate particulars of income. Reliance placed on the judgement of the Hon'ble Delhi High Court in case of *Ms. Madhushree Gupta vs. Union of India [2009] 183 Taxman 100 (Delhi) dated 24-07-2009* and Hon'ble Karnataka High Court in case of *Commissioner of Income-tax Vs. Manjunatha Cotton & Ginning Factory 359 ITR 565 (Karnataka)*. He submitted that the basic foundation of levying the penalty is to first issue the notice u/s 274 of the Act levying the specific charge against the assessee but no such exercise has been carried out. He also submitted that when the order of ITSC is invoked and demands have been recovered against tax liability calculated then how can the penalty to be imposed to the assessee. Alternative submission was also made and when the issue is debatable then the penalty cannot be levied. He also submitted that the action of Id. CIT (A) of enhancing the penalty to 300% is illegal, bad in law and violation of principle of natural justice as no show cause notice was issued to the assessee.
09. The brief synopsis filed by the Id. counsel for the assessee against the levy of penalty u/s 271(1)(c) of the Act is reproduced below: -

*Appeal against order u/s 271(1)(c) of Income tax Act, 1961 communicated vide DIN & Order No. ITA 56 /PAT/2021 in the case of M/S Patliputra Builders LTD. (2013-14). (PAN: AACCP06293)*

<i>Dates</i>	<i>Particulars of events</i>
<i>29.07.2011</i>	<i>Search and seizure operation was conducted on the business and residential premises of the appellant and his family members. No statement was recorded during the search proceeding or after.</i>
<i>31.12.2015</i>	<i>The appellant moved before Hon'ble Settlement Commission and the Hon'ble ITSC passed order u/s 254 D (4).</i>
<i>25.01.2016</i>	<i>Demand notice u/s 156 was issued to the assessee giving effect to the order of amount ₹2,13,63,076/-</i>
<i>17/18<sup>th</sup> Jan. 2018</i>	<i>Settlement Commission had withdrawn Immunity from penalty and prosecution against the assessee</i>
<i>30.07.2018</i>	<i>Penalty order passed against the assessee u/s 271(1)(c) of the act Imposing penalty leviable @ 100% amounting to Rs. 1,93,52,140/-</i>
<i>15.03.2021</i>	<i>The appellant preferred appeal against the order of the Ld. AO and the Ld. CIT (Appeal) without looking in the merits of the case enhances the penalty leviable @ 300% of the tax sought to be evaded.</i>

#### *Synopsis of Argument*

<i>Without recording satisfaction and mentioning specific direction of the Hon'ble Settlement Commission penalty under sec. 271(1) (C) cannot be levied</i>	<i>In the assessment order the Ld.AO has mentioned about the specific direction of the Hon'ble Settlement Commission which was followed by the Ld.AO while imposing penalty u/s 271(1)(c) of the Act. Penalty u/s 271(1)(c) cannot be exercised in deemed or presumption basis. It must be specific with satisfaction. In our case no satisfaction was recorded by the Ld. AO. All the basis ingredients for invoking penalty against the assessee under sec 271(1)(c) is being miss out. The penalty imposed on the basis of casual grounds u/s 271(1)(c) is not applicable in our case and fit to be declare non-est. The assessee relied upon following case laws -  <i>Madhushree Gupta vs. Union of India [2009] 183 TAXMAN 100 (DELHI) Ajaybhai I Gogia Vs ITO (ITAT Rajkot) CIT vs. Manjunatha Cotton &amp; Ginning Factory [2013] 359 ITR 565(Kar.)</i></i>
<i>If the quantum appeal Is admitted by the Higher authority, it means that the Issue is debatable and penalty under sec. 271(1) (C) cannot be levied</i>	<i>The appellant had filed settlement application before Hon'ble Settlement Commission on 26/06/2014 for A.Ys. 2006-07 to 2014- 15 (9 assessment years). Subsequently, the Hon'ble Settlement Commission, (IT and WT), Additional Bench, Kolkata has admitted the application filed by the assessee it means that the quantum amount is not disputed by the department. Once the quantum was not disputed and admitted by the Hon'ble Settlement Commission the Issue will become debatable. Hence, when the Issue in debatable and penalty u/s 271(1)(c) Is unlawful. The assessee relied upon following case laws:</i>



	<i>CIT Vs. Advaita Estate Development Pvt. Ltd. (Bombay High Court) Ajaybhai I Gogia Vs. ITO (ITAT Rajkot)</i>
<i>Enhancement of amount @300% by the CIT(A) without issuing show cause notice is unjustified</i>	<i>In this present case the Ld. CIT(A) has enhanced the penalty leviable @ 300% without issuing any show cause notice to the assessee which is unjustified and bad in law. The Ld. CIT(A) in the entire appeal order nowhere mentioned that the show notice was issued as mandated by the Section 251(2) of the Income tax Act, before enhancing the penalty leviable @ 300%.</i>  <i>The assessee has relied upon following case laws: Meetu Bansal Vs. DCIT (Uttarakhand High Court) Syed Maqsoodulla Vs. ITO (ITAT Bangalore) Syed Maqsoodulla Vs ITO (ITAT Bangalore) of CIT vs. Rai Bahadur Hardtroy Motilal Chamaria [1967] 66 ITR 443 (SC)</i>

010. As regards the penalty u/s 271AAA of the Act, he submitted that the preliminary requirement for invoking penalty u/s 271AAA of the Act is basis of the statement recorded during the course of search u/s 132(4) of the Act. However, in the case of the assessee no such statement was recorded and in support to that an affidavit has been filed by the Director of the assessee company and therefore since the basic conditions which needs to be fulfilled for invoking penalty u/s 271AAA of the Act has not been complied by the Revenue authorities, the impugned penalty deserves to be deleted. A brief synopsis filed in this regard by the Id. counsel for the assessee reads as under: -

<i>Dates</i>	<i>Particulars of events</i>
<i>29.07.2011</i>	<i>Search and seizure operation was conducted on the business and residential premises of the appellant and his family members. No statement was recorded during the search proceeding or after.</i>
<i>31.12.2015</i>	<i>The appellant moved before Hon'ble Settlement Commission and the Hon'ble ITSC passed order u/s 254 D (4).</i>
<i>25.01.2016</i>	<i>Demand notice u/s 156 was issued to the assessee giving effect to the order of amount ₹17,01,193/-</i>
<i>17/18<sup>th</sup> Jan. 2018</i>	<i>Settlement Commission had withdrawn Immunity from penalty and prosecution against the assessee</i>
<i>30.07.2018</i>	<i>Penalty order passed against the assessee u/s 271AAA of the act</i>



	<i>imposing penalty leviable @10% of tax sought to be evaded amounting to ₹ 3,64,81,666/-.</i>
15.03.2021	<i>The appellant preferred appeal against the order of the Id. AO and the Id. CIT (A) without looking in the merits of the case confirmed penalty leviable @10% of tax sought to be evaded.</i>

### Synopsis of Argument

<p><i>Without recording statement imposition of the penalty u/s 271AAA is not sustainable.</i></p>	<p><i>Preliminary requirement for invoking penalty u/s 271AAA is basis of statement recorded during the period of search u/s 132(4) of the Act. But in our case no such statement was recorded. The director of the assessee company is submitting affidavit on oath containing that no statement was recorded during the search proceeding. (The affidavit is enclosed as annexure for your honour record.)</i></p> <p><i>Once the statement was not recorded the imposition of sec. 271AAA is invalid in any circumstances. The Ld. CIT(A) on the ground that the assessee is a habitual offender passed the appeal order which is not a basis to impose penalty u/s 271AAA. The Ld. CIT(A) has not verified that on the date of search statement was recorded u/s 132(4) of the Act by the Ld. AO. No merit was discussed appeal order was passed by the CIT(A). The CIT(A) has brushed aside the provision of section</i></p> <p><i>271AAA which is mandatory to be verified. But in our case on the ground that the assessee is a habitual offender passed the appeal order which itself make order impugned. If the Ld. Has not mentioned about the statement recorded u/s 132(4) before imposing penalty u/s 271AAA the Ld. CIT(A) must mention about it in the appeal order. No statement was recorded during search and date of the statement recorded in not mentioned in the order. Enquiry was also not conducted in our case. In absence of statement enquiry is not possible. On that reason the Ld. AO has not conducted enquiry. Hence, in absence of both the mandatory ingredient penalty u/s 271AAA is not sustainable.</i></p> <p><i>The assessee has relied upon the following case law: Pr.CIT vs. M/s. Emirates Technologies Pvt. Ltd. (ITA No. 400/2017) order dated 18.07.2017 CIT vs. Mahendra C Shah reported as 299 ITR 305 (GJ) PCIT vs. Mukeshbhai Ramanlal Prajapati 398 ITR 0170(GJ) Page no.8</i></p>
----------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

011. On the other hand, the Id. DR vehemently argued supporting the order of the Id. lower authorities and submitted that since the assessee did not follow the direction of Id. ITSC by way of making payment within the

scheduled time the immunity granted by Id. ITSC stood withdrawn and the penal provisions became applicable and the impugned penalties have rightly been levied.

012. We have heard the rival contentions and perused the records available on record. The assessee is aggrieved with levy of penalty u/s 271(1)(c) and 271AAA of the Act levied for the following assessment years:

<i>ITA No.</i>	<i>A.Y.</i>	<i>Penalty u/s</i>	<i>Amount</i>
<b>54/PAT/2021</b>	2011-12	271AAA	36,48,167
<b>55/AT/2021</b>	2012-13	271AAA	25,47,388
<b>52/PAT/2021</b>	2009-10	271(1)(c)	1,93,52,140
<b>53/PAT/2021</b>	2010-11	271(1)(c)	1,13,77,978
<b>56/PAT/2021</b>	2013-14	271(1)(c)	90,09,772
<b>57/PAT/2021</b>	2014-15	271(1)(c)	1,33,60,445

013. We note that post search action on the assessee, the application filed before the learned ITSC on 26<sup>th</sup> June, 2014, for A.Y. 2006-07 to A.Y. 2014-15 (nine years) was admitted and learned ITSC passed the order under Section 245D of the Act calculating the settlement amount for A.Y. 2006-07 to A.Y. 2014-15 at ₹6,51,35,358/-. In compliance to the said order the assessee immediately paid a sum of ₹3,78,94,711/-, but the balance amount of ₹2,72,40,647/- could not be paid on account of shortage of funds and other bonafide reasons. For the short payment by the assessee, the learned ITSC took cognizance and withdrew the immunity granted to the assessee. Against the said order of withdrawing of immunity assessee filed Writ Petition before the Hon'ble High Court where Hon'ble High Court directed the assessee to make payments of the outstanding amount. Compliance to the direction of Hon'ble High Court, assessee further deposited

₹1,93,52,140/- and subsequently, paid the remaining amount of ₹72,41,946/-. Further, we note that Hon'ble jurisdictional High Court disposed off the Writ Petition vide order dated 24<sup>th</sup> January, 2024.

014. We further observe that the Hon'ble Court has directed to set off the delayed payments against the demand raised towards either interest or principal dues standing against the petitioner assessee as the statute mandates. It is also not in dispute that immediately after passing of the order by ITSC on 31<sup>st</sup> December, 2015, assessee has paid a considerable amount which is almost 58.23% and the remaining amount has been paid thereafter.

015. Now in the backdrop, these facts about the assessee's application to Id. ITSC having been accepted and the settlement amount stands deposited though not on schedule time but major part of the amount has been deposited immediately after passing the orders of learned ITSC. We note that there is no allegation against the assessee that the order of Id. ITSC u/s 245D (4) of the Act has been obtained by the assessee by any fraud or misrepresentation of facts as provided u/s 245D (6) of the Act. We also notice that when the assessee is unable to make payments in accordance with the order of Id. ITSC Section 245D(6A) of the Act comes into action and the same reads as under: -

**"Section 245D(6A) in The Income Tax Act, 1961**

*(6A)Where any tax payable in pursuance of an order under sub-section (4) is not paid by the assessee within thirty-five days of the receipt of a copy of the order by him, then, whether or not the Settlement*



*Commission has extended the time for payment of such tax or has allowed payment thereof by instalments, the assessee shall be liable to pay simple interest at one and one-fourth per cent for every month or part of a month on the amount remaining unpaid from the date of expiry of the period of thirty-five days aforesaid."*

016. Now, going through the above provision by Sub-Section 245D(6A) of the Act, we find that there is no mention about levy of penalty on an assessee if the tax is not paid within time limit. Further, the assessee has gone before the Hon'ble Jurisdictional High Court challenging the immunity withdrawn by Id. ITSC and also prayed for grant of installment to deposit the remaining amount payable to the Department as per the settlement amount ordered by Id. ITSC. As per the directions of Hon'ble Court assessee has deposited the outstanding amount. On one hand, penalty has been levied post withdrawing of immunity and on the other hand, the assessee was paying the outstanding amount as per the order of Id. ITSC dated 31<sup>st</sup> December, 2015. All these facts and circumstances indicates that parallel working is going on i.e. on one hand assessee was asked to deposit the amount as per the order of Id. ITSC dated 31<sup>st</sup> December, 2015, to which assessee deposited almost 60% of the tax settlement amount and paid the remaining amount as directed by the Hon'ble High Court vide writ order (*supra*) and parallelly Id. AO without making reference to the provisions of the Act laying down the procedure prior to visiting the assessee with the penalty, has levied the penalty solely on the basis of order of Id. ITSC, withdrawing immunity from levy of penalty and prosecution.



017. We now proceed to examine whether the learned Assessing Officer was justified in levying the penalty under Section 271(1)(c) and 271AAA of the Act.

018. As per Section 271(1)(c) of the Act, the assessee can be subjected to levy the penalty if it is found that the assessee has concealed the particulars of income or has furnished inaccurate particulars of income. Now, the said penalty can be levied only if the Id. AO or Id. CIT (A) or Id. PCIT during the course of any proceeding in this act are satisfied. The word 'satisfied' is of great importance in the present context before levying the penalty he/ she he has to first satisfy as to whether assessee has concealed any particulars of income or furnished any inaccurate particulars of such income. In the instant case, the Revenue authorities have failed to prove on record by placing any such evidence which could establish that prior to levy of penalty under Section 271(1)(c) of the Act, any satisfaction has been recorded by the learned AO. For reference we would like to reproduce below the penalty order u/s 271(1)(c) of the Act for A.Y. 2009-10, and the same reads as under:-

*"A search and seizure operation was conducted on 29/07/2011 in the business and residential premises of Shri Anil Kumar and his family members including their business concerns, namely M/s Patliputra Builders Ltd., M/s Patliputra Shoppers Plaza Pvt. Ltd. and other group companies. M/s Patliputra Builders Ltd. and its sister concerns are mainly engaged in the business of real estate, retail chain, entertainment and hospitality. Notice u/s 153A of the Income- tax Act, 1961 was issued on 08/02/2013 for filing of return of Income.*



However, the assessee filed settlement application before Hon'ble Settlement Commission, (IT & WT), Additional Bench, Kolkata on 05/06/2014 for A.Y. 2006-07 to 2012-13 (7 assessment years). However, the applications were not allowed to be proceeded with on account of short payment of tax and interest. Subsequently, the assessee filed fresh settlement application on 26/06/2014 before the Settlement Commission, (IT & WT), Additional Bench, Kolkata for A.Ys. 2006-07 to 2014-15 (9 assessment years). Subsequently, the Hon'ble Settlement Commission, (IT & WT), Additional Bench, Kolkata had passed the order u/s 245D (4) on 31/12/2015.

After receiving the Settlement order, the effect to the order was given and demand raised Rs 2,13,63,076/-. The demand notice u/s 156 was issued to the assessee on 25/01/2016.

But, the assessee did not pay entire demand. Further, show cause was issued to the assessee for payment of demand on 27/07/2017 & 30/11/2017. But, the assessee did not pay the demand. The Hon'ble Settlement Commission, (IT & WT), Additional Bench, Kolkata has withdrawn immunity from penalty and prosecution in the case of the assessee M/s Patliputra Builders Ltd. (PAN - AACCP0629B) on 17th/18th January, 2018.

Letters were issued on 28/06/2018 & 05/07/2018 for information regarding withdrawal of immunity from penalty and prosecution in the case of the assessee M/s Patliputra Builders Ltd. and also to provide final opportunity before passing penalty order u/s 271(1)(c) of the Income-tax Act, 1961. Compliance requested on 12/07/2018.

On 13/07/2018, the assessee filed time petition for payment of income-tax through its director which is as under :-

"... I would like to convey that our Patliputra Group is one of the reputed names in business community in the State of Bihar. For the past many years we are regular taxpayer and contributed significantly to State exchequer. However in the past few years, the business scenario of Bihar has been gloomy one, especially for real estate sector. Some policy changes of State Govt. have hit us hard and our revenue has been badly affected. As such we



are facing lot of hardship in running day to day business affairs due to crunch of funds.

Sir, I would like to categorically assure you that we are honest taxpayer of the nation and we always strive for payment of all statutory dues against us. We just want some support from the department in form of some relaxation in time missioner period of payments of demands. Therefore, we request you to kindly grant us time period of at least 60 days, so that we will be able to clear all tax dues against us.

The reply of the assessee is not tenable in view of the fact that the assessee failed to make payment of the demand determined by the Hon'ble ITSC and Hon'ble ITSC has withdrawn immunity granted to the assessee earlier. The assessee is totally silent in that as pact. Hence, after withdrawal of immunity by the Hon'ble ITSC, the undisclosed income declared by the assessee for SOF as well as further amount of undisclosed income adjusted and determined by the Hon'ble ITSC is liable for penalty for concealment of income u/s 271(1)(c). Therefore, keeping in view facts of the case, I have left with no other option but to impose penalty u/s 271(1)(c) of the Income-tax Act, 1961 for concealment.

Hence, penalty, as calculated below is being levied on this issue.

*Calculation of Penalty:*

(i) Income determined by Hon'ble Settlement Commission	Rs. 6,56,65,495/-
(ii) Returned income	Rs. 96,03,759/-
(iii) Tax on (i) above including surcharge	Rs. 2,23,19,702/-
(iv) Tax on (ii) above including surcharge	Rs. 29,67,562/-
(v) Undisclosed income declared by the assessee and further amount determined by the Hon'ble ITSC for A.Y. 2009-10	=Rs. 5,60,61,736/-
(vi) Tax sought to be evaded on above (iii - iv)	= Rs. 1,93,52,140/-
(vii) Minimum penalty leviable @ 100% tax sought to be evaded u/s 271(1)(c) of the Income tax Act.	Rs. 1,93,52,140/-



(viii) Maximum penalty leviable @300% tax sought to be evaded u/s 271(1)(c) of the Income tax Act. Rs. 5,80,56,420/-

*In the light of the facts and circumstances discussed in foregoing paras, penalty of Rs. 1,93,52,140/- is hereby imposed u/s 271(1)(c) of the Income-tax Act, 1961.*

*This order is passed with the prior approval of Joint CIT, Central Range-1, Patna received vide letter no. JCIT/CR-1/Pat/Penalty Approval/2018-19/1014*

*dated 27/07/2018.*

019. Now, going through the penalty order, referred (*supra*) for A.Y. 2009-10, we note that the learned AO has not referred to the assessment proceedings if any, carried out. The Id. AO has also not referred to any satisfaction having been recorded during the course of assessment proceedings prior to initiating the penalty proceedings. There is also no reference of any notice issued u/s 274 with respect to 271 of the Act. What is indicated in the said penalty order is that immediately after getting information about withdrawing of immunity from penalty and prosecution by Id. ITSC vide order dated 17<sup>th</sup> / 18<sup>th</sup> January 2018, letters were issued to the assessee on 28<sup>th</sup> June, 2018, and 5<sup>th</sup> July, 2018, informing about the withdrawal of immunity from penalty and prosecution to which the assessee filed the reply on 13<sup>th</sup> July, 2018, stating that a major amount of tax liability has been paid off and some more time is required to deposit the remaining amount. The reply of the assessee is already captured in the penalty order reproduced above. Soon after receiving the reply of the assessee on 13<sup>th</sup> Jul, 2018, the Id. AO has framed the penalty order on 30<sup>th</sup> July,

2018, levying the penalty at ₹1,93,52,140/-. The complete exercise carried out by the Id. AO levying penalty u/s 271(1)(c) of the Act is arbitrary and not in accordance with the law. It has been held time and again that without the Id. AO having been satisfied with that the assessee has either concealed particulars of income or furnished inaccurate particulars of income, he could not proceed for penalty proceedings. Hon'ble High Court Karnataka in case of *Manjunatha Cotton & Ginning Factory (supra)* held as under: -

*"If after applying his mind, the AO made himself satisfied that there was no concealment/furnishing of inaccurate particulars of income and accordingly, did not initiate the penalty proceedings in the body of assessment order, he cannot proceed for penalty proceedings. The absence of direction for initiation of penalty proceedings under Section 271(1)(c) in the body of assessment order, cannot even be ratified by issue of notice under Section 271(1)(c) r.w.s. 274 along with assessment order or by taking recourse to Section 154/2928 otherwise it will render Section 271(1B) meaningless and otiose."*

020. *Madhushree Gupta vs. Union of India* [2009] 183 TAXMAN 100 (DELHI)] held as under: -

*"in this case it was held that "an assessment order should contain at least a direction for initiation of penalty proceedings to constitute satisfaction of the AO for initiation of penalty proceedings under Section 271(1)(c). Even post Section 271(18), still a prima facie satisfaction of Assessing Officer that the case may deserve imposition of penalty should be discernible from order passed during the course of assessment proceedings."*

021. In light of the above judgement on the legal ground itself, the assessee deserves to succeed as the penalty proceedings have not been initiated in accordance with law

and they are *void ab initio*. We therefore are of the considered view that assessee deserves to succeed on the legal ground as the penalty proceedings have not been initiated in accordance with provision of Section 271(1)(c) r.w.s. 274 of the Act as neither there is any reference to any assessment order having been passed for the impugned assessments nor there is any reference to any notice issued u/s 274 of the Act which is a mandatory requirement prior to initiation of penalty proceedings u/s 271(1)(c) of the Act. Accordingly, the penalty proceedings-initiated u/s 271(1)(c) of the Act are held to be illegal and void ab-initio and therefore the alleged penalty orders framed u/s 271(1)(c) of the Act for A.Ys. 2009-10, 2010-11, 2013-14 and 2014-15 are hereby quashed and the penalty is levied therein u/s 271(1)(c) of the Act are hereby deleted. Legal grounds raised by the assessee challenging the validity of penalty order u/s 271(1)(c) of the Act are allowed.

022. Now, we take up the grounds challenging the levy of penalty u/s 271 AAA of the Act, which deals with the penalty levied under certain circumstances where search has been carried out u/s 132 of the Act. and for necessary reference Section 271 AAA of the Act is reproduced below:

-

**"Section 271AAA in The Income Tax Act, 1961**

**271AAA. [ Penalty where search has been initiated. [ Inserted by Act 22 of 2007, Section 77 (w.e.f. 1.4.2007).]**

*(1)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 June, 2007, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.

(2) Nothing contained in sub-section (1) shall apply if the 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) pays the tax, together with interest, if any, in respect of the undisclosed income.

(3) 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).

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

*Explanation.* - For the purposes of this section,-

(a) "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;*

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

*(i)which has ended before the date of search, but the date of filing 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 said date; or*

*(ii)in which search was conducted.]”*

023. Before examining the facts of the case in light of the above provisions, we would first like to note the observation of the Id. AO in the penalty order u/s 271AAA of the Act and for reference, the penalty order for A.Y. 2011-12 is reproduced below: -

*"A search and seizure operation was conducted on 29/07/2011 in the business and residential premises of Shri Anil Kumar and his family members including their business concerns, namely M/s Patliputra Builders Ltd., M/s Patliputra Shoppers Plaza Pvt. Ltd. and other group companies. M/s Patliputra Builders Ltd. and its sister concerns are mainly engaged in the business of real estate, retail chain, entertainment and hospitality. Notice u/s 153A of the Income- tax Act, 1961 was issued on 08/02/2013 for filing of return of Income.*

*However, the assessee filed settlement application before Hon'ble Settlement Commission, (IT & WT), Additional Bench, Kolkata on 05/06/2014 for A.Y. 2006-07 to 2012-13 (7 assessment years). However, the applications were not allowed to Tax interest. be proceeded with on account of short payment of tax and interest. Subsequently, the assessee filed fresh settlement application on 2.P28/06/2014 before the Settlement Commission, (IT & WT), Additional Bench. Kolkata for A.Ys. 2006-07 to 2014-15. (9 assessment*



years). Subsequently, the Hon'ble Settlement Commission, (IT & WT), Additional Bench, Kolkata had passed the order u/s 245D(4) on 31/12/2015.

After receiving the Settlement order, the effect to the order was given and demand raised Rs. 17,01,193/-. The demand notice u/s 156 was issued to the assessee on 25/01/2016.

But, the assessee did not pay entire demand. Further, show cause was issued to the assessee for payment of demand on 27/07/2017 & 30/11/2017. But, the assessee did not pay the demand. The Hon'ble Settlement Commission, (IT & WT), Additional Bench, Kolkata has withdrawn immunity from penalty and prosecution in the case of the assessee M/s Patliputra Builders Ltd. (PAN AACCP0629B) on 17th/18th January, 2018.

Letters were issued on 28/06/2018 & 05/07/2018 for information regarding withdrawal of immunity from penalty and prosecution in the case of the assessee M/s Patliputra Builders Ltd. and also to provide final opportunity before passing penalty order u/s 271AAA of the Income-tax Act, 1961 on 02/07/2018. Compliance requested on 10/07/2018.

On 13/07/2018, the assessee filed time petition for payment of income-tax through its director which is as under :-

"... I would like to convey that our Patliputra Group is one of the reputed names in business community in the State of Bihar. For the past many years we are regular taxpayer and contributed significantly to State exchequer. However in the past few years, the business scenario of Bihar has been gloomy one. especially for real estate sector. Some policy changes of State Govt. have hit us hard and our revenue has been badly affected. As such we are facing lot of hardship in running day to day business affairs due to crunch of funds.

Sir, I would like to categorically assure you that we are honest taxpayer of the nation and we always strive for payment of all statutory dues against us. We just want some support from the department in form of some relaxation in time period for payment of demands. Therefore, we request you to kindly grant

*us time period of at least 60 days, so that we will be able to us."  
clear all tax dues against us.*

*The reply of the in view of the fact that the assessee is not tenable in view of the fact that the assessee failed to make payment of the demand determined by the Hon'ble ITSC and Hon'ble ITSC has withdrawn immunity granted to the assessee earlier. The assessee is totally silent in that as pact. Hence, after withdrawal of immunity by the Hon'ble ITSC, the undisclosed income declared by the assessee for SOF as well as further amount of undisclosed income adjusted and determined by the Hon'ble ITSC is liable for penalty u/s 271AAA. Keeping in view facts of the case, I have left with no other option but to impose penalty u/s 271AAA of the Income-tax Act, 1961. It is considered a fit case to levy a penalty of Rs. 36,48,167/- u/s 271AAA, being 10% of the amount of tax leviable in respect of the undisclosed income of Rs. 3,64,81,666/-. Hence, after considering fact of the case, penalty order passed u/s 271AAA of the Income-tax Act, 1961. Penalty of Rs. 36,48,167/- u/s 271AAA of the Income-tax Act, 1961 is imposed.*

*This order is passed with the prior approval of Joint CIT, Central Range-1, Patna received vide letter no. JCIT/CR-1/Pat/Penalty Approval/2018-19/1014 dated 27/07/2018.*

*Issue demand notice & challan accordingly."*

024. While dealing with the penalty u/s 271(1)(c) of the Act, in the preceding paras, similar is the fact with regard to penalty order u/s 271AAA of the Act because, the Id. AO has not made any discussion about the conditions provided u/s 271AAA of the Act on the fulfilment of which the penalty could be levied. Revenue has also failed to place any evidence on record which could prove that whether any show cause notice was issued to the assessee prior to the passing the order levying penalty u/s 271AAA of the Act. The Id. AO has again followed the same course of action and jumped on the conclusions by levying penalty u/s 271AAA of the Act without even having

satisfied as to whether section 271AAA of the Act can be invoked in the case of the assessee or not. As per section 271AAA(1) of the Act, the assessee can be held liable to pay penalty at the rate of 10% of undisclosed income of the specified previous year. Now, sub-section 1 of Section 271AAA of the Act will not apply if the assessee admits the undisclosed income in the statement given u/s 132(4) of the Act and specify/ substantiate the manner in which such income has been derived. Thus, for invoking of Section 271AAA of the Act, the condition is that the statement has to be recorded u/s 132(4) of the Act during the course of search and only in case of assessee is unable to answer in the statement as discussed above then the penalty u/s 271AAA of the Act can be levied. However, in the instant case, the fact placed before us by the Id. Counsel for the Assessee is that no statement of the director of the company was recorded and in support an affidavit has been filed by Mr. Anil Kumar, director of assessee company, stating that during the search proceedings no statement u/s 132(4) of the Act was recorded by the department at any stage. Once it is established that no statement of the Director of the assessee company was recorded u/s 132(4) of the Act, there cannot be any mechanism to proceed with levy of penalty u/s 271AAA of the Act because assessee had no occasion to admit any undisclosed income and specify the manner in which such income has been derived. When the basic condition which are required to be fulfilled prior to visiting the assessee with the penalty u/s 271AAA of the Act are not present, then without being satisfied, the Id.

AO cannot proceed to levy penalty u/s 271AAA of the Act. We are thus of the view that the penalty u/s 271AAA of the Act has been wrongly levied by the Id. AO on account of not fulfilling the condition mentioned in Section 271AAA of the. We further find support from the judgement of Hon'ble Delhi High Court in case of *M/s. Emirates Technologies Pvt. Ltd (supra)*, where Hon'ble Court has held that when no specific query has been put to the assessee by drawing his attention to the provision of Section 271AAA of the Act, asking him to specify the manner in which the undisclosed income surrendered during the course of search, then the penalty is not leviable under that Section.

025. In the light of the above judgement/ decision, we find that in the penalty order u/s 271AAA of the Act, the Id. AO has not referred to any conditions prescribed u/s 271AAA of the Act nor there is any mentioned of any statement recorded u/s 132(4) of the Act nor is there any mention about the assessee having being asked to explain the manner of earning undisclosed income. Therefore, when the conditions prescribed u/s 271AAA of the Act remains to be fulfilled, the initiation of penalty proceedings u/s 271AAA of the Act are itself void, illegal and bad in law and therefore, the penalty proceedings u/s 271AAA of the Act for A.Ys. 2011-12 and 2012-13 are hereby quashed and impugned penalty levied u/s 271AAA of the Act are hereby deleted. Relevant grounds raised by the assessee for the said assessment years challenging the penalty levied u/s 271AAA of the Act are hereby allowed.



026. Though the assessee has raised other grounds of appeal challenging the action of Id. CIT (A) enhancing the penalty without issuing of show cause notice which is in violation principle of natural justice and that the mater which are debatable in nature cannot be subjected to levy of penalty u/s 271(1)(c), since, we have already quashed penalty orders of Id. lower authorities passed u/s 271AAA and 271(1)(c) of the Act on the legal grounds itself, dealing with the remaining grounds would be merely academic in nature.

027. In the result, all the captioned appeals of the assessee for A.Y. 2009-10 to 2014-15 are allowed.

Order pronounced in the open court on 30.09.2024.

Sd/-  
(SONJOY SARMA)  
(JUDICIAL MEMBER)

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

Kolkata, Dated:30.09.2024

*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