

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA**  
(समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)  
[Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

**I.T.A. Nos. 1608/Kol/2017**  
**Assessment Years: 2013-14**

DCIT, Central Circle 2(2), Kolkata	Vs.	M/s. Rashmi Metaliks Ltd. [PAN: AACCR 7183 E]
Appellant		Respondent

Date of Hearing	27.12.2018
Date of Pronouncement	01.02.2019
For the Appellant	Shri A.K. Singh, CIT, DR
For the Respondent	Shri A.K. Tulsyan, FCA & Ms. Shikha Agarwal, ACA

**ORDER**

**Per Shri A.T.Varkey, JM**

This appeal is filed by the Revenue against the order dated 13/04/2017 passed by the Ld. CIT(A)-21, Kolkata for the AY 2013-14 deleting the penalty which was levied by the AO u/s 271AAB of the Income-tax Act, 1961 (in short “Act”).

2. Briefly stated the facts of the case are that search and seizure operation under Section 132 of the Act was conducted on 18/02/2013 upon ‘Rashmi Group’ and the panchanama was drawn in the name of the assessee company. The assessee company is engaged in the business of manufacture of iron, steel and railway sidings operations. In the course of search the assessee company along with another group company, M/s Rashmi Cement Ltd and M/s Sajjan Kumar Patwari (HUF) offered to pay tax on sum of Rs.102 crores in a joint disclosure petition submitted before the DDIT(Inv), Kolkata. In the said disclosure petition, which is placed at Page 53 to 128 of the Paper Book, the Rashmi Group furnished its explanation in respect of assets found in the course of search in form of cash, jewellery & silver utensils and also the documents seized and impounded during the course of survey. It was mentioned in the joint petition that since on the date of search the promoters of ‘Rashmi

Group' had made an ad hoc disclosure of Rs.102 crores and therefore with a view to honor the initial statement the Rashmi Group agreed to pay tax on the additional income, break-up of which was as follows:

<i>Assessee</i>	<i>Income Offer</i>
<i>Rashmi Metaliks Ltd.</i>	<i>69 crores</i>
<i>Rashmi Cement Ltd.</i>	<i>31 crores</i>
<i>Sajjan Kr. Patwari (HUF)</i>	<i>2 crores</i>
<i>Total</i>	<i>102 crores</i>

3. Acting in conformity with the aforesaid declaration, while filing its return for the AY 2013-14 the assessee company included additional income of Rs.69,00,00,000/- in the return filed on 30.09.2013 for the relevant AY 2013-14. Having included such additional income of Rs.69,00,00,000/- the assessee returned business loss of Rs.72,76,45,862/- for AY 2013-14. In the order u/s 143(3) the AO admitted that the additional income of Rs.69,00,00,000/- formed part of the returned income which was loss of Rs.72,76,45,862/-. The assessment thereafter was completed on 31.03.2015 after making certain additions/disallowances on other counts. In the assessment order the AO however initiated penalty proceedings in respect of the additional income of Rs.69,00,00,000/- u/s 271AAB of the Act and show cause notice u/s.271AAB r.w.s. 274 of the Act was issued.

4. In the penalty proceedings, vide its letter dated 21/09/2015 the assessee submitted that income of Rs.69 crores declared voluntarily was not represented by any assets, jewellery, cash etc. found in the course of search or for that matter any document or papers which were impounded and seized in the course of search. It was therefore claimed that the income voluntarily offered did not qualify as 'undisclosed income' as defined for the purposes of that section and hence no penalty was warranted u/s 271AAB of the Act. The Ld. AO was however of the opinion that unlike Section 271(1)(c) or 271AAA, the provisions contained in Section 271AAB were mandatory and automatic and once

disclosure of income was made by an assessee in his statement u/s 132(4), then penalty had to be levied under Section 271AAB of the Act. According to AO the disclosure of Rs.69 crores made by the assessee was with reference to seized documents bearing identification Mark RASHMI/1 to RASHMI/5 and RCPL/1 to RCPL/7 and therefore it qualified as 'undisclosed income' under Explanation (c) to Section 271AAB of the Act. The AO accordingly imposed penalty of Rs.6,90,00,000/- under Section 271AAB(a) of the Act. Aggrieved by the action of the AO, the assessee preferred an appeal before the Ld. CIT(A) who deleted the penalty by observing as under:

*I have considered the findings given by the A.O. in the penalty order and submissions made by the AR during the appellate proceeding. I find that the A.O. has taken the undisclosed income of the assessee on the amount declared suomoto by the assessee (for which no incriminating evidence, papers/documents, stock, cash etc. were found during the search operation) in order to buy peace of mind and avoid and further litigation. The assessee has brought on record the case law of Dilip N Shoriff vs CIT(2007) 291 ITR519 (SC). In this case law the Hon'ble Supreme Court has held that imposition of penalty is not automatic. Levy of penalty is not only discretionary in nature, but such discretion is required to be exercised on the part of the Assessing Officer keeping the relevant factors in mind. The AR has also brought on record the case of Punjab Tyres (Punjab Tyres [1986] 162 ITR 517 (Madhya Pradesh), the Hon'ble High Court of Madhya Pradesh) in which it was held that when surrender is made to purchase peace or for other similar reason, surrender cannot amount to admission, constituting evidence of concealment in penalty proceedings.*

*The AR has brought on record the case law of Sudharsan Silk and Sarees, 300 ITR 30 (Supreme Court) in this case, the Hon'ble Supreme Court has held that if the appellant offers any amount for taxation for the purpose of purchasing peace and assessment has been made based upon the aforesaid offerings, even if no assurance in writing is given by the searching party, it may be clearly inferred that such an inducement must have been given by the searching party. When only partial evidence or no evidence in support of concealment was detected during the search, why would a person go to offer a higher amount unless he was promised some reciprocal benefits like not being visited by penalty. Thus, it was held that where additions have been made based on assessee's own offerings, penalty provision shall not lie.*

*7. I also agree with the recent decision of ITAT, Lucknow in the case of Sandeep Chandak vs ACIT (2017) 186 TTJ (Lucknow) 265 in which it has been held that it is not mandatory to impose penalty u/s 271AAB in each and every case even if the assessee has made the default under the said provision. The Hon'ble ITAT has held as under:*

*'We have also gone through the provisions of s. 271AAB and noted that this section specifies three different situations under which the penalty can be imposed on the assessee under different cls. (a), (b) and (c), the penalty has to be imposed on different*

*rates. The A.O. has not specified in the notice in respect of which clause the penalty is going to be levied on the assessee. On this basis also, in our opinion, the penalty cannot be sustained. We further noted that the provisions of s. 271AAB are not mandatory which means that the penalty has (Sic-not) to be levied in each and every case wherever the assessee has made default as stated under cls. (a), (b) and (c) of the Act. Sub-s. (1) of s. 271AAB uses the word 'may' not 'shall'. 'May' cannot be equated with 'shall' especially in penalty proceedings. Using the word 'may' in our opinion, gives a discretion to the A.O. to levy the penalty or not to levy, even if the assessee has made the default under the said provision. In view of aforesaid discussion, we set aside the order of CIT(A) and delete the penalty levied on the assessee.'*

*8. I find that during the search and seizure operation u/s 132 in this case no evidences regarding concealment/undisclosed income in the form of cash seizure/papers/documents/stock etc. were found and seized. Nothing incriminating/no evidences were found regarding Rs. 69,00,00,000/- which was offered for taxation by the assessee suomoto in order to buy peace of mind. I also find that neither the officers in the investigation wing in the post search investigation nor the Assessing Officer during assessment process found any discriminating evidence of undisclosed income other than the statement of the assessee for making the addition of Rs. 69,00,00,000/-.*

*Further I find that the A.O. has levied penalty u/s 271AAB(1)(a). This section reads like sum computed at the rate of ten per cent of the undisclosed income of the specified previous year. Undisclosed income has been defined in the explanation in section 271AAB of the I.T. Act. Thus it is clear that in order to levy penalty two things are essential (1) undisclosed income and (2) specified previous year. Here in this case Rs. 69,00,00,000/- was offered for taxation by the assessee suo moto in the statement recorded at the time of search. From the ratio decided by the Hon'ble Supreme Court in the case of Sudrashan Silk & Sarees (supra), it is clear that only the statement of the assessee without any corroborating evidence cannot be the only basis for levying penalty. Here it is also clear that from the statement of the assessee one cannot point out which amount of undisclosed income pertains to which specified previous year. In this situation, where nothing is clear from assessee's statement recorded at the time of search, the action of the A.O. to levy penalty u/s 271AAB(1)(a) on the amount offered by the assessee suo moto to buy peace of mind, cannot be justified. The Hon'ble Supreme Court has also categorically decided the ratio that penalty cannot be levied on the amount offered by the assessee in order to buy peace of mind [in the case of Sudarshan Silk & Sarees (supra)]. Thus, respectfully following the ratio decided by the Hon'ble Supreme Court, the A.O. is directed to delete the penalty u/s 271AAB(1)(a). Accordingly, assessee's appeal on ground no. 1 is allowed."*

5. Aggrieved by the order of the Ld. CIT(A), the Revenue is in appeal before us.

6. We have heard both the parties and perused the material available on record. The Ld. DR appearing on behalf of the Revenue submitted that in the present case it is not in dispute that the disclosure of Rs.69 crores was made by the assessee in the course of search

conducted u/s 132 of the Act. Not only the disclosure was made at the time of search conducted on 18.02.2013 but in the joint declaration dated 18.04.2013 the assessee along with Rashmi Cement Ltd & SajjanPatwari HUF reiterated its admission of paying tax on the undisclosed income of Rs.69 crores which was found as a result of search conducted against Rashmi Group. The Ld. DR also brought to our attention that not only such undisclosed income of Rs.69 crores was included in the returned income but the assessee had also credited such undisclosed income in its Profit & Loss Account for the relevant year. The Ld. DR submitted that once the assessee made a disclosure of income u/s 132(4) then in terms of provisions of Section 271AAB, levy of penalty was mandatory and therefore automatic. He submitted that the Ld. CIT(A) did not appreciate the schematic difference in enacting Section 271AAB in contradistinction to provisions of Section 271(1)(c) or 271AAA where the AO was given discretion in the matter of levying penalty. The Ld.CIT DR supported the action of the AO by relying on the decision of Hon'ble Allahabad High Court in the case of ACIT vs Sandeep Chandak (405 ITR 648). He therefore urged for upholding the order of AO levying penalty u/s 271AAB of the Act.

7. Per contra, the Ld. AR fully supported the order of the Ld. CIT(A) cancelling the penalty. He reiterated his submissions before the lower authorities and vehemently contended that the income of Rs.69 crores voluntarily offered in the return of income did not come within the ken of the expression 'undisclosed income' as defined in Explanation (c) to Section 271AAB of the Act. The Ld. AR also vehemently argued that the AO was incorrect in stating that the levy of penalty u/s 271AAB was mandatory and automatic and he had no discretion in the matter of levying penalty u/s 271AAB of the Act. In this regard he brought to our attention the relevant provisions of Section 271AAB which provided that the AO 'may' notwithstanding anything contained in any other provisions direct the assessee shall pay penalty in addition to tax. With reference to the use of the expression 'may' in Section 271AAB, the Ld. AR argued that the levy of penalty was discretionary and not mandatory as contended by the Ld. DR as well as the AO. Drawing attention to the assessment order u/s 143(3) dated 31.03.2015 the Ld. AR submitted that nowhere in the assessment order the AO had made out a case that the income of Rs.69 crores voluntarily

offered while filing of the return was in any manner represented by any asset or by an entry in the books of accounts or any other related documents found in the course of search. The Ld. AR therefore submitted that merely because with a view to avoid protracted litigation and to buy peace of mind, the appellant had made voluntary offer to pay tax on income and acted upon such offer, such fact ipso facto does not lead to conclusion that such income was in the nature of 'undisclosed income' for the purposes of clause (c) of Explanation to Section 271AAB of the Act. It was his argument that the expression 'undisclosed income' was defined for the purposes of Section 271AAB in a specified manner and therefore it was obligatory on the AO's part to prove that the income voluntarily offered came within the ambit and scope of the expression 'undisclosed income' as defined in clause (c) of the Explanation. According to Ld. AR the voluntary offer made by the assessee to pay tax on income of Rs.69 crores did not fall within any of the specified sub-clauses contemplated by clause (c) of the Explanation to Section 271AAB and therefore merely because the assessee had made offer to pay tax on income while recording his statement u/s 132(4) of the Act, that by itself did not lead to conclusion that income specified in the joint declaration u/s 132(4) was 'undisclosed income' for the purposes of Section 271AAB attracting rigors of penalty under that Section. He further submitted that the offer to pay tax on the additional income of Rs.69 crores was made and acted upon by the assessee in good faith on the assurance given by the search party that the assessee would not be visited with any penal consequences. The assessee was therefore under bona fide belief that since it had acted upon its bona fide offer and the income did not come within the meaning of undisclosed income, it would not be visited with penalty u/s 271AAB of the Act. The Ld. AR argued that the Ld. CIT(A) correctly appreciated the true and correct purport of Section 271AAB and applying the ratio laid down by the Hon'ble Apex Court in the case of Sudardhan Silk & Sarees Vs CIT (300 ITR 205), he rightly deleted the penalty levied u/s 271AAB of the Act. The Ld. AR therefore urged for upholding the order of the Ld. CIT(A).

8. We have heard the arguments on behalf of both the parties and perused the documents on record, examined applicable legal provisions and the judicial pronouncements on the subject. At the outset we note that it has been the submission of the AO as well as the

Ld. DR that the levy of penalty under Section 271AAB is mandatory and automatic and therefore in the matter of levy of penalty the AO had no discretion once the assessee admits of any undisclosed income in his statement u/s 132(4) of the Act. Such a view goes against the words used in section 271AAB and section 274 of the Act. For saying so we note that if the intention of the Legislature to levy the penalty was mandatory and automatic then the right of appeal u/s 246A would not have been provided for by the Legislature against the order of penalty passed u/s 271AAB of the Act. We also note that while enacting Section 271AAB the Legislature has consciously used the word 'may' in contradistinction to the word 'shall' in the opening words of Section 271AAB of the Act. The choice of the expression 'may' and not 'shall' in the opening Section of 271AAB shows that the Legislature did not intend to make the levy of penalty statutory, automatic and binding on the AO but the AO was given discretion in the matter of levy of penalty. Our foregoing view finds support in the decision of the coordinate Bench of the Tribunal at Vishakhapatnam in the case of ACIT Vs Marvel Associates (170 ITD 353) which inturn relied on Hon'ble Andhra Pradesh High Court ratio in Radha Krishna Vihar (infra). The following observations of the Tribunal in the said decision are relevant in this regard:

*"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 RadhakrishnaVihar 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."*

9. As far as to the judgment of the Hon'ble Allahabad High Court in the case of Pr. CIT Vs Sandeep Chandak (supra) is concerned, we note that the facts of the present case are distinguishable from the facts involved in that judgment. In Sandeep Chandak (supra) the assessee had not only made the disclosure/surrender of the amount but also had specified the manner in which such income has been derived i.e. from the trading of F&O and derivatives and was advanced for purchase of land. That is not the case in the present appeal; there is no explanation by the assessee the manner of deriving the surrender made during search. As discussed in the foregoing, it is a matter of record that in the course of search no undisclosed asset or thing was found nor any incriminating material was found from which any undisclosed income or unexplained expenditure could be inferred. In the circumstances the bald offer made by the assessee to pay tax on additional income in the statement u/s 132(4) cannot be considered to be 'undisclosed income' within the meaning of sec. 271AAB of the Act. So the rigors of Section 271AAB of the Act is not attracted. Having regard to these material facts the judgment of Hon'ble Allahabad High Court relied upon by the Ld. DR, has no application in the facts of the instant case.

10. We further note that the coordinate Bench of this Tribunal at Jaipur in the case of Shri Ravi Mathur vs. DCIT in ITA No. 969/JP/2017 dated 13.06.2018 after taking note of the decision of the Hon'ble Allahabad High Court (supra), had recorded following findings to hold that levy of penalty u/s 271AAB is not automatic.

*"5. Before we proceed further, the decisions relied upon by the ld. D/R are to be considered. In the case of Principal CIT vs. Sandeep Chandak & Others (supra) the issue before the Hon'ble High Court was the defect in the notice issued under section 271AAB on account of*

*mentioning wrong provision of the Act being 271(1)(c) of the Act. The Hon'ble High Court after considering the fact that the show cause notice issued by the AO though mentions section 271(1) in the caption of the said notice, however, the body of the show cause notice clearly mentions section 271AAB, which was fully comprehended by the assessee as reveals in the reply filed by the assessee against the said show cause notice. Hence the Hon'ble High Court has held as under :-*

*“ The ld. A.Rs have also challenged that the caption of the notice mentioned only Section 271 and not 271AAB. In this respect, the copy of notice has been produced by the ld. A.R. before me. It is seen that the ld. A.R is correct in observing that the section of penalty has not been correctly mentioned by the AO in the caption. However, the AO will get the benefit of section 292BB of the Income Tax Act, 1961 because firstly, the assessee has raised no objection before the AO in this regard. Secondly, last line of the notice clearly mentions section 271AAB. Thirdly, the assessee has given reply to said notice which shows that the assessee fully comprehended the implication of the notice that it is for section 271AAB.*

*The assessee has also challenged that the principles of natural justice has not followed by the AO. The detailed submissions of A.R in this regard has already been reproduced above. The A.R did not produce any evidence to show that he was not given proper opportunity of hearing. It is clear from the penalty order that the AO has given penalty notice and which was also replied by the assessee. Therefore, in my opinion, principle of natural justice has not been violated. Thus in view of above discussion penalty imposed by AO u/s 271AAB of the Act is confirmed.”*

*Thus it was found by the Hon'ble High Court that the mistake in mentioning the section in the show cause notice is covered under section 292BB and the AO will get the benefit of the same. The said decision will not help the case of the revenue so far as the issue involves the merits of levy of penalty under section 271AAB. As regards the decision of Kolkata Benches of the Tribunal in the case of DCIT vs. AmitAgarwal (supra), we find that the said decision was subsequently recalled by the Tribunal and a fresh order dated 14th March, 2018 was passed by the Tribunal in favour of the assessee. Therefore, the decision relied upon by the ld. D/R is no more in existence.*

*6. The question whether levy of penalty under section 271AAB by the AO is mandatory or discretionary has been considered by the Visakhapatnam Bench of this Tribunal in case of ACIT vs. M/s. Marvel Associates (supra) in para 5 to 7 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 isparimateria 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 1 st 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 RadhakrishnaVihar 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.”*

*Thus the Tribunal has held that the levy of penalty under section 271AAB is not mandatory but the AO has the discretion to take a decision and shall be based on judicious decision of the AO. Hence we fortify our view by the above decisions of Tribunal in case of ACIT vs. Marvel Associates.”*

11. So for the reasons as aforesaid and relying on the Hon'ble Andhra Pradesh High Court ratio in Radha Krishna Vihar (supra), we cannot agree with the Revenue that the levy of penalty under Section 271AAB was mandatory and automatic. We further note that the penalty leviable under Section 271AAB must have necessary and proximate nexus with discovery of 'undisclosed income' in the course or as a result of search. The expression 'undisclosed income' for the purposes of levy of penalty u/s 271AAB has a definite and specific meaning and the said word or expression does not have any loose or colloquial meaning. Unless and until income offered to tax by an assessee comes within the mischief of undisclosed income and that too of the specified previous year it is not open for the AO to invoke provisions of Section 271AAB of the Act. We note that the expression 'undisclosed income' has been defined in clause (c) and the said clause reads as follows:

*"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. From the foregoing definition of 'undisclosed income' we find that this expression is given a definite and specific meaning and the word has not been described in an inclusive manner so as to enable the tax authorities to give wider or elastic meaning which enables them to bring within its ambit the species of income not specifically covered by the definition. From bare perusal of the definition of the word "undisclosed income" we find that in order to bring a receipt or specie of income within the meaning of the said expression, it is obligatory for the AO to demonstrate and prove that the income is represented either wholly or partly by any money, bullion, jewellery or other valuable article or thing found in the course of search u/s 132 and which was not recorded on or before the date of search in the books of accounts or other documents maintained in the normal course relating to such previous year or otherwise not disclosed to the Commissioner before the date of search. From the bare perusal of the assessment order and the penalty order, we note that the assessee had voluntarily included Rs.69 crores as its income for AY 2013-14. We however find that nothing has been brought on record by the AO which in any manner even suggested let alone proved with cogent material that the said income was actually represented either wholly or partly by any sum of money, bullion, jewellery or other valuable article or thing and which was found in the course of search. Since no sum of money, bullion, valuable or article equivalent to Rs.69 crores was discovered by the Revenue in the course of search, the additional requirement of the same being found not recorded in the books or other documents was redundant. We therefore find that the conditions prescribed in first limb of clause (i) of clause (c) of Explanation were not satisfied.

13. The second limb of sub-clause (i) provides that 'undisclosed income' shall mean any income represented either wholly or partly by any entry in the books of accounts or other documents or transactions found in the course of search under Section 132 but which were not recorded on or before the date of search in the books of accounts or other documents maintained in the normal course relating to such previous year or otherwise not been disclosed to the Commissioner before the date of search. We find that even in respect of the second limb no material or evidence has been brought on record by the AO which showed

that the income of Rs.69 crores was represented by any entry in the books of accounts or other documents or transactions found in the course of search. In this regard we may make useful reference to the relevant portion of the assessment order in which the assessee's voluntary offer in respect of Rs.69 crores was discussed by the AO.

*“In a joint disclosure petition dated 18.04.2013, the assessee company along with M/s. Rashmi Cement Ltd. and Sajjan Kr. Patwari (HUF) disclosed Rs. 102.00 crores for the F.Y. 2012-13 relevant to the A.Y. 2013-14 on account of ‘Estimated amount of Capital Employed plus profit on sales and commodity trading income’ and ‘miscellaneous income’. Out of the same, M/s. Rashmi Metaliks Ltd., M/s. Rashmi Cement Ltd. and SAjjan Kr. Patwari (HUF) disclosed Rs. 69 crores, Rs. 31 crores and Rs. 2 crores respectively. M/s. Rashmi Metaliks Ltd. has disclosed Rs. 69 crores on account of ‘Estimated amount of Capital Employed plus profit on sales and commodity trading income’ and Rs. 1 crore on account of ‘Misc. Income (Net) to cover up the probable errors and commissions’ for the F.Y. 2012-13 relevant to the A.Y. 2013-14.*

*It is seen from the return that the assessee has disclosed the amount in the return of income under the head of ‘income/receipts credited to profit and loss. Account considered under other heads of income under schedule BP thereby increasing the income by Rs. 69 crores.”*

14. From the foregoing findings recorded by the AO in Para 7 of the assessment order, we find that save & except making reference to the voluntary offer made through joint declaration petition dated 18.04.2013, the AO had not brought on record any incriminating material found in the course of search from which one could infer that the income of Rs.69 crores was represented in part or whole by any entry made in the books of accounts or other documents or transactions found in the course of search. In the penalty order, the AO has however tried to make out a case that the income of Rs.69 crores was represented by the entries found recorded in seized documents RASHMI/1 to RASHMI/5 and RCPL/1 to RCPL/7. The AO has therefore tried to justify treating the said sum of Rs.69 crores as ‘undisclosed income’ within the meaning of clause (c). In this regard it is material to refer to Para 4.4 to 4.5 of the assessment order, which is as follows:

*“4.4 Documents found/seized during the course of search:*

*During the course of search, the following documents were found and seized from the premises mentioned below:*

I. No	Name & Address of the Person searched	Date of Search	Residence/ Office	I.D. Marks of the Books of A/c. Seized	Seized Books on Revocation of Joint Seal Operation
01	a) M/s. Rashmi Cement Ltd. b) M/s. Rashmi Metaliks Ltd. c) M/s. Rashmi Float Glass Ltd. d) M/s. Kalinga Metalicks Ltd. e) M/s. Image Vinimay Ltd. f) M/s. Orissa Khanij Pvt. Ltd. j) M/s. Rashmi Infrastructure Pvt. Ltd. & Others at 39 <sup>th</sup> Shakespeare Sarani, 6 <sup>th</sup> Floor, Kolkata - 700 017	18 - 19.02. 2013 & 18.04. 2013	Office	RASHMI/1 to RASHMI/5, RASHMI/HD/1 (Where RASHMI/HD/1 is a hard disk.)	Rashmi/PO/ 1
02.	M/s. Rashmi Iron Industries Pvt. Ltd. M/s. Roxy Securities Pvt. Ltd. M/s. Consortium Enterprises Pvt. Ltd.	18- 19.02. 2013 & 09/04/ 2013	Office	RCL/01 to RCL/10 & RCL/HD/1 (Where RCL/HD/1 is a hard disk.)	RCL/PO/1
03.	M/s. Bothra G and N N Brothers Pvt. Ltd. M/s. Orissa Metaliks Pvt. Ltd. M/s. Rosemary Sponge and Ispat Pvt. Ltd. M/s. Sursadhana Sponge and Ispat Pvt. Ltd. 1, Garstin Place, Orbit, 3 <sup>rd</sup> Floor, Kolkata	2013			
03.	Sajjan Kumar Patwari Sanjay Kumar Patwari Sunil Kumar Patwari Sanjib Kumar Patwari M/s. Rosemary Sponge and Ispat Pvt. Ltd. M/s. Sursadhana Sponge and Ispat Pvt. Ltd. At Inda Behind Kundu Math, Kharagpur - 721 305	18- 19.02. 2013 & 05/04/ 2013	Residence cum office	INDA/1 to INDA/9 & INDA/HD/1 (where INDA/HD/ is a Hard disc.)	INDA/PO/1
04.	Sajjan Kumar Patwari M/s. Rashmi Cement Ltd. & ors. At P.O. Jhargram, Dist. Paschim Midnapore, Jhargram - 721 507 (W.B)	18/02/ 2013	Factory	RML-II/1 to RML-II/5, RML-II/HD/1 & RML-II/PD/1 (where RML-II/HD/ is a Hard disc. & RML-II/PD/ is a pendrive )	Nil
05.	Sajjan Kumar Patwari Sanjay Kumar Patwari Sunil Kumar Patwari Sanjib Kumar Patwari & ors. 3, Rowdon Street, 6 <sup>th</sup> Floor, Kolkata -17	18 -19 /02/ 2013 & 18/04/ 2013	Residence	SSSP/1	SSSP/PO/1
06.	M/s. Rashmi Cement Ltd. M/s. Rashmi Metaliks Ltd. M/s. Rashmi Float Glass Ltd. & other group companies. 5, Khairu Place, 4 <sup>th</sup> Floor, Kolkata	19 /02/ 2013 &09/0 4/ 2013	Office	RCPL/1 to RCPL/7	RCPL/PO/1

4.5 The assessee was asked to furnish page wise explanation of the documents seized. Reply furnished by the assessee has been examined with reference to the seized documents.”

15. From the foregoing findings of the AO, we note that in the assessment order u/s 143(3), the AO had admitted that the assessee had satisfactorily explained the contents of the documents identified as RASHMI/1 to RASHMI/5 and RCPL/1 to RCPL/7 and there was no finding in the said assessment order which in any manner even suggested let alone proved that the income of Rs.69 crores offered by the assessee in its return of income was relatable to or represented by the entries made in documents identified as RASHMI/1 to RASHMI/5 and RCPL/1 to RCPL/7. In the course of appellate hearing the foregoing submission of the Ld. AR went un-rebutted from the Ld. DR who could not bring to our attention any specific noting in the said documents from which it could be construed that the income disclosed was relatable to documents seized in the course of search.

16. From the foregoing discussion and material on record, we find that applying both the limbs contained in clause (c) of Explanation to Section 271AAB, the additional income of Rs.69 crores offered by the assessee through its joint declaration was neither represented by any assets found in the course of search nor represented by any entry made in the books of accounts or other documents or transactions found in the course of search. We therefore find that the income voluntarily offered by the assessee did not come within the ambit and scope of the expression 'undisclosed income' as defined for the purposes of Section 271AAB of the Act.

17. From the plain reading of Section 271AAB we find that the levy of penalty is permissible if and only if there exists 'undisclosed income'. Finding or unearthing of undisclosed income in the course or as a result of search conducted u/s 132 of the Act is sine qua non for invoking penal provisions of Section 271AAB of the Act. Discovery and consequent assessment of undisclosed income is a condition precedent for levy of penalty under Section 271AAB of the Act. It has to be borne in mind that every offer of the assessee to pay tax on his or her income in the course of recording of statement u/s 132 does not amount to finding of 'undisclosed income'. A mere offer or disclosure by an assessee to pay tax on some additional amount with a view to avoid protracted litigation cannot and does not amount to discovery of undisclosed income for the purposes of levy penalty u/s

271AAB of the Act. The Legislature has all along been conscious in providing for levy of penalty only in respect of “undisclosed income”. We find that in all penal provisions such as Explanation 5A of Section 271(1)(c), Section 271AAA & Section 271AAB, the Legislature has restricted the scope of penal provision only to “undisclosed income” and not assessed total income. Moreover the term/expression “undisclosed income” has been defined by the Legislature in all such penal provisions in a specific and restricted manner and not in an inclusive manner. For that reason the definition of undisclosed income nowhere provides that the said expression shall “include” all and every species of income but the word used is undisclosed income “means”. The conscious use of the expression “means” in contradistinction to the use of word “includes” indicate that the Legislature intended to restrict the scope of penal provisions only to income which came within the ken of the said expression and not beyond. Applying the definition of undisclosed income to the income of Rs.69 crores, we find that such income was offered in the statement recorded u/s 132(4) of the Act at the time of search. However only for the said reason, it could not be brought within the ambit of undisclosed income particularly when such income was not represented by any valuable asset or entry in books of accounts or which was not found as a result of search not recorded in the books. We therefore find much force in the Ld. AR’s arguments that since the sum of Rs.69 crores voluntarily offered to tax was not in the nature of undisclosed income, the levy of penalty u/s 271AAB was unsustainable.

18. In this regard we rely on the decision of the coordinate Bench of the Tribunal in the case of ACIT Vs KanwarSain Gupta in ITA No.538/Kol/2017 dated 29.06.2018 involving similar set of facts and circumstances. In the instant case also the assessee had voluntarily offered sum of Rs.1,00,00,000/- to tax in his statement u/s 132(4) without any proof of concealment. The AO assessed such sum to tax solely based on the assessee’s disclosure petition and there was no material brought on record to indicate that it was represented by any valuable asset or any entry found in any books or other documents seized in the course of search. The AO thereafter also levied penalty u/s 271AAB @ 10% which was deleted by Ld. CIT(A). On appeal this Tribunal upheld the order of Ld. CIT(A) by observing as under:

*“4. Learned Departmental Representative argued that the Assessing Officer had rightly imposed the impugned penalty in assessee’s case @10% of his undisclosed income of Rs.1 crore coming Rs.10,00,000 in question. We find no substance in Revenue’s instant arguments. We first of all make it clear that section 271AAB of the Act applies in relation to the impugned penalty @10% of the undisclosed income as stood defined in Explanation (c) thereto. There is no material in the case file to indicate that the assessee’s undisclosed income represents any money, bullion, jewellery or valuable article or any entry in the books or other documents therein. We make it clear that we are dealing with a penalty provision in tax statute which is to be strictly interpreted. We therefore are of the opinion that the CIT(A) has rightly deleted the impugned penalty as the assessee’s search statement nowhere indicated the corresponding undisclosed income as per specific requirement in the Act. The CIT(A)’s findings under challenge deleting penalty in question are accordingly confirmed.*

19. We also rely on the decision of this coordinate Bench of Tribunal in the case of DCIT Vs Liladhar Agarwal in ITA No. 1605/Kol/2017 dated 26.12.2018 wherein identical issue had come up for consideration and the Tribunal upheld the CIT(A)’s order deleting the levy of penalty since there was no material to suggest that the income offered to tax was a consequence of any valuable asset or any entry found in any books or other documents seized in the course of search. The relevant findings of the Tribunal are as follows:

*4. Learned CIT.DR vehemently contends during the course of hearing that the Assessing Officer had rightly invoked the impugned penal provision as stipulated u/s 271AAB on account of search operation in issue conducted in assessee’s case on 20.12.2012. He heavily relies upon assessee’s admission stating his undisclosed income of ₹2,79,15,065/-. His case therefore is that the same formed sufficient reasons for the Assessing Officer to imposed the impugned penalty. We sought to know from learned CIT-DR as to whether the authorized officer had found any specified asset i.e. any money, bullion, jewellery or other valuable article or things as per explanation (c) forming of sec. 271AAB. There is no such material indicated during the course of hearing. We find that co-ordinate bench’s order in **ITA No.538/Kol/2017** in ACIT vs. Sri KanwarSain Gupta decided on 29.06.2018 declines Revenue’s identical arguments para 3-4 follows as under:-*

*“3. We now come to the impugned penalty proceedings. The Assessing Officer levied penalty in question in his order dated 23.02.2016 by quoting section 271AAB of the Act on the ground that all the relevant conditions stipulated therein stood duly satisfied qua the above stated undisclosed income.*

*The CIT(A) reverses the Assessing Officer's action as follows:*

*"I find that during the search and seizure operation u/s 132 in this case no evidences regarding concealment/undisclosed income in the form of cash seizure/papers/documents/stock etc were found and seized. Nothing incriminating/no*

*evidences were found regarding Rs.1 crore which was offered for taxation by the assessee suomoto in order to buy peace of mind. I also find that neither the officers in the investigation wing in the post search investigation nor the Assessing Officer during assessment process found any discriminating evidence of undisclosed income other than the statement of the assessee for making the addition of Rs.1 crore.*

*Further I find that the AO has levied penalty u/s 271AAB (1)(a). This section reads like sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.*

*Thus, it is clear that in order to levy penalty two things are essential (1) undisclosed income and (2) specified previous year. Here in this case Rs.1 crore was offered for taxation by the assessee suomoto in the statement recorded at the time of search. From the ratio decided by the Hon'ble Supreme Court in the case of SudarshanSiik&Saries (supra), it is clear that only the statement of the assessee without any corroborating evidence cannot be the only basis for levying penalty. Here it is also clear that from the statement of the assessee one cannot point out which amount of undisclosed income pertains to which specified previous year. In this situation, where nothing is clear from assessee's statement recorded at the time of search, the action of the AO to levy penalty u/s 271AAB(1)(a) on the amount offered by the assessee suomoto to buy peace of mind, cannot be justified. The Hon'ble Supreme Court has also categorically decided the ratio that penalty cannot be levied on the amount offered by the assessee in order to buy peace of mind (in the case of Sudarshan Silk &Saries (supra)]. Thus, respectfully following the ratio decided by the Hon'ble Supreme Court, the AO is directed to delete the penalty u/s 271AAB(1)(a). Accordingly, assessee's appeal on grounds no 1, 2 and 3 are allowed. "*

*4. Learned Departmental Representative argued that the Assessing Officer had rightly imposed the impugned penalty in assessee's case @ 10% of his undisclosed income of Rs.1 crore coming Rs.10,00,000 in question. We find no substance in Revenue's instant arguments. We first of all make it clear that section 271AAB of the Act applies in relation to the impugned penalty @ 10% of the undisclosed income as stood defined in Explanation (c) thereto. There is no material in the case file to indicate that the assessee's undisclosed income represents any money, bullion, jewellery or valuable article or any entry in the books or other documents therein. We make it clear that we are dealing with a penalty provision in tax statute which is to be strictly interpreted. We therefore are of the opinion that the CIT(A) has rightly deleted the impugned penalty as the assessee's search statement nowhere indicated the corresponding undisclosed income as per specific requirement in the Act. The CIT(A),s findings under challenge deleting penalty in question are accordingly confirmed."*

*We adopt above detailed reasoning mutatis mutandis to affirm the CIT(A)'s findings under challenge deleting the impugned penalty. The Revenue's appeal in ITA No.1605/Kol/2017 fails therefore."*

20. We may also refer to the decision of the coordinate Bench of the Tribunal at Vishakhapatnam in the case of ACIT Vs Marvel Associates (supra) wherein it was held as follows:

9. Penalty u/s 271AAB attracts on undisclosed income but not on admission made by the assessee u/s 132(4). The AO must establish that there is undisclosed income on the basis of incriminating material. In the instant case a loose sheet was found according to the A.O., it was incriminating material evidencing the undisclosed income. In the penalty order the AO observed that loose sheet shows the cost per square feet is Rs.3571/- per sft. and assessee stated to have submitted in sworn statement cost per sq. feet at Rs.2200/- to Rs.2300/- per sq. feet. However neither the AO nor the Ld.CIT(A) has verified the cost of construction with the books and projections found at the time of search. The counsel argued that it was mere projection but not the actuals. The write up heading also mentioned that summary of the projected profitability statement. There is no evidence to establish that projections reflected in the loose sheet is real. No other material was found during the course of search indicating the undisclosed income. 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 loose sheet of page No.107 of Annexure A/GS/MA/1 was found that does not indicate any suppression of income but it is only projection of profit statement. The amount of Rs.3571/- mentioned in the projections refers to cost and profit which is approximate sale price but not the cost as stated by the AO in the penalty order. The cost of construction in the projections projected at Rs.2177/- which is in synch with the statement given by the assessee. The AO was happy with the disclosure given by the assessee and did not verify the factual position with the books of accounts and projections and bring the evidence to unearth the undisclosed income. Neither the A.O. nor the investigation wing linked the cost of profit or cost of asset to the entries in the books of accounts or to the sales conducted by the assessee to the sale deeds. Therefore, we are unable to accept the contention of the revenue that the loose sheet found during the course of search indicates any undisclosed income or asset or inflation of expenditure. The Hon'ble ITAT Delhi Bench in the case of *Ajay Sharma v. Dy. CIT* [2013] 30 taxmann.com 109 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, hence we hold that there is no case for imposing penalty u/s 271AAB of the Act, accordingly, we set aside the order of the lower authorities and cancel the penalty u/s 271AAB of the Act.

10. In the result, the appeal filed by the revenue is dismissed.

21. Useful reference in this regard may also be made to the decision of the coordinate Bench of this Tribunal at Jaipur in the case of Shri Dinesh Kumar Agarwal vs. ACIT in ITA No. 855 & 856/JP/2017 dated 24/07/2018 wherein it was held as follows:

*“18. We have considered the rival submissions as well as relevant material on record. At the outset, we note that the surrender of Rs. 1,65,38,920/- was made by the assessee during the course of search and Seizure proceedings and offered to tax for the year under consideration. The details of the surrendered income pertains to the year under consideration are as under:-*

<i>On account of debtors (advances given)</i>	<i>Rs. 80,00,000/-</i>
<i>Unexplained cash found</i>	<i>Rs. 10,00,000/-</i>
<i>Accrued interest on debtors</i>	<i>Rs. 20,00,000/-</i>
<i>Excess stock found during search</i>	<i>Rs. 55,38,920/-</i>
<i>Total</i>	<i>Rs. 1,65,38,920/-</i>

*We find that out of these four items of surrenders only advances of Rs. 80,00,000/- is based on the incriminating material and all other items are not based on the seized material. The interest on advances/ debtors is only an estimated amount disclosed during the year but no record or any document was found during the search and seizure action. As regards the excess stock we find from the record as produced before us by the ld. DR that the valuation report is based on the market price of the gold Jewellery prevailing on the date of search as against the cost or realization wherever is less. Therefore, the computation of excess stock based on the market price of the stock cannot be considered as undisclosed income of the assessee as it is the subject matter of regular assessment and cannot be regarded as undisclosed income based on incriminating material. There is no such fact either recorded during the search and seizure proceeding or in the assessment order or in the penalty proceeding to show that there was discrepancy in the stock as recorded in the books of account and found at the time of search. In the absence of any discrepancy in the quantity of stock the valuation of the stock is purely a question of assessment and cannot be held as undisclosed income detected during the course of search and seizure proceeding. Therefore, to the extent of excess stock based on the valuation report the disclosure of the income by the assessee would not fall in the category of undisclosed income as per explanation to Section 271AAB of the Act. It is not the case of the Revenue that any stock of jewellery was found which is not recorded in the books of account but the value of stock is computed based on the valuation report of the departmental valuer. Once the difference in the value of stock is only due to market price as against the cost of the said stock, the same will not fall in the ambit of undisclosed income as defined under clause-(c) of explanation -1 of section 271AAB of the Act.*

*19. Similarly the accrued interest of Rs. 20,00,000/- is also only estimated and not based on any incriminating documents. This amount was estimated as there were advances as per the entries of the seized material. Even otherwise accrued interest is dependent on the outcome of the levy of penalty in respect of advances given by the assessee. We have considered the issue*

*of advances for the assessment year 2013-14 and accordingly in view of our finding on the said issue the penalty U/s 271AAB of the Act is not sustainable in respect of the surrender amount of Rs. 1,65,38,920/-.”*

22. We also rely on the decision of the coordinate Bench at Ranchi in the case of Rinku Agarwal in ITA No. 262/Ran/2017 dated 30.11.2018. In the instant case as well in the course of search operations conducted at the Mica Mod Group on 21.11.2012, the assessee had admitted additional income of Rs.5,00,000/- u/s 132(4) which she had offered to tax in her return of income. The AO levied penalty u/s 271AAB on such additional income offered to tax. The Tribunal noted that neither the Investigation Wing in the post search nor during the course of assessment proceedings, the Assessing Officer found any incriminating evidence of undisclosed income otherwise the declaration of the assessee for making the addition. Following the decision rendered in the case of ACIT Vs Kanwar Sain Gupta (supra), the Tribunal deleted the penalty levied u/s 271AAB of the Act.

23. Respectfully following the decisions in the foregoing and having regard to our finding that the income of Rs.69 crores voluntarily offered to tax was not in the nature of ‘undisclosed income’ defined in clause (c) of Explanation to Section 271AAB, we hold that the Ld. CIT(A) was justified in cancelling the penalty levied u/s 271AAB of the Act. Accordingly the order of the Ld. CIT(A) is upheld for the reasons discussed above and the Revenue’s appeal stands rejected.

24. In the result, the appeal of the Revenue is dismissed.

Order is pronounced in the open court on 01.02.2019

Sd/-  
(Dr. A.L. Saini)  
Accountant Member

Sd/-  
(Aby. T. Varkey)  
Judicial Member

Dated : 01February, 2019

Biswajit.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – DCIT, Central Circle 2(2), Aayakar Bhawan, Poorva, 110, Shantipally, Kolkata – 700 107.
2. Respondent – M/s. Rashmi Metaliks Ltd., 39, Shakespeare Sarani, Kolkata – 700 017.
3. The CIT(A), Kolkata.
4. CIT, Kolkata
5. DR, ITAT, Kolkata.

/True Copy,

By order,

Assistant Registrar/H.O.O/D.D.O.  
ITAT, Kolkata