

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Tax Appeal No. 16 of 2021

The Principal Commissioner of Income Tax, Dhanbad, having its office at Aayakar Bhawan, Luby Circular Road, P.O. & P.S.-Dhanbad, District-Dhanbad. Appellant

Versus

M/s. Jai Maa Jagdamba Flour Private Limited having its office at Damkara, Panduki, Nagnagar, P.O. & P.S.-Nagnagar, Dhanbad. Respondent

CORAM: Hon'ble Mr. Justice Aparesh Kumar Singh
Hon'ble Mr. Justice Deepak Roshan

For the Appellant : Mr. Ratnesh Nandan Sahay, Sr.S.C.
 For the Respondent : Mr. Nitin Kr. Pasari, Adv.
 Mr. Subham Choudhary, Adv.

7/21.02.2023 Heard learned counsel for the parties.

2. The instant application is directed against the order dated 05.01.2021 passed by the learned Income Tax Appellate Tribunal, Kolkata 'Ranchi E-Court' Bench at Kolkata (hereinafter to be referred as "ITAT") in Appeal being I.T.(S.S.) A No. 11/Ran/2020, for the A.Y 2014-15 preferred by the Appellant-Department; whereby the learned ITAT has dismissed the appeal of the revenue and sustained the order of CIT Appeal who has dismissed the order of penalty passed by the Assessing Officer.

3. The brief fact of the case is that search and seizure operation under Section 132 of the Income Tax Act, 1961 (hereinafter referred to as the "Act") was carried out on 03.09.2014 at the business and residential premises of Jagdamba Group and the respondent is one of the members of the said group. During the course of search, no incriminating material was found in the case of the respondent. The Assessing Officer, subsequent to the said search, on 25/26.02.2015 had issued notice under Section 153A of the Act to the respondent to furnish return of income of the respondent. In response to the said notice, the respondent filed its return of income on 07.03.2016 showing loss at Rs. 2,40,73,444/-. In order to verify the genuineness of the aforesaid return of the respondent, the Assessing Officer on 10/11.08.2016 issued notice under Section 143(2) of the Act to the respondent. The Assessing Officer also issued a

notice under Section 142(1) of the Act to the respondent on 15.11.2016 seeking information from the respondent in respect of the audited financial statements of the respondent up-loaded on the Income Tax website on 30.11.2014. The respondent, upon receipt of the said notice, filed a subsequent return of income manually before the Assessing Officer on 18.11.2016 showing now a loss of Rs. 92,68,340/- for the same concerned period. Again on 21.11.2016, the respondent filed another return of income manually before the Assessing Officer showing now an income of Rs. 19,73,110/-. The respondent revised its return of income from showing a loss of Rs. 2,40,73,444/- to the income of Rs. 19,73,110/- when the Assessing Officer confronted the respondent with the audited financial statements of the respondent for the concerned period wherein it was shown that the respondent had a profit of Rs. 18,95,065/- during the concerned period. As the respondent revised its return of income from loss of Rs. 2,40,73,444/- to income of Rs. 19,73,110/-; after issuance of notice under Section 143 (2), questionnaire along with notice under Section 142(1), the penalty proceedings were initiated for concealment of the particulars of income and/or inaccurate particulars of income to the tune of Rs. 2,60,46,553/- and notice under Section 274 read with section 271 of the Act was issued on 27.12.2016. Thereafter, the penalty proceedings continued and the Assessing Officer, after giving adequate opportunity of hearing to the Assesse and after due application of mind, passed the penalty order dated 29.06.2017 imposing penalty amounting to Rs. 1,69,01,620/- under Section 271(1) (c) of the Act on the respondent for concealing the particular of its income and for furnishing inaccurate particulars of such income.

The Assesse preferred an appeal against the said penalty order dated 29.06.2017 before the Commissioner of Income Tax (Appeals) (hereinafter referred to as "CIT (Appeals)"). The said appeal was registered and the learned CIT (Appeals), vide its order dated 11.10.2018, allowed the said appeal of the Assesse on the ground that no penalty could have been imposed on the respondent under Section 271 (1) (c) of the Act as the penalty on the respondent could have been imposed under Section 271AAB of the Act.

Aggrieved by the said order dated 11.10.2018 passed by the Learned CIT(Appeals), the Revenue preferred an appeal before the Learned ITAT. The said appeal preferred by the Revenue was registered for the A.Y. 2014-15. The Learned ITAT vide its order dated 05.01.2021, has dismissed the said appeal and sustained the order of CIT (Appeal).

4. This Court vide its order dated 03.08.2022 admitted the appeal on following grounds;

(i). Whether in the circumstances and on facts of the case, the learned I.T.A.T was right in upholding the order of the learned C.I.T (A) without considering the ground that the amount on which penalty under section 271(1) (c) was levied by the Assessing Officer represented the income in respect of which particulars had been concealed in the return rather than 'undisclosed income' found in course of search within the meaning of explanation (c) to section 271AAB?

(ii). Whether in the facts and circumstances of the case, the impugned order passed by the learned I.T.A.T is perverse and deserves to be set aside by this Hon'ble Court?

5. Mr. R.N.Sahay, learned counsel for the revenue submits that the order passed by the CIT appeal as well as the impugned order passed by the Tribunal suffers from infirmity. It is true that section 271AAB of the Income Tax Act has been inserted w.e.f. 1.7.2012 for a specific purpose to cover all those cases where search has been initiated after the 1st day of July, 2012, but before 15th of December, 2016. It is also true that the search was initiated in premises of the respondent assessee on 3.09.2014 and as such the case of the assessee falls under the above provisions as the section has been introduced in the statute for a specific purpose.

However, it can be seen from the provisions of section 271AAB of the Act that the penalty is prescribed for 'undisclosed income' which has also been defined under this section. In the case of the Assesse, no incriminating documents including the books of account or audit report was found. Thus, the question arises when no income of the specified previous year is 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; whether section 271AAB of the Act will apply. He contended that the case of the respondent assessee is not covered under section 271AAB of the Income Tax Act and the Assessing Officer has rightly imposed penalty under section 271 (1)(c) of the Income Tax Act.

6. Mr. Nitin Kr. Pasari, learned counsel for the respondent supports the impugned judgment and submits that on the one hand no penalty can be levied under section 271 (1)(c) of the Act after the amendment made from 1st July 2012 nor the notice issued under section 271 (1)(c) is in accordance with law, as such no interference is required.

7. Having heard learned counsel for the parties and after going through the impugned order passed by the learned tribunal and also the order passed by the CIT (Appeals), the undisputed fact is that a search and seizure action under section 132 (1) was carried out at the business and residential premises of Jagdamba Group of cases on 03.09.2014. The appellant is one of the members of the said group.

At this stage, it is pertinent to note that a case where search has been initiated under Section 132 (1) on or after the first day of July, 2012, the penalty, if any, need to be levied under Section 271 AAB and not under section 271 (1)(c) as the case falls under the specified previous year. In this regard reference may be made to Section 271 AAB of the Act which is reproduced below:

“271AAB Penalty where search has been initiated.

(1) 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 1st day of July, 2012 but before 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 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 computed at the rate of sixty per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).

(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 thirty per cent of the undisclosed income of the specified previous year, 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) 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 270 A or clause (c) of sub-section (1) section 271 of 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 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 148 or under section 153 A , 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. From the plain reading of Section 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 under section 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 obstante* clause and excludes the applicability of section 271(1)(c), if the undisclosed income pertains to the specified previous year.

Viewed from the above, the facts of the case of the Assessee is squarely covered by section 271AAB as the search was conducted on 03.09.2014 i.e., after 01/07/2012. On the date of search the due date to furnish the return for A.Y.2014-15 has not expired and the respondent has furnished the return on 30.11.2014. Further the respondent has not admitted any income in a statement recorded under section 132(4) nor paid any taxes on the admitted income. Therefore, the case of the respondent is not governed by Section 271AAB (1)(a) and Section

271AAB(1)(b). The respondent's case clearly falls under section 271AAB(1)(c) where the minimum penalty prescribed is 30% and maximum penalty is 90% of undisclosed income.

Thus, as per clause (2) of section 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 Sub Section (1A) of section 271AAB. Accordingly, the AO should have initiated and levied penalty under section 271AAB(1)(c) instead of section 271(1)(c).

9. From the order passed by the CIT (Appeals), it clearly transpires that he has deliberated the issue of initiation of proceeding under section 271 AAB in details which in our view is in accordance with law. We further find that the learned tribunal after examining the order passed by the CIT (Appeal) sustained the same.

We do not find any infirmity in the order as stated hereinabove. At the cost of repetition, a case where a search has been initiated under section 132 (1) of the Act on or after 1st day of July, 2012, the penalty, if any, should be levied under section 271 AAB and not under section 271 (1)(c) of the Act as the case falls under specified previous year.

The argument of learned counsel for the revenue does not stand in the eye of law because the penalty proceeding was initiated pursuant to a search conducted on 03.09.2014 i.e., after the amendment made in the Act; as such whether incriminating document was found or not is immaterial because the law mandates that the penalty if any should have been taken under section 271 AAB of the Act where search has been initiated on or after first day of July 2012.

10. In view of the aforesaid discussions, both the questions of law are decided against the revenue. Consequently, the instant appeal is dismissed being devoid of merit.

(Aparesh Kumar Singh, J.)

(Deepak Roshan, J.)