आयकर अपीलीय अधीकरण, न्यायपीठ – "A" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA

Before **Shri J.Sudhakar Reddy, Accountant Member** and
Shri S.S.Godara, Judicial Member

ITA No.1604/Kol/2017 & **C.O. No.96/Kol/2017** (a/o ITA No. 1604/Kol/2017) Assessment Year: 2013-14

DCIT, Central Circle-2(2), Aayakar Bhawan, Poorva, -107, Shantipally, Kolkata-700107	बनाम / **V/s.**	AKA Logistics Pvt. Ltd., 3rd Floor, 8, Beck Bagan Row, Kolkata-700017 [**PAN No. AADCC 4844 N**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent/प्रतयाक्षेपक Co-objector

ITA No.1607/Kol/2017 & **C.O. No.97/Kol/2017** (a/o ITA No. 1607/Kol/2017) Assessment Year: 2013-14

DCIT, Central Circle-2(2), Aayakar Bhawan, Poorva, -107, Shantipally, Kolkata-700107	बनाम / **V/s.**	Ambey Mining Pvt. Ltd., 9th Floor, 8, A.J.C. Bose Road, Kolkata-700017 [**PAN No. AAFCA 2578 R**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent/प्रतयाक्षेपक Co-objector

ITA No.1610/Kol/2017 & **C.O. No.98/Kol/2017** (a/o ITA No. 1610/Kol/2017) Assessment Year: 2013-14

DCIT, Central Circle-2(2), Aayakar Bhawan, Poorva, -	बनाम /	M/s Calcutta Industrial Supply Corp. 3rd Floor, 4,

107, Shantipally, Kolkata-700107	**V/s.**	Rippon Street, Kolkata-16 [**PAN No. AACF 2065P**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent/प्रतयाक्षेपक Co-objector

आवेदक की ओर से/By Assessee	Shri A.K. Tibrewal, FCA
राजस्व की ओर से/By Revenue	Shri A.K. Kayak, CIT-DR
सुनवाई की तारीख/Date of Hearing	28-01-2019
घोषणा की तारीख/Date of Pronouncement	27-02-2019

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

The Revenue and all three assessees have filed their main appeals and corresponding Cross Objection(s) against the Commissioner of Income Tax (Appeals)-20, Kolkata's separate orders; all dated 22.03.2017, passed in case went in all cases No.350, 726 & 344/CIT(A)-20/CC-2(2)/2015-16 for assessment year 2013-14; involving penalty proceedings u/s271AAB of the Income Tax Act, 1961; in short 'the Act'.

2. We notice at the outset that Revenue's instant three appeal(s) suffer from 25 days' delay in filing. It has filed separate condonation petition therein attributing reasons thereof to compilation of necessary documents and procedural formalities at various departmental levels. The assessees are fair enough in not disputing the said pleadings during the course of hearing. We therefore condone the impugned identical delay of 25 days' in filing of these three Revenue's appeals to be neither intentional nor deliberate. These three appeals are now taken up for adjudication on merits.

3. Coming to merits, we find that the Assessing Officer levied the impugned penalt(ies) of ₹45 lac, ₹38.50 lac and ₹35.50 lac in case of all thee assessees cases @ 10% of additional income disclosures amounting to ₹4.5 corres, ₹4.02 crores and

₹3.55 crores; respectively. The CIT(A) has deleted first and third penalt(ies) in enterity and restricted second one to the tune of ₹17 lac in his lower appellate order. The Revenue seeks to revive the Assessing Officer's action in all of its three appeal(s) whereas the assessees' corresponding three Cross Objections support the CIT(A)'s order deleting the impugned penalt(ies) in first and third cases and further seeks to delete the remaining penalty of ₹17 lac in second one. Both the learned representatives are *ad idem* during the course of hearing that the instant ***lis*** comprising of these cases contain identical facts. We thus propose to dispose of all these cases vide its instant common order.

4. A combine perusal of the case file(s) reveals that the department had carried out the search in question in M/s BLA Group of cases on 20.12.2012. The assessees' authorized person(s) got recorded their search statement(s) u/s 132(4) of the Act admitting additional incomes of ₹4.5 crores, ₹4.02 crores and ₹3.55 crores; respectively. There is no dispute that all these three assessees duly included the said additional income in their respective returns filed post search. The Assessing Officer assessed the same without making any addition in consequential assessment framed on 06.06.2014. He further initiated the impugned sec. 271AAB penal proceedings in all three assessees' cases Quantum proceedings in all cases attained finality at this stage itself.

5. We now advert to impugned penalt(ies) proceedings. These three assessees pleaded before the Assessing Officer that they had declared their respective additional incomes *suo motu* and substantiated the manner of having derived the same from various business such as mining, civil construction, transportation and other activities followed by due payments of tax thereupon. They claimed to have complied with all requisites conditions on the premise that no penalty would be levied post the impugned search. We find from the Assessing Officer's identical penalty orders forming subject-matter of the instant ***lis*** that although he had accepted all other foregoing contentions on merits, he was of the view that assessees had made the impugned disclosures only because of the impugned search those on their own. He held that all the three assessees' additional incomes disclosures had arisen from

various documents / transactions / evidence found in the course of impugned search only. All this made the Assessing Officer to levy the impugned penalt(ies) of ₹40.50 lac, ₹40.20 lac and ₹35.50 lac; respectively.

6. These three assessees preferred their respective appeals. The CIT(A)'s separate orders under challenge have in first and third cases have deleted the impugned penalty(ies) in full whereas he has restricted the penalty sum of ₹40.20 lac in second assessee's case to the extent of ₹17 lac only. We deem it appropriate at this stage to treat Revenue's appeals and second assessee Ambey Mining Pvt. Ltd. Cross Objections i.e. ITA No.1607/Kol/2017 and C.O. No.97/Kol/2017 as the "**lead**" cases comprising CIT(A)'s following detailed discussion:-

> "3. I have considered the finding of the AO in the assessment order and the written submissions as well as oral submissions made by the AR during the appellate proceedings.
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> 4. Appeal on grounds no 1, 2 and 3 are against the imposition of penalty u/s 271AAB (1)(a). Brief facts Of the case are that
>
> a) Search and seizure proceedings were conducted on 20-12-2012 and thereafter at the residential as well as business premises of BLA Group. Panchanama was also drawn in the name of the assessee.
>
> b) During the course of search proceeding, while making the statement u/s 132(4) of the Act, an amount of Rs4,02,00,000/- was offered to tax in the hands of assessee as additional income in FY 2012-13. Break-up of disclosure of Rs.4,02,00,000/- consists of following-
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> | | |
> |---|---|
> | Cash | 17,00,000/- |
> | Others | 3,85,00,000/- |
> | TOTAL | **4,02,00,000/-** |
>
> c) In the previous year relevant to the assessment year 2013-14, the assessee filed its Return of Income u/s 139 of the Act on 30-09-2013 declaring total income at Rs.6,75,85,9901 - and thereafter return was revised on 18-11-2013 declaring total income at Rs.6,75,85,990/ -including the offered income of Rs.6,02,00,000/-.
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> d) The return was selected for scrutiny assessment. Compliance to notices u/s 143(2) and 142(1) were duly made. Assessment Order for AY 2013-14 was passed u/s 143(3) on 06-06-2014 at a total income of Rs.6,75,85,990/- i.e. on returned income.
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> e) Penalty proceedings was initiated separately on the disclosure amount of Rs.4,02,00,000/- u/s 271AAB of the Income Tax Act, 1961.

f) During the course of penalty proceeding, it had been stated that out of such offering of Rs.4,02,00,000/-, an amount of Rs.3,85,00,000/- was not backed by any evidence of undisclosed income or any undisclosed assets / items that had been found / inventorised by the Department. Hence, such suo moto offering of Rs.3,85,00,000/- does not come under the purview of "**undisclosed income**" as explained in Explanation (c) of Section 271AAB and hence the penalty provision cannot be invoked on such figure of Rs.3,85,00,000/-. Further, such suo moto offering of Rs.3,85,00,000/- has been made in order to buy peace, to avoid unnecessary long drawn litigations with the department and to demonstrate utmost cooperative attitude with the department.

g) However, the Assessing Officer did not pay any heed to such submission and went on to pass an order u/s 271AAB of the Act considering the offered amount of Rs.4,02,00,000/- as undisclosed income and imposed a penalty of Rs.40,20,000/-.

5. Because of the act of the AO of imposing penalty u/s 271AAB(1)(a) in this case, this appeal has been filed. In the penalty order the AO has brought it on record that the contention of the assessee that the aforesaid amount of Rs.3,85,00,000/- is not '**undisclosed income**' is contrary to the fact that the said additional income of Rs.3,85,00,000/- was offered for taxation during the course of search operation and was substantiated by the assessee as earned out of the business in which the assessee is engaged. By dint of assesses own submissions, the assessee was found to have accumulated an undisclosed income of Rs.3,85,00,000/- which was not recorded on or before the date of search in the books of account or other documents maintained in the normal course of business. By virtue of the very nature of disclosure by the assessee himself, that such unaccounted income was generated out of transactions in business it was involved in the additional income of Rs.3,85,00,000/- disclosed only during the course of search & seizure operation partakes the character of undisclosed income.

6. During the appellate proceedings the AR has made oral submission as well as filed a written submission on this issue which is as under:

Aggrieved by the said penalty order of the Assessing officer, we have filed an appeal before your good-self to consider the above matter in the principle of natural justice. We re-iterate that such offering of Rs.3,85,00,000/- was made suo moto and to buy peace and was not backed by any evidence of undisclosed income or any undisclosed assets / items that had been found / inventorised by the Department and as such no penalty u/s 271AAB should be imposed. The similar view has also been expressed by the Hon'ble High Court of Gujarat in the case of Girish Devchand Rajani [2013] 33 taxmann.com 174 (Gujarat) where it had been held that Where assessee to buy peace and to avoid protracted litigation filed revised return disclosing additional income, imposition of penalty under section 271(I)(c) upon assessee on plea that he had furnished inaccurate particulars of income was not justified.

Further, in the case of Punjab Tyres [1986] 162 ITR 517 (Madhya Pradesh), the Hon'ble High Court of Madhya Pradesh also 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.

We also rely on the judgement of the Supreme Court of India in the case of Dilip N. Shroff v. Jt. CIT (2007) 291 ITR 519 (SC) wherein it was 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.

In this regard, we would like to state that assessment has been completed based on the explanations given and documents produced during the course of assessment without making any further addition on the ground of disclosure. We had been a co-operative assessee during the course of assessment proceeding.

7. I have considered the findings given by the AO in the penalty order submissions made by the AR during the appellate proceeding. I find that the AO has taken the undisclosed income of the assessee found during the search operation u/s 132 (for which evidences, documents/papers, stock, cash etc were found) along with the amount declared suo moto by the assessee (for which no evidence, papers/ documents, stock, cash etc were found during the search operation) in order to buy peace of mind and avoid any further litigation. The assessee has brought on record the case law of Dilip N Shroff vs CIT (2007) 291 ITR 519 (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 Pubjab Tyres (Pubjab 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.

I find that during the search and seizure operation u/s 132 in this case evidences regarding concealment/undisclosed income in the form of cash seizure/papers/documents/stock etc were found and seized of the value of Rs.17,00,000/- only. Nothing incriminating/no evidences were found regarding Rs.3,85,00,000/- which was offered for taxation by the assessee suo moto 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 undisciosed income other than the statement of the assessee for making the addition of Rs.3,85,00,000/-.

> 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**.
>
> 8. 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.3,85,000/- was offered for taxation by the assessee suo moto in the statement recorded at the time of search. From the the ratio decided by the Hon'ble Supreme Court in the case of Sudarshan Silk & 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 lime of search, the action of the AO 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 & Saries (supra)]. Thus, respectfully following the ratio decided by the Hon'ble Supreme Court, the AO is directed to calculate and levy penalty u/s 271AAB(1)(a) on Rs.17,00,000/- only. Accordingly, assessee's appeal on grounds no 1, 2 and 3 are partly allowed."

7. We now come to Revenue's three appeals. Learned CIT-DR vehemently contends during the course of hearing that CIT(A) has erred in law and on facts in reversing the Assessing Officer's action imposing u/s 271AB penalt(ies) based on impugned search in all three cases. He submits that the purpose of above special provision is to penalize the assessees in whose cases the department carries out search action u/s 132 of the Act. Mr.Nayak submits that it is nowhere necessary for the Assessing Officer to establish a direct link between the incriminating material or money, bullion, jewellery or books of account so as to prove undisclosed income of the searched-assessee as stipulated u/s 271AAB Explanation (c) of the Act. His contention; if taken in plain terms, is that the impugned penal provision comes into play the moment the searched-assessee declares any additional income. The Revenue further pleads that impugned penal provision automatically applies in a search instance involving declaration of additional income as per hon'ble apex court [2018] 93 taxmann.com 406 (SC) Sandeep Chandak vs. PCIT containing the relevant head-note to this effect. Learned CIT-DR case therefore is that hon'ble apex court's decision settles the law and therefore, we ought to confirm the impugned penalt(ies) in all three cases.

8. These three assessees place a very strong reliance on the CIT(A)'s findings that the impugned penalt(ies) could only be levied if the undisclosed income in issue is

found to have been derived from the specified categories of assets i.e. money, bullion, jewellery, other valuable articles or things or books of account revealing alike material to this effect. Mr.Tibrewal submits that sec. 271AAB Explanation (c) defines "**undisclosed income**" of the searched-assessees on these lines only. He quotes tribunals' various co-ordinate benches decisions in ACIT vs. Kanwar Sain Gupta ITA No.538/Kol/2017 decided on 29.06.2018, DCIT vs. Liladhar Agarwala ITA No.1605/Kol/2017 & CO 99/Kol/2017 decided on 26.12.2018, PCIT vs. Smt Ritu Singal 92 taxmann.com 224 (Del) (2018) ACIT vs. Marvel Associates [2018] 92 taxmann.com 109 (Vizag ITAT) DCIT Vs. Subhas Chandra Agarwala & Sons (HUF) **ITA No.1470/Kol/2015** and many other similar decisions echoing the very principal. The assessee further pleaded that we are dealing with a penalty provision in the fiscal statute which can never be taken as automatic. Mr. Tibrewal's next argument seeks to distinguish hon'ble Apex Court's (supra) that their lordships have nowhere held imposition the impugned penalty to be automatic following the corresponding assessment(s). He therefore urges us to confirm the CIT(A)'s findings deleting the impugned penalt(ies) forming subject-matter all three Revenue's appeals.

9. We have given our thoughtful consideration to rival contentions. There is hardly any dispute between the parties about the basic facts *inter alia* that the department had conducted the impugned search in these three assessees' cases wherein they declared their respective additional incomes they filed their respective returns accordingly including said additional incomes therein. The Assessing Officer accepted the same in consequential assessments. The sole dispute between the parties herein is about operation of the impugned penal provision i.e. section 271AAB of the Act. The Revenue's case before us is that it automatic comes into play the moment the searched-assessee makes any disclosure of undisclosed income whereas the assessee pleads that this penal provision applies in case the search itself leads to some specified material indicating undisclosed income defined in Sec. 271AAB Explanation (c) of the Act. The Revenue admittedly raises its arguments as per hon'ble apex court's decision in *Sandeep Chandak* (supra) declining the taxpayer's Special Leave petition *in limine* challenging hon'ble Allahabad high court's decision reviving the penalty

therein. The Revenue's case appears to be carrying substance *ab initio* that as per hon'ble apex court's clinching observations whilst declining assessee's special leave petition that no ground was made out to interfere with the hon'ble high court's judgment under challenge. It does not stand on the correct side of law when we carefully study in all these legal developments. We find that the tribunal's co-ordinate bench's order in *Sandeep Chandak vs. ACIT* (2017) 185 TTJ 265 (Luc) had deleted sec. 271AAB penalty in issue primarily for the reasons that the Assessing Officer served only u/s. 271(1)(c) penalty notices, granted very short time to the taxpayer before levying the impugned penalty. It then observed that the Assessing Officer had not applied u/s 271AAB Explanations clause (a) to (c) as well in the given facts and circumstances. The Revenue preferred its appeal before hon'ble Allahabad high court finally culminating in judgment reported as (2018) 93 taxmann.405 (All) PCIT Vs. Sandeep Chadak. It raised three substantial question of law in its appeal as follows:-

> *"(A) Whether on the facts and circumstances of the case and in law, the Ld. ITAT has erred in not appreciating the facts that the notice was issued for imposition of penalty u/s. 271AAB and not for imposition of penalty u/s 271(a)(c) of the Act.?*
> *(B) Whether on the facts and circumstances of the case and in law, the Ld. ITAT has erred in not appreciating the facts that the specific charge have in a statement under sub section 4 of section 132 during the course of search and seizure operation admitted undisclosed income was mentioned in the notice?*
> *(c) Whether the benefit of Section 292BB was correctly denied to the AO/appellant by the ITIAT?"*

10. It is in this factual backdrop that hon'ble high court had held that the Assessing Officer had issued the relevant notice u/s 271(1)(c) r.w.s. 274 containing all particulars and section 292B of the Act would apply since the assessee had never objected correctness thereof before the Assessing Officer in corresponding proceedings and had in fact respond to the notice in writing with an undertaking that this was the notice issued by the Assessing Officer u/s 271AAB of the Act. In other words, the assessee had not contended that the impugned notice was issued u/s 271(1)(c) r.w.s. 274 in its reply and was clear that the notice was issued to levy penalty u/s 271AAB of the Act. It is thus clear that the CIT-DR's argument that the Revenue has already succeeded on the issue as to whether the impugned penalty is automatically flows than from the additional income declaration made during search;

does not find support from the hon'ble high court's discussion. We therefore go by various co-ordinate benches' decisions (supra) in these facts and circumstances to confirm the CIT(A)'s action deleting the impugned penalt(ies) to the extent indicated hereinabove forming part of subject-matter of adjudication of these three Revenue's appeals holding that sec. 271AAB comes into play in case of corresponding material only than automatic in case of a search. We wish to reiterate here in these facts that the tribunal's decisions (supra) have already held that Sec. 271AAB penalty applies in case of additional income defined under Explanation (c) of the Act. We therefore decline Revenue's three appeals. The assessee's cross objections No. 96 & 98/Kol/2017 supporting the CIT(A)'s order to this extent are rendered infructuous.

11. We now advert to second assessee's cross objection No.97/Kol/2017 challenging correctness of the sustained penalty component to the extent ₹17 lac (supra) based on incriminating material found / seized during search. Its first argument is that the relevant penalty notice nowhere indicated as to under which limb the Assessing Officer had initiated the impugned penalty proceedings is not sustainable. We find this first argument to be devoid of any merit since the Assessing Officer made it clear in assessment order dated 06.06.2014 that he had already initiated u/s 271AAB proceedings. Hon'ble Allhabad high court's decision (supra) involved such an issue wherein their lordships made it clear that these proceedings are automatic in case of search followed by Sec. 132(4) statement involving admission of undisclosed income. The assessee's first argument is rejected therefore.

12. Mr. Tibrewal thereafter files a written note raising yet another legal plea as follows:-

> *"4. Penalty under section 271AAB could be levied on "**Undisclosed Income**" of the "Specified Previous Year". The first clause (i) refers to income of the specified previous year represented by -*
>
> (i) any money, bullion, jewellery or other valuable article or thing, or
> (ii) any entry in the books of accounts or other documents or transactions
>
> *found in the course of search u/s 132 of the Act and was not recorded in the books of accounts or other documents or transactions maintained in the normal course relating to such previous year.*

The second clause (ii) refers to income of the specified previous year represented, either wholly or partly, by an entry in respect of an expenses recorded in the books of accounts 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.

*4.2 It is also submitted that in the first clause the undisclosed income is represented by an asset or an entry in the books of accounts or documents maintained for such previous year, whereas in the second clause the undisclosed income is represented by some false entry of expenses recorded in the books of accounts or documents of the Specified previous year. Thus in clause (i) and clause (ii) of Explanation (c) to section 271AAB two different words being "**previous year**" and "specified previous year" have been used. It is submitted that when different words or phrases are used at different places more particularly in the same section of the statute, it carries different interpretation and different meaning of the same. Different words or phrases used at different places in section 271AAB have been highlighted to explain the meaning of the two phrases used at two places.*

4.3 The Appellant refers to the judgement of Hon'ble Andhra Pradesh High Court in the case of Madhucon Projects Ltd. vs. CCE for Settlement Commission [2016] 72 taxmann.com 71 (AP), which provides at para 50 that two different expressions in a statute must be construed to carry different meanings.

*4.4 The relevance of the phrase "**in which search was conducted**" used in definition of "**specified previous year**" would be found from reading of clause (ii) of Explanation (c) below section 271AAB of the Act. There the words "**specified previous year**" has been used for the purposes of levy of penalty under section 271AAB of the Act. Thus if it is found that the assessee has made some claim of bogus expenditure in the books of accounts of the year in which search is conducted and/or in the books of accounts of the previous year for which the previous year has ended but the due date of furnishing the return of income has not expired and the assessee has not furnished the return of income, in those cases penalty could be levied in as much as the phrase "**specified previous year**" has been used in clause (ii) to Explanation (c) below section 271AAB of the Act.*

*4.5 On the other hand the words such previous year have been used in clause (i) of Explanation (c) to Section 271MB of the Act. The word "**previous year**" has been defined in section 3 of the Income Tax Act, 1961 as under:*

> "3. For the purposes of this Act, "**previous year**" means the financial year immediately preceding the assessment year:
> Provided that, in the case of a business or profession newly set up, or a source of income newly coming into existence, in the said financial year, the previous year shall be the period beginning with the date of setting up of the business or profession or, as the case may be, the date on which the source of income newly comes into existence and ending with the said financial year."

*Thus "**Previous Year**" and "specified previous year" carry different meanings for two different situations as stated herein above. The words "previous year" has been used in clause (i) of Explanation (b) of Section 271AAB of the Act to mean the previous year which has ended before the date of search for which the return of income has not*

> *been furnished by the assessee and the due date of furnishing the return of income has not been expired. If the Statute intended to levy penalty under section 271AAB of the Act in respect of money, bullion, jewellery or other valuable article or thing or any entry in the books of accounts or other document recorded in the books of accounts in respect of the previous year in which search was conducted then in clause (i) of Explanation (b) of section 271MB the words "**specified previous year**" would have been used which words have been used in clause (ii) of Explanation (b) of section 271AAB of the Act."*

13. We have given our thoughtful consideration to rival contentions. It transpires from the case file first of all that the assessee's authorized signatory, Shri Narayaan Prasad Agarwala had made the impugned additional income disclosure to the ADIT(Inv) that the said income was in the nature of cash to the tune of ₹17 lac in relation to financial year 2012-13 corresponding to the impugned assessment year 2013-14. We reiterate that search in issue is dated 20.12.2012. The assessee's case admittedly does not come under the former definition of "***the specified previous year***" since the due date for filing return u/s. 139(1) of the Act for preceding assessment year 2012-13 had elapsed on 30.09.2012.The above cash sum; coming under the connotation of "any money" u/s.271AAB Explanation (c)(i); stood assessed in the impugned assessment year 2013-14. We observe in these facts and circumstances that the assessee's above extracted argument seeking to take advantage of the "specified previous year" definition vis-a-vis undisclosed income declared does not carry any substance.

14. Lastly comes assessee's reliance of this tribunal co-ordinate bench's decision in Sanjay Dattatray Kakade vs. ACIT **ITA No.932/Pun/2013**. Learned co-ordinate bench dealt with a search dated 11.02.2009 concluded on 03.04.2009 wherein the Assessing Officer had invoked sec. 271AAA for assessment year 2009-10. The Learned co-ordinate bench held in these facts and circumstances that "specified previous year" could not be taken to be assessment year 2009-10 as follows:-

> "2. Briefly stated, the facts of the case are that a search and seizure action u/s.132 of the Act was taken upon the assessee on 11-02-2009. Return was filed on 30.09.2010 declaring total income of Rs.26,21,24,080/-. The AO assessed the total income at Rs.28,20,70,090/-. Penalty of Rs.57,70,620/- was imposed u/s.271 AAA on the undisclosed income of Rs.5,77,06,205/-. The Id. CIT(A) dismissed the appeal of the assessee and also made an enhancement of penalty on a further income of

Rs.2,07,46,005/-, on which the AO had chosen not to impose penalty under this section. Aggrieved thereby, the assessee is in appeal before the Tribunal.

3. We have heard the rival submissions and gone through the relevant material on record. The assessee raised certain grounds in the memorandum of appeal. Thereafter, certain additional grounds were filed and eventually modified additional grounds of appeal were filed, challenging the impugned order on certain legal issues as well as on merits.

4. We will first espouse the legal issues urged on behalf of the assessee in seriatim. The first legal issue taken up by the Id. AR is that the penalty u/s.271 AAA be deleted as the same can be imposed only in respect of 'specified previous year' and the assessment year 2009-10 under consideration, cannot be so construed. In his opinion, the assessment year 2008-09 was the correct 'specified previous year' in terms of Explanation (b)(i) to section 271AAA of the Act and further that sub-clause (ii) of the Explanation (b) was not attracted in the present case. This contention was strongly countered by the Id. DR.

5. It is seen from the assessment order that the search in this case was initiated on 11-02-2009. The Id. AR has invited our attention towards the last panchnama, a copy of which has been placed on page 19 onwards of the paper book, which is dated 03-04-2009. The dates of initiation and conclusion of search have not been denied on behalf of the Revenue. It is thus palpable that the search in this case commenced on 11-02-2009, which is prior to the closure of the financial year ending 31-03-2009 and completed on 03-04-2009, which is after the closure of the financial year ending 31-03-2009. The question which looms large before us is to determine '***specified previous year***' in terms of Expl. (b)(i) to section 271 AAA of the Act, which in the opinion of the Id. AR should be reckoned from the date of commencement of search, i.e. 11-02-2009, whereas the Revenue is contending that the same should be considered from 03-04-2009, being the date on which the search was concluded. In order to appreciate the rival contentions, it would be apt to note down the definitions contained in Explanation below sub-section (4) of section 271AAA, which read as under :-

"Explanation.-For the purposes of this section,-

(a) "**undisclosed income**" means-

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has-

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or

(B) otherwise not been disclosed to the Chief Commissioner or Commissioner before the date of 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;

(b) "**specified previous year**" means the previous year-

(i) which has ended before the date of search, but the date of filing 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 said date; or
(ii) in which search was conducted.]"
(some parts italicized by us)

6. Sub-section (1) of section 271 AAA provides that penalty shall be computed @ 10% of the undisclosed income of the '**specified previous year**' where search is initiated after 01-06-2007 but before 01-07-2012. Sub-section (3) of section 271 AAA provides that in case penalty is imposed under sub-section (1), then the provisions of section 271(1)(c) shall not apply in respect of such undisclosed income. When we consider the provisions of section 271(1)(c) in juxtaposition to section 271AAA, it is manifested that in case of a search, penalty is imposed u/s.271AAA on the undisclosed income of the '**specified previous year**' and penalty u/s.271(1)(c) is imposed with reference to other years covered under search assessments. Search in the extant case was conducted in the year 2009, which undoubtedly falls within the period stipulated in sub-section (1) of section 271 AAA. In such a scenario, penalty is liable to be imposed on undisclosed income of the 'specified previous year' u/s 271 AAA alone.
The AO has treated assessment year 2009-10 as the 'specified previous year' and imposed the instant penalty.

7. Now the question arises about the determination of the 'specified previous year' as per sub-clause (i) of the Explanation (b) to section 271AAA, which provides that a 'specified previous year' means a 'previous year' which has ended before the date of search, but the date of filing the return of income u/s.139(l) for such year has not expired before the date of search and the assessee has not furnished his return of income for that previous year before the said date. The controversy in this regard is to find out the meaning of the terms '**date of search** '. Whereas the case of the assessee is that the expression '**date of search**' as employed in Expl. (b) (i) means the date of initiation or commencement of search, the Revenue has canvassed a view that it refers to the date of conclusion or completion of search. If we consider the date of initiation as the date of search, which in the instant case is 11-02-2009, then the '**specified previous year**' would be the previous year which ended on 31-03-2008 and the relevant assessment year would be 2008-09 and if we go with the Revenue and take the date of conclusion of search as the date of search, which is 3.4.2009, then the '**specified previous year**" would be the previous year which ended on 31-03-2009 and the relevant assessment year would be 2009-10.
8. Normally, there are three stages in case of a search. First is the initiation of process of search; second is the initiation of search; and third is conclusion of search. Section 132(1) of the Act provides that where Principal Director General etc., in consequence of the information in his possession, has reason to believe the existence of one of the three conditions, such as, any person is in possession money, bullion, jewellery or other valuable article of thing etc. and such money, bullion, jewellery etc., represents either wholly or partly income which has not been or would not be disclosed, then he may authorize any Additional Director etc., being the authorized officer, to enter and search any building, place, vessel etc., where he has reason to suspect that such undisclosed money, bullion, jewellery or other valuable article or things are kept. This is the stage of authorization of search by the Principal Director General etc., which is

the first stage in our discussion, being, the initiation of process of search. Pursuant to such first stage, that is, authorization of search action by the Principal Director General etc., the authorized officer physically enters the building etc. and carries out the actual search. This is the second stage in our discussion, which is initiation of search. When the entire search is concluded by the authorized officer and a final panchnama is drawn, then we enter the third stage, that is, the search is concluded.

9. The legislature has used the word '**search**' preceded by the words '**initiation of**' or '**conclusion of'** at different places to clearly convey that it is referring to the date of initiation of search or the conclusion of search, as the case may be. For example, section 153A dealing with assessment in case of search or requisition specifically uses the expression 'initiation of search' in second proviso to sub-section (1). Similarly, section 153C dealing with the assessment of income of any other person uses the expression '**initiation of search**' in first proviso to sub-section (1). On the contrary, section 153B(2) provides that the authorization shall be deemed to have been executed in the case of search, on the 'conclusion of search' as recorded in the last panchnama. Section 158BE setting out time limit for completion of block assessment also provides under sub-section (2) that the authorization shall be deemed to have been executed in the case of search on the '**conclusion of search**'. Thus, it is overt that the Parliament has recognized the expression 'initiation of search' as distinct from '**conclusion of search**' and used such expressions at the appropriate places as deemed necessary.

10. Reverting to the Explanation to clause (b)(i) to section 271AAA, we find that the legislature has simply used the expression '**date of search**' and the same is not qualified by the words 'initiation of' or '**conclusion of**'. The 'specified previous year' in the extant case varies with pre-fixing of the words '**initiation of**' or '**conclusion of**' to the word '**search**' as used in the provision. the Whereas the assessee is battling for pre-fixing the words 'initiation of' before the word '**search**' in the provision, the Revenue is strongly pitching for using the words '**conclusion of**'. In the absence of any express usage of the appropriate pre-fix to the word 'search' in the language of the Explanation (b)(i) to section 271AAA of the Act, we need to discover the same on a harmonious reading of the provision in entirety. When so understood and on taking a holistic view of the mater, it turns out that the legislature intended to mean the 'date of search' in sub-clause (i) of clause (b) of the

Explanation to section 271AAA as the '**date of initiation of search**' . We fortify our view by simultaneously reading clauses (a) and (b) of the Explanation to section 271AAA defining '**undisclosed income**' and '**specified previous year**'. Firstly, it is pertinent to note that similar expression, namely, '**before the date of search**' has been used in both the clauses, viz., (a) and (b)(i) of the Explanation. We have set out supra the definition of '**undisclosed income'** in the Explanation (a) in two sub-clauses (i) and (ii), dealing with broader categories of any income represented by unexplained assets etc. and any income represented by false expenses. We are restricting ourselves to sub-clause (i), which defines 'undisclosed income' to mean any income represented by any money, bullion, jewellery etc. found in the course of a search which has: (A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or (B) otherwise not been disclosed to the Chief Commissioner or Commissioner before the

date of search'. The expression 'before the date of search, in Explanation (b)(i) has also been used without any pre-fix of 'initiation of' or 'conclusion of' .

On an analysis of the expression '**before the date of search**' in the definition of '**undisclosed income**', it amply transpires that it refers to the date of '**initiation of the search**'. Our reasoning is that part (A) in clause (i) of the Explanation (a) refers to the undisclosed income etc. which has not been recorded in the books of account before the date of search. It necessarily has to be an income which is not found to be recorded at the time of initiation of search and it cannot be an income which is not found to be recorded at the time of conclusion of search. Once an item of income not recorded is found at the time of initiation of search, it will remain undisclosed even if the assessee during the course of search records it in its books of account. If we interpret it as referring to the date of conclusion of search, then anyone can easily go scot free by recording in his books of account the undisclosed income found during the course of search, before the conclusion, thereby making it as disclosed income, which proposition is patently incorrect. Once an item of income is found, which is not recorded in the books of account up to the date of initiation of search, the same has to be obviously characterized as undisclosed income. Similar position follows by reading part (B) in clause (i) of the Explanation (a), which also refers to the undisclosed item of income which has otherwise been not disclosed to the Principal Cf. CIT etc. '**before the date of search**'. Here again, if we construe the '**date of search**' as the date of conclusion of search, it would mean that any undisclosed income found during the course of search would become a disclosed income, if the assessee discloses it to the competent authority at any time during the continuation of search. Thus, if any income by way of certain money, bullion, jewellery etc. is found during the course of search which has not been recorded in the books of account, the assessee cannot escape the clutches of section 271AAA simply by recording or disclosing the same after the initiation but before the conclusion of search. Obviously, this cannot be the intention of the legislature to construe the expression '**date of search**' given in clause (a) of the Explanation to mean the '**date of conclusion of search**'. It has to be the 'date of initiation of search' so that any income represented by any money, bullion, jewellery etc. found in the course of search but not recorded in the books is considered as '**undisclosed income**'. Thus it becomes crystal clear that the expression '**before the date of search**' used in clause (a) of the Explanation refers to the '**date of search**' as the date of '**initiation of search**' and not the date of '**conclusion of search**'. As the same expression of '**before the date of search**' has been used in the definition of '**specified previous year**', we hold that on a tuneful reading of clauses (a) and (b) of the Explanation to section 271AAA, the '**date of search**' in the Explanation (b) is also the '**date of initiation of search** and not the '**date of initiation of search**' as the '**date of search**', the '**specified previous year**' in terms of sub-clause (i) of clause (b) of Explanation to section 271AAA becomes the year ending 31-03-2008, being, the previous year which ended before the date of search on 11-02-2009. Going by this interpretation of the provision, the A.Y. 2009-10 cannot be considered as the 'specified previous year'. The contention of the assessee is, ergo, upheld."

15. We have given our thoughtful consideration to assessee's above last argument. It emerges from the learned co-ordinate bench's decision that the said assessee had made out a case of non-applicability of assessment year 2009-10 in a search

conducted on 11.02.2009 whereas the instant taxpayer's case makes it clear that "specified previous year" in its case u/s. 271AAB Explanation (b)(ii) squarely applies in given facts and circumstances of the case. We wish to repeat here at the cost of brevity that impugned search is dated 20.12.2012. The assessee's last date of filing return u/s 139(1) was upto on 30.09.2012. The 'specified previous year" therefore has been rightly taken in the instant case to be financial year 2012-13 under the above statutory provision. We conclude in these facts that CIT(A) has rightly sustained the impugned penalty of ₹17 lac *qua* the impugned cash sum declared during the course of search as undisclosed income under Explanation (c) of the Act. The second assessee's instant Cross Objection 97/Kol/2017 challenging correctness of CIT(A)'s action sustaining penalty of ₹17 lac fails therefore.

16. These three Revenue's appeals ITA No.1604, 1607 & 1610/Kol/2017 are dismissed. The first and last assessee's two Cross Objection Nos. 96 & 98/Kol/2017 are dismissed as rendered infructuous and second assessee's Cross Objection No.97/Kol/2017 is dismissed. Ordered accordingly.

Order pronounced in open court on 27/02/2019

Sd/-	Sd/-
(लेखा सदस्य)	(न्यायिक सदस्य)
(J.Sudhakar Reddy)	(S.S.Godara)
Accountant Member	Judicial Member

*Dkp-Sr.PS

दिनांकः- 27/02/2019 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-AKA Logistics Pvt. Ltd. 3rd Floor, 8, Beck Bagan Row, Kol-17/ Ambey Mining Pvt. Ltd. 9th Fl, 8 AJC Bose Road, Kolkata-17/ M/s Calcutta Industrial Supply Corp. 3rd Fl, 4, Rippon St. Kol-16
2. प्रत्यर्थी/Respondent-DCIT, C.C.-2(2) Aayakar Bhawan, Poorva, 110, Shantipally Kolkata-107
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अ□ल / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अ□लीय अधिकरण कोलकाता/DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

Sd/-

उ□/सहायक □जक़ार

आयकर अ□लीय अधिकरण, **कोलकाता** ।