

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. 359/JP/2017
निर्धारण वर्ष/Assessment Years : 2013-14

Shri Rajendra Kumar Gupta S-3 Mahesh Marg, Bapu Nagar, Jaipur.	बनाम Vs.	The DCIT, Central Circle-2, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACQPG 4728 D		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से / Assessee by : Shri R.K. Bhatra (C.A.) &
Shri S.R. Sharma (C.A.)
राजस्व की ओर से / Revenue by : Shri Rajendra Jha (ACIT)

सुनवाई की तारीख / Date of Hearing : 05/11/2018
उदघोषणा की तारीख / Date of Pronouncement : 18/01/2019

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A), Jaipur dated 27.03.2017 for the Assessment Year 2013-14 wherein the assessee has taken the following grounds of appeal:-

"1. That on the facts and circumstances of the case the learned CIT(A) is wrong, unjust and has erred in confirming the penalty of Rs 10,00,000 imposed by the Assessing officer u/s 271AAB of the Income Tax Act, 1961."

2. At the outset, the Id. AR submitted that the assessee has moved an application seeking permission for taking the following additional ground of appeal as under:-

"That in the facts and circumstances of the case, notice issued by the Assessing officer u/s 271AAB of the Income tax Act is wrong and bad in law in as much as it did not specify in which limb of section 271AAB of the Act, the penalty proceedings have been initiated."

3. The Id. AR has submitted that the issue raised in the additional ground is purely a legal issue 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. The Id. DR is heard who has not raised any specific objection against the admission of the additional ground. After hearing both the parties and considering the material available on record, we find that the assessee has challenged basically the issue of show cause notice by the Assessing Officer, the said additional ground being a purely legal ground, the same is being admitted for adjudication on merits.

4. Briefly the facts of the case are that the assessee is engaged in the business of building construction and supply of building material, and has reported income from business, capital gains and other sources in his return of income. A search under section 132 was carried out on 31.10.2012 at various premises of Motisons Group including the residential premises of the assessee and the statement of the assessee was recorded u/s 132(4) wherein he has surrendered income to the tune of Rs 1,00,00,000/-. The assessee subsequently filed his return of

income on 16.10.2013 declaring total income of Rs. 1,05,28,110/- which includes an amount of Rs. 1,00,00,000/- towards undisclosed income surrendered during the course of search in his statement recorded u/s 132(4) of the Act. The AO subsequently completed the assessment U/s 143(3) r.w.s 153B(1)(b) of the Act vide order dated 23.02.2015 at a total income of Rs. 1,05,28,110/-. The AO simultaneously initiated penalty proceedings U/s 271AAB of the Act vide issuance of show cause noticed dated 23.02.2015 and thereafter vide order dated 19.08.2015 has imposed a penalty of Rs. 10,00,000/- U/s 271AAB(1)(a) of the Act @ 10% of the undisclosed income surrendered during the course of search. On appeal by the assessee, the Id. CIT(A) has confirmed the said levy of penalty and against the said order, the assessee is now in appeal before us.

5. During the course of hearing, the Id. AR drawn our reference to the penalty notice U/s 271AAB dated 23.02.2015 and submitted that Section 271AAB of the Act has three different limbs for levy of penalty at three different rates and the impugned notice issued for initiation of penalty U/s 271AAB of the Act is of very general nature and doesn't specify the specific limb of section 271AAB which the AO wishes to invoke in the assessee's case. It was submitted that though the notice has been received by the assessee, however, the assessee was not in a position to reply to specific default which he has committed. In the circumstances, issuance of such notice left the assessee bereft of proper opportunity and specific defence. It was submitted that the assessee should be given opportunity by quoting the specific provisions under which penalty is imposable so that assessee can furnish his

adequate defence. It was submitted that the Assessing Officer has not struck off and has not ticked the relevant provisions while issuing the penalty notice and it shows that the penalty proceeding have been initiated in a very light and trivial manner. In support, reliance was placed on the decision of Hon'ble Karnataka High Court in case of CIT vs. Manjunatha Cotton and Ginning Factory 359 ITR 565, decision of Hon'ble Rajasthan High Court in case of Sheveta Construction Co. Pvt Ltd (*DBIT Appeal No. 534/2008 dated 6.12.2016*) and the decision of the Coordinate Bench in case of DCIT vs R. Elangovan (ITA No. 1199/CHN/2017 dated 5.4.2018).

6. Heard both the parties. The penalty proceedings are separate from assessment proceedings, which are initiated with the issue of notice u/s. 274 and culminate with passing of 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.

7. 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.

8. 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 which is found during the course of search in the case of the assessee. Therefore, in the instant case, where the notice dated 23.02.2015 is issued to the assessee to show-cause why penalty should not be levied u/s 271AAB of the Act in respect of undisclosed income of the specified previous year, 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*) 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 provisions 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.”

9. 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 found the same equally relevant in context of section 271AAB for the limited context of examining multiple charges and therefore, deem it relevant to consider the same for the purposes of present appeal.

10. The Coordinate Bench in the aforesaid decision 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 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(l)(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."

11. In the instant case, the notice initiating the penalty proceedings talks about initiation of penalty proceedings U/s 271AAB of the Act in respect of undisclosed income of the specified previous year. However, while passing the penalty proceedings, the Assessing officer has given a clear 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% of the undisclosed income. 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. In such a case, 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 Bench in case of R Elangovan (supra) so relied upon by the Id AR, has been rendered without taking into consideration the earlier decision of the Co-ordinate Bench in case of Mahesh Jain (Supra) and decision of the larger Bench of the Tribunal in case of ONGC Mittal (Supra) which has duly considered the decision in case of Manjunatha

(supra) and thus doesn't act as a binding precedent. As far as decision of the Hon'ble Rajasthan High Court is concerned, we find that the same in fact supports the case of the Revenue as a definite finding has been record in the penalty order. In light of above discussions, the additional ground so raised by the assessee is hereby dismissed.

12. Now, coming to the main ground of appeal. In this regard, the Id AR has raised the contention challenging the findings of the AO 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. In support, reliance was placed on provisions of section 158BFA(2) wherein similar phrasology has been used by the legislature and the decisions of the Coordinate Benches in case of DCIT vs Manish Agarwal 92 taxmann.com 81 and ACIT vs Marvel Associates 92 taxmann.com 109.

13. Per contra, the Id. DR submitted that the assessee has surrendered the undisclosed income in his 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.

14. 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 (supra) 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."

15. 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.

16. Another contention which was raised by the Id AR is that during the course of search, no undisclosed income was found as defined U/s 271AAB. Further in the case search u/s 132 of the Act was carried out in assessee's premises but no evidence was found during the course of search except Ann. AS which was found wherein from page No. 1

to 7 certain figures, dates, cryptic names and/or places were written. The search parties totaled those figures to be Rs. 82,80,000/- holding that amount has been given to various person as advances The assessee also offered a sum of Rs.17,20,000/- in his statement recorded u/s 132(4) of the Act as his additional income for the current year to compensate the defect (if any) found in his books of accounts. The assessee also stated in his statement that said surrender was made to buy piece and avoid long litigation with department on the request that no penalty proceedings etc. be initiated against him. Thus no incriminating material was found during the search and said Annex-AS was containing imaginary names and some figures. Further the officers of search proceedings and Ld. A.O. made no further enquiry/investigation regarding entries made in the seized papers. The surrender of current years income by assessee of Rs. 1,00,00,000/- was just to buy peace by assessee which also he categorically stated in statement u/s 132 (4). The said entry in the pocket diary giving advances itself is not an undisclosed income. And there is no discrepancy which has been found by the Assessing officer and accordingly, there cannot be any undisclosed income in respect of sum of Rs.17,20,000/-as well.

17. It was submitted that the Revenue authorities have exerted undue, uncalled for and an unwarranted pressure and obtained surrender of income and therefore, there was no undisclosed income in the hands of the assessee. It was submitted that such confessional statement violates Board's circular dated 10.03.2003 and 18.12.2014. It was submitted that such forceful admission does not comply with the

spirit of the law. The provisions of Section 271AAB(1)(a)(ii) clearly requires that such undisclosed income admitted U/s 132(4) requires to be substantiated. In other words, the assessee is required to specify the manner in which such income has been derived and further substantiate the same by furnishing material available with him. In the instance case, no such substantiation was done as in fact there existed no undisclosed income. The entire disclosure was on paper and assessee admitted such disclosure to avoid undue harassment and unwanted litigation.

18. It was further submitted that the penalty U/s 271AAB is attracted on undisclosed income but not on admission made by the assessee U/s 132(4) of the Act. The AO must establish that there is undisclosed income on the basis of some incriminating material. In the instant case, a diary was found which according to the A.O, it was incriminating material evidencing the undisclosed income. In the penalty order the AO observed nothing related to the diary. However, neither the AO nor the Ld.CIT(A) has verified the contents of the diary as the same was maintained as books of accounts. No other material was found during the course of search indicating the undisclosed income. There is no discrepancy which has been found by the Assessing officer and therefore, there cannot be any undisclosed income in respect of sum of Rs.17,20,000/- as well. There was no money, bullion, jewellery or valuable article or thing or entry in the books of accounts or documents transactions were found during the course of search indicating the assets not recorded in the books of accounts or other

documents maintained in the normal course, wholly or partly. The Revenue did not find any undisclosed asset, any other undisclosed income or the inflation of expenditure during the search/ assessment proceedings. Though a diary was found that does not indicate any suppression of income. Similarly, no discrepancy was found in the books of accounts. The AO was happy with the disclosure given by the assessee and did not verify the factual position with the books of accounts and other documents. The Tribunal in the case of Ajay Sharma vs. DCIT (2012) 32CCH 334 held that *"with respect to the addition on account of alleged receivables as per seized paper, there is no direct material which leads and establishes that any income received by the assessee has not been declared by the assessee. An addition has been made on the basis of loose document, which did not closely prove any concealment or furnishing of inaccurate particulars by the assessee. Hence penalty u/s 158BFA (2) of the Act is not leviable."* The facts of the assessee's case shows that there was no undisclosed income found during the course of search and no incriminating material was found, therefore the penalty levied by the Learned Assessing Officer and confirmed by the Learned CIT(A) deserves to be deleted.

19. In order to appreciate the aforesaid contentions of the Id AR, we refer to the statement of the assessee recorded during the course of search u/s 132(4) and the relevant extract thereof is reproduced as under for sake of reference:-

"प्रश्न 14 सर्च की कार्यवाही के दौरान आपके निवास स्थान से रूपयों लेन-देन की कच्ची पर्चियों पाई गई, कृपया इन पर्चियों के बारे में स्पष्ट करें?"

उत्तर मैंने मेरे निवास स्थान पर पाई गई सातों पर्चियों को भली भांति पूर्वक पढ़ लिया है, ये रूपयें मैंने विभिन्न लोगो को उधार दिये हैं जिनका उल्लेख मेरी Regular Books of Accounts में नहीं है। इन पर्चियों का जोड़ 82 लाख 80 हजार रूपयें है चूंकि इन रूपयों का उल्लेख में मेरी Books में नहीं है। अतः मैं उपरोक्त 82 लाख 80 हजार को अपनी अघोषित आय मानते हुए इसे करारोपण हेतु समर्पित करता हूँ साथ ही मैं 17 लाख 20 हजार की अतिरिक्त आय को जोड़ते हुए कुल 1 करोड़ की आय को करारोपण हेतु समर्पित करता हूँ। उपरोक्त 17 लाख 20 हजार रूपयें की अतिरिक्त अघोषित आय मैं अपनी मानसिक शांति के लिए करारोपण के लिए समर्पित किये हैं। यदि मेरी लेखा बहियों में कोई कमी पाई जाती है। तो इसे इस 17 लाख 20 हजार से समायोजित कर दिया जायें। इसके ऊपर समयानुसार मैं अग्रिम कर जमा करवा दूंगा।

प्रश्न 15 क्या आपको और कुछ कहना है?

उत्तर कहना है कि उपरोक्त 1 करोड़ रूपये मन की शांति के लिए Surrender किया है। मेरा आपसे निवेदन है कि उक्त पर किसी प्रकार का Penalty, Prosecution एवं ब्याज न लगाया जायें....."

20. In this case, the search was conducted on 31.10.2012 wherein the statement of the assessee was recorded u/s 132(4) wherein he has surrendered the amount of Rs 1,00,00,000. Subsequently, almost after a year, the assessee has disclosed the same in his return of income filed on 16.10.2013. 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 his return of income. Even from the perusal of the statement, there is nothing which demonstrates 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 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. For the purposes of levy of penalty, what has to be seen is whether the surrender so made, in terms of statement of the assessee 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."

21. During the course of search, a note book (diary) has been found referred to as Ann. AS wherein there are certain notings relating to cash advances given to various persons totaling to Rs 82,80,000. Referring to the statement of the assessee in respect of these notings recorded u/s 132(4), Id CIT(A) has given a finding that the assessee has given a generalized statement without specifying the complete particulars of persons to whom loans were given and also failed to substantiate the same. The said findings have not been disputed by the Revenue and therefore, merely based on surrender and generalized statement of the assessee, in absence of anything specific to corroborate such entries, can it be said that such entries/notings represent undisclosed income of the assessee. As per the definition of undisclosed income u/s 271AAB, the said cash advances 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 cash advances 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. A cash advance *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 can be subsequent outflow by way of an advance to any third party. Giving an advance 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 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 and not vice-versa. We are also conscious of the fact that there are deeming provisions in terms of section 69 and 69B wherein such amounts may be deemed as income in absence of satisfactory explanation. In our view, the deeming fiction so envisaged under Section 69 and Section 69B 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 contained in section 69 and section

69B 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. 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 advances 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.

22. Regarding surrender of Rs 17,20,000 made on account of other discrepancies if any found in the books of accounts, 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 which are separate and distinct proceedings 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.

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

Order pronounced in the open Court on 18/01/2019.

Sd/-

Sd/-

(विजय पाल राव)
(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member

(विक्रम सिंह यादव)
(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 18/01/2019.

*Santosh

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

1. अपीलार्थी / The Appellant- Shri Rajendra Kumar Gupta, Jaipur.
2. प्रत्यर्थी / The Respondent- DCIT, Central Circle-2, 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. 359/JP/2017 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar