

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

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष  
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 991/JP/2017  
निर्धारण वर्ष/Assessment Years : 2014-15

M/s Rambhajo's 397, First Floor, Ram Bhawan, Hanumanji Ka Rasta, Jaipur.	बनाम Vs.	The ACIT, Central Circle-1 Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAJFR 4553 Q		
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

निर्धारिती की ओर से/ Assessee by : Shri Vijay Goyal (C.A.)  
राजस्व की ओर से/ Revenue by : Shri J.C. Kulhari (JCIT)

सुनवाई की तारीख/ Date of Hearing : 12/10/2018  
उदघोषणा की तारीख/Date of Pronouncement : 11/01/2019

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A)-4, Jaipur dated 03.11.2017 for the Assessment Year 2014-15 wherein the assessee has taken the following grounds of appeal:-

*"On the fact and in the circumstances of the case and in law the Learned CIT(A) erred in confirming the imposition of penalty of Rs. 57,33,335/- @ 10% of surrendered amount in return and statement u/s 132(4) of the I.Tax Act being Rs. 5,73,33,348/- under section*

*271AAB (1)(a) of I.T. Act, 1961 more so when this amount does not come under preview of definition of undisclosed income.*

*2. On the fact and in the circumstances of the case and in law the Learned CIT(A) erred in confirming the imposition of penalty of Rs. 35,408/- @ 20% of Rs. 1,77,039/- under section 271AAB (1)(b) of I.T. Act, 1961 more so when this amount does not come under preview of definition of Undisclosed Income."*

2. Briefly the facts of the case are that the assessee is a partnership firm and engaged in the business of manufacturing and trading of Gem Stones and Jewellery. The assessee's firm operates through its three branches situated at Jaipur, Jodhpur and Mumbai. A search and seizure action was carried out U/s 132(1) of the Act on 04.09.2013 at various business and residential premises of Rambhajo's Group and assessee firm is part of the said group. Subsequently, the assessee furnished its return of income on 01.10.2014 declaring total income of Rs. 5,91,64,560/- which includes income of Rs. 5,73,33,348/- which was surrendered during the course of search proceedings. In the return of income, the assessee also disclosed an amount of Rs. 1,77,039/- which, as per the Assessing officer, represents the undisclosed income of the assessee firm. The Assessing officer thereafter completed the assessment U/s 143(3) r.w.s. 153(1)(b) of the Act vide order dated 16.03.2016 at a total income of Rs. 5,93,25,040/-. The Assessing officer simultaneously initiated the penalty proceeding in relation to undisclosed income by way of issuance of notice dated 16.03.2016 U/s 271AAB of the Act.

3. Subsequently, during penalty proceeding, a fresh show cause notice dated 17.08.2016 was issued to the assessee. In response, the assessee submitted that the additional income was duly declared in the return of income filed U/s 139(1) of the I.T. Act and therefore, the same cannot be treated as concealed income of the assessee. It was further submitted that the Department has carried out search and seizure operations on the assessee group and during the course of search, the Department has not found any evidence, which shows that the assessee was having any undisclosed income. It was further submitted that it was bona-fide disclosure by the assessee and the intention behind the disclosure was to avoid litigation and buy peace. It was further submitted that the Department could not prove any source of undisclosed income during the course of assessment proceedings. It was further submitted that on the date of search, the assessee was having requisite time to file its return of income and the additional income was duly declared in the return of income so filed U/s 139(1) of the Act.

4. The submissions were considered by the Assessing Officer, however, the same were not found acceptable. The Assessing Officer referring to the provisions of Section 271AAB of the Act stated that the assessee has satisfied all the essential requirements of Section 271AAB of the Act: there should be a search U/s 132 of the Act, the said search should be conducted on or after 01.07.2012, there should be undisclosed income and the undisclosed income should relate to the specified previous year. In terms of quantum of penalty, the Assessing Officer held that the assessee had admitted undisclosed income of

Rs. 5,73,33,348/- in his statement U/s 132(4) of the Act and also furnished its return of income on or before the specified due date on 30.11.2014 which was extended by the CBDT U/s 119 of the Act from 30<sup>th</sup> September, 2014 for the Assessment Year 2014-15 for all purposes of the Act. Accordingly, the AO levied the penalty @ 10% on the undisclosed income of Rs. 5,73,33,348/- U/s 271AAB(1)(a) of the Act. Regarding the additional income of Rs. 1,77,039/- disclosed in the ITR, the AO levied the penalty @ 20% of the said undisclosed income U/s 271AAB(1)(b) of the Act.

5. The assessee moved an appeal before the Id. CIT(A) against the said levy of penalty and submitted before him that the assessee in its return of income has declared additional income surrendered during the course of search and seizure amounting to Rs. 4,38,10,387/- on account of excess stock found during the search, Rs. 5 lacs on account of excess cash found during the search, Rs. 1,12,00,000/- on account of cash advances for land purchases, and Rs. 20 lacs on account of silver & other possible discrepancies totaling to Rs. 5,75,10,387/-. It was further submitted that the additional income so declared in the return of income cannot be treated as concealed income of the assessee as the Department has not found any evidence, which shows that the assessee was having some source of undisclosed income. It was further submitted that the assessee cooperated with the department and true disclosure of income was made, the intention was to avoid litigation and buy peace and the disclosure was not based on any material gathered as a result of search but the same was *suo-moto* surrendered by the assessee. It was further submitted that the

provisions of Section 271AAB are *pari materia* to Section 271AAA in so far as both the provisions are discretionary in nature and given the facts and circumstances of the present case, the penalty should not be levied.

6. The Id. CIT(A) considered the assessee's submission, however, the same were not found acceptable to him. The Id. CIT(A) held that the penalty provisions U/s 271AAB were introduced for search and seizure conducted on or after 01.07.2012 to strengthen the penal provisions. It was stated by the Id. CIT(A) that unlike Section 271AAA where immunity from imposition of penalty is possible subject to fulfillment of conditions in Section 271AAA(2), there is no immunity from penalty U/s 271AAB of the Act. It was held that the penalty U/s 271AAB is mandatory in nature and is imposed at the varying rate of 10%, 20% or 30% depending on the fulfillment of certain conditions therein. It was held by the Id. CIT(A) that all the conditions specified in Section 271AAB have been fulfilled, therefore, the penalty U/s 271AAB being in the nature of mandatory penalty and there being no discretion with the Income tax authorities, the penalty so imposed by the AO was confirmed. Against the said levy and confirmation of penalty, the assessee is now in appeal before us.

7. At the outset, the Id. AR submitted that an application has been submitted for taking an additional ground of appeal and requested for permission to raise the following additional ground of appeal which reads as under:-

*"1. The penalty order passed u/s 271AAB of Income Tax Act, 1961 is wrong, bad in law, in-valid and void-ab-initio as the Id. AO initiated the penalty u/s 271AAB of the Income Tax Act, 1961 without specifying the clause of section 271AAB of the Act in the penalty notice under which the penalty was initiated i.e. whether it is for clause (a) or clause (b) or clause(c) of section 271AAB(1) because the conditions for imposing the penalty under each such clauses are separate."*

8. The Id. AR has submitted that the additional ground is purely a legal ground and it goes to the root of the matter, the same should be admitted in the interest of justice. In support, reliance was placed on the decision of Hon'ble Supreme Court in case of National Thermal Power Corporation Ltd. Vs. CIT 229 ITR 383. After hearing both the parties and considering the fact that the assessee in his additional ground of appeal has challenged the initiation of proceeding U/s 271AAB of the Act which is purely legal in nature, the additional ground of appeal is admitted for adjudication.

9. In this regard, the Id AR submitted that sub-section (3) of the Section 271AAB prescribes that Section 274 and Section 275 of the Act shall, so far as may be, apply. Sub section (1) of the Section 274 of the Act mandates that order imposing penalty has to be imposed only after hearing the assessee or giving assessee opportunity of hearing. Opportunity i.e. to be given should be meaningful one and not a farce. It was submitted that the Id. AO initiated the penalty u/s 271AAB of Income Tax Act, 1961 without specifying the clause of section 271AAB of the Act in the assessment order and penalty notice under which the penalty was initiated i.e. whether it is for clause (a) or clause (b) or

clause (c) of section 271AAB(1). The conditions for imposing the penalty under each such clauses are separate therefore, the cause of the default should be specified while initiation of penalty in assessment order as well as in the notice issued u/s 274 of I.Tax Act. In this regard, our attention was drawn towards the initiation of penalty in assessment order and notice issued under section 274 read with section 271AAB as under:

a) Initiation of penalty in Assessment Order:-

The Id. AO initiated the penalty proceeding u/s 271AAB of Income Tax Act in the assessment order dated 16-03-2016. The Id AO initiated penalty by mentioning that:-

*"It is pertinent to mention here that the search operation relevant to this case has been conducted 04-09-2013 i.e. FY 2013-14 relevant to AY 2014-15. This date of initiation of search u/s 132 of the Act falls after 1<sup>st</sup> day of July, 2012 as required in sub section (1) of the section 271AAB. The FY 2013-14 is the 'specified previous year' in this case as explained in clause (b) of the explanation given in the section 271AAB. On the basis of the documents/papers/evidences found and seized from its business premise (4, Pearl Premier, Jamnalal Bajaj Marg, Opp. Hotel Raj Mahal, C-Scheme, Jaipur), Shri Nitin Gilara and Vipul Gilara (partners of the assessee firm) had accepted undisclosed income of Rs. 5,73,33,348/- in his statement u/s 132(4) of the Act. The total income declared in the return of income for the 'specified previous year' includes this 'Undisclosed Income' and further income disclosed in ITR of Rs. 1,77,039/- (total Rs. 5,75,10,387/-) which represented the 'Undisclosed Income' as explained in clause (c) of the explanation given*

*in the section 271AAB. Accordingly, penalty u/s 271AAB of the Act in initialed on such amount of Rs. 5,75,10,387/- by way of issue of notice u/s 271AAB r.w.s 274 of the Act separately.*

b) Notice u/s 274 r/w section 271AAB dated 16.03.2016:-

The Id AO issued notice u/s 274 r.w.s 271AAB dated 16-03-2016 and 17-08-2016. In both the notices, the clause (a) or (b) or (c) of section 271AAB has not been specifically mentioned. The conditions for imposing the penalty under each such clauses are separate, therefore, the notice issued u/s 274 should be specific.

c) Penalty order:-

The Ld AO levied penalty of Rs. 57,33,335/- under sub clause (a) of section 271AAB (1) and Rs 35,408/- under sub clause (b) of section 271AAB (1) of I.Tax Act.

Thus, the clause of section 271AAB(1) has not been specified in the initiation of penalty in Assessment order as well as in the notices issued u/s 274 of I.Tax Act, the levy of penalty is bad in law and void *ab initio*.

10. It was submitted by the Id AR that from the reading of the notice issued u/s 274 of I.Tax Act and from the assessment order, the Ld. AO has not put the Appellant on notice as to under which Clause of Sub Section (1) of Section 271AAB, the penalty has been proposed to be imposed. It is to be appreciated that the Appellant was never issued notice under Section 271AAB(1)(a) and 271AAB(1)(b) of the Act and no explanation of the Appellant was sought by the Ld. AO under Section 271AAB(1)(a) and 271AAB(1)(b). Therefore, the imposition of penalty under Section 271AAB(1)(a) and 271AAB(1)(b) is void *ab-initio* and bad

in law in as much as no opportunity to be heard has been provided by the Ld. AO before imposition of the penalty as the notice itself is vague.

11. It was submitted that Ld. AO has not recorded his satisfaction in the assessment order as to under what circumstances or manner the provisions of Section 271AAB(1)(a) and 271AAB(1)(b) are attracted in the case of Appellant. Further, it is relevant that Ld. AO has not discussed the default of the Appellant attracting the provisions of Section 271AAB(1)(a) and 271AAB(1)(b). The assessment has been completed accepting the returned income. Therefore, without recording his satisfaction, Ld. AO was not justified in initiating penalty proceedings under Section 271AAB(1) and imposing penalty under Section 271AAB(1)(a) and 271AAB(1)(b) of the Act.

12. It was submitted that the Ld. AO could not have asked the Appellant to show cause for all the three different clauses of Section 271AAB(1) of the IT Act. It is well-settled principle of law that the Appellant should have been specifically asked to reply on default with reference to the specific provision of the Income Tax Act, 1961. This is so as per the decision in the case of Manjunatha Cotton & Ginning Factory 359 ITR 565 which has been followed by the Hon'ble Tribunal Jaipur Bench in the case of Mradula Agarwal vs. Income Tax Officer in ITA No. 176/JP/2016 dated 16.09.2016. The Ld. AO has imposed penalty u/s 271AAB(1)(a) and 271AAB(1)(b) but the Appellant was not issued any show cause notice mentioning this specific Clause of the Section nor the penalty proceedings were initiated in the assessment order mentioning Section 271AAB(1)(a) and 271AAB(1)(b). In view of

these illegalities the levy of penalty deserves to be deleted. Ld. AO issued the show cause notice on 16-03-2016 and 17/08/2016, which do not disclose that Appellant was required to show cause specifically for default u/s 271AAB(1)(a) and 271AAB(1)(b) of the Act. In view of the above facts the penalty proceeding was not initiated, validity and before imposition of penalty show cause notice was not issued validity as there was no specific mention of Section 271AAB(1)(a) and 271AAB(1)(b) for which the Ld. AO subsequently imposed the penalty. The Appellant was not aware to put its defense for non-levy of penalty. It is also submitted that a duty was cast upon the Ld. AO to initiate penalty proceedings specifically and seek reply of the Appellant accordingly. But nothing was done of this sort. Thus, the initiation of the penalty proceedings itself was unlawful, illegal and unjust. In these circumstances the levy of penalty was not justified and the same deserves to be deleted.

13. It was submitted that Section 271AAB of the Act has three different limbs for levy of penalty at three different rates (i) 10% u/s 271AAB(1)(a), (ii) 20% u/s 271AAB(1)(b) and (iii) 30% to 90% u/s 271AAB(1)(c). The show cause notice issued along with the assessment order is also silent regarding the applicability of the specific limb of section for levy of penalty. In the absence of this, the Appellant was precluded in submitting a cogent reply. The Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory, 259 ITR 565 (Kar.) has held that penalty is not leviable in similar circumstances. Thus this being a legal lacuna, penalty levied may kindly be deleted. The reliance is also placed on the decision of Hon'ble ITAT Chennai Bench in the case of DCIT vs. Shri R. Elangovan in ITA No.

1199/CHN/2017 dated 05.04.2018, wherein Hon'ble ITAT in the said order while considering the validity of show cause notice and initiation of proceedings under section 271AAB and following the decision of Hon'ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton & Ginning Factory (supra) as well as the decision of Hon'ble Supreme Court dismissing the SLP filed by the revenue in the case of CIT vs. SSA's Emerald Meadows, 242 Taxman 150 (SC) held that the notice issued under section 274 read with section 271AAB of the Act not specifying the ground and clauses for levy of penalty was not valid and consequently the penalty order was set aside. Reliance is also placed on the decision of Hon'ble Jurisdictional High Court in the case of Sheveta Construction Co. Pvt Ltd in DBIT Appeal No. 534/2008 dated 06.12.2016, decisions of the Co-ordinate Bench in case of Shri Dinesh Kumar Agarwal v/s. ACIT, Central Circle-1, Jaipur (*ITA No. 855 & 856/JP/2017 dated 24.07.2018*), Shri Ravi Mathur Vs. DCIT, Central Circle-4, 2018 (6) TMI 1128, Shri Anil Mathur V. DCIT, Central Circle-4, Jaipur 2018 (6) TMI 1311 and Shri Suresh Chand Mittal Vs. DCIT, Central Circle-2, Jaipur, 2018 (7) TMI 220. Thus, it was submitted that the order of imposing penalty under section 271AAB is unlawful and not sustainable in law.

14. It was finally submitted that it is trite law that penalties should not be imposed unless the case falls under the four corners of law mandating the penalty. Thus such laws are to be strictly implemented. Thus, the clause of section 271AAB(1) has not been specified in the initiation of penalty in Assessment order as well as in the notices issued u/s 274 of Act, the levy of penalty is bad in law and void ab initio.

15. Heard both the parties and perused the material available on record. Firstly, the AO has to record his satisfaction in the assessment order as to whether the assessee case falls under section 271AAB of the Act or not. The penalty proceedings are thereafter initiated with the issue of notice u/s. 274 and culminate in the penalty order u/s. 271AAB of the Act. Further, there cannot be any dispute that the assessee should be confronted with the charge against him which is *sine qua non* for any valid penalty proceedings. It is only when the assessee is made aware of such a charge against him that he can present his contentions. Thus prescribing the charge in the penalty notice and penalty order is must. Absence of a charge in the penalty notice and not finding the assessee guilty of a clear offence in the penalty order vitiates the penalty order.

16. The question that arises for consideration is the nature of charge(s) specified under section 271AAB of the Act. Whether it provides for a singular charge of undisclosed income for the specified previous year found during the course of search initiated under section 132 on or after the 1st day of July, 2012 or it provides for multiples charges as so contended by the Id AR in terms of clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB of the Act.

17. On close reading of provisions of Section 271AAB, we find that the primary condition or charge for levy of penalty is the existence of undisclosed income for the specified previous year found during the course of search in the case of assessee. Once the said primary condition or charge is satisfied, for the purposes of quantifying the

penalty, the Assessing officer has to examine the satisfaction of ancillary conditions as specified under clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB. Merely because the quantum of penalty varies from 10% to 30% subject to compliances with the ancillary conditions, it cannot be said that where the AO has initiated the penalty under section 271AAB, there is any ambiguity in the charge or there is any lack of application of mind on part of the Assessing officer. Further, the levy of penalty under Section 271AAB is not based on addition made and investigation/enquiry conducted during the course of assessment proceedings, rather it is based on search conducted on the assessee on or after the 1st day of July, 2012, in such a situation, where the penalty show-cause notice is issued u/s 271AAB, the Assessing officer is making the assessee aware of the charge against him in terms of undisclosed income found during the course of search and thus, the assessee is granted an opportunity to refute such charge and file his explanations/submissions. Unlike provisions of section 271(1)(c) which provides for separate charge of "concealment of particulars of income" or "furnishing of inaccurate particulars of income", there is a singular charge under section 271AAB i.e, of the existence of undisclosed income for the specified previous year found during the course of search. Therefore, in the instant case, where the notice dated 16.3.2016 is issued to the assessee to show-cause why penalty should not be levied u/s 271AAB of the Act, the assessee is made aware of the specific charge against him and an opportunity has thus been given to him to rebut such charge and therefore, we do not see any infirmity in the initiation of the penalty proceedings and consequent penalty order so passed by the AO. A similar view has been

taken by the Co-ordinate Bench in case of Mahesh Kumar Jain & others (*ITA No. 630/JP/17 & others dated 27.11.2017*), available at APB Page 156-195, wherein it was held as under:

*"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."*

18. Further, even for sake of argument, if it is assumed that primary charge of undisclosed income has to be read along with ancillary conditions and thus multiples charges have been prescribed in terms of clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB and where the Assessing officer has not stated the specified charge at the time of initiation of penalty proceedings, in our considered view, such uncertain charge at the stage of initiation of penalty proceedings

can be made good with a clear-cut charge in the penalty order. In any case, existence of a clear-cut charge in penalty order is a must so as to validate any penalty order and so long as there is a clear finding in the penalty order, no infirmity can be said to arise in terms of initiating of such proceedings and subsequent penalty order. In this regard, reference can be made to the Three Member Bench decision in case of HPCL Mittal Energy vs Add. CIT reported in 97 Taxmann.com 03. Though the said decision has been rendered in context of section 271(1)(C), it has laid down certain legal proposition revolving around initiation of penalty proceeding and charges towards levy of penalty and we, therefore, deem it relevant to consider the same for the purposes of present appeal.

19. In the aforesaid decision, the Coordinate Bench after analyzing catena of judicial pronouncements, including the decision of Hon'ble Karnataka High Court in case of Manjunatha Cotton and Ginning Factory (supra) which has also been cited by the Id AR in the instant case, it was held as under:

***"15.** The moot question is that what should be the nature of specification of a charge by the AO at the stage of initiation of penalty proceedings and at the time of passing the penalty order. Is the AO required to specify in the penalty notice/order as to whether it is a case of 'concealment of particulars of income'; or 'furnishing of inaccurate particulars of income'; or both of them, which can be expressed by using the word 'and' between the two expressions. When the AO is satisfied that it is a clear-cut case of*

*concealment of particulars of income, he must specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. The AO cannot initiate penalty on the charge of 'concealment of particulars of income', but ultimately find the assessee guilty in the penalty order of 'furnishing inaccurate particulars of income'. In the same manner, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of 'furnishing of inaccurate particulars of income', he must again specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. After initiating penalty on the charge of 'furnishing of inaccurate particulars of income', he cannot impose penalty by finding the assessee guilty of 'concealment of particulars of income'. Again, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of imposition of penalty u/s. 271(I)(c) of the Act on two or more additions/disallowances, one or more falling under the expression 'concealment of particulars of income' and the other under the 'furnishing of inaccurate particulars of income', he must specify it so by using the word 'and' between the two expressions in the notice at the time of initiation of penalty proceedings. If he remains convinced in the penalty proceedings that the penalty was rightly initiated on such counts and imposes penalty accordingly, he must specifically find the assessee guilty of*

*'concealment of particulars of income' and also 'furnishing of inaccurate particulars of income' in the penalty order. If the charge is not levied in the above manner in all the three clear-cut situations discussed above in the penalty notice and also in the penalty order, the penalty order becomes unsustainable in law.*

**16.** *The Hon'ble Karnataka High Court in CIT v. Manjunatha Cotton and Ginning Factory has held that a person who is accused of the conditions mentioned in section 271 should be made known about the grounds on which they intend imposing penalty on him as section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in section 271(l)(c) do not exist as such he is not liable to pay penalty. The Hon'ble High Court went on to hold that: 'Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income.... But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law..... Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid'.*

**17.** *In Manu Engg. Works (supra) penalty was imposed by noting: 'that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income'. Striking down the penalty, the Hon'ble High Court held that: 'it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down.'*

**18.** *In Padma Ram Bharali (supra), the Hon'ble High Court did not sustain penalty levied u/s. 271(l)(c) when: 'the initiation of the penalty proceeding was for concealment of the particulars of income. But the Tribunal finally held that the assessee would be deemed to have concealed the particulars of income or to have furnished inaccurate particulars of such income.'*

**19.** *Thus it is evident that when the AO is satisfied at the stage of initiation of penalty proceedings of a clear-cut charge against the assessee in any of the three situations discussed above (say, concealment of particulars of income), but imposes penalty by holding the assessee as guilty of the other charge (say, furnishing of inaccurate particulars of income) or an uncertain charge (concealment of particulars of income/furnishing of inaccurate particulars of income), the penalty cannot be sustained.*

**20.** *Another crucial factor to be kept in mind is that the satisfaction of the AO as to a clear-cut charge leveled by him in the penalty notice or the penalty order must concur with the actual default. If the clear-cut charge in the penalty notice or the penalty order is that of 'concealment of particulars of income', but it turns out to be a case of 'furnishing of inaccurate particulars of such income' or vice-versa, then also the penalty order cannot legally stand.*

*21. Apart from the above three situations in which the AO has clear-cut satisfaction, there can be another fourth situation as well. It may be when it is definitely a case of under-reporting of income by the assessee for which an addition/disallowance has been made, but the AO is not sure at the stage of initiation of penalty proceedings of the precise charge as to 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income'. In such circumstances, he may use slash between the two expressions at the time of initiation of penalty proceedings. However, during the penalty proceedings, he must get decisive, which should be reflected in the penalty order, as to whether the assessee is guilty of 'concealment of particulars of income' or 'furnishing of inaccurate particulars of such income'. Uncertain charge at the time of initiation of penalty, must necessarily be substituted with a conclusive default at the time of passing the penalty order. If the penalty is initiated with doubt and also concluded with a doubt as to the concealment of particulars of income or furnishing of inaccurate particulars of such income etc.,*

*the penalty order is vitiated. If on the other hand, if the penalty is initiated with an uncertain charge of 'concealment of particulars of income/furnishing of inaccurate particulars of income' etc., but the assessee is ultimately found to be guilty of a specific charge of either 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income', then no fault can be found in the penalty order.*

**22.** *In Manu Engineering Works (supra), the Hon'ble Gujarat High Court noticed that the charge at the stage of initiation of penalty proceedings as well in the penalty order was uncertain and the expression used at both the stages was concealment of particulars of income and/or furnishing of inaccurate particulars of such income. It struck down the penalty by holding that the assessee must have been found to be guilty of a certain charge in the penalty order. It, however, did not find anything amiss with the initiation of penalty on such uncertain charge, which is vivid from the following observations : —*

*'We find from the order of the IAC, in the penalty proceedings, that is, the final conclusion as expressed in para. 4 of the order: "I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income". Now, the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the IAC to come to a positive finding as to*

*whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee.'*

*23. It is thus evident that uncertain charge at the stage of initiation of penalty proceedings can be made good with a clear-cut charge in the penalty order. In any case, existence of a clear-cut charge in penalty order is a must so as to validate any penalty order."*

20. Similar proposition has been laid down in case of Sheveta Constructions (supra) wherein the Hon'ble Rajasthan High Court has held that "the AO has to give a notice as to whether he proposes to levy penalty for concealment of income or furnishing inaccurate particulars. He cannot have both the conditions and if it is so he has to say so in the notice and record a finding in the penalty order."

21. In the instant case, the AO has recorded his satisfaction while passing the assessment order that there is undisclosed income found during the course of search and other conditions being satisfied and therefore, the assessee is liable for penalty u/s 271AAB, thereafter the notice initiating the penalty proceedings U/s 271AAB was issued to the assessee. Thereafter, the Assessing officer has given a finding as reflected in the penalty order that the assessee is liable for penalty U/s 271AAB(1)(a) which provides for levy of penalty @ 10% on the undisclosed income of Rs 5,73,33,348/- found during the course of search and admitted in his statement recorded u/s 132(4). Further, it

was also held that the assessee is liable for penalty U/s 271AAB(1)(b) of the Act which provides for levy of penalty @ 20% on the undisclosed income of Rs. 1,77,039/- disclosed in the income tax return by the assessee. As held by the Coordinate Bench (supra), the uncertain charge at the time of initiation of penalty has been made good and substituted with a conclusive default at the time of passing the penalty order and that in such a case, no fault can be found in the penalty order. Similar proposition has been laid down by the Hon'ble Rajasthan High Court in case of Shweta Construction (supra). Hence, following the same, we do not see any infirmity in the initiation of penalty proceedings and consequent penalty order so passed by the Assessing officer and the contentions so raised by the Id AR in this regard cannot be accepted. Further, we find that the decision of the Coordinate Benches so relied upon by the Id AR, have been rendered without taking into consideration earlier decision of the Co-ordinate Bench in case of Mahesh Jain (Supra) and earlier decision of the larger Bench of the Tribunal in case of ONGC Mittal (Supra) and thus doesn't act as a binding precedent. In light of above discussions, the additional ground so raised by the assessee is hereby dismissed.

22. Now, coming to the merits of levy of penalty. During the course of search, the particular of income in the hands of the assessee which was surrendered in the statement recorded u/s 132(4) of Act is as under:

S.No	Particulars	Amount (Rs)
(i)	On account of excess stock found at the premises of assessee	4,36,33,348
(ii)	On account of excess cash found at the residence of partners	5,00,000
(iii)	On account of cash advances or land purchases on the basis of receipts seized vide Annexure AS-2 pg 1-4 at the residence of partner	1,12,00,000
(iv)	On account of silver utensils found at the residence of partners	12,70,861
(v)	Other possible discrepancies in books of account  (Rs. 20,00,000/- minus Rs. 12,70,861)	7,29,139
	Total	5,73,33,348

The assessee filed its return u/s 139(1) of Income Tax Act on 01/10/2014 declaring total income of Rs. 5,91,64,561/- under the head "Income from Business and Profession". In profit and loss account, income of Rs. 5,75,10,387/- has been shown as "Income surrendered during the search" and net profit of Rs. 5,91,20,615 has been declared as regular business income of the assessee. The assessment was completed u/s 143(3) of Act, at total income Rs. 5,93,25,040/- wherein the returned income was accepted except for an addition of Rs.

1,60,479/- which was made on a/c of disallowance of certain expenses. The Id AO levied penalty of Rs. 57,33,335/- under clause (a) of section 271AAB(1) @ 10% of Rs. 5,73,33,348/- being income surrendered in search as recorded in statement u/s 132(4) and of Rs. 35,408/- under sub clause (b) of section 271AAB (1) of Act @ 20% of Rs. 1,77,039/-, being difference of Rs. 5,75,10,387/- minus 5,73,33,348/- of surrendered income as reported in the return of income.

23. It was submitted by the Id AR that the additional income declared in return of income was business income and not undisclosed income. The term "undisclosed income" has been defined u/s 271AAB of the Act as under:-

*"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 the 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."*

24. It was submitted that the additional business income declared in the income Tax return filed u/s 139(1) of Income Tax Act, 1961, cannot be treated as "Undisclosed Income" within the specific meaning given in section 271AAB. The Department carried out search and seizure operations over assessee group and during the course of the search, the Department has not found any evidence of unaccounted purchase/sales or source of undisclosed income. The disclosure of additional income was bona-fide disclosure by the assessee in order to buy peace and avoid prolonged litigation. During the course of assessment proceedings, the Department could not prove any source of undisclosed income of the assessee. The Id AO completed the assessment u/s 143(3) of Income Tax Act and merely on the basis of search statement, the additional business income was accepted. The additional income declared in Profit and Loss Account of the assessee is based on the search statement in order to avoid prolonged litigation and buy peace and this has been specifically mentioned in submission filed before the Id AO.

25. It was submitted that the Revenue authorities have exerted undue pressure and obtained the surrender of income from the assessee. Attention was drawn towards Board's Circular dated 10<sup>th</sup> March, 2003 wherein the Board has expressed its concern about the

practice of confession of additional income during the course of search and seizure proceedings and, therefore, clarified that the confession during the course of search and survey operation do not serve any useful purpose. There should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Department. The Board has again issued a Circular dated 18<sup>th</sup> December, 2014 and advised the taxing authorities to avoid obtaining admission of undisclosed income under coercion/undue influence. Except the statement under section 132(4), there is no undisclosed income in the case of the assessee. The assessee was forced to admit and surrender the income in the statement recorded under section 132(4). The provisions of section 271AAB clearly requires that such undisclosed income to be substantiated and, therefore, the assessee is required to specify the manner in which such income has been derived and further substantiate the same furnishing material available with him. In the absence of any record or material to show any undisclosed source of income, the entire disclosure on papers is to avoid undue harassment and unwanted litigation.

26. It was submitted that factually there was no undisclosed income in the hands of the assessee, this may be further seen from the following submission on each of ingredients of surrender:-

a) Stock of Rs. 4,36,33,348/- surrendered in search statement against which Rs. 4,38,10,387/- shown as business income utilized/ represented as excess stock.

The assessee has declared additional Income of Rs. 5,75,10,387/- shown as "Income surrendered during the search" in Profit & Loss Account out of which Rs. 4,38,10,387/- stated as against excess stock. The Id AO has not determined it as income from other sources u/s 69 of Income Tax Act in the assessment but accepted as business income of current year. Now the mute question arise, whether the excess stock represents unaccounted purchases or difference on account of valuation of stock at the time of search at market value as against the cost.

(i) No document of unaccounted purchase/sales was found:-

At the outset, we submit that the department has carried out the intensive search operations over the assessee and no document was found to show unaccounted purchases of stock. Neither any entry in the books of account was found to show unaccounted purchases or sales nor any loose document was found to show the unaccounted purchases.

(ii) Excess stock is result of valuation of stock at Market rate as on the date of search as against cost.

The excess stock was arrived by valuation of stock at market rate as on 04/09/2013. The gold rate was taken by the valuer at Rs. 31,900/- per ten gram which was market rate of 03/09/2013. The assessee's method of valuation of stock is "Cost". The stock tally made by the search team relating to this assessee at the time of search was as under:-

S.No	Stock found from the Premises	Stock as per Books of account of assessee	Physically found as valued by the valuer
(i)	M/s Ram Bhajo's Mumbai	2,37,44,058	1,50,13,750
(ii)	M/s Ram Bhajo's Jodhpur	4,79,55,354	4,65,15,883
(iii)	M/s Ram Bhajo's Jaipur	27,94,24,619	32,89,89,166
(iv)	At residence of Partners		63,55,000
	Total	35,11,24,031	39,68,73,799
(v)	Silver items at residence of Partners		12,70,861
	Total stock including silver items		39,81,44,660

The above stock was valued at market price as on the date of search. In order to estimate the value of stock at cost, the GP declared in last year should be deducted from the market value of the stock in order to arrive at the estimated value of stock at cost. If this was done, then there would be no excess stock and this may be seen from the following chart:

S.No	Particulars	Stock as per Books of account of assessee	Physically found as valued by the valuer
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	Total	35,11,24,031	39,81,44,660
	Less GP of Preceding year (13.92%)		(-) 5,54,21,736
	Stock estimated at cost		34,27,22,924

Therefore, if the valuation of stock is made at cost, then its estimated cost comes to Rs. 34,27,22,924/- against which the books stock computed by the search team from the books of account of the assessee was Rs. 35,11,24,031/-. Factually, there was short stock by Rs. 84,01,107/- Hence, there could not be any excess stock. However, the difference was on account of valuation which was accepted by the assessee in order to avoid litigation and honor search statement. However, in any way, this could not be termed as undisclosed income, but it is preponment of accounting of income.

- (iii) Excess stock in quantity was on account of not giving proper deduction for Chapadi etc by valuer at Jaipur.

During the course of assessment proceedings, the assessee has challenged the valuation of the jewellery stock lying at Jaipur office vide letter dated 15/12/2015 as under:-

*"Further, Kundan Meena jewellery is special jewellery quite different to ordinary jewellery. Kundan Meena jewellery also has wax, colour stones, tassels, semi precious stones, silver and diamonds. Therefore, the valuation should have been made by adjusting the gross weight for*

*wax, tassels and other impurities. In Jaipur, the valuation of Kundan jewellery was made in totality without specifying the individual item and without giving the deduction for wax, tassels and other impurities. The valuer at Jaipur office/shop valued the jewellery at the rate of fine gold (24 carat gold) prevailing in market as on the date of search. For Kundan jewellery the valuer simply took the gross weight of Kundan jewelry and converted it into the weight in fine jewellery. For this purpose he converted the gross weight of Kundan Jewelry into fine jewellery by giving the deduction of 10% in the gross weight by considering the Kundan jewellery is of 21.6 carat. For valuation of Kundan jewellery he must have given proper deduction for wax and other impurities and then he should convert the resulted weight in 24 carat for valuation at the rate of fine gold (rate of 24 carat). For this purpose kindly refer the valuation of Kundan jewelry made at Jodhpur Branch, Mumbai Branch of assessee and jewelry found at residence (where the valuer was different) where gross weight was firstly adjusted for net weight and then it was converted into weight of fine jewellery. Further, at these places valuation of precious and semi precious stones studded in the jewellery was separately made. At this places the valuer gave heavy deduction for wax, tassels and other impurities, which was not considered by the valuer who valued the Kundan Jewellery at premise situated at Pearl Premier.”*

In assessment order, the Id AO is silent on this issue raised by the assessee. Attention was also invited towards the valuation of jewellery stock done by the valuers at the time of search as under:

Valuation at Jaipur	10% deduction was given for impurities for 22 carat and 24 carat.	PB pg 3
Valuation at Jodhpur	30% to 35% chapadi +wax+other impurities	PB 8
Valuation at Mumbai Office	40% to 48% chapadi +wax+other impurities	PB pg 52 item 15& 16

Therefore the excess weight is on account of non deduction on account of chapadi, wax etc for the kundan meena jewellery found at Jaipur Office.

Further, there is no finding of the Id AO that the alleged excess stock was excess stock which was not found recorded in the books of account of the assessee.

b) Cash Rs. 5,00,000/-

The cash of Rs. 5,50,000/- was found from the residence of the partners of the assessee out of which Rs. 5,00,000/- was explained by the partners in search statement as belong to the assessee firm. The assessee has declared additional business Income of Rs. 5,75,10,387/- for current year shown as "Income surrendered during the search" in Profit & Loss Account out of which Rs. 5,00,000/- represents cash. The Id AO has not determined it as income from other sources u/s 69 of Income Tax Act in the assessment but accepted as business income of

current year. Therefore, merely on the basis of surrender made in the search statement, this cannot be held as "Undisclosed Income" for the purpose of levy of penalty u/s 271AAB.

c) Advance against purchase of land Rs. 1,12,00,000/-

During the course of search under section 132 though loose document was found and seized during the search which contains the advances given by the assessee for purchase of land. However, the said entry in the loose paper giving advances for purchase of land itself is not an undisclosed income.

The assessee has declared additional business Income of Rs. 5,75,10,387/- for current year shown as "Income surrendered during the search" in Profit & Loss Account out of which Rs. 1,12,00,000/- represents as utilized in advance against purchase of land. The Id AO has not determined it as income from other sources u/s 69 of Income Tax Act in the assessment but accepted as business income of current year. No document of unaccounted purchase or sales was found showing any unaccounted business by the assessee firm. Therefore, normal business income of the assessee was utilized in making the payments for purchase of land.

Therefore, merely on the basis of surrender made in the search statement, this cannot be held as "Undisclosed Income" for the purpose of levy of penalty u/s 271AAB.

d) Silver items Rs. 12,70,861/-

It was submitted that explanation given for the jewellery stock of the firm should be consider for silver items . However the silver items found at the residence of the assessee cannot be considered as undisclosed income of the assessee in view of the fact that these silver items were found from the residence of six families. The total weight of these silver items is 30.825 kg. These items were personal items of the family members and holding is very reasonable considering the size of the family. However under the pressure of the department, these persons have surrendered the silver items as stock of the business firms just to buy peace and avoid litigation.

e) Other discrepancies in account Rs. 7,29,139:-

The partners have surrendered Rs. 12,70,861/- against the silver items and Rs.7,29,139/- against any discrepancy in books of account totaling to Rs. 20,00,000/- in the hands of firm. In assessment, the Id AO has not pointed out any other discrepancy in account, then how it can constitutes as "Undisclosed Income". Therefore, merely on the basis of surrender made in the search statement, this cannot be held as "Undisclosed Income" for the purpose of levy of penalty u/s 271AAB.

27. It was submitted that the assessee has shown additional income of Rs. 5,75,10,387/- in Profit and Loss Account under the head "Income surrendered during the search". In computation of total income, the assessee shown it as "Income from Business or Profession". The Id AO

has not assessed it as Income u/s 69 under the head "Income from other sources" but accepted it as business income. Therefore, the surrendered income represents the normal business income more so when no document was found to show unaccounted purchase and sales. The Profit is result of sales & purchase transactions which are fully recorded in the regular books of account found at the time of search. The accounting year of the assessee was not completed as on the date of the search. Further, the profit can be declared only after end of the year. After the end of the year, final account are prepared and only after that profit can be ascertained.

28. It was further submitted that the levy of penalty u/s 271AAB is discretionary not mandatory in nature. It is submitted that the AO while passing the order under section 271AAB has to examine the case in terms of the provisions of said section and, therefore, the levy of penalty under section 271AAB is not automatic but discretionary. The provisions of section 271AAB itself speak that these are not mandatory. In section 271AAB the term "The AO may" is used, which shows the levy of penalty is not mandatory. The section states that the Assessing Officer "MAY" direct. Thus it is not 'SHALL' which would have made the levy of penalty mandatory. Thus the Id. CIT (A) was wrong in observing that levy of penalty u/s 271AAB was mandatory. Secondly the provisions of section 271AAB(3) lay down that penalty shall be levied under the section with reference to section 274. In other words the provisions of section shall apply in levying penalty under this section. Section 274 states that "No order imposing penalty under this chapter shall be made unless the assessee has been heard or has been given a

reasonable opportunity of being heard.” Thus hearing has to be given to the assessee before levy of penalty. This itself shows that penalty is leviable only after hearing the assessee and in case assessee is able to make out a case by showing some reasonable cause or otherwise then penalty shall not be leviable. Penalty is not automatically leviable.

29. Furthermore, every additional income declared in the return filed is not amount of undisclosed income. There may be several bonafide reasons of declaring additional income in the return. The assessee has disclose the additional income in the return filed u/s 153A as a precautionary measure just to avoid prolonged litigation and just to buy the peace. There is no evidence with the department that the assessee was having some undisclosed income.

30. The discretion for not to levy the penalty should be used in favour of assessee on consideration of the following facts:-

a) The difference in stock is on account of valuation of physical stock found at the time of search at market value as on the date of search whereas the stock was purchased not on the date on search but on various past dates and the assessee follows the method of stock valuation at cost.

b) The Id AO has accepted the additional income surrendered by the assessee as business income of current year and the normal business income was utilized in stock, land advances, cash and stock of silver items.

c) The assessee has surrendered Rs. 7,29,139/- against any possible discrepancy in books of account and the Id AO has not noticed any discrepancy in the books of account, therefore this surrender cannot be treated as "Undisclosed Income"

31. It was further submitted that since, the assessee has not acted deliberately in defiance of law or was not guilty of conduct contumacious or dishonest, or has not acted in conscious disregard of its obligation, penalty cannot be levied. In this regard, attention was drawn towards the Hon'ble Supreme Court's decision in the case of Hindustan Steels Ltd. Vs. State of Orissa, 83 ITR 26 (SC) wherein it was held as under:

*"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."*

32. Per contra, the Id. DR submitted that the assessee has surrendered the undisclosed income in its statement recorded u/s 132(4) and therefore, there cannot be any question of said surrender of income not falling in the definition of undisclosed income. It was submitted that the penalty U/s 271AAB is mandatory in nature and is imposed at the varying rate of 10%, 20% or 30% depending on the fulfillment of certain conditions therein. It was submitted that all the conditions specified in Section 271AAB have been fulfilled in the instant case, therefore, the penalty U/s 271AAB being in the nature of mandatory penalty and there being no discretion with the Income tax authorities, the penalty so imposed by the AO was rightly confirmed by the Id CIT(A) and the order of the Id CIT(A) should be upheld.

33. We have heard the rival contentions and perused the material available on record. Firstly, regarding the contention of the Id AR where he has challenged the findings of the Id. CIT(A) that penalty U/s 271AAB is mandatory in nature and there is no discretion with the Income tax authorities. It was submitted by the Id AR that in section 271AAB, the word 'may' is used instead of 'shall' so it is not mandatory but same is discretionary. It was submitted that it is settled position of law that penalties are not compulsory, not mandatory but are also discretionary considering the overall facts and circumstances of the case.

34. In this regard, we refer to the provisions of Section 271AAB which begins with the stipulation that the Assessing officer may direct the assessee and the assessee shall pay the penalty as per clause (a) to

(c) so satisfied in sub-section (1) to Section 271AAB. Further, as per sub-section (3) of Section 271AAB, the provisions of section 274 and section 275 as far as may be applied in relation to penalty under this section which means that before levying the penalty, the Assessing officer has to issue a show-cause granting an opportunity to the assessee. Thus, the levy of penalty is not automatic but the Assessing officer has to decide based on facts and circumstances of the case. Similar view has been taken by the various Co-ordinate Benches and useful reference can be drawn to the decision of the Co-ordinate Bench in case of ACIT vs Marvel Associates 92 Taxmann.com 109 wherein it was held as under:

*"5. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. During the appeal hearing, the Ld. A.R. vehemently argued that the A.O. has levied the penalty under the impression that the levy of penalty in the case of admission of income u/s 132(4) is mandatory. The Ld. A.R. further stated that penalty u/s 271AAB of the Act is not mandatory but discretionary. The provisions of section 271AAB of the Act is parimateria with that of section 158BFA of the Act relating to block assessment and accordingly argued that the levy of penalty under section 271AAB is not mandatory but discretionary. When there is reasonable cause, the penalty is not exigible. The Ld. A.R. taken us to the section 271AAB of the Act and also section 158BFA(2) of the Act and argued that the words used in section 271AAB of the Act and the words used in section 158BFA(2) of the Act are identical. Hence, argued that the penalty section 271AAB of the*

*Act penalty is not automatic and it is on the merits of each case. For ready reference, we reproduce hereunder section 158BFA (2) of the Act and section 271AAB of the Act which reads 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 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 per cent but which shall not exceed ninety per cent 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).*

*Section 158BFA(2):*

*(2) The Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Chapter, may direct that a person shall pay by way of penalty a sum which shall not be less than the amount of tax leviable but which shall not exceed three times the amount of tax so leviable in respect of the undisclosed*

*income determined by the Assessing Officer under clause (c) of section 158BC:*

*Provided that no order imposing penalty shall be made in respect of a person if—*

- (i) such person has furnished a return under clause (a) of section 158BC;*
- (ii) the tax payable on the basis of such return has been paid or, if the assets seized consist of money, the assessee offers the money so seized to be adjusted against the tax payable.*
- (iii) Evidence of tax paid is furnished along with the return; and*
- (iv) An appeal is not filed against the assessment of that part of income which is shown in the return:*

*Provided further that the provisions of the preceding proviso shall not apply where the undisclosed income determined by the Assessing Officer is in excess of the income shown in the return and in such cases the penalty shall be imposed on that portion of undisclosed income determined which is in excess of the amount of undisclosed income shown in the return.*

*6. Careful reading of section 271AAB of the Act, the words used are 'AO may direct' and 'the assessee shall pay by way of penalty'. Similar words are used section 158BFA(2) of the Act. The word may direct indicates the discretion to the AO. Further, sub section (3) of section 271AAB of the Act, fortifies this view. Sub section (3) of section 271AAB:*

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

*7. The legislature has included the provisions of section 274 and section 275 of the Act in 271AAB of the Act with clear intention to consider the imposition of penalty judicially. Section 274 deals with the procedure for levy of penalty, wherein, it directs that no order imposing penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. Therefore, from plain reading of section 271AAB of the Act, it is evident that the penalty cannot be imposed unless the assessee is given a reasonable opportunity and assessee is being heard. Once the opportunity is given to the assessee, the penalty cannot be mandatory and it is on the basis of the facts and merits placed before the A.O. Once the A.O. is bound by the Act to hear the assessee and to give reasonable opportunity to explain his case, there is no mandatory requirement of imposing penalty, because the opportunity of being heard and reasonable opportunity is not a mere formality but it is to adhere to the principles of natural justice. Hon'ble A.P. High Court in the case of Radhakrishna Vihar in ITTA No.740/2011 while dealing with the penalty u/s 158BFA held that 'we are of the opinion that while the words shall be liable under sub section (1) of section 158BFA of the Act that are entitled to be mandatory, the words may direct in sub section 2 there of intended to directory'. In other words, while payment of interest is mandatory levy of penalty is discretionary. It is trite position of law that discretion is vested and authority has to be exercised in a reasonable and rational*

*manner depending upon the facts and circumstances of the each case. Plain reading of section 271AAB and 274 of the Act indicates that the imposition of penalty u/s 271AAB of the Act is not mandatory but directory. Accordingly we hold that the penalty u/s 271AAB is not mandatory but to be imposed on merits of the each case."*

35. Therefore, we agree with the contentions of the Id AR that the levy of penalty under section 271AAB is not mandatory. In the instant case, it therefore needs to be examined whether there is any basis for levy of penalty or non-levy thereof and the same will depend upon the facts and circumstances of the present case which we shall discuss in subsequent paragraphs.

36. Now, coming to the contention of the Id AR where he contends that the Revenue authorities have exerted undue pressure on the assessee and obtained surrender of income and therefore, there was no undisclosed income in the hands of the assessee. In this regard, we refer to the assessment order wherein the Assessing officer has stated that the partners of the assessee firm had accepted undisclosed income in their statements recorded u/s 132(4), thereafter, the statements were again recorded during the post-search proceedings and there is nothing on record which suggest any retraction on part of the assessee, and subsequently, the assessee has disclosed the same in its return of income filed on 1.10.2014. Therefore, the assessee was having ample time to retract from said surrender, however there

is no such retraction during post-search proceedings and even the assessee has included the same in its return of income. Even from the perusal of the statements so recorded of the partners of the assessee firm, there is nothing which in any way suggests that there is any forced surrender by the assessee. The contention of the Id AR therefore has no legal leg to stand where he contends that the Revenue authorities have exerted undue pressure on the assessee and obtained surrender of income and therefore, there was no undisclosed income in the hands of the assessee. In any case, the assessment proceedings have attained finality where such undisclosed income has been offered and brought to tax and the same is not an issue before us.

37. Now, coming to the contention of the Id AR regarding amount surrendered during the course of search not qualifying as undisclosed income u/s 271AAB. For the purposes of levy of penalty, what has to be seen is that whether the surrender so made, in terms of statement of the assessee's partners recorded u/s 132(4) during the course of search, falls in the definition of "undisclosed income" which has been specifically laid down in terms of clause (c) of explanation to section 271AAB which reads as under:

*"(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.”*

38. Firstly, regarding stock of Kundan Meena, and diamond and other gemstones studded jewellery which has been surrendered during the course of search, what has to be determined is the income which is represented by such stock of jewellery which is not found recorded in the books of accounts maintained in the normal course relating to such previous year. In other words, the value at which such stock has been

acquired by the assessee and not the value which such stock can fetch in the market or the fair market value of such stock. In the instant case, it has been contended that the valuation of the stock has been done at market rate as on the date of search without considering the cost disclosed in the books of accounts and without considering the well-accepted accounting policy which has been followed by the assessee firm where it values its stock at lower of cost and net realizable value. The cost can be determined on the basis of historical and/or current cost so recorded in the books of accounts. Alternatively, past gross profit percentage can also give a reasonable basis for determining such cost. In the instant case, the Id AR has contended that where gross profit of the past year determined at the rate of 13.92% is used and applied to the stock valued by the Revenue at the current market value, it will result in a scenario where the stock as per books of account is higher than the stock valued at the time of search. As per computation prepared which we have noted above, we find that stock (including stock of silver jewellery) as per books of accounts comes to Rs 35,11,24,031 as against Rs 34,27,22,924 valued by the Department at the time of search and therefore, contention so advanced by the Id AR is found reasonable. Another aspect which has been submitted by the assessee relates to non-deduction on account of chapadi, wax etc for the Kundan Meena Jewellery while physically weighing the jewellery. It was submitted by the Id AR that the said fact was duly brought to the notice of Assessing officer vide written submission dated 15.12.2015, however, the same has not been considered by the Assessing officer. In our view, given that the assessee has disclosed the whole of the amount surrendered during the

course of search in its return of income, the amount so surrendered and disclosed in the return of income has rightly been brought to tax in the quantum proceedings. However, as far as penalty proceedings are concerned, the Assessing officer is required to give a specific finding that there is an undisclosed income found during the course of search and which has not been recorded in the books of account. In the instant case, we find that the Assessing officer has merely gone by the surrender statement and has not examined the matter from the perspective of determining the cost of such stock and the quantification thereof after allowing deduction for Chapadi, wax, etc. which is a well established step as part of valuation methodology of such kind of jewellery and which has been followed at other locations except at Jaipur. There is no finding that there is any excess stock which has been physically found and which has not been found recorded in the books of accounts as on the date of search. In light of above discussions, it is thus clear that difference in stock of jewellery and silver items as per books and as found at the time of search is on account of valuation of such stock at the market value instead of cost and such valuation difference and on account of non-deduction of Chapadi, wax, etc while weighing the Kundan Meena Jewellery and the same cannot be a basis to hold that it represent undisclosed income so defined in explanation to section 271AAB of the Act and the penalty levied thereon is liable to be set-aside.

39. Now, coming to surrender made on account of cash advances for land purchases in the statement recorded u/s 132(4) of the Act. During the course of search, a diary has been found wherein there are notings

relating to advance given to various persons towards purchase of land. The notings describe the name of the persons, the amount advanced which ranges from Rs 2 lacs to Rs 50 lacs to 4 persons totaling to Rs 1.12 Crores and the date of such advance during the period 28.07.2013 to 3.9.2013 just before the date of search on 4.9.2013. Therefore, what has been found during the course of search is certain entries relating to undisclosed investment in purchase of land. Besides the said entries, there are no other documents/material in terms of any agreement to sell, the description of the property etc, which has been found during the course of search. As per the definition of undisclosed income u/s 271AAB, the undisclosed investment in so called purchase of land cannot be stated to be income which is represented by any money, bullion, jewellery or other valuable article or thing. Whether it can then be said that such undisclosed investment represents income by way of any entry in the books of account or other documents or transactions found in the course of a search under section 132. An investment *per se* represents an outflow of funds from the assessee's hand and an income *per se* represents an inflow of funds in the hands of the assessee. Therefore, once there is an inflow of funds by way of income, there could be subsequent outflow by way of investment. Investment and income thus connotes different meaning and connotation and thus cannot be used inter-changeably. In the definition of undisclosed income, where it talks about "income by way of any entry in the books of account or other documents or transactions found in the course of a search under section 132", what perhaps has been envisaged by the legislature is an inflow of funds in the hands of the assessee which has been found recorded by way of any entry in the

books of accounts or other documents, and which has not been recorded before the date of search in the books of accounts or other documents maintained by the assessee in the normal course. We are also conscious of the fact that there are deeming provisions in terms of section 69 and 69B wherein such investments are deemed to be treated as income in absence of satisfactory explanation. In our view, the deeming fiction so envisaged under Section 69 and Section 69B where investments which are found either not recorded or found recorded at a lesser value in the books of accounts, and such investments are deemed to be income of the assessee of the year in which such investments have been made, cannot be extended and applied automatically in context of section 271AAB. It is a well-settled legal proposition that the deeming provisions are limited for the purposes that have been brought on the statute book and have therefore to be applied in the context of provisions wherein they have been brought on the statute book and not otherwise. In the instant case, the deeming provisions are contained in section 69 and section 69B and therefore, the same could have been applied in the context of bringing to tax such investments to tax in the quantum proceedings, though the fact of the matter is that the AO has not even invoked the said deeming provisions in the quantum proceedings in the instant case. Therefore, even on this account, the deeming fiction cannot be extended to the penalty proceedings which are separate and distinct from the assessment proceedings and more so, where the provisions of section 271AAB provide for a specific definition of undisclosed income. Where a specific definition of undisclosed income has been provided in Section 271AAB, being a penal provision, the same must be strictly construed and in light

of satisfaction of conditions specified therein and it is not expected to examine other provisions where the same has been defined or deemed for the purposes of bringing the amount to tax. In light of the same, the undisclosed investment by way of advance for purchase of land can be subject matter of addition in the quantum proceedings, as the same has been surrendered during the course of search in the statement recorded u/s 132(4) and offered in the return of income, however the same cannot be said to qualify as an undisclosed income in the context of section 271AAB read with the explanation thereto and penalty so levied thereon deserved to be set-aside.

40. Regarding surrender of Rs 7,29,139 made on account of other discrepancies, in absence of any such discrepancy so found by the Assessing officer either during the assessment or penalty proceedings, the said surrender may be the basis for assessment but can't form the basis for levy of penalty in absence of a specific finding as to how the same qualify as an undisclosed income so defined u/s 271AAB of the Act. Hence, penalty levied thereon is liable to be set-aside.

41. Regarding surrender of cash of Rs 5 lacs found from the residence of the partners and which has been admitted as belonging to the assessee firm in statement recorded u/s 132(4) and not found recorded in the books of accounts at the time of search, there cannot be any dispute that the same represents undisclosed income and liable for penalty u/s 271AAB of the Act which is hereby confirmed.

42. In light of above discussions and in the entirety of facts and circumstances of the case, the penalty U/s 271AAB is sustained to the extent of cash found during the course of search and penalty is hereby directed to be deleted on rest all items of surrender made during the course of search in absence of the same qualifying as undisclosed income as so defined under section 271AAB of the Act.

In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open Court on 11/01/2019.

Sd/-  
(विजय पाल राव)  
(Vijay Pal Rao)  
न्यायिक सदस्य / Judicial Member

Sd/-  
(विक्रम सिंह यादव)  
(Vikram Singh Yadav)  
लेखा सदस्य / Accountant Member

जयपुर / Jaipur  
दिनांक / Dated:- 11/01/2019.

**\*Santosh**

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

1. अपीलार्थी / The Appellant- M/s Rambhajo's, Jaipur.
2. प्रत्यर्थी / The Respondent- ACIT, Central Circle-1, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 991/JP/2017 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar