

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री कुल भारत, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI KUL BHARAT, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA No. 630/JP/17
निर्धारण वर्ष / Assessment Year : 2014-15

Sh. Mahesh Kumar Jain, R.D. Mittal Hospital City Road, Madanganj, Kishangarhg.	बनाम Vs.	The ACIT, Central Circle, Ajmer.
स्थायी लेखा सं./ जीआईआर सं./ PAN No. ADOPJ4253D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA No. 651/JP/17
निर्धारण वर्ष / Assessment Year : 2014-15

The DCIT, Central Circle, Ajmer.	बनाम Vs.	Sh. Mahesh Kumar Jain, R.D. Mittal Hospital City Road, Madanganj, Kishangarhg.
स्थायी लेखा सं./ जीआईआर सं./ PAN No. ADOPJ4253D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA No. 629/JP/17
निर्धारण वर्ष / Assessment Year : 2014-15

Sh. Jai Kumar Bakliwal, Bakliwal Sadan Jaipur Road, Madanganj, Kishangarh.	बनाम Vs.	The ACIT, Central Circle, Ajmer.
स्थायी लेखा सं./ जीआईआर सं./ PAN No. AASPB1716G		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA No. 648/JP/17
निर्धारण वर्ष / Assessment Year : 2014-15

The DCIT, Central Circle, Ajmer.	बनाम Vs.	Sh. Jai Kumar Bakliwal, Bakliwal Sadan Jaipur Road, Madanganj, Kishangarh.
स्थायी लेखा सं./ जीआईआर सं./ PAN No. AASPB1716G		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA No. 631/JP/17
निर्धारण वर्ष / Assessment Year : 2014-15

Sh. Prakash Chand Jain Near Balaji Temple Jaipur Road, Madanganj, Kishangarh.	बनाम Vs.	The ACIT, Central Circle, Ajmer.
स्थायी लेखा सं./ जीआईआर सं./ PAN No. AAQPJ1224R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA No. 650/JP/17
निर्धारण वर्ष / Assessment Year : 2014-15

The DCIT, Central Circle, Ajmer.	बनाम Vs.	Sh. Prakash Chand Jain Near Balaji Temple Jaipur Road, Madanganj, Kishangarh.
स्थायी लेखा सं./ जीआईआर सं./ PAN No. AAQPJ1224R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA No. 632/JP/17
निर्धारण वर्ष / Assessment Year : 2014-15

Sh. Suresh Chand Mittal Mittal Traders near Balaji Temple, Madanganj, Kishangarh.	बनाम Vs.	The ACIT, Central Circle, Ajmer.
स्थायी लेखा सं./ जीआईआर सं./ PAN No. AAVPM6105B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 633/JP/17
निर्धारण वर्ष / Assessment Year : 2014-15

Sh. Dinesh Kumar Mittal Vinayak Nagar Jaipur Road, Madanganj, Kishangarh.	बनाम Vs.	The ACIT, Central Circle, Ajmer.
स्थायी लेखा सं. / जीआईआर सं. / PAN No. AAVPM6028M		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 649/JP/17
निर्धारण वर्ष / Assessment Year : 2014-15

The DCIT, Central Circle, Ajmer.	बनाम Vs.	Sh. Dinesh Kumar Mittal Vinayak Nagar Jaipur Road, Madanganj, Kishangarh.
स्थायी लेखा सं. / जीआईआर सं. / PAN No. AAVPM6028M		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 634/JP/17
निर्धारण वर्ष / Assessment Year : 2014-15

Smt. Alka Jain, Near Balaji Temple, Madanganj, Kishangarh.	बनाम Vs.	The ACIT, Central Circle, Ajmer.
स्थायी लेखा सं. / जीआईआर सं. / PAN No. AFQPJ8732H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 635/JP/17
निर्धारण वर्ष / Assessment Year : 2014-15

Sh. Puneet Jain, Near Balaji Temple Jaipur Road, Madanganj, Kishangarh.	बनाम Vs.	The ACIT, Central Circle, Ajmer.
स्थायी लेखा सं. / जीआईआर सं. / PAN No. AAQPJ1234P		

अपीलार्थी / Appellant		प्रत्यर्थी / Respondent
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आयकर अपील सं. / ITA No. 652/JP/17
निर्धारण वर्ष / Assessment Year : 2014-15

The DCIT, Central Circle, Ajmer.	बनाम Vs.	Sh. Puneet Jain, Near Balaji Temple Jaipur Raod, Madanganj, Kishangarh.
स्थायी लेखा सं. / जीआईआर सं. / PAN No. AAQPJ1234P		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Nikhilesh Kataria (CA)
राजस्व की ओर से / Revenue by : Shri Prithviraj Meena (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 18/10/2017
घोषणा की तारीख / Date of Pronouncement : 27/11/2017

आदेश / ORDER

PER BENCH:

These are cross appeals filed by the Revenue and respective assesseees against the consolidated order of Id. CIT(A)-2, Udaipur dated 31.05.2017. All these appeals involved similar facts pattern and identical question relating to levy of penalty u/s 271AAB. Hence, all these appeals were taken up for hearing together and are being disposed off by this consolidated order.

2. At the outset, the Id. AR submitted that the matter relating to Sh. Mahesh Kumar Jain in ITA No. 630/JP2017 & 651/JP/2017 for A.Y. 2014-15 may be taken as a lead case. With the consent of both the parties, the matter pertaining Sh. Mahesh Kumar Jain has been taken as a lead case for the purpose of present discussion and adjudication of the issues that have been raised before us. In this case, the respective grounds of appeal taken by the assessee and the Revenue are as under:-

Assessee's Grounds of appeal (ITA No. 630/JP/17)

"1.1 The penalty order passed u/s 271AAB is bad in law as well as on facts and hence, the same may please be quashed.

1.2 The Id. AO erred in law as well as on the facts of the present case in levying penalty u/s 271AAB (1)(c) @ 30% of undisclosed income and the Id. CIT(A) has also erred in modifying the same @ 10% of undisclosed income u/s 271 AAB (1)(a) of the Act, the same may please be deleted in toto."

Revenue's Ground of appeal (ITA No. 651/JP/17)

"1. Whether on the facts and in the circumstances of the case the CIT(A) was right in deleting the penalty of Rs. 42,12,360/- imposed by the AO u/s 271AAB (1)(c) of the Income Tax Act, 1961 on undisclosed income disclosed during the search."

3. The facts of the case are that the search and seizure operation was carried out at the residential and business premises of Jain Agarwal Group at Kishangarh including the assessee Sh. Mahesh Kumar Jain on 19.12.2013. During the course of search and seizure operation, statement of Sh. Mahesh Kumar Jain was recorded u/s 132 (4) of the Act on 20.12.2013 wherein he surrendered undisclosed income of Rs. 1,40,41,210/- for taxation as his undisclosed income for A.Y. 2014-15. The assessee subsequently filed his return of income disclosing income of Rs. 1,48,24,560/- which included the undisclosed income of Rs. 1,40,41,210/- declared during the course of search in the statement recorded u/s 132(4) of the Act. During the course of assessment proceedings, the Assessing Officer referred to the statement recorded u/s 132(4) of the Act and stated that the assessee was asked to explain the source of cash found at the office amounting to Rs. 22,28,710/- as per question no. 18 and in response the assessee has stated that he is unable

to state anything about the source of such cash found at the office and he surrendered the same for taxation as his undisclosed income for A.Y. 2014-15. Further, during the course of search, various incriminating documents including Annexure AS Ex-3 were found and seized which contain details of advances given for land by Shri Mahesh Kumar Jain to various parties amounting to Rs. 1,18,12,500/- and in this regard, the assessee vide question nos. 20 and 21 was asked to provide full details. In response, the assessee has submitted that all these entries which are recorded in "Diary 2013 (Saving life with every intension)" which has been found at my residential premises contain details of advances given to various persons against purchase of land and the same are not recorded in the books of accounts. Further, it was stated by the assessee that he does not have the full particulars of the persons whose name are mentioned in those entries and finally the assessee voluntarily surrendered the amount of Rs. 1,18,12,500/- as his undisclosed income for A.Y. 2014-15.

The Assessing Officer has stated in the assessment order that Sh. Mahesh Kumar Jain has subsequently confirmed the above surrendered of Rs. 1,40,41,210/- vide letter dated 03.03.2014. The AO thus held that during the course of assessment proceedings, the assessee failed to furnish the names with address of the persons with whom the above transactions have been made and failed to substantiate the manner in which the undisclosed income have been arrived at. It was further held by the AO that above discloser was discovered by action u/s 132(4) and otherwise it could never be disclosed by the assessee. It was held that since the discloser was not voluntarily but based on seized documents as well as search action, the assessee is liable for penalty u/s 271AAB (1)(c) and accordingly penalty proceedings u/s 271 AAB(1)(c) were being initiated separately.

The assessed income was determined at Rs. 1,48,24,560/-, the same as the returned income which includes the undisclosed income of Rs 1,40,41,210/-

and the assessment order u/s 143(3) was passed on 29.03.2016 and on the same date, notice u/s 274 r.w. sec 271 AAB (1)(c) was issued to the assessee to show cause why penalty u/s 271 AAB(1)(c) should not be imposed upon the assessee for the undisclosed income found and finally assessed in his hands.

4. During the course of penalty proceedings, the assessee submitted that no penalty can be levied since the assessee during the course of search in his statement recorded u/s 134(2) specifically mentioned that the said surrendered was made to buy peace and avoid litigation with the department and was made on the condition that no penalty can be levied. It was further submitted that the assessee disclosed the said income in the return filed u/s 139(1) of the Act and is accordingly entitled to immunity against the levy of penalty. It was further submitted that the penalty u/s 271AAB is not applicable as the assessee during the course of search in his statement admitted the additional income and specifies the manner in which such income has been derived, substantiates the manner in which the additional undisclosed income was derived and paid the taxes along with the interest in respect of such additional income. It was further submitted that provisions of section 271AAB(1)(a) are applicable in case of the assessee as the assessee has admitted the undisclosed income in his statement recorded u/s 132(4) of the Act and the provisions of section 271AAB(1)(c) are not applicable as the latter provisions have been introduced by the Finance Act 2012 to penalize those assessee who neither declared undisclosed income u/s 132(4) nor surrender/report the same in their return of income.

5. The assessee's contention however did not find favour with the Assessing Officer. The Assessing Officer held that the contention of the assessee that the surrendered was made to buy peace and avoid long litigation is not acceptable as there was no provision in the Act which gives immunity to the assessee on such basis. The disclosure made by the assessee was only on the

basis of seized material gathered during the course of search which was confronted to the assessee. The assessee having no alternate but to admit the undisclosed income mentioned therein and offered the same for taxation. It was accordingly held that the disclosure made by the assessee cannot be treated as voluntarily disclosure of income. Further, it was held that subsequent filing of return of income cannot exonerate the assessee from blame worthiness of concealing of income. Though the assessee included the undisclosed return of income but he has neither specified nor substantiated the manner in which the undisclosed was derived. It was held by the Assessing Officer during the course of assessment proceedings the assessee was specifically asked to furnish the names and addresses of the persons from whom the above transactions have been made as well as sources of undisclosed income so earned and to substantiate the manner in which the undisclosed has been arrived at. But during the course of assessment as well as penalty proceedings, the assessee has completely failed to furnish desired details, sources of undisclosed income and failed to substantiate the manner in which undisclosed income was arrived at as required u/s 271AAB of the Act. It was further held that even otherwise the assessee has failed to explain the sources and manner of deriving of above undisclosed income as appearing in the seized material while recording statement u/s 132(4) of the Act and offered the same for taxation. It was further held that during the course of penalty proceedings the assessee has also not submitted any evidences to substantiate his claim on record. It was accordingly held that the assessee has completely failed to explain the issues raised during the assessment as well as penalty proceeding, therefore penalty u/s 271 AAB (1)(c) of the Act is imposable in respect of the unaccounted income. Regarding reliance placed by the assessee on case laws in the context of section 271AAA, the Assessing Officer held that the facts and circumstances in those cases are different with the facts and circumstances of the assessee's case in as much as the

assessee's case is covered u/s 271AAB of the Act which has been introduced by the Finance Bill 2012 in order to strengthen the penal provision which are applicable for search conducted on or after 01.07.2012. It was finally held by the Assessing Officer that the provisions of section 271AAB(1)(c) are applicable in the case of the assessee as he has not substantiated the manner in which the undisclosed income was derived. He accordingly levied penalty @ 30% of undisclosed income amounting to Rs. 42,12,360/-.

6. Being aggrieved with the action of the AO in levying the penalty, the assessee carried the matter in appeal before the Id. CIT(A). In his order, the Id. CIT(A) noted that while completing the assessment, the AO was of the opinion that the assessee failed to furnish the name with address of the persons from whom the above transactions have been made and failed to substantiate the manner in which undisclosed income have been arrived at and the AO initiated the penalty u/s 271 AAB(1)(c) of the Act for which he issued a show cause dated 23.03.2016. The Id. CIT(A) further noted that the assessee had filed a detailed reply before the AO on 11.04.2016 in which it was contended before the AO that the case of the assessee is fully covered u/s 271AAB(1)(a) and not u/s 271AAB(1)(c) for which the penalty was initiated by the AO. It was further noted by the Id. CIT(A) that the assessee has contended before him as well that the assessee duly comply with the requirements of section 271AAB(1)(a) of the Act and in the statement recorded u/s 132(4), the assessee had categorically explained the manner of earning such income and also substantiated the same in reply to question no. 18 to 21.

It was further contended by the assessee before the Id. CIT(A) that provisions of section 271AAA and section 271 AAB are pari-materia and therefore the case laws cited by the assessee are very much relevant to the case of the case of the assessee. It was submitted that the provisions of section 271AAA(2) and 271AAB(1)(a) are pari-materia with a minor modification of a

token penalty of 10% of undisclosed income. It was further contended by the assessee that all the conditions specified in section 271AAB(1)(a) are satisfied in as much as in the statement recorded u/s 132(4), the assessee has admitted the undisclosed income, specified in the said statement the manner of earning of such income by doing the business, the manner of earning income is substantiated from the fact that the assessee is in the business and has paid tax together with interest on the income disclosed by him. It was accordingly contended that the penalty levied @ 30% instead of 10% is not justifiable in the present case. It was further contended that since the AO has levied penalty u/s 271AAB(1)(c) which are not applicable provision, it would not be proper for the appellate authority to sustain any penalty even u/s 271AAB(1)(a) of the Act.

7. The Id. CIT(A) considered the above contentions raised by the assessee as well as the comparative position of provisions contained in section 271AAA and 271AAB, and thereafter, confirmed the levy of penalty @ 10% of undisclosed income u/s 271AAB(1)(a) of the Act and his relevant findings are contained at para 4.3 to 4.8 of his order which are reproduced as under:-

"4.3 There is no dispute as to the fact that assessee has offered the income in the statement recorded u/s 132(4), offered the same in the return and paid the due tax thereon. Therefore, I agree with the submission of the A/R of the appellate that in the present case, all these assessee have satisfied all the above conditions 271AAB(1)(a).

4.4 I also find from the underlined provisions of section 271AAA and 271AAB reproduced in para 4.1 & 4.2 above that the provisions of section 271AAA(2) and 271AAB(1) (a) are pari-materia with a minor modification of a token penalty of 10% of undisclosed income provided in section 271AAB(1)(a) which was absent in section 271AAA(2) and therefore the ratios of case laws cited by the assessee are relevant with a minor modification as categorised above to the facts of the case of assessee though the same are decided in the context of 271AAA(2).

4.5 However, I do not agree with the arguments of the A/R for the appellants that since the AO has levied penalty u/s 271AAB(1)(c) which is not applicable provision it would be not proper for appellate authority to sustain any penalty u/s 271AAB(1)(a). The controversy in the name of provisions of section 271AAB(1)(c) or provisions of section 271 AAB (1)(a) is uncalled for as the entire section 271 AAB is concerning penalty in search cases and the different clauses of 271AAB(1) namely (a),(b) &(c) only makes grades the intensity of concealing the undisclosed income whether it is disclosed during the search or while filing the return it is not disclosed at all. The ground reality of the case decides which clause is relevant to determine the quantum of penalty. The factual matrix of all these cases falls within parameters of section 271AAB(1)(a), the penalty has to be adjudicated under section 271AAB(1)(a). If the AO has not invoked the provisions of 271AAB(1)(a), as CIT(A), I do have co-terminus power to invoke appropriate provisions for levy of penalty and I do invoke the provisions of section 271AAB (1)(a) of IT Act to adjudicate these penalty matters.

4.6 The various Courts including the decision of the ITAT, Jaipur and Jodhpur Bench and appellate orders by CIT(A), (Central), Jaipur and CIT(A), Udaipur deleted the penalties levied in the similar facts and circumstances in the context of provisions of section 271AAA and erstwhile corresponding section 271(1)(c).

4.7 The same rational is applied with the minor modification- a penalty of 10% of undisclosed income disclosed during search for the specified previous year and returned in the income tax return after payment of due taxes in accordance with the provisions of section 271AAB(1)(a) of IT Act as invoked above.

4.8 Thus, the action of the AO levying penalties at the rate of 30% of undisclosed income disclosed during search in all these cases u/s 271AAB(1)(c) of IT Act stand modified/ reduced 10% of undisclosed income disclosed during search 271AAB(1)(a) of IT Act. In nut shell the penalty levied by the AO are confirmed to the extent of one-third and cancelled to the extent of two-third. Accordingly the Ground of appeal in all these appeals are partly allowed."

8. During the course of hearing, Id. AR submitted that the assessee has admitted the undisclosed income, paid taxes and filed returns. The provisions of section 271AAB (1)(a) read as under:

"271AAB Penalty where search has been initiated

(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 July, 2012 the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

(a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) substantiates the manner in which the undisclosed income was derived; and

(iii) on or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;---"

We may submit that all the conditions which has been stipulated above in section 271AAB(1)(a) of the Act, has been satisfied by the assessee. The assessee admitted undisclosed income in statement recorded during the course of search, paid taxes thereon and filed return. The manner of deriving income as well as substantiation of the same is very much clear from the statement itself.

However, the only objection of the Id. AO is that the assessee could not substantiate the manner in which the undisclosed income has been derived as appearing in *para 9 last page* of the order of the Id. AO, which reads as under:

"9. Sub section (1)(c) to this section 271AAB is applicable in the case of the assessee as she does not substantiated the manner in which the undisclosed income was derived"

8.1 It was further submitted that the source of income has clearly been explained by the assessee in response to the answer to question no.3 wherein he has explained that he is earning income from salary, private practice and property transactions.

8.2 It was further submitted that in the instant case, the assessee duly stated that it has given advance to various persons for purchasing of land as would appear from answer to question no.18 as appearing on page 2 of the assessment order & also question no.21 & 22 as appearing on page 5 of the assessment order. In his answer the assessee has clearly explained that it is his income of the current year. The Id. AO in para 3 of the assessment order also observed that the assessee derives income from salary, house property and other sources. The advances have been given for purchasing of land which clearly suggests that the assessee was into this business which he has also explained in response to question no.3.

8.3 It was further submitted that it is important to note that the income declared by the assessee has been accepted by the Id. AO as it is without disturbing the same by making assessment at the returned income and further as stated that the Id. AO has also observed that the assessee is earning income from capital gain and other sources. Therefore, this clearly suggests that the Id. AO was completely satisfied with manner and substantiation of the undisclosed income declared by it. Therefore, the Id. AO was incorrect in giving finding that the assessee failed to substantiate the undisclosed income.

8.4 It was further submitted that as already explained that the assessee made a surrender of undisclosed income and the same was assessed by the

Id. AO on the same figure. Now once there is quantification of amount of undisclosed income by the assessee followed by acceptance by the investigation team and subsequent assessment of the same amount by the Id. AO, it is full proof evidence that the undisclosed income was duly substantiated by the assessee. Hence, no question could be raised by the Id. AO in the order of penalty.

8.5 It was further submitted that the term manner of deriving undisclosed income and its substantiation is not defined in the Act. So it was otherwise incumbent upon the Id. AO to explain to the assessee what constituted these terms. In the entire search proceedings or assessment proceedings or penalty proceedings, it is not stated by the department that what exactly constituted these terms and what was expected from the assessee to have complied with these terms, absence of which has completely jeopardize the penalty proceedings in as much as there was no opportunity for the assessee to give its stand. Therefore, the penalty levied was also bad in law and as such rightly deleted by the Id. CIT(A).

8.6 It was further submitted that the assessee himself has surrendered the income, paid taxes and filed return of income. There has been no further probe by the investigating team during the course of search after surrender of income by the assessee. Even more, this surrender has been accepted by the Id. AO on the same income without any modification as has been declared by the assessee in its return of income. The Id. AO simply stated in its order that the assessee did not make surrender voluntarily but it is a fact on record that the alleged non disclosure not in any way affected the assessed income. Therefore it has to be accepted that there has been complete disclosure of manner and substantiation of undisclosed income declared by the assessee.

8.7 It was further submitted that the only reason for levy of penalty u/s 271AAB (1)(c) of the Act by the Id. AO was that the assessee has failed to substantiate the manner in which the undisclosed income has been earned. However, it would appear from the perusal of the statement that while recording of statement, no specific questions were asked from the assessee to explain the manner of earning of income or to substantiate the undisclosed income declared by the assessee. As stated above, the assessee surrendered the undisclosed income in response to question no. 18, 21 & 22 and afterwards, there is no further question for the manner of earning the same or to substantiate the same. There is consistent view of various Courts and Benches that in case the department has not raised any specific query regarding the manner in which the undisclosed income has been derived and its substantiation, the Id. AO would not be justified in levy of penalty u/s 271AAA.

8.8 It was further submitted that the provisions of Section 271AAB is *pari materia* to Section 271AAA existed earlier. The provisions of section 271AAA which was applicable for the searches carried out before 1-7-2012 read as under:

"SECTION 271AAA Penalty where search has been initiated

(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 but before the 1st day of July, 2012, 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)."

We may submit that the provisions of section 271AAB are applicable on the searches initiated on or after 1-7-2012 and before that section 271AAA was in force for the period from 1-6-2007 to 30-6-2012 and the language and interpretation of section 271AAB is in *pari materia* to section 271AAA of the Act. The conditions for non levy of penalty including disclosure of the manner of deriving of undisclosed income and substantiating the same u/s 271AAA(2) is identical to section 271AAB(1)(a) which speaks of levying of penalty @10% in case of certain conditions being satisfied. It is also notable that the *provisions of both the sections are period specific and not applicable simultaneously*. As such the decisions and interpretation given by various courts with respect to section 271AAA would be equally applicable to the provisions of section 271AAB in which the penalty has been levied in the case of the assessee. Similar observations have been made by the Hon'ble Delhi ITAT in the matter of Neeraj Singal vs. ACIT 146 ITD 152 (Del) at para 11 when interpreting the provisions of section 271AAA while relying on the decisions rendered in context of explanation 5(2) of section 271(1)(c). Therefore, it is incorrect & unjustified to conclude that the decisions cited by

the assessee on section 271AAA are not applicable while dealing with provisions of section 271AAB which is in question.

8.9 It was further submitted that the matter is covered by a recent judgement, the Hon'ble Delhi High Court in the matter of Pr. CIT (Central) vs. Emirates Technologies Pvt. Ltd. ITA No. 400/2017 dt.18-7-2017 dismissing the appeal of the revenue while confirming the order of Hon'ble ITAT in the matter in ITA no.476/Del/2014 dt.28-10-2016 wherein the Hon'ble ITAT in its order, held as under:

"5.1 In view of the facts of the present case and the findings recorded by the Id. CIT(A) which could not be negated by the Id. DR it is evident that the department has not raised any specific query regarding the manner in which the undisclosed income has been derived. In absence of query about the manner in which the undisclosed income was derived and its substantiation, it is our considered view that the AO was not justified in imposing penalty u/s 271AAA specially when the offered undisclosed income was accepted by the AO and tax due thereon had been paid by the assessee. We draw our strength from the decision of the ITAT Delhi Bench in case of Neeraj Singal vs. ACIT in ITA No.337/Del/2013 reported in 2015(3)-TMI-680-ITAT, Delhi which is identical to the present case. Accordingly, we uphold the order of Id. CIT(A).

6. In the final result, the appeal filed by the department is dismissed."

Thus the case of the assessee is squarely covered by the above decision of Hon'ble Delhi High Court in as much as in the present case also, absolutely no question was asked by the Id. AO regarding the manner of deriving of undisclosed income & substantiating the same. As would appear from the statement, after making of surrender of undisclosed income by the assessee,

the Id. AO stopped and on this issue, the Id. AO did not ask any further question from the assessee.

Therefore, there being identical facts, following the verdict of Hon'ble Delhi High Court penalty u/s 271AAB(1)(c) cannot be sustained and as such the Id. CIT(A) was fully justified in deleting the same.

8.10 It was further submitted that the Hon'ble Jaipur ITAT is taking an identical and consistent view as has been taken by the Hon'ble Delhi High Court in its recent decision in Emirates Technologies Pvt. Ltd. (*supra*). In case of Late Sudha Patni vs. ACIT in ITA No. 963/JP/2015 dt.9-8-2016 (Jp)(Tri), it was held as under:

4. After considering the rival submissions, we do not see any reason to interfere with the order of CIT(A). The order is in tune with the principles laid down by various co-ordinate Benches and High Courts particularly with reference to disclosure made under section 132(4). In the case of CIT Vs. Mahendra C. Shah (299 ITR 305) the Hon'ble Gujarat High Court considered similar statement under section 132(4) to grant immunity under section 271(1)(c). The Hon'ble High Court held as under:-

"When the statement is being recorded by the authorized officer it is incumbent upon the authorized officer to explain the provisions of Explanation 5 in entirety to the assessee concerned and the authorized officer cannot stop short at a particular stage so as to permit the Revenue to take advantage of such a lapse in the statement. The reason is not far to seek. In the first instance, the statement is being recorded in the question and answer form and there would be no occasion for an assessee to state and make averments in the exact format stipulated by the provisions considering the setting in which such statement is being

recorded. Secondly, considering the social environment it is not possible to expect from an assessee, whether literate or illiterate, to be specific and to the point regarding the conditions stipulated in the second exception while making statement under section 132(4). Even if the statement does not specify the manner in which the income is derived, if the income is declared and tax thereon paid, there would be substantial compliance not warranting any further denial of the benefit."

4.1 In this case, the assessee was asked to explain the entries in the 'work-in-progress sheet' and assessee in the course of statement offered the income with a plea not to initiate penalty proceedings. The assessee was not asked about the manner in which such income was earned and also to substantiate the manner in which undisclosed income was derived. The provision of clause-2 of Explanation-V appended to section 271(1)(c) are similar to section 271AAA(2). The scope and meaning has been lucidly explained by the Hon'ble Allahabad High Court in the case of CIT Vs. Radha Kishan Goel (2005) 278 ITR 454 (All.), which was followed by the Hon'ble Gujarat High Court in the above referred case. In view of the above principles laid down, we are of the opinion that immunity provided under s/s. (2) of section 271AAA is applicable and accordingly, the order of CIT(A) does not require any modification. Revenue's grounds are rejected. "

Respectfully following the decision of the coordinate benches, we set aside the orders of the authorities below. The AO is directed to delete the addition. The appeal of the assessee is allowed.

5. In the result, appeal of the assessee is allowed.

Thus the case of the assessee is squarely covered by the decisions of Hon'ble Jaipur ITAT in as much as there being identical facts in the present case and hence, the penalty u/s 271AAB(1)(c) rightly deleted by the Id. CIT(A)

8.11 It was further submitted that there is almost consensus between various benches of Hon'ble ITAT that no adverse inference could be taken where the department has not raised any question regarding the manner and substantiation of undisclosed income. Few such decisions are as under:

- DCIT vs. Babu Lal Motawat ITA No.93/JU/2014 dt.7-5-2014 (Jodh)(Tri)
- DCIT vs. Piyush Maru ITA No.21/Jodh/2014 dt.9-6-2014 (Jodh)(Tri)
- DCIT vs. Sulochana Devi A Agarwal ITA No. 1052/Ahd/2012 (Ahd)(Tri)
- ACIT vs. Ajit Singh ITA No.714/JP/2014 dt.26-9-2016 (Jp)(Tri)
- ACIT vs. Kanakia Spaces Pvt. Ltd. 6763/Mum/2011 dt.10-7-2013 (Mum)(Tri)
- Pramod Kumar Jain vs DCIT (2012) 77 DTR 0244 (Cuttack Tri)

8.12 Further, reliance was placed on the following High Court decisions:

- CIT vs. Mahendra C Shah (2008) 215 CTR 0493 (Guj)(HC)
- CIT vs. Radha Kishan Goel (2006) 200 CTR 0300 (All)(HC)

8.13 It was further submitted that without prejudice to our foregoing submission, even if it is held that the assessee failed to specify the manner and substantiation thereof then still penalty @20% could only be levied as per the provisions of 271AAB(1)(b) which reads as under:

"--- (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;"

In the instant case, undisputedly the assessee duly admitted the undisclosed income in the statement and paid the taxes, interest and declared the income in the return of income and therefore, a maximum penalty @20% could be levied by the Id. AO

8.14 Now, coming to assessee's own appeal, the Id AR submitted that the Id. CIT(A) has erred in levying penalty u/s 271AAB(1)(a) when the AO specifically initiated and levied penalty u/s 271AAB(1)(c). In this regard, it was submitted that the Id. AO issued the notice specifically u/s 271AAB(1)(c) which is clear from para 1 of the penalty order. Ultimately, the penalty was levied in this particular section only against which the assessee filed the appeal and therefore, the issue before the Id. CIT(A) was limited on application of this specific section.

8.15 Otherwise also, it was submitted that Section 271AAB(1)(b) could only be invoked as per finding in penalty order. We may also submit that it is clear from the facts and findings given by the Id. AO in the penalty order that the assessee duly admitted the undisclosed income in the statement taken during the course of search and further that it paid taxes and filed return of income. So even in worst case scenario maximum a penalty u/s 271AAB(1)(b) could have been levied as has also been discussed in para 1.4 above. Therefore the penalty order passed by the Id. AO was bad in law and on the facts of the present case. So once the order itself is held to be bad in law, the same cannot be revived by the Id. CIT(A) so as to bring in penalty with some different section.

8.16 Reference was drawn by the Id AR to section 251 which deals with the power of Commissioner (Appeals) while disposing of an appeal, reads as under:

Powers of the Commissioner (Appeals)

(1) In disposing of an appeal, the Commissioner (Appeals) shall have the following powers—

(a) in an appeal against an order of assessment he may confirm, reduce, enhance or annul the assessment;

(aa) in an appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abates under section 24 HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment;]

(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty.

(c) in any other case, he may pass such orders in the appeal as he thinks fit.

(2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation.— In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant.

The above makes it clear that the Commissioner (Appeals) may only confirm, cancel, reduce or enhance the penalty *which is under appeal* and it is nowhere provided that the Id. CIT(A) may proceed to levy penalty in some other section.

8.17 It was further submitted that the levy of penalty u/s 271AAB(a) was not before the Id. CIT(A). We may submit that the issue of levy of penalty was not before the Id. CIT(A) and the appeal was filed by the assessee to challenge application of section 271AAB(c) only. So once the penalty u/s 271AAB(1)(c)

was cancelled, the Id. CIT(A) could not have proceeded to levy penalty under section 271AAB(1)(a).

8.18 It was further submitted that the explanation to section 251 is not relevant. It was submitted that though there is explanation given in the section that the Id. CIT(A) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed but we may submit that the issue of penalty u/s 271AAB(1)(a) was never considered by the Id. AO and therefore this issue is not arising out of the appeal before him. Accordingly, the explanation to section 251 cannot be extended to levy penalty u/s 271AAB(1)(a) when this was never considered by the Id. AO and the order of the Id. AO itself was out of jurisdiction.

In view of the above, the Id. CIT(A) could not have proceeded to levy penalty u/s 271AAB(1)(a) of the Act and hence, the appeal of the assessee deserves to be allowed

8.19 It was further submitted that in a recent judgement the Hon'ble Supreme Court has dismissed an appeal filed by the revenue in the case of CIT vs. SSA EMERALD MEADOWS SLP 11485/2016 DT.5-8-2016 (SC) wherein the Hon'ble Karnataka High Court has dismissed the following substantial question of law filed by the department in the case of CIT vs. SSA EMERALD MEADOWS ITA NO.380/2015 DT.23-11-2015 (Kar)(HC) wherein the Hon'ble High Court has followed the judgement of the same court in the case of CIT vs. Manjunatha Cotton & Ginning Factory 359 ITR 565 (Kar):

"Whether, omission of assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?"

In the present case also, the notice have been issued under the provisions of section 271AAB(1)(c) of the Act and not 271AAB(1)(a) and hence, covered by

the above decision of Hon'ble Supreme Court and hence, sustenance of penalty under different section was bad in law

8.20 It was further submitted that even the Id. CIT(A) could not have levied the penalty in a different section. It has been held by some of the benches of Hon'ble ITAT that the Id. CIT(A) can only vary or cancel the penalty but cannot sustain it in some different section and reliance was placed on following decisions:

- Ajit Ramchandra Jadhav vs. ACIT 178 TTJ 204, 135 DTR 1 (Pune)(Tri)
- Ashwani Kumar Arora vs. ACIT 50 ITR 37 (Delhi)(Tri)
- Dr. Sarita Milind Davare vs. ACIT ITA No. 2187 & 1789 /Mum/2014, dt. 21-12-2016 (Mum)(Tri)
- K.N. Dadina (P) ltd. vs. DCIT (1997) 60 ITD 0010 (Kol)(Tri)
- Indian Standard Metal Co. Ltd vs. ITO (1982) 14 TTJ 0335 (Mum) (Tri)

9. The Id DR is heard who has vehemently argued the matter, took us through the findings of the AO in assessment and penalty proceedings and submitted that the AO has rightly levied the penalty u/s 271AAB(1)(c) of the Act.

10. The first and foremost question that arises for consideration is the nature of penalty provisions as contained in section 271AAB(1)(a) and 271AAB(1)(c). In other words, whether these provisions provide for levy of penalty on account of separate and independent charges or these provision provide for levy of penalty for the same charge under section 271AAB, however, subject to satisfaction of the prescribed conditions, the quantum of penalty may vary as specified in the respective sub-clauses of 271AAB of the Act.

11. In this regard, we refer to the provisions of section 271AAB which are reproduced as under:

“271AAB. (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 July, 2012, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

- (a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such assessee—
 - (i) in the course of the search, in a statement under sub-section (4) of [section 132](#), admits the undisclosed income and specifies the manner in which such income has been derived;
 - (ii) substantiates the manner in which the undisclosed income was derived; and
 - (iii) on or before the specified date—
 - (A) pays the tax, together with interest, if any, in respect of the undisclosed income; and
 - (B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;
- (b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—
 - (i) in the course of the search, in a statement under sub-section (4) of [section 132](#), does not admit the undisclosed income; and
 - (ii) on or before the specified date—
 - (A) declares such income in the return of income furnished for the specified previous year; and
 - (B) pays the tax, together with interest, if any, in respect of the undisclosed income;
- (c) a sum which shall not be less than thirty percent but which shall not exceed ninety percent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and

(b).

(2) No penalty under the provisions of clause (c) of sub-section (1) of [section 271](#) shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1) or sub-section (1A).

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

Explanation.—For the purposes of this section,—

- (a) "specified date" means the due date of furnishing of return of income under sub-section (1) of [section 139](#) or the date on which the period specified in the notice issued under [section 153A](#) for furnishing of return of income expires, as the case may be;
- (b) "specified previous year" means the previous year—
 - (i) which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of [section 139](#) for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or
 - (ii) in which search was conducted;
- (c) "undisclosed income" means—
 - (i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under [section 132](#), which has—
 - (A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating

- to such previous year; or
- (B) otherwise not been disclosed to the 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.

12. On reading of the above provisions, it provides that the Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under [section 132](#) on or after the 1st day of July, 2012, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of 10% of the undisclosed income of the specified previous year, if such assessee, in the course of the search, in a statement under sub-section (4) of [section 132](#), admits the undisclosed income and satisfies other conditions as provided in 271AAB(1)(a). It further provides that where the declaration of undisclosed income is not made by the searched person in the course of search but is declared in the return of income furnished for the specified previous year and subject to satisfaction of other conditions, penalty @ 20% is payable by him. It further provides that where the declaration of undisclosed income is neither made by the searched person in the course of search nor declared in the return of income furnished for the specified previous year and additions are made during the course of assessment proceedings, penalty which can vary from 30% to 90% is payable by him.

13. Both the provisions as contained in section 271AAB(1)(a) and 271AAB(1)(c) thus provides for levy of penalty in cases where search has

been initiated under [section 132](#) on or after the 1st day of July, 2012 and quantum of penalty has been kept at 10% where there is declaration in the statement recorded during the course of search, and where there is neither a declaration in the statement u/s 132(4) recorded during the course of search nor a declaration in the return of income, the penalty has been kept at a higher pedestal which can vary from 30% to 90%. Further, it is noted that the provisions of section 271AAB overrides section 271(1)(c) which infact contain provisions for levy of penalty under two separate limbs- concealment of particulars of income or furnishing inaccurate particulars of income. Further, the decision of the Hon'ble Supreme Court in case of SAS Emerald Meadows (supra) rendered in the context of two separate limbs/charges under section 271(1)(c) therefore doesn't support the case of the assessee company. In our considered view, both the provisions of section 271AAB(1)(a) and 271AAB(1)(c) provides for levy of penalty for an identical charge i.e, undisclosed income for the specified previous year which is found during the course of search initiated under section 132 on or after the 1st day of July, 2012. Therefore, we are unable to accede to the contention of the Id AR that the Id CIT(A) has erred in confirming the levy of penalty u/s 271AAB(1)(a) which provides for a separate and independent charge and comes under different section than the provisions of section 271AAB(1)(c) which has been specifically invoked by the AO.

14. The second issue that arise for consideration is whether the Id CIT(A) was well within his powers u/s 251 to confirm the levy of penalty under section 271AAB(1)(a) given that the provisions of section 271AAB(1)(c) have only been specifically invoked by the AO. The provisions of section 251(1)(b) provides that in an appeal against an order imposing a penalty, the Id CIT(A) may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty. As we have held above, there is no distinction in the nature of charge as provided in clause (a) of sub-section

(1) of 271AAB and clause (c) of sub-section (1) of 271AAB, however the quantum of penalty may vary depending upon the declaration of undisclosed income in the statement recorded u/s 132(4), declaration in the return of income and satisfaction of other conditions. The Id CIT(A) who was ceased of the whole penalty matter under section 271AAB, after detailed examination, came to a conclusion that levy of penalty @ 10% under clause (a) is more appropriate as against levy of penalty @ 30% under clause (c) and he accordingly, varied and reduced the penalty and confirmed the levy of penalty @ 10%. In any case, where the Id CIT(A) has come to a conclusion that levy of penalty under clause (a) and not under clause (c) is more appropriate in the facts of the present case, he couldn't have cancelled the penalty order merely because the AO has invoked clause (c) specifically. Our view is fortified by the decision of the Hon'ble Supreme Court in case of CIT vs Assam Travel Shipping Services reported in 199 ITR 1 where the Hon'ble Supreme Court was pleased to held that "In view of section 251(1)(b) it was also clear that the AAC was wrong in taking the view that he had no power to enhance the penalty in accordance with law on reaching the conclusion that the computation of penalty made by the ITO was illegal, and that he could only cancel even the lesser penalty which had been imposed by the ITO." Drawing support from the said legal proposition, in the instant case, the Id CIT(A) held that the AO was wrong in levying penalty @ 30% and on appreciation of the same facts, the Id CIT(A) reduced it to 10% which is clearly within his jurisdiction as laid down in section 251(1)(b) of the Act.

15. Further, as we have held above, both the clauses fall under same section 271AAB which provide for the same charge for levy of penalty. It is therefore not a case that the Id CIT(A) cancelled the penalty under clause (c) and levied the penalty under clause (a). All he has done is vary and reduced the levy of penalty for the same charge which remain

undisputed. The Coordinate Bench decisions cited by the Id AR in this regard therefore doesn't support the case of the assessee. In our view, the Id CIT(A) acted well within his powers and jurisdiction in varying and reducing the penalty @ 10% as against levy of penalty @ 30% by the AO under section 271AAB of the Act.

16. The next issue that arise for consideration is whether the conditions specified in section 271AAB(1)(a) are satisfied in the instant case and the Id CIT(A) has rightly invoked the said provisions as against residuary provisions of section 271AAB(1)(c) invoked by the AO.

17. The provisions of section 271AAB(1)(a) provides for satisfaction of the following conditions:

- (a) if such assessee, 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;
- (b) substantiates the manner in which the undisclosed income was derived; and
- (c) 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;

18. There is no dispute that the assessee, in the course of the search, in a statement under sub-section (4) of [section 132](#), has admitted the undisclosed income of Rs 1,40,41,210. There is also no dispute that on or before the specified date, the assessee has paid the taxes along with

interest in respect of the undisclosed income for the specified previous year and has furnished the returned of income for the specified previous year declaring such undisclosed income therein. The same is evident from the return of income filed on 28.07.2014 declaring the undisclosed income of Rs 1,40,41,210 which has been accepted and the assessment completed at the returned income without any further additions made by the AO.

19. The only dispute which has also been specifically raised by the AO relates to whether in the statement recorded under section 132(4) during the course of search, the assessee has specified the manner in which such undisclosed income has been derived and substantiates the manner in which the undisclosed income was derived.

20. In this regard, the principle contention of the Id AR is that from the perusal of the statement of the assessee recorded u/s 132(4), it may be noted that while recording the said statement, no specific questions were asked from the assessee to explain the manner of earning of income or to substantiate the undisclosed income declared by the assessee. It was submitted that the assessee surrendered the undisclosed income in response to question no.18, 21 & 22 and afterwards, there is no further question for the manner of earning the same or to substantiate the same.

21. It was further submitted that, and to which we agree, the provisions of Section 271AAB(1)(a) is *pari materia* to Section 271AAA(2) so far as it relates to satisfaction of condition whereby it requires specifying the manner of earning of undisclosed income as well as to substantiate the manner in which the undisclosed income was derived.

22. It was further submitted that there is consistent view of various Courts and Benches of the Tribunal that in case the department has not raised any specific query regarding the manner in which the undisclosed income has been derived and its substantiation, the Id. AO would not be justified in levy

of penalty u/s 271AAA of the Act. It was submitted that the legal proposition so laid down continues to apply in context of section 271AAB(1)(a) with a variation of levy of penalty @ 10% as against discharge from levy of penalty under section 271AAA(2) of the Act. In this regard, we refer to the various authorities on the subject.

23. The Hon'ble Allahabad High Court in case of Radha Kishan Goel reported in 278 ITR 454 in context of explanation 5 to section 271(1)(c) has held as under:

"10. Under section 132(4) of the Act, it is the authorised officer, who examines on oath any person, who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing, therefore, it is for the authorised officer to record the statement in his own way. Therefore, it is not expected from the person to state those things, which are not asked by the authorised officer.

11. It is a matter of common knowledge, which cannot be ignored that the search is being conducted with the completed team of the officers consisting of several officers with the police force. Usually telephone and all other connections are disconnected and all ingress and egress are blocked. During the course of search person is so tortured, harassed and put to a mental agony that he loses his normal mental state of mind and at that stage it cannot be expected from a person to preempt the statement required to be given in law as a part of his defence.

12. In these circumstances, we are of the view that under section 132(4) of the Act unless the authorized officer puts a specific question with regard to the manner in which income has been derived, it is not expected from the person to make a statement in this regard and in

case in the statement the manner in which income has been derived has not been stated but has been stated subsequently, that amounts to the compliance with Explanation 5(2) of the Act. We are also of the opinion that in case there is nothing to the contrary in the statement recorded under section 132(4) of the Act, in the absence of any specific statement about the manner in which such income has been derived, it can be inferred that such undisclosed income was derived from the business which he was carrying on or from other sources. The object of the provision is achieved by making the statement admitting the non-disclosure of money, bullion, jewellery, etc. Thus, we are of the opinion that much importance should not be attached to the statement about the manner in which such income has been derived. It can be inferred on the facts and circumstances of the case, in the absence of anything to the contrary. Therefore, mere non-statement of the manner in which such income was derived would not make Explanation 5(2) inapplicable."

24. The Hon'ble Gujarat High Court in case of Mahendra C Shah reported in 299 ITR 305 in context of explanation 5 to section 271(1)(C) has held as under:

"15. Insofar as the alleged failure on the part of the assessee to specify in the statement under section 132(4) of the Act regarding the manner in which such income has been derived, suffice it to state that when the statement is being recorded by the authorized officer it is incumbent upon the authorized officer to explain the provisions of Explanation 5 in entirety to the assessee concerned and the authorized officer cannot stop short at a particular stage so as to permit the revenue to take advantage of such a lapse in the statement. The reason is not far to seek. In the first instance, the statement is being recorded in the question and answer form and there would be no occasion for an

assessee to state and make averments in the exact format stipulated by the provisions considering the setting in which such statement is being recorded, as noted by Allahabad High Court in case of Radha Kishan Goel (supra). Secondly, considering the social environment it is not possible to expect from an assessee, whether literate or illiterate, to be specific and to the point regarding the conditions stipulated by Exception No. 2 while making statement under section 132(4) of the Act. The view taken by the Tribunal as well as Allahabad High Court to the effect that even if the statement does not specify the manner in which the income is derived, if the income is declared and tax thereon paid, there would be substantial compliance not warranting any further denial of the benefit under Exception No. 2 in Explanation 5 is commendable."

25. The Hon'ble Delhi High Court in case of Emirates Technologies (in ITA No. 400/2017 dated 18.7.2017) in context of section 271AAA has held as under:

"3. The CIT(A) in para 4.7 of the order dated 4th November, 2013 noted that no specific query had been put to the Assessee by drawing his attention to section 271AAA of the Act asking him to specify the manner in which the undisclosed income, surrendered during the course of search, had been derived. The CIT(A) therefore, relying on the decisions of this Court held that the jurisdictional requirement of section 271AAA was not met.

4. The above view has been concurred with by the ITAT.

5. In the facts and circumstances of the case, the Court is of the view that concurrent decision of the CIT(A) and the ITAT represent a plausible view which cannot be said to be perverse."

26. In light of above discussions, it is clear that the legal proposition which has been laid down by the Courts in the context of explanation 5 to section 271(1)(c) has been followed in the context of section 271AAA as apparent from the recent decision of the Hon'ble Delhi High Court in case of Emirates Technologies. Similar view has been taken by this Bench in case of Late Sudha Patni (*ITA No. 963/JP/2015 dated 9.8.2016*), Ajit Singh (*ITA No. 714/JP/2014 dated 26.09.2016*) and others. As we have noted above, the provisions of Section 271AAB(1)(a) are *pari materia* to Section 271AAA(2) so far as it relates to satisfaction of condition whereby it requires specifying the manner of earning of undisclosed income as well as to substantiate the manner in which the undisclosed income was derived. The legal proposition so laid down in context of section 271AAA(2) thus equally applies in context of section 271AAB(1)(a) of the Act.

27. In light of above legal proposition, let's examine the statement of the assessee, recorded during the course of search, under section 132(4) of the Act with a view to determine whether any specific question(s) were raised to the assessee drawing his attention to the provisions of section 271AAB which require the assessee to specify the manner of earning of undisclosed income as well as to substantiate the manner in which the undisclosed income was derived. The relevant questions are question no. 3, 18, 19, 20, 21, 22 and 23 and the same are reproduced as under:

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|-----------|--|
| प्रश्न 3 | आपकी आमदनी के स्रोत बताइये— |
| उत्तर | मुझे मै. आर.डी.मिस्तल, हॉस्पिटल, किशनगढ़ से वेतन प्राप्त होता है। प्राइवेट प्रेक्टिस से आय है। प्रोपर्टी का कार्य भी करता हूँ। |
| प्रश्न 18 | आपके आवास की भौतिक तलाशी के दौरान आपके आवास से रुपये 22,28,710/- की नकदी प्राप्त हुई है। जबकि आपने प्रश्न 7 के उत्तर में रुपये 25 लाख की नकदी होना बताया है। कृपया आप इस |

नकद राशि के स्रोत का पूर्ण बयौरा प्रस्तुत करें।

उत्तर जी हॉ भौतिक तलाशी की कार्यवाही के दौरान पायी गयी नकदी मेरी ही है। यह राशि मेरी लेखा पुस्तकों में दर्ज नहीं है। मैं इनके स्रोत के बारे में अभी व भविष्य में कुछ भी बताने में असमर्थ हूँ। अतः इसे चालू वित्त वर्ष की आय मानते हुए वित्त वर्ष 2013-14 में आयकर हेतु स्वेच्छा से समर्पित करता हूँ। इस पर जो भी आयकर दायितव बनेगा वो मैं कर के रूप में जमा करा दूंगा।

प्रश्न 19 आपके आवास से भौतिक तलाशी के दौरान प्राप्त हुई Super Fine Note Book (ASI) व Anand Note Book दिखा रहा हूँ। जिसमें कई प्रविष्टियाँ है इसमें 1 से 18 तक लिखे हुए पृष्ठ है इसके बारे में पूर्ण बयौरा दीजिये।

उत्तर जी हॉ मैंने Super Fine Note Book (ASI) देख ली है यह मेरे आवास से ही मिली है इसमें कुल 18 पृष्ठ लिखे हुये है। व कुल पृष्ठ संख्या 1 से 46 तक है। इसमें मेरे व्यवसाय से संबधि प्रविष्टियाँ है। जो मेरी लेखा पुस्तकों में दर्ज है।

प्रश्न 19 मैं आपको आपके आवास से भौतिक तलाशी के दौरान प्राप्त हुई Anand Exercise Note Book दिखा रहा हूँ जिसमें कुल पृष्ठ 155 है व लिखे हुए पृष्ठ 41 है। कृपया इसमें लिखे पृष्ठों का पूर्ण विवरण दें।

उत्तर यह Anand Exercise Book मैंने देख ली है यह तलाशी के दौरान मेरे आवास से मिली है इसमें दर्ज प्रविष्टियाँ मेरे बैंक खातों का विवरण है जो मेरी लेखा पुस्तकों में दर्ज है।

प्रश्न 20 आपके आवास से तलाशी कार्यवाही के दौरान मिली डायरी 2013 (Saving Life with every infusion) दिखा रहा हूँ जिसमे लिखे हुए पृष्ठ 16 है। जिनमें निम्न प्रविष्टियाँ अंकित है।

1	Rs.500000	Advance	Dt.06/04/2013
2	Rs.450000	Advance	Dt.13/04/2013
3	Rs.1000000	Advance	Dt.27/04/2013
4	Rs.811000	Advance	Dt.14/05/2013
5	Rs.750000	Advance	Dt.30/05/2013
6	Rs.200000	Advance	Dt.06/06/2013
7	Rs.721000	Advance	Dt.29/06/2013
8	Rs.571000	Advance	Dt.09/07/2013
9	Rs.300000	Advance	Dt.09/07/2013
10	Rs.631000	Advance	Dt.23/07/2013
11	Rs.455000	Advance	Dt.01/08/2013
12	Rs.1172500	Advance	Dt.26/09/2013

13	Rs.600000	Advance	Dt.14/10/2013
14	Rs.350000	Advance	Dt.28/10/2013
15	Rs.1100000	Advance	Dt.01/11/2013
16	Rs.1001000	Advance	Dt.06/11/2013
17	Rs.500000	Advance	Dt.18/11/2013
18	Rs.700000	Advance	Dt.02/12/2013

कुल 1,18,12,500 के अग्रिम की प्रविष्टियाँ दर्ज है कृपया इनका पूर्ण ब्यौरा दीजिये।

उत्तर जी हॉ मैंने Diary 2013 देख ली है व इसमें अंकित प्रविष्टियाँ भी देख ली है। यह डायरी मेरे आवास से मिली है इसमें अंकित प्रविष्टियाँ की कुल राशि रूपये 1,18,12,500/- होती है जो मैंने कई व्यक्तियों को जमीन हेतु अग्रिम दे रखी है। यह लेखा पुस्तकों में दर्ज नहीं हैं एवं इसका कोई अन्या हिसाब-किताब भी मेरे पास नहीं है।

प्रश्न 21 आपने प्रश्न 20 के उत्तर में रूपये 1,18,12,500/- विभिन्न व्यक्तियों को जमीन खरीदने हेतु अग्रिम देना बताया है। कृपया आप इन व्यक्तियों का पूर्ण ब्यौरा प्रस्तुत करें।

उत्तर जो डायरी 2013 प्राप्त हुई है उसमें अंकित व्यक्तियों के नाम पतों का विवरण मेरे पास उपलब्ध नहीं है व न ही कोई अन्य विवरण। ब्यौरा मेरे पास मौजूद है। अतः इसे मेरी अघोषित आय मानते हुए मैं स्वेच्छा से रूपये 1,18,12,500/- वित्तीय वर्ष 2013-14 में आयकर हेतु समर्पित करता हूँ। जिस पर जो भी टैक्स बनेगा वो मैं जमा करा दूँगा।

प्रश्न 22 आपने प्रश्न 18 के उत्तर में रूपये 22,28,710/7 नकद राशि को आयकर हेतु समर्पित किया है व प्रश्न 21 के उत्तर में रूपये 1,18,12,500/- अतः कुल समर्पित राशि (रु.11812500+2228710) रूपये 1,40,41,210/- (एक करोड़ चालीस लाख इकतालिस हजार दो सौ दस होती है इस बारे में आपको कुछ कहना हो तो बतायें।

उत्तर मैं स्वेच्छा से नकद प्राप्त राशि 22,28,710/- व 1,18,12,500/- विभिन्न प्रविष्टियाँ अग्रिम राशि की कुल 1,40,41,210/- वित्त वर्ष 2013-14 हेतु अघोषित आय मानते हुए स्वेच्छा से समर्पित करता हूँ। जिस पर जो भी दायित्व आयकर का बनेगा वो मैं जमा करा दूँगा।

प्रश्न 23 आप अपने प्रतिष्ठान की लेखा पुस्तकों का पूर्ण ब्यौरा देवे।

उत्तर हमारे प्रतिष्ठान की लेखा पुस्तकें कम्प्यूटर पर तैयार होती है। आज हमारे लेखापाल बीमार है एवं उपलब्ध नहीं है अतः मैं आज लेखा पुस्तकें प्रस्तुत नहीं कर सकता। लेकिन मैं आपको कहना चाहता हूँ कि उपरोक्त अघोषित आय रूपये 1,40,41,210/- मेरी लेखा पुस्तकों में दर्ज नहीं है। यह मेरी अघोषित आय है। जिसे मैं पुनः अघोषित मानते हुए आयकर हेतु समर्पित करता हूँ।

28. On review and examination of above statement of the assessee recorded u/s 132(4) of the Act, we find that no specific question(s) were raised to the assessee drawing his attention to the provisions of section 271AAB which require the assessee to specify the manner of earning of undisclosed income as well as to substantiate the manner in which the undisclosed income was derived. We are therefore of the view that in absence of a specific query raised during the course of search drawing assessee's attention to the provisions of section 271AAB where the statement of the assessee was recorded u/s 132(4) about the manner in which the undisclosed income has been derived and its substantiation thereof, the AO was not justified in invoking the residuary provisions of clause (c) of section 271AAB(1) instead of clause (a) of section 271AAB(1) of the Act. The assessee having satisfied the other conditions specified in section 271AAB(1)(a), which remain undisputed, in terms of admission of undisclosed income in the statement recorded u/s 132(4), payment of taxes together with interest, if any in respect of undisclosed income on or before the specified date and declaring the undisclosed income in the return of income for the specified previous year on or before the specified date, we are of the view that the Id CIT(A) has rightly varied the levy of penalty and confirm the levy of penalty @ 10% in terms of section 271AAB(1)(a) of the Act. In the result, we affirm the order of the Id CIT(A) and dismiss the appeal of the assessee as well as the revenue.

29. In ITA No. 629/JP/2017 in case of Sh. Jai Kumar Bakliwal Vs. ACIT, in ITA No. 648/JP/2017 in case of DCIT Vs. Sh. Jai Kumar Bakliwal, in ITA No. 631/JP/2017 in case of Sh. Prakash Chand Jain Vs. ACIT, in ITA No. 650/JP/2017 in case of DCIT Vs. Prakash Chand jain, in

ITA No. 632/JP/2017 in case of Sh. Suresh Chand Mittal vs. ACIT, in ITA No. 633/JP/2017 in case of Sd. Dinesh Kumar Mittal vs. ACIT, in ITA No. 649/JP/2017 in case of DCIT Vs. Sh. Dinesh Kumar Mittal, in ITA No. 634/JP/2017 in case of Smt. Alka Jain Vs. ACIT, in ITA No. 635/JP/2017 in case of Sh. Puneet Jain vs. ACIT and in ITA No. 652/JP/2017 in case of DCIT vs. Sh. Puneet Jain, which are cross appeals filed by the revenue and the respective assesses, both the parties submit and agree that under identical fact and circumstances of the case, the penalty has been levied by the AO under section 271AAB(1)(c) which has been varied by the Id CIT(A) and upheld @ 10% in terms of section 271AAB(1)(a) of the Act. Our findings and directions contained in ITA No. 630/JP/2017 & 651/JP/17 shall accordingly apply *mutatis mutandis* to these appeals.

In the result, we affirm the order of the Id CIT(A) in all these cases and all these cross appeals filed by the revenue and the assessee are dismissed.

Order pronounced in the open court on 27/11/2017.

Sd/-
(KUL BHARAT)
न्यायिक सदस्य/Judicial Member

Sd/-
(VIKRAM SINGH YADAV)
लेखा सदस्य/Accountant Member

Jaipur

Dated:- 27/11/2017

*Ganesh Kr.

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- Shri Mahesh Kumar Jain, Suresh Chand Mittal, Prakash Chand Jain, Dinesh Kumar Mittal, Jai Kumar Bakliwal, Smt. Alka Jain & Puneet Jain, Kishangarh.
2. प्रत्यर्थी/ The Respondent- The ACIT Central Circle/DCIT Central Circle, Ajmer.

3. आयकर आयुक्त / CIT –III, Jaipur
4. आयकर आयुक्त(अपील) / The CIT(A)-III, Jaipur
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No.629 to 635 & 648 to 652 /JP/2017)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar.