

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCH 'A' JAIPUR

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

आयकर अपील सं./ITA No. 1379/JP/2018  
निर्धारण वर्ष/Assessment Year : 2016-17

Smt. Aparna Agrawal, 1-TA-12, Vigyan Nagar, Kota.	बनाम Vs.	The Deputy Commissioner of Income-tax, Central Circle, Room No. 212, 2 <sup>nd</sup> Floor, C.R. Building, Rawat Bhata Road, Kota.
स्थायी लेखा सं./जीआईआर सं./PAN No. AAVPA 5425 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 1439/JP/2018  
निर्धारण वर्ष/Assessment Year : 2016-17

The Deputy Commissioner of Income- tax, Central Circle, Kota	बनाम Vs.	Smt. Aparna Agrawal, 1-TA-12, Vigyan Nagar, Kota.
स्थायी लेखा सं./जीआईआर सं./PAN No. AAVPA 5425 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Vijay Goyal (CA) &  
Shri Gulshan Agarwal (CA)

राजस्व की ओर से / Revenue by: Shri Varinder Mehta (CIT-DR)

सुनवाई की तारीख / Date of Hearing : 28/02/2019.  
घोषणा की तारीख / Date of Pronouncement : 25/03/2019.

आदेश / ORDER

PER BENCH :

These two cross appeals are directed against the order dated 5<sup>th</sup> October, 2018 of Id. CIT (A)-2, Udaipur arising from the penalty order passed under section 271AAB of the IT Act for the assessment year 2016-17. The assessee is an individual and belongs to M/s. Kota Dall Mill Group. The assessee filed her return of income under section 139(1) of the IT Act on 22.07.2016 declaring total income at Rs. 5,72,65,200/- which includes surrendered income of Rs. 3,85,30,241/- on

account of Long Term Capital Gain and Rs 82,50,000/- on account of cash found during the course of search. The assessment was completed under section 143(3) read with section 153B(1)(b) of the IT Act on 27.12.2017 at the total income of Rs. 5,73,90,530/- in which addition of Rs 82,655 was made on account of interest and Rs 42,677 on account of undisclosed turnover. The AO then initiated the proceedings for levy of penalty under section 271AAB of the IT Act by issuing a show cause notice dated 27.12.2017. The AO while passing the penalty order dated 27th June, 2018 has levied the penalty under section 271AAB(1) of the IT Act @ 30% of the undisclosed income of Rs. 4,68,22,918/- which was admitted during the search. The assessee challenged the action of the AO before the Id. CIT (A). The Id. CIT (A) has reduced the levy of penalty under section 271AAB from 30% to 10%. Hence both the assessee as well as the Revenue has challenged the impugned order of the Id. CIT (A) by filing these cross appeals. The grounds raised by the assessee as well as by the Revenue in the cross appeals are as under:-

**ITA No.1379/JP/2018 (Assessee's Appeal) :**

*"1. On the facts and in the circumstances of the case and in law the Id. CIT (A) erred in not holding the penalty order as wrong, bad in law, invalid and void-ab-initio as the Id. AO initiated the penalty u/s 271AAB of Income Tax Act, 1961 without specifying the clause of section 271AAB of the Act in the penalty notice under which the penalty was initiated i.e. whether it is for clause (a) or clause (b) or clause (c) of section 271AAB(1) because the conditions for imposing the penalty under each such clauses are separate.*

*2. On the facts and in the circumstances of the case and in law the Id. CIT (A) erred in applying the provisions of section 271AAB(1)(a) as against levy of penalty u/s 271AAB(1)(c) of I. Tax Act by Id AO without issuing notice as required u/s 251(2) of I. Tax Act.*

*3. On the facts and in the circumstances of the case and in law the Id. CIT (A) erred in confirming the penalty of Rs. 46,82,292/- u/s 271AAB(1)(a) of the Act out of penalty of Rs. 1,40,46,875/- imposed by the AO u/s 271AAB(1)(c) of the Act more so when :-*

*a) the long term capital gain of shares offered by appellant for taxation is not an undisclosed income within the meaning of section 271AAB of the Act, therefore no penalty under this section can be imposed thereon.*

- b) the penalty was levied by drawing the inference only from the statement recorded u/s 132(4) of the Act whereas there is no incriminating material or evidence was found during search to prove that the assessee was having undisclosed income.*
- c) documents and evidences were filed to prove the genuineness of exempted LTCG which were remained uncontroverted.*
- d) there is no finding/reason/conclusion in the penalty order regarding imposing the penalty on income of Rs. 82,50,000/- declared in Income Tax Return.*
4. *On the facts and in the circumstances of the case and in law the Id. CIT (A) erred in holding that the penalty u/s 271AAB of the Act is mandatory.*
5. *On the facts and in the circumstances of the case and in law the Id. CIT (A) erred in not giving the finding on the allegation of AO that the appellant find in the position of mens rea and intention was of wrong doing that constitutes part of a crime.*
6. *The appellant prays for leave to add, to amend, to delete or modify the all or any grounds of appeal on or before the hearing of appeal."*

**ITA No.1439/JP/2018 (Departmental Appeal) :**

*"Whether on the facts and circumstances of the case and in law, the CIT (A) was right in reducing the penalty of Rs. 1,40,46,875/- levied by the AO @ 30% of the undisclosed income under clause 1(c) of section 271AAB of the Income Tax Act to Rs. 46,82,291/- under clause 1(a) of that section despite the fact that manner of earning of undisclosed income was not disclosed by the assessee."*

2. During the course of hearing, the Id. A/R of the assessee has submitted that the transaction of purchase and sale of shares which has resulted in Long Term Capital Gains are duly recorded in the books of account of the assessee. Though the LTCG arising on sale of shares of listed companies is exempt under section 10(38) of the IT Act, however, during the course of search and seizure action on 2<sup>nd</sup> July, 2015 the assessee in the statement recorded under section 132(4) has surrendered the LTCG to tax. The Id. A/R has further contended that the shares purchased in the financial year 2012-13 were duly shown in the Balance Sheet as on 31<sup>st</sup> March 2015 and the AO has not disturbed the transaction of purchase of shares. The purchase consideration as well as sale consideration has been paid and received respectively

through banking channel. The fact of purchase of shares as well as sale of shares and payment and receipt of consideration are independently verifiable from the Demat Account, bank account statement as well as the record of the Stock Exchange. The Id. A/R has further contended that the assessee produced all the supporting documentary evidences of purchase and sale of these shares through Stock Exchange as the transactions of purchase and sale of shares are of listed companies through registered brokers. The shares were duly reflected in the Demat account of the assessee and the sale of these shares were also from the Demat account of the assessee. Therefore, when the transactions of purchase and sales are through Stock Exchange and payment of purchase consideration as well as receipt of sale consideration is through banking channel and duly recorded in the books of accounts, then the transactions recorded in the separate slips will not change the character of the transaction and the income from disclosed to undisclosed. The Id. A/R has pointed out that the assessee submitted all the documents and records pertaining to purchase and sale of equity shares of listed companies through recognized Stock Exchange. The documents also include Contract Notes showing payment of STT, bills, depository statement, registered stock brokers ledger account and bank statement evidencing the payment of purchase consideration as well as the receipt of the sale consideration through proper banking channel. All these documents duly substantiated the genuineness of the LTCG earned during the year under consideration and the documents produced by the assessee were not either detected or controverted by the AO in the course of assessment proceedings. Further, during the course of search and seizure operation, no incriminating material, evidence or document whatsoever was found but only the calculation of LTCG recorded in the separate slips cannot be said to be incriminating material when all these transactions are duly recorded in the books of account. The Id. A/R has further submitted that the levy of penalty under section 271AAB(1) of the Act is not automatic but the AO has to take a decision by considering all the conditions to be satisfied as provided under the said section. Since the disclosure and surrender of the amount does not fall in the definition of undisclosed income, therefore, the penalty under section 271AAB is not leviable in

the case of the assessee merely because the assessee has declared and surrendered some income to tax. In support of his contention, he has relied upon the decision of the Coordinate Bench of this Tribunal dated 24<sup>th</sup> July, 2018 in case of Shri Dinesh Kumar Agarwal vs. ACIT in ITA No. 855 & 856/JP/2017 as well as decision dated 13.06.2018 in case of Shri Ravi Mathur vs. DCIT in ITA No. 969/JP/2017 and submitted that the Tribunal has held that the penalty under section 271AAB is not automatic but the AO has to issue a show cause notice and give a proper opportunity of hearing to the assessee and, thereafter take a decision to impose the penalty. It is statutory requirement that the explanation of the assessee for not fulfilling the conditions as prescribed under section 271AAB of the IT Act is required to be considered by the AO while passing the penalty order. The penalty under section 271AAB is not consequential to the assessment or surrender of income during the course of search but the AO has to first initiate proceedings by issuing a show cause notice and after considering the explanation and reply of the assessee has to take a decision. The Id. A/R has contended that it is settled law that penalty should not be imposed unless the case falls under the four corners of law mandating the penalty. The Id. A/R has referred to the definition of undisclosed income as provided in the Explanation to section 271AAB and submitted that the mere surrender of income would not automatically become undisclosed income but the AO has to take a decision as per the definition given in the Explanation to section 271AAB. In the case of the assessee, when the surrender is not falling under the category of undisclosed income as prescribed under section 271AAB as the assessee has already recorded these transactions in the books of account and also furnished the supporting documents to prove the genuineness of the transaction of purchase and sale of the shares of listed companies on the Stock Exchange through registered brokers, therefore, while passing the penalty order the AO has to decide whether the surrender made by the assessee is covered under the definition of undisclosed income for the purpose of section 271AAB. The AO has imposed the penalty based on the statement recorded during the search whereas the income surrendered by the assessee is not covered under the definition of undisclosed income provided under section 271AAB of the Act. The Id. A/R has asserted that the revenue

authorities have exaggerated undue pressure and obtained surrender from the assessee and this fact is manifest from all the supporting documents produced by the assessee as well as the transactions were recorded in the books of account and the shares held by the assessee were reflected in the Balance Sheet as on 31<sup>st</sup> March, 2015. Thus the Id. A/R has submitted that the mere statement recorded under section 132(4) does not by itself constitute incriminating material as held by the Hon'ble Delhi High Court in case of CIT vs. Harjeev Aggarwal, 290 CTR 263 (Delhi) as well as in case of Pr. CIT vs. Best Infrastructure (India) Pvt. Ltd., 397 ITR 82 (Delhi). The Id. A/R has also referred to a series of decisions on the point that the penalty under section 271AAB cannot be imposed merely on the surrender made under section 132(4) in the absence of any incriminating material found during the search. He has referred to the various documents produced by the assessee before the AO and submitted that the AO has not pointed out any defect or given the finding that the documents produced by the assessee are not genuine, then treating the surrender made by the assessee on account of LTCG as undisclosed income and levying the penalty under section 271AAB is not sustainable in law.

3. On the other hand, the Id. D/R has submitted that it was a case of bogus claim of LTCG exempt under section 10(38) of the IT Act. However, during the course of search and seizure action, it was found that the claim was bogus and consequently the assessee declared the income and surrendered to tax. Therefore, bogus claim was detected only during the course of search and seizure action which was admitted by the assessee in the statement recorded under section 132(4). The disclosure of undisclosed income is in reference to the seized material which was found during the course of search. Once the assessee has surrendered the undisclosed income based on the incriminating material found and seized during the search, then the said income was rightly treated by the AO as undisclosed income in terms of provisions of section 271AAB of the Act. Further, the assessee has not substantiated the manner in which the undisclosed income was derived during the statement under section 132(4) or during the assessment or penalty proceedings. Therefore, the penalty @ 30% is leviable in the case of the assessee when the

assessee failed to satisfy the condition (a)(ii) of section 271AAB(1) of the IT Act. The Id. CIT (A) has committed an error while restricting the penalty to 10% from 30% of the surrendered income levied by the AO. He has relied upon the penalty order passed under section 271AAB of the IT Act.

4. We have considered the rival submissions as well as the relevant material on record. The AO has levied the penalty under section 271AAB of the Act in respect of the income surrendered by the assessee on account of LTCG from purchase and sale of equity shares. The question arises whether the surrender made by the assessee in the statement recorded under section 132(4) will be regarded as undisclosed income without testing the same with the definition as provided under clause (c) of Explanation to section 271AAB of the Act. There is no dispute that in the statement recorded under section 132(4), the assessee has disclosed the income under consideration as undisclosed income on account of LTCG. However, for the purpose of levying the penalty under section 271AAB, the primary condition is that the assessee shall pay the penalty equivalent to 10%, 20% or 30% of undisclosed income of specified previous year depending upon the satisfaction of the condition as provided under section 271AAB. The term "undisclosed income" has been defined in the Explanation to section 271AAB and, therefore, the penalty under the said provision has to be levied only when the income surrendered by the assessee falls in the ambit of undisclosed income as defined under this section. The mere disclosure of income in the statement recorded under section 132(4) would not ipso facto be regarded as undisclosed income unless and until it is tested as per the definition provided in the Explanation to section 271AAB of the Act. In the case in hand, there is no dispute that the assessee has duly recorded the transaction of purchase and sale of equity shares of the listed companies in the books of account which has yielded the capital gain in question of Rs. 3,85,30,241/-. The assessee has also shown these shares in the Balance Sheet as on 31<sup>st</sup> March, 2015 and the AO has not doubted or disturbed the holding of shares by the assessee on the date of Balance Sheet ended on 31<sup>st</sup> March, 2015. Once the transactions are duly recorded in the books of account, then the documents in the shape of slips

containing the details of LTCG found during the search would not amount to incriminating material disclosing any undisclosed income. The definition of undisclosed income as per clause (c) of Explanation to section 271AAB reads as under :-

“ *“undisclosed income” means—*

(c)

(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 <sup>54</sup>[Principal Chief Commissioner or] Chief Commissioner or <sup>54</sup>[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.] ”*

The levy of penalty under section 271AAB does not depend on the addition made during the assessment proceedings but the conditions provided under section 271AAB are precedent for levy of penalty. The assessment order is relevant only for the purpose of limitation provided under section 275 of the IT Act whereas the penalty under section 271AAB has to be imposed only when the income disclosed by the assessee falls in the ambit of undisclosed income as defined under section 271AAB of the Act. The definition of undisclosed income contemplates various forms and the primary condition is that the income of the specified previous year represented 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 during the course of search which has 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. In the case in hand, since the surrender was made in respect of the LTCG recorded in the seized material, therefore, it is based on the entries in the other documents found during the course of search. The income in the shape of entries in other documents found during the course of search would be considered as undisclosed income if the said income has not been recorded in the books of account on or before the date of search. In the case in hand, it is undisputed fact that all the transactions of purchase and sale and LTCG arising from the sale of equity shares of the listed companies are duly recorded in the books of account. Therefore, it is not the case of any income of the specified year representing the entry in the other documents which has not been recorded in the books of account on the date of search. Therefore, the primary condition of undisclosed income that the income represented by the entry in the other record is not recorded in the books of account on the date of search is not satisfied. The definition of "undisclosed income" is subjected to two conditions that the said income has 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. The second condition is not relevant for our purpose since these entries are undisputedly duly recorded in the books of account of the assessee. We further note that the seized material does not reveal the nature of transaction being genuine or bogus but the entry in the seized material is only the computation of long term capital gain on sale of shares. Therefore, the documents which were found and seized during the course of search and seizure action contains the details of LTCG would not be regarded as incriminating material disclosing any income not recorded in the books of account. Hence the primary condition for treating such income as undisclosed income in terms of section 271AAB is not satisfied. Apart from the fact that these transactions were duly recorded in the books of account, the assessee has also produced relevant documents, the details of which are as under :-

(A) IN RELATION TO SHARES PURCHASE :
Summary of shares purchased during the FY 2012-13 (page no. 87 of paper book)
Copy of share allotment Advice in support of share purchased (page no. 88 of paper book).
Copy of relevant page of bank statement showing the payment made against purchases of shares (page no. 89 of paper book)
Copy of Corporate Action of the Company informed to Bombay Stock Exchange (Effect of Stock Split)(page no. 90 of paper book)
Acknowledgement of ITR filed on 07.10.2013 u/s 139(1) of Income Tax Act, 1961 along with computation sheet of total Income of the A.Y. 2013-14 (page nos. 91-93 of paper book).
Acknowledgement of ITR filed on 02.02.2016 u/s 153A of Income Tax Act, 1961 along with computation sheet of total Income of the A.Y. 2013-14. (page nos. 94-97 of paper book)
Copy of Balance Sheet and Capital Account of Assessment Year 2013-14 (page no. 98 of paper book)
Copy of Assessment Order dated 22.12.2017 u/s 143(3) r.w.s. 153A passed by Deputy Commissioner of Income Tax, Central Circle Kota (Raj.) for the Assessment Year 2013-14 (page nos. 99-105 of paper book)
Copy of ledger A/c of following shares brokers from the books of account of assessee depicting the details of equity shares purchased by the assessee are enclosed : (page no. 102 -105 of paper book) <ul style="list-style-type: none"> <li>• Religare Securities Limited</li> <li>• Hem Securities Limited</li> <li>• Suresh Rathi Securities Private Limited.</li> </ul>
(B) IN RELATION TO SHARES SALES:
Summary of shares sale during the year under consideration (page no. 110 of paper book)
Copy of sales bills/contract notes of shares (page nos. 111-158 of paper book)
Copy of ledger Account of assessee in books of accounts of share brokers through whom the shares were sold (page nos. 159 of paper book)
Copy of relevant page of bank statement showing the entry of payment received against sales of shares (page nos. 160-169 of paper book)
(C) DEMAT ACCOUNT STATEMENT OF FOLLOWING SHARES BROKERS IN RESPECT OF SALES & PURCHASE OF SHARES (Page nos. 170-172A of paper book) : <ul style="list-style-type: none"> <li>• Arihant Capital Markets Limited</li> <li>• Suresh Rathi Securities Private Limited</li> <li>• Hem Securities Limited</li> </ul>

Thus, the purchase bill for the purchase of shares along with ledger account in the books of the share broker clearly reveal the date of purchase and also payment of purchase consideration through banking channel as reflected in the bank account statement of the assessee. All the above mentioned documents are independently verifiable evidence without having any control or influence of the assessee except the books of account of the assessee which were not disputed by the AO. Further, the revenue has not disputed the correctness of the documentary evidence filed by the assessee but the AO has proceeded on the assumption that the income disclosed by the assessee under section 132(4) is undisclosed income for the purpose of section 271AAB of the Act. The AO while passing the assessment order under section 153A for the assessment year 2015-16 has not disturbed the holding of the shares shown in the Balance Sheet as on 31<sup>st</sup> March, 2014. These transactions were also carried out from the capital account of the assessee which was also part of the record of the assessment year 2014-15. But the AO has accepted all these details without any adverse finding or comments while passing the assessment order under section 153A of the Act. The assessee has also produced sale bills/contract notes regarding sale of shares, copy of ledger account of the assessee in the books of share broker in respect of sale transactions, bank statement showing receipt of sale consideration and Demat account having the entries of credit of shares at the time of purchase and debit of shares at the time of sale. The equity shares in question are of listed companies in the Stock Exchange and were purchased and sold by the assessee through Stock Exchange. Therefore, the transactions of purchase and sale are verifiable from the independent source including the record of the Stock Exchange without having any influence of the assessee. Hence the document produced by the assessee is the evidence which cannot be manipulated and also can be verified from the independent sources. Once the assessee has established the fact that all these transactions are recorded in the books of account and also produced, the relevant documentary evidence to establish the genuineness of the purchase and sale of shares through Stock Exchange, then the mere disclosure and surrender of income would not ipso facto lead to the conclusion that the amount surrendered by the assessee is undisclosed

income in terms of section 271AAB of the Act. For bringing the income surrendered by the assessee in the fold of undisclosed income as per the definition of "undisclosed income" in Explanation to section 271AAB, the said income must represent either any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents but has not been recorded in the books of account as on the date of search. Therefore, the primary condition for treating an income as undisclosed income is that it should represent inter alia any entry in the books of account or other documents found during the search but the said income is not recorded in the books of account. In the case in hand, the document found during the search is not an incriminating material when the entry and the income were duly recorded in the books of account. Therefore, the statement of the assessee recorded under section 132(4) would not constitute incriminating material. Therefore, the said income disclosed by the assessee cannot be considered as undisclosed income in terms of section 271AAB of the Act. The Tribunal has taken a consistent view that the penalty under section 271AAB is not automatic but the AO has to take a decision as per the provisions of section 271AAB and particularly in the light of the definition of the undisclosed income as prescribed in the Explanation to section 271AAB of the Act. We further note that this Tribunal has considered this issue in case of Shri Raja Ram Maheshwari vs. DCIT vide order dated 10<sup>th</sup> January, 2019 in ITA No. 992/JP/2017 in para 12 to 14 as under :-

*"12. Now, coming to another contention of the Id AR where he has challenged the findings of the Id. CIT(A) that penalty U/s 271AAB is mandatory in nature and there is no discretion with the Income tax authorities. It was submitted by the Id AR that in section 271AAB, the word 'may' is used instead of 'shall' so it is not mandatory but same is discretionary. It was submitted that it is settled position of law that penalties are not compulsory, not mandatory but are also discretionary considering the overall facts and circumstances of the case. In support, reliance was placed on provisions of section 158BFA(2) wherein similar phrasology has been used by the legislature and*

*decision of Hon'ble A.P High Court in case of RadhaKrishna Vihar (ITA no. 740/2011).*

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

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

*words used in section 271AAB of the Act and the words used in section 158BFA(2) of the Act are identical. Hence, argued that the penalty section 271AAB of the Act penalty is not automatic and it is on the merits of each case. For ready reference, we reproduce hereunder section 158BFA (2) of the Act and section 271AAB of the Act which reads as under:*

*271AAB [Penalty where search has been initiated]:*

*(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of July, 2012, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him—*

- (a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such assessee—*
  - (i) in the course of search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived.*
  - (ii) Substantiates the manner in which the undisclosed income was derived; and*
  - (iii) On or before the specified date—*
    - (A) pays the tax, together with interest, if any, in respect of the undisclosed income; and*
    - (B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;*
- (b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—*

- (i) *in the course of the search, in a statement under sub-section (4\_) of section 132, does not admit the undisclosed income; and*
- (ii) *on or before the specified date-*
  - (A) *declares such income in the return of income furnished for the specified previous year; and*
  - (B) *pays the tax, together with interest, if any, in respect of the undisclosed income;*
  - (C) *a sum which shall not be less than thirty per cent but which shall not exceed ninety per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).*

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

*Section 158BFA(2):*

*(2) The Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Chapter, may direct that a person shall pay by way of penalty a sum which shall not be less than the amount of tax leviable but which shall not exceed three times the amount of tax so leviable in respect of the undisclosed income determined by the Assessing Officer under clause (c) of section 158BC:*

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

- (i) *such person has furnished a return under clause (a) of section 158BC;*
- (ii) *the tax payable on the basis of such return has been paid or, if the assets seized consist of money, the assessee offers the money so seized*

*to be adjusted against the tax payable.*

- (iii) Evidence of tax paid is furnished along with the return; and*
- (iv) An appeal is not filed against the assessment of that part of income which is shown in the return:*

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

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

*Sub section (3) of section 271AAB:*

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

*7. The legislature has included the provisions of section 274 and section 275 of the Act in 271AAB of the Act with clear intention to consider the imposition of penalty judicially. Section 274 deals with the procedure for levy of penalty, wherein, it directs that no order imposing penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. Therefore, from plain reading of section 271AAB of the Act, it is evident that the penalty cannot be imposed unless the assessee is given a reasonable opportunity and assessee is being heard. Once the opportunity is given to the assessee, the penalty cannot be mandatory and it is on the basis of the facts and merits placed before the A.O. Once the A.O. is bound by the Act to hear the assessee and to give reasonable opportunity to explain his case, there is no mandatory requirement of imposing penalty, because the opportunity of being heard and reasonable opportunity is not a mere formality*

*but it is to adhere to the principles of natural justice. Hon'ble A.P. High Court in the case of Radhakrishna Vihar in ITTA No.740/2011 while dealing with the penalty u/s 158BFA held that 'we are of the opinion that while the words shall be liable under sub section (1) of section 158BFA of the Act that are entitled to be mandatory, the words may direct in sub section 2 there of intended to directory'. In other words, while payment of interest is mandatory levy of penalty is discretionary. It is trite position of law that discretion is vested and authority has to be exercised in a reasonable and rational manner depending upon the facts and circumstances of the each case. Plain reading of section 271AAB and 274 of the Act indicates that the imposition of penalty u/s 271AAB of the Act is not mandatory but directory. Accordingly we hold that the penalty u/s 271AAB is not mandatory but to be imposed on merits of the each case."*

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

5. Hence in view of the facts and circumstances as discussed in detail in foregoing paras as well as following the earlier decision of this Tribunal, we hold that the income surrendered of Rs. 3,85,30,241/- on account of Long Term Capital Gain by the assessee in the statement recorded under section 132(4) does not fall in the ambit of definition of undisclosed income as contemplated in Explanation to section 271AAB of the Act. Regarding cash of Rs 82,50,000/- found during the course of search, there cannot be any dispute that the same falls in the definition of undisclosed income and the same is subject to penalty u/s 271AAB of the Act Accordingly, the penalty levied by the AO and sustained by the Id. CIT (A) on LTCG is deleted and penalty sustained by the Id CIT(A) on cash found during the course of search is upheld.

In the result, appeal of the assessee is partly allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 25/03/2019.

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

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

Jaipur

Dated:- 25/03/2019.

Ganesh Kr.

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

1. The Appellant- Smt. Aparna Agarwal, Kota.
2. The Respondent – The DCIT, Central Circle, Kota.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 1379 & 1439/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar

