

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'A': NEW DELHI)**

**BEFORE SHRI S.K. YADAV, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No:- 3531/Del/2015
(Assessment Year: 2011-12)**

Deputy Commissioner of Income Tax, Central Circle-13, New Delhi.	Vs.	M/s Nirala Housing Pvt. Ltd., 1113, 11 th Floor, Kailash Building, 26 Kg Marg, New Delhi-110001.
PAN No: AADCN5377R		
APPELLANT		RESPONDENT

**ITA No:- 3135/Del/2015
(Assessment Year: 2011-12)**

Nirala Housing Pvt. Ltd., 1113, 11 th Floor, Kailash building 26, KG MARG, New Delhi-110001.	Vs.	Dy. Commissioner of Income Tax, Central Circle-13, New Delhi.
PAN No: AADCN5377R		
APPELLANT		RESPONDENT

**ITA No:- 3136/Del/2015
(Assessment Year: 2012-13)**

Nirala Housing Pvt. Ltd., 1113, 11 th Floor, Kailash building 26, KG MARG, New Delhi-110001.	Vs.	Dy. Commissioner of Income Tax, Central Circle-13, New Delhi.
PAN No: AADCN5377R		
APPELLANT		RESPONDENT

ITA No:- 3137/Del/2015
(Assessment Year: 2012-13)

Nirala Housing Pvt. Ltd., 1113, 11 th Floor, Kailash building 26, KG MARG, New Delhi-110001.	Vs.	Dy. Commissioner of Income Tax, Central Circle-13, New Delhi.
PAN No: AADCN5377R		
APPELLANT		RESPONDENT

ITA No:- 3155/Del/2015
(Assessment Year: 2012-13)

Nirala Developers Pvt. Ltd., 1113, 11 th Floor, Kailash building 26, KG MARG, New Delhi-110001.	Vs.	Dy. Commissioner of Income Tax, Central Circle-13, New Delhi.
PAN No: AACCN0173C		
APPELLANT		RESPONDENT

Assessee by : Sh. Rahul Khare, Adv. &
Sh. Youdhishter Seth, CA
Revenue by : Sh. Manoj Kumar Chopra, Sr. DR

ORDER

PER: ANADEE NATH MISSHRA, AM

These five appeals by the Assesseees (ITA Nos.- 3135, 3136, 3137 & 3155/Del/2015) and Revenue (ITA No.-3531/Del/2015) are filed against orders of

Learned Commissioner of Income Tax (Appeals)-XXVI, New Delhi-110092. Grounds of appeal are as under:

ITA No.- 3531/Del/2015

- i. The Ld. Commissioner of Income Tax (Appeals) has erred in law, as well as on facts in deleting the penalty u/s 271(1)(c) of the Income Tax Act, 1961 amounting to Rs. 66,94,323/-.*
- ii. (a) The order of the Ld. CIT(Appeals) is erroneous and not tenable in law and on facts.
(b) The appellant craves leaves to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.*

ITA No.-3135/Del/2015

- i. The Learned CIT(A) erred in fact and in law in confirming the penalty of Rs. 20,15,300 imposed u/s 271 AAA which is not only bad in law but also against the facts and circumstances of the case.*
- ii. That the addition made, based on which penalty was imposed, was protective and not substantive.*

ITA no. 3136/Del/2015

- i. The Learned CIT(A) erred in fact and in law in confirming the penalty of Rs. 2,00,000 imposed u/s 271 AAA which is not only bad in law but also against the facts and circumstances of the case.*
- ii. That the addition made, based on which penalty was imposed, was protective and not substantive.*

ITA No. -3137/Del/2015

- i. The Learned CIT(A) erred in fact and in law in partly confirming the penalty on a addition of Rs. 63,00,000 imposed u/s 271 (1)(c) which is not only bad in law but also against the facts and circumstances of the case.*

ITA No. 3155/Del/2015

- i. The Learned CIT(A) erred in facts and in law in confirming the penalty of Rs. 19,54,700/- imposed u/s 271AAA which is not only bad in law but also against the facts and circumstances of the case.*

(1.1) In this order, the following abbreviations have been used:

a. Assessing Officer	as	AO
b. Commissioner of Income Tax Appeal	as	CIT(A)
c. Departmental Representative	as	DR
d. Dated	as	dtd.
e. Income Tax Act	as	I.T. Act
f. Income Tax Appellate Tribunal	as	ITAT
g. Learned	as	Ld.
h. Under Section	as	U/s
i. Nirala Housing Pvt. Ltd.	as	NHPL
j. Nirala Developers Pvt. Ltd.	as	NDPL

(2) For the sake of convenience, these appeals are being hereby disposed off through this consolidated order, as similar/interlinked issues are involved in these appeals. These appeals pertain to two assesseees namely Nirala Housing Pvt. Ltd. (in ITA No. 3135/Del/2015, 3136/Del/2015, 3137/Del/2015) & Nirala Developers Pvt. Ltd. (in ITA no. 3155/Del/2015) henceforth referred as NHPL and NDPL respectively. Both the assesseees are companies in Nirala Group of cases that was searched U/s 132 of I.T. Act on 4/08/2011. Both the assesseees, are mainly engaged with the business of real estate. The assesseees are companies of the Nirala Group that was searched on 04.08.2011. The key persons of the Nirala Group are Sh. Suresh Kumar Garg, Sh. Rakesh Mahajan and Sh. Iftikhar Ahmed. The search resulted in cash seizure of Rs 53,98,000 and jewellery seizure of Rs 10,52,124. A number of incriminating documents were also found and seized, including to pages 47- 48 of annexure A-4

found from H-121, Sector-63, Noida, the corporate office of the group, which inter alia referred to cash receipts of Rs. 2,21,53,000 in addition to cheques, received against booking for flats from various customers by Nirala Housing Pvt. Ltd. Out of the total cash receipts of aforesaid Rs. 2,21,53,000/-; an amount of Rs. 2,01,53,000 pertained to F.Y. 10-11 and Rs. 20,00,000 to FY 11-12. Post search, Sh. Suresh Kumar Garg, one of the directors and shareholders in the Nirala group, disclosed before the DDIT Inv, Unit 1(3), New Delhi, a sum of Rs 10,00,00,000 as additional income of the entire group for FYs relevant to AYs 11-12 and 12-13. Subsequently, before the AO, on 20/3/2014, the breakup of the 'surrendered income' amongst 4 companies of the group was provided as follows:

S.No.	Name of the assessee	A.Y.	Amt. (Rs.)	Remarks
1.	M/s Nirala Developers (P) Ltd.	2012-13	19547000	No incriminating document found an seized, to be telescoped with the addition made, if any
2.	M/s PAN Realtors (P) Ltd.	2012-13	50000000	No incriminating document found an seized, to be telescoped with the addition made, if any
3.	M/s Nirala Infratech (P) Ltd.	2012-13	7500000	Reduction of WIP
4.	M/s Nirala Housing (P) Ltd.	2011-12	20153000	Advances from customers to be adjusted in PCM
5.	M/s Nirala Housing (P) Ltd.	2012-13	2000000	Advances from customers to be adjusted in PCM
6.	Others		800000	To be telescoped
	Total		100000000	

(3) In the case of NDPL, While filing the return of income on 21.03.2013 for AY 12-13, the assessee included the additional business income Rs 1,95,47,000 that was claimed as part of the surrendered income of Rs 10 crores. While passing the assessment order, the AO made further additions of Rs 3,75,387 on account of bogus

payment to contractors; Rs 10,65,117 and Rs 1,31,27,456 on account of bogus payment to suppliers; Rs 74,58,064 on account of bogus expenses; Rs 8,00,000 that was part of the surrendered sum of Rs 10 crores but had not been reflected as additional business income against any of the companies of the group; and Rs 8,21,575 as disallowance u/s 14A of the I.T. Act. He also initiated penalty proceedings u/s 271AAA and 271(1)(c). While adjudicating the appeal filed by the appellant against the assessment order, the additions of Rs 3,75,387/- and Rs 10,65,117/- were deleted. No appeal was filed in respect of the addition of Rs 1,31,27,456/- while the appeal relating to the additions of Rs.74,58,064 and Rs 8,00,000 was not pressed. Consequently, the additions of Rs. 1,31,27,456/- and Rs. 74,58,064/- and Rs 8,00,000 became final.

(3.1) In the case of NHPL the appellant showed the unaccounted cash receipts found at the time of search, in its books of accounts for FY 10-11 (at Rs 2,01,53,000] and FY 11-12 (at Rs 20,00,000], under the head 'current liabilities' on one side of the balance sheet and as cash available on the other. However, no income was declared for these years in the Return of Income, although surrendered income of the Group included the aforesaid amounts of Rs. 2,01,53,000/- and Rs. 20,00,000/- in the case of NHPL for AY 2011-12 and A.Y. 2012-13 respectively. When queried by the AO during the assessment proceedings, it was stated by the NHPL that the unaccounted cash receipts of Rs 2,21,53,000/- which was received as advances from customers for its project, would be offered to tax in the succeeding financial years, based on AS-7 and the percentage completion method. While passing the assessment order, the AO noted that the assertion of the appellant - that it will offer the cash receipts as income in succeeding

years - 'cannot be verified at this stage'. Accordingly, he added the cash of Rs 2,01,53,000 and Rs 20,00,000 in AY 11-12 and AY 12-13 respectively, on a protective basis. He also stated that in the event the NHPL offered the aforementioned cash receipts as income in succeeding years, after due verification, the protective additions in AY 11-12 and AY 12-13 to that extent would stand deleted. NHPL did not file any appeal against the additions made by the AO. Thus, the additions made by the AO became final. The AO also initiated penalty proceedings u/s 271AAA and 271(l)(c) of the I.T. Act. The appellant did not contest the assessment order passed by the AO. In the penalty proceedings u/s 271AAA of I.T. Act, the AO referred to the provisions of section 271AAA of I.T. Act. The AO observed that while the provision required the assessee to offer undisclosed income in its return, substantiate the manner in which the undisclosed income was derived, and also pay the tax liability arising thereon, the appellant had not met any of these conditions; that undisclosed income had not been offered in the return of income; that the assessee was trying to 'fool the department' by its offer of undisclosed income in the form of current liabilities; that it had not substantiated the manner in which the unaccounted income had been derived; and that tax had also not been paid by it. With these observations, the AO imposed penalty u/s 271AAA @ 10% on undisclosed income of Rs 2,01,53,000/- in AY 11-12 and on undisclosed income of Rs 20,00,000 in AY 12-13, penalty thus imposed amounting to Rs. 20,15,300 and Rs. 2,00,000 respectively.

(3.2) In the case of NHPL the AO also levied penalty U/s 271(1)(c) of I.T. Act amounting to Rs. 66,94,323/- in A.Y. 2011-12 and Rs. 25,64,700/- in A.Y. 2012-13.

The penalty levied U/s 271(1)(c) of I.T. Act for A.Y. 2011-12, amounting to aforesaid Rs. 66,93,323/- was in respect of the amount of Rs. 2,01,53,000/- which was offered by the Assessee as current liability on account of advances received. This offer was made by the assessee after search U/s 132 of I.T. Act and was part of the overall surrender of undisclosed income of aforesaid Rs. 10,00,00,000/-. This penalty U/s 271(1)(c) of I.T. Act was in addition to penalty levied U/s 271AAA of I.T. Act on the same amount of aforesaid Rs. 2,01,53,000/-. For A.Y. 2012-13, the AO had made a further addition of Rs. 63,00,000/- to the Assessment order, on the basis of for the small pocket red diary seized from the cooperate office of Nirala Group which was in addition to Rs. 20,00,000/- included in total surrender of Rs. 10,00,00,000/- by Nirala Group. Thus, the AO computed the total incomes sought to be evaded by the assessee at Rs. 83,00,000/- (sum of aforesaid Rs. 20,00,000/- and aforesaid Rs. 63,00,000/-). The penalty of the aforesaid Rs. 25,64,700/- levied U/s 271(1)(c) of I.T. Act was in respect of the aforesaid total amount of Rs. 83,00,000/- which was in addition to penalty levied U/s 271AAA, amounting to Rs. 2,00,000/- in respect of the aforesaid Rs. 20,00,000/-.

(4) NDPL filed appeal before the Ld. CIT(A) against levy of penalty of aforesaid Rs. 20,34,700/- U/s 271AAA of I.T. Act. Vide order dated 20th March 2015 in appeal no. 422/2014-15 the Ld. CIT(A) confirmed the imposition of penalty amounting to Rs. 19,54,700/- and deleted the balance amount of Rs. 80,000/-. The relevant portion of the appellate order of Ld. CIT(A) is reproduced as under:

"3. The appellant is one of the companies of the Nirala group that was searched on 04.08.2011. The group, including the appellant, is mainly engaged in the business of real

estate development. The key persons of the group were Sh Suresh Kumar Garg, Sh Rakesh Mahajan and Sh Iftikhar Ahmed. The search resulted in cash seizure of Rs 67,79,000 of which cash of Rs was found and seized from the appellant company. A number of incriminating documents were also found and seized.

4. Post search, Sh Suresh Kumar Garg, one of the directors and shareholders in the Nirala group, disclosed before the DDIT Inv, Unit 1(3), New Delhi, a sum of Rs 10,00,00,000 as additional income of the entire group for FYs relevant to AYs 11-12 and 12-13. Subsequently, before the AO, on 20/3/2014, the 'bifurcation' of the 'surrendered income' amongst 4 companies of the group was provided, as follows:

5. While filing the return of income on 21.03.2013 for AY 12-13, the appellant included the additional business income Rs 1,95,47,000 that was claimed as part of the surrendered income of Rs 10 crores. While passing the assessment order, the AO made additions of Rs 3,75,387 on account of bogus payment to contractors; Rs 10,65,117 and Rs 1,31,27,456 on account of bogus payment to suppliers; Rs 74,58,064 on account of bogus expenses; Rs 8,00,000 that was part of the surrendered sum of Rs 10 crores but had not been reflected as additional business income against any of the companies of the group; and Rs 8,21,575 as disallowance u/s 14A. He also initiated penalty proceedings u/s 271AAA and 271(l)(c). While adjudicating the appeal filed by the appellant against the assessment order, the additions of Rs 3,75,387 and Rs 10,65,117 were deleted. It is a matter of record that no appeal was filed in respect of the addition of Rs 1,31,27,456, while the appeal relating to the additions of Rs 74,58,064 and Rs 8,00,000 was not pressed. Consequently, the additions of Rs 1,31,27,456, Rs. and Rs. 8,00,000 became final.

6. During the penalty proceedings u/s 271AAA, the AO imposed penalty upon Rs 2,03,47,000, which comprised of Rs 1,95,47,000 declared by the appellant in the return of income, and Rs 8,00,000 that had been added by him while passing the assessment order. He noted that the appellant had not specified and substantiated the manner in which the unaccounted income had been derived by it either during the assessment proceedings or the penalty proceedings, and thus, the conditions specified in sub-section (2) of section 271AAA had not been met.

7. Challenging the imposition of penalty on Rs 1,95,47,000, the AR stated that all the 3 conditions provided in sub-section (2) of section 271AAA were met. It was submitted that clauses (ii) and (iii) of sub section (2) of section 271AAA were met, since the sum had been

declared and explained as 'advance payments in cash from the customers' by the appellant and taxes thereon had also been paid, as evident from the financial statements and the computation of income attached with the return for AY 12-13. With regard to clause (i) of sub-section (2) of section 271AAA, it was claimed that since the AO had 'not commented anything', it may be 'assumed that he had accepted that the declaration/surrender was made u/s 132(4)'. It was further submitted that in the event of any doubt, all IT records along with the appraisal report of the Investigation wing may be summoned to ascertain if the disclosure was made u/s 132(4) or not. Stating that since the search, a 'partition' had taken place amongst the erstwhile directors of the group, no documents were available with the appellant. Further, referring to the Indian Evidence Act, it was requested that in the event of drawing any adverse inference, the documentary evidence 'specially the appraisal report' may be shown to the appellant. In furtherance to its arguments against the impugned order, the appellant placed reliance on the cases of Crossing Infrastructure P Ltd v CIT 267 CTR 519 (All); and DCIT v Pioneer Marbles & Interiors P Ltd 144 TTJ 663 (Kol). As regards Rs 8,00,000, the AR stated that, though this sum had not been included in the return of the appellant, it was part of the disclosure and tax thereon, amounting to Rs 2,40,000 also stood paid, since excess tax had been paid by the appellant while filing the return of income, resulting in refund claim of Rs 5,47,810, which 'takes care' of payment of tax of Rs 2,40,000. In this manner, according to the appellant, all the 3 conditions provided in sub-section (2) of section 271 AAA were met in respect of Rs 8,00,000 as well.

8. The submissions of the appellant are considered.

8.1 The appellant has sought to claim that sub-section (1) of section 271AAA was not applicable to its case because it was covered by sub-section (2) that prohibits the application of subsection (1). Broadly, sub-section (1) of section 271AAA provides for imposition of penalty @ 10% of the undisclosed income, while sub-section (2) of section 271AAA stipulates that the provisions of sub-section (1) will not apply if the assessee admits to undisclosed income in a statement u/s 132(4) made in the course of search and specifies the manner in which it was derived, substantiates the manner in which such income was derived, and pays the tax and interest thereon.

8.2 The relevant facts of this case is that, while Suresh Kumar Garg disclosed Rs 10 crores as 'additional business income' of the Nirala group for FY 10-11 and 11-12, in which the cash of Rs 1,95,47,000 pertaining to the appellant for AY 12-13 was subsequently claimed to be included, the admission was not made u/s 132(4) of the Income Tax Act. The disclosure was in fact made in a typed letter addressed to

DDIT(Inv), Unit-1(3), New Delhi, following search action on the Nirala group. This is evident from page 5 of the assessment order of the appellant for AY 12-13, where the AO has reproduced the letter of Sh S K Garg to the DDIT. The said letter refers to the search on the group and seizure of certain valuables and documents and goes on to state that 'in order to avoid litigation and to buy peace of mind', disclosure of Rs 10 crores was being made by the group as 'additional business income' for FY 10-11 and 11-12.

8.3 Now since the letter of disclosure, stands reproduced in the assessment order of the appellant itself, it dispels all doubt about whether the disclosure of Rs 10 crores was made u/s 132(4) or not. Section 132(4) entails statement of any person who is found to be in possession or control of books of accounts, documents, money, bullion, jewellery or other valuable article or thing, upon examination on oath by the authorized officer during the course of search or seizure. It is thus crystal clear that the aforesaid disclosure of Rs 10 crores was not made before the authorised officer upon examination on oath during the course of search as contemplated in section 132(4). This is also evident from the various statements recorded u/s 132(4) of Suresh Kumar Garg on 4.8.2011, 5.8.2011 and 30.9.2011; Sh Rakesh Mahajan on 4.8.2011 and 12.9.2011; and Sh Iftikhar Ahmed on 4.8.2011, none of which refer to any disclosure at all.

8.4 It is also noted that the disclosure of Rs 10 crores was an omnibus declaration made by Sh Suresh Kumar Garg in respect of the entire group, without bifurcation and without specifying the manner in which it had been earned. The specific admission, about Rs 1,95,47,000 being the undisclosed income of the appellant company and its inclusion in the group disclosure of Rs 10 crores, was made for the first time while filing the return of income for AY 12-13. The bifurcation of Rs 10 crores came much later, when a letter was filed before the AO on 20/3/2014, specifying the amounts and the companies in which the sums had been offered.

8.5 Moreover, while disclosing Rs 10 crores, Sh Suresh Kumar Garg, Director of the appellant company, did not specify the manner in which it had been derived, instead, the reason given was 'to avoid litigation and to buy peace of mind'. In the letter of 20.03.2014, against the name of the appellant, the sum of Rs 1,95,47,000 was disclosed as its 'additional business income', but no explanation, about the manner in which the quantification had been made, was stated. Most significantly, in the return of income filed on 21.03.2013, Rs 1,95,47,000 was referred as 'business income declared' in note 20 relating to 'Other Income', and not included in the 'Revenue from

Operations', which as per note 19 related to the 'sale of flats' and 'other operating incomes'. Thus, though the appellant used the words 'business income declared' in respect of Rs 1,95,47,000, it is evident that it did not declare it as income from sale of flats or other such operating income. Therefore, the contention of the appellant, that it had specified and substantiated the manner in which Rs 1,95,47,000 had been derived, is incorrect.

8.6 It is thus evident from the facts narrated above that neither clause (i) nor clause (ii) of subsection (2) of section 271AAA - requiring admission of undisclosed income u/s 132(4) and substantiation of the manner in which it was derived - are fulfilled. Since it is apparent that a general disclosure of Rs 10 crores was made for the whole group in a typed letter before the DDIT (Inv), and the specific declaration of undisclosed income of Rs 1,95,47,000 in case of the appellant was made at the time of filing the return of income for AY 12-13, the request of the appellant to show the 'appraisal report' (which in any case is a confidential document) is irrelevant. The other contention of the appellant, that since the AO did not make any specific comment, assumption may be made that the declaration/surrender was made u/s 132(4) - is also without merit, in view of the facts narrated above.

8.7 Therefore, even though the tax on the undisclosed income of Rs 1,95,47,000 was apparently paid, and clause (iii) of sub section (2) of section 271AAA complied, since clauses (i) and (ii) of sub section (2) of section 271AAA - relating to the disclosure in a statement u/s 132(4) and specifying and substantiating the manner in which the undisclosed income was derived - were not satisfied, penalty u/s 271AAA was correctly imposed on Rs 1,95,47,000.

8.8 It may be also mentioned that penalty u/s 271AAA is rightly levied upon the appellant on Rs 1,95,47,000 because it constitutes 'undisclosed income' for 'specified previous year' as defined in the Explanation appended to section 271AAA. As per Explanation (a) appended to section 271 AAA, 'undisclosed income' means any income of specified previous year, represented wholly or partly by money, bullion, jewellery or other valuable article or thing or documents or transactions found in the course of search and which is not recorded in the books of accounts maintained in the normal course, or has not been disclosed to the CCIT or CIT before the date of search. Also, any income of specified previous year, represented wholly or partly by any entry in respect of expense recorded in the books of accounts maintained in the normal course, but which is found to be false because of search, is also defined as 'undisclosed income'. Since the declaration by the appellant of Rs 1,95,47,000 was the outcome of

search, and it was not recorded in the books of accounts maintained in the normal course, and had also not been disclosed to the CCIT or CIT before the date of search, it constituted 'undisclosed income' of the appellant within the meaning conferred by Explanation (a) appended to section 271AAA.

8.9 The appellant has referred to some decisions, namely Crossing Infrastructure P Ltd (supra) and Pioneer Marbles & Interiors P Ltd (supra), but these do not help its case. In the case of the former, all the three conditions given in sub section (2) of section 271AAA had been met. The latter decision was in the context of timeline relating to payment of tax. In the case of the appellant, it has already been noted that clauses (i) and (ii) of sub section (2) of section 271AAA were not met.

8.10 However, the imposition of penalty u/s 271AAA in respect of Rs 8,00,000, is erroneous. It is a matter of record that this sum was not offered by the appellant as its undisclosed income; in fact, the sum of Rs 8,00,000 was added by the AO during the course of assessment. It is also a matter of record that the appellant accepted the addition and did not press appeal against it. Since Rs 8,00,000 did not constitute 'undisclosed income' within the meaning of Explanation (a) appended to section 271AAA, and was in fact, the concealed income found and added by the AO during the assessment proceedings, the matter of levy of penalty on Rs 8,00,000 ought to have been governed by the provisions of section 271(l)(c). Therefore, penalty u/s 271AAA levied @ 10% of Rs 8,00,000 is deleted and the AO is directed to consider the matter of levy of penalty on the concealed income of Rs 8,00,000 u/s 271(l)(c).

8.11 In view of the discussion above and the facts of the case, the imposition of penalty u/s 271 AAA upon Rs 1,95,47,000 is confirmed. Penalty u/s 271AAA in respect of Rs 8,00,000 is deleted for consideration u/s 271 (l)(c)."

Appeal No. 3155/Del/2015 before us has been filed by the NDPL against this appellate order of Ld. CIT(A).

(4.1) NHPL filed appeal before the Ld. CIT(A), against levy of penalty U/s 271AAA for A.Ys. 2010-11 and 2012-13. Vide consolidated order dated 20th March, 2015 in appeal nos. 425, 427/2014-15, the Ld. CIT(A) confirmed the penalties levied by the AO U/s

271AAA and dismissed the assessee's appeal for both A.Ys. 2011-12 and 2012-13. The relevant portion of order of Ld. CIT(A) is reproduced as under:

"3. The appellant is one of the companies of the Nirala Group that was searched on 04.08.2011. The group, including the appellant, is mainly engaged in the business of real estate development. The key persons of the group were Sh. Suresh Kumar Garg, Sh Rakesh Mahajan and Sh. Iftikhar Ahmed. The search resulted in cash seizure of Rs. 53,98,000 and jewellery seizure of Rs. 10,52,124. A number of incriminating documents were also found and seized. Specific mention is made to pages 47-48 of annexure A-4 found from H-121, Sector-63, Noida, the corporate office of the group, which inter alia referred of cash receipts of Rs. 2,21,53,000 in addition to cheques, received against booking for flats from various customers by Nirala Housing Pvt. Td. (the appellant company). Out of the total cash of Rs. 2,21,53,000, cash of Rs. 2,01,53,000 pertained to FY 10-11 and Rs. 20,00,000 to FY 11-12.

4. Post search, Sh Suresh Kumar Garg, one of the directors and shareholders in the Nirala group, disclosed before the DDIT Inv, Unit 1(3), New Delhi, a sum of Rs 10,00,00,000 as additional income of the entire group for FYs relevant to AYs 11-12 and 12-13. Subsequently, before the AO, on 20/3/2014, the 'bifurcation' of the 'surrendered income' amongst 4 companies of the group was provided as follows:

S.N o.	Premises of Assessee	A.Y.	Additional business income	Remarks
1	Nirala Developers P.Ltd.	12-13	1,95,47,000	To be telescoped with addition made if any
2	PAN Realtors P Ltd.	12-13	5,00,00,000	
3	Nirala Infratech P Ltd.	12-12	75,00,000	Reduction of WIP
4	NiralaHousing P Ltd.	12-13	20,00,000	Advance from customers to be adjusted in PCM
		11-12	2,01,53,000	
5	Others	-	8,00,000	To be telescoped with

				<i>addition made if any</i>
	<i>Total</i>		<i>10,00,00,000</i>	

5. When confronted with the seized material [pages 47- 48 of annexure A-4 found from H-121, Sector-63, Noida] by DDIT(Inv), Sh Rakesh Mahajan, a director in the appellant company, stated u/s 131(I)(a) on 26.12.2011 in response to query 23 that the 2 pages contained the same details with respect to flat no, customer name, rate, total amount received, mode of receipt, etc; that the amounts received through cheque as reflected in these pages were duly recorded in the books of account of Nirala Housing Pvt Ltd; and that the unaccounted cash portion had 'already been offered for tax being part of additional business income offered'.

6. Since search had taken place on 04.08.2011, on which date the return for AY 11-12 was not due, the appellant showed the unaccounted cash receipts found at the time of search, in its books of accounts for FY 10-11 (at Rs 2,01,53,000) and FY 11-12 (at Rs 20,00,000), under the head 'current liabilities' on one side of the balance sheet and as cash available on the other. Since the appellant was following percentage completion method for revenue recognition as per the accounting standard AS-7, and in FY 10-11 and FY 11-12, the percentage of completion was below the bench mark of 25%, no income was declared for these years. When queried by the AO during the assessment proceedings, it was stated by the appellant that the unaccounted cash receipts of Rs 2,21,53,000, which was received as advances from customers for its project, would be offered to tax in the succeeding financial years, based on AS-7 and the percentage completion method. While passing the assessment order, the AO rightly noted that the assertion of the appellant - that it will offer the cash receipts as income in succeeding years - 'cannot be verified at this stage'. Accordingly, he added the cash of Rs 2,01,53,000 and Rs 20,00,000 in AY 11-12 and AY 12-13 respectively, on a protective basis. He also stated that in the event the appellant offered the aforementioned cash receipts as income in succeeding years, after due verification, the protective additions in AY 11-12 and AY 12-13 to that extent would stand deleted. The AO also initiated penalty proceedings u/s 271AAA and 271(I)(c). The appellant did not contest the assessment order passed by the AO on 28.03.2014.

7. In the penalty proceedings u/s 271AAA, the AO referred to the provisions of section 271AAA. , Stating that while the provision required the assessee to offer undisclosed income in its return, substantiate the manner in which the undisclosed

income was derived, and also pay the tax liability arising thereon, the appellant had not met any of these conditions. It was stated that undisclosed income had not been offered in the return of income; that the assessee was trying to 'fool the department' by its offer of undisclosed income in the form of current liabilities; that it had not substantiated the manner in which the unaccounted income had been derived; and that tax had also not been paid by it. With these observations, the AO imposed penalty u/s 271AAA @ 10% on undisclosed income of Rs 2,01,53,000 in AY 11-12 and on undisclosed income of Rs 20,00,000 in AY 12-13, amounting to Rs 20,15,300 and Rs 2,00,000 respectively. Aggrieved by these orders, the appellant is in appeal.

8. *In the written submissions, the AR has lodged a strong objection to the observation of the AO in para 4.1 of the impugned orders, where it was stated that the assessee was 'trying to fool the department by offering undisclosed income in the form of current liabilities and not paying any tax during the year'. He has requested that this remark of the AO may be deleted. While there is no provision to 'delete' the remarks of the AO in the appellate proceedings, in order to adjudicate upon the ground of appeal filed by the appellant in Form 35, it is essential to refer to the relevant facts of the case, which have already been referred above. Thus, it is an admitted fact that the cash reflected in the seized documents pertained to unaccounted cash, received by the appellant from customers at the time of booking of flats in FY 10-11 and FY 11-12. It is also a matter of record, as emanating from the assessment order of the relevant years, that the unaccounted cash receipts were eventually taken into the books after search and reflected under the head of current liabilities' in the balance sheet. The explanation of the appellant - that the sum was not offered as income in AYs 11-12 and 12-13 because it was following the percentage completion method and AS-7, and less than the bench mark of 25% of the project had been completed in those years - is also recorded and accepted in the assessment orders. Therefore, the observation of the AO in the impugned order about the appellant 'trying to fool the department' is not consistent with the facts and observations made in the assessment order.*

9. *Coming to the contentions of the AR, it has been argued as per submission dated 17.3.2015, that the levy of penalty is against law, since the appellant's case 'comes squarely within the ambit of 271AAA(2)(i) and (hi)'. It was submitted that complete disclosure was made during the course of search and seizure proceedings, that the source was disclosed, and that the sum was in the nature of advance payments received from customers, and shown as current liabilities in FY 10-11 and FY 11-12 since the prescribed percentage of completion had not been achieved then. Reference was made*

to clause (iii) of sub-section (2) of section 271AAA, where the payment of tax and interest on undisclosed income was qualified by the phrase 'if any'. It was argued that tax and interest on the undisclosed income became payable only when the income of the appellant from its project became taxable, based on the accounting standard AS-7 followed by it and accepted by the AO while passing the assessment order. It was further stated that the project was delayed and was started only in FY 14-15, and that accordingly, advance tax of Rs 76.50 lakhs was paid for FY 14-15. Reference was made to the case of Crossing Infrastructure P Ltd v CIT 267 CTR 519 (All)-, and DCIT v Pioneer Marbles & Interiors P Ltd 144 TTJ 663 (Kol).

10. In the written submission filed on 20.3.2015, it was stated that the AO had only commented upon the appellant's conduct with reference to clauses (ii) and (iii) of sub section (2) of section 271AAA and that since he had 'not commented anything' as far as clause (i) was concerned, it may be 'assumed that he had accepted that the declaration/surrender was made u/s 132(4)'. It was submitted that in the event of any doubt, all IT records along with the appraisal report of the Investigation wing may be summoned to ascertain if the disclosure was made u/s 132(4) or not. Stating that since the search, a 'partition' had taken place amongst the erstwhile directors of the group, no documents were available with the appellant. Further, referring to the Indian Evidence Act, it was requested that in the event of drawing any adverse inference, the documentary evidence 'specially the appraisal report' may be shown to the appellant. With regard to clause (ii) of sub section (2) of section 271AAA, it was submitted that since the appellant had stated that the income was 'additional business income', the requirement of 'substantiating the manner in which undisclosed income was derived' was met and the condition of clause (ii) satisfied. With regard to clause (iii) of sub section (2) of section 271AAA, the explanation given in the earlier submission was reiterated.

11. The submissions of the AR, as contained in written submissions dated 17.3.2015 and 20.3.2015 are considered.

- 11.1 The appellant has sought to claim that sub-section (1) of section 271AAA was not applicable to its case because it was covered by sub-section [2] that prohibits the application of subsection (1). Broadly, sub-section (1) of section 271AAA provides for imposition of penalty @ 10% of the undisclosed income, while sub-section (2) of section 271AAA stipulates that the provisions of sub-section (1) will not apply if the assessee admits to undisclosed income in a statement u/s 132(4) made in the course of search and specifies the manner in which it was derived, substantiates the manner in which such income was derived, and pays the tax and interest thereon.*
- 11.2 The relevant facts of this case is that, while Suresh Kumar Garg disclosed Rs 10 crores as 'additional business income' of the Nirala group for FY 10-11 and 11-12, in which the*

- cash of Rs 2,21,53,000 pertaining to the appellant was subsequently claimed to be included, the admission was not made u/s 132(4) of the Income Tax Act. The disclosure was in fact made by a typed letter addressed to DDIT(Inv), Unit-1(3), New Delhi, following search action on the Nirala group. This is evident from page 2 of the assessment order of the appellant for AY 11- 12 and 12-13, where the AO has reproduced the letter of Sh S K Garg to the DDIT. The said letter refers to the search on the group and seizure of certain valuables and documents and goes on to state that **'in order to avoid litigation and to buy peace of mind'**, disclosure of Rs 10 crores was being made by the group as 'additional business income' for FY 10-11 and **11-12.***
- 11.3 *Now since the letter of disclosure, stands reproduced in the assessment order of the appellant itself, it dispels all doubt about whether the disclosure of Rs 10 crores was made u/s 132(4) or not. Section 132(4) entails statement of any person who is found to be in possession or control of books of accounts, documents, money, bullion, jewellery or other valuable article or thing, upon examination on oath by the authorized officer during the course of search or seizure. It is thus crystal clear that the aforesaid disclosure of Rs 10 crores was not made before the authorised officer upon examination on oath during the course of search as contemplated in section 132(4). This is also evident from the various statements recorded u/s 132(4) of Suresh Kumar Garg on 4.8.2011, 5.8.2011 and 30.9.2011; Sh Rakesh Mahajan on and 12.9.2011; and Sh Iftikhar Ahmed on 4.8.2011, none of which refer to any disclosure at all.*
- 11.4 *It is also noted that the disclosure of Rs 10 crores was an omnibus declaration made by Sh S K Garg in respect of the entire group, without bifurcation and without specifying the manner in which it had been earned. The bifurcation of Rs 10 crores came much later, when a letter was filed before the AO on 20/3/2014, specifying the amounts and the companies in which the sums had been offered. The specific admission, about Rs 2,21,53,000 being the unaccounted cash receipts of the appellant company and its inclusion in the group disclosure of Rs 10 crores, was made for the first time by Sh Rakesh Mahajan (who continues to be the key person in the appellant company even after 'partition' of the group), only in response to query 23 on u/s 131(1A) in the chamber of DDIT(Inv). Thereafter, while filing the return of income for AY 11-12 and 12-13 (subsequent to search), the appellant showed the unaccounted cash receipts of Rs 2,01,54,000 and Rs 20,00,000 in its books for FY 10-11 and 11-12. These facts are part of the assessment orders of the appellant company for AY 11-12 and 12-13.*
- 11.5 *It is thus evident from the facts narrated above that clause (i) of sub-section (2) of section 271AAA, requiring admission of undisclosed income u/s 132(4), is not fulfilled. Since it is apparent that the issue of disclosure of 'undisclosed income' of the appellant company was made on 26.12.2011 u/s 131(1A), the request of the appellant to show the 'appraisal report' (which in any case is a confidential document) is irrelevant. The other contention of the appellant, that since the AO did not make any specific comment, assumption may be made that the declaration/surrender was made u/s 132(4) - is also without merit.*
- 11.6 *The appellant has claimed that the clause (ii) of sub-section (2) of section 271AAA, that requires substantiation of the manner in which the undisclosed income was derived by the assessee, is met, since the seized material itself referred to it as cash advance received from customers against their booking of flat. In this regard, it is noted that since the appellant admitted about Rs 2,21,53,000 being the unaccounted cash receipts of the appellant company on 26.12.2011 u/s 131(1A) in the chamber of DDIT(Inv), the fulfillment towards clause (ii) of sub-section (2) of section 271AAA - the substantiation 'about the manner in which the undisclosed income was derived - came about on that date.*
- 11.7 *The appellant has also claimed that clause (iii) of sub-section (2) of section 271AAA, relating to the payment of tax and interest, is applicable only if these were due and that since this was not so in its case, the condition was not applicable to it. But this*

contention does not appear to be correct, since the words 'if any' is evidently used in the clause in connection with 'interest' and not 'tax'. It may be mentioned that 'undisclosed income' in all instances will suffer tax, but interest thereon, may or may not apply, depending upon the facts and circumstances of each case. In case of Pioneer Marbles & Interiors P Ltd (supra), the Hon'ble Tribunal noted that though no time limit had been set out in the statute, for immunity under sub section (2) of section 271AAA, tax and interest should have been paid well before the conclusion of the impugned penalty proceedings. In the case of the appellant, it is an admitted fact that tax was not paid on the undisclosed sums before the date of the impugned penalty orders. Therefore, clause (iii) of sub- section (2) of section 271AAA, requiring payment of tax, is also not fulfilled by the appellant.

- 11.8 *Thus, the appellant cannot escape from the penalty envisaged in sub-section (1) of section 271AAA because clauses (i) and [ii] of sub-section (2) of section 271AAA are not met.*
- 11.9 *It may be also mentioned that penalty u/s 271AAA is rightly levied upon the appellant in AY 11-12 and AY 12-13, even though the additions made on account of seized material in the relevant assessment orders are made on protective basis. This is because the unaccounted receipt of Rs 2,21,53,000 constitutes 'undisclosed income' for 'specified previous year' as defined in the Explanation appended to section 271AAA.*
- 11.10 *As per Explanation (a) appended to section 271AAA, 'undisclosed income' means any income of specified previous year, represented wholly or partly by money, bullion, jewellery or other valuable article or thing or documents or transactions found in the course of search and which is not recorded in the books of accounts maintained in the normal course, or has not been disclosed to the CCIT or CIT before the date of search. Also, any income of specified previous year, represented wholly or partly by any entry in respect of expense recorded in the books of accounts maintained in the normal course, but which is found to be false because of search, is also defined as 'undisclosed income'. Thus, it is evident that the words 'undisclosed income' referred in section 271AAA, is not with reference to the 'total income' of any previous year relevant to assessment year, but with the income/earning in the generic sense of the term. Since as per the seized document, the appellant received cash of Rs 2,21,53,000 from customers as part of advance against purchase of flats, and this was not recorded in its books of accounts maintained in the normal course, and had also not been disclosed to the CCIT or CIT before the date of search, it constituted its 'undisclosed income' within the meaning conferred by Explanation (a) appended to section 271AAA.*
- 11.11 *It is also relevant that the penalty u/s 271AAA applies only to 'specified previous year', which has been defined in Explanation (b) appended to section 271 AAA. Thus, the year in which search is conducted, and the year which had ended before the date of search but the date for filing the return of income u/s 139(1) had not expired before the date of search and the assessee had not furnished the return for that previous year, are 'specified previous year'. Since the date of search on the appellant was 4.8.2011, the previous year 10-11 had ended and the date for filing return u/s 139(1) had not expired and the appellant had not furnished the return for previous year 10-11, the previous year 10-11 and previous year 11-12 relevant to AY 11-12 and AY 12-13 respectively come within the meaning of 'specified previous year', as defined by Explanation (b) appended to section 271AAA.*
- 11.12 *Penalty u/s 271AAA is applicable in respect of previous years relevant to AY 11-12 and AY 12-13 since the documents relating to undisclosed income of Rs 2,01,53,000 and Rs 20,00,000 had been found in the course of search on the Nirala group and the unaccounted cash receipts were in respect of the specified previous years. In this manner, with **all the ingredients referred in the definition of 'undisclosed income' and 'specified previous year', as per Explanation appended to section 271AAA, fulfilled**, the imposition of penalty u/s 271AAA is confirmed in respect of AY*

11-12 and AY 12-13.

- 11.13 The appellant has referred to some decisions, namely Crossing Infrastructure P Ltd (supra) and Pioneer Marbles & Interiors P Ltd (supra), but these do not help its case. In the case of the former, all the three conditions given in sub section (2) of section 271 AAA had been met. The latter decision was in the context of timeline relating to payment of tax. In the case of the appellant, it has already been noted that clauses (i) and (ii) in sub section (2) of section 271AAA were not met. The claim of the appellant about payment of Rs 76.50 lakhs as advance tax for FY 14-15 is not relevant to the matter of 'undisclosed income' relating to previous years 10-11 and 11-12.*
- 11.14 In view of the discussion above and the facts of the case - where document containing details of undisclosed income of Rs 2,01,53,000 and Rs 20,00,000, received from customers as part of advance against purchase of flats, was found during search; where these cash receipts were not recorded in the books of accounts maintained in the normal course, and had also not been disclosed to the CCIT or CIT before the date of search; where subsequently these sums were reflected in the balance sheet; **but where no admission of the undisclosed income was made under section 132(4) and tax thereon was not paid till the passing of the impugned orders**, - the appellant is liable for penalty u/s 271AAA. Accordingly, the AO was justified in imposing penalty u/s 271AAA, determined at Rs 20,15,300 in AY 11-12 and Rs 2,00,000 in AY 12-13, being 10% of undisclosed income on Rs 2,01,53,000 and Rs 20,00,000 respectively. Consequently, the penalty orders are confirmed."*

NHPL has filed appeals vide ITA Nos. 3135 & 3136/Del/2015 against the aforesaid consolidated order of Ld. CIT(A), for A.Ys. 2011-12 and 2012-13 respectively.

(4.1.1) NHPL separately filed appeal against the levy of penalty U/s 271(1)(c) of I.T. Act for A.Y. 2011-12. Vide order dated 20th March, 2015 in appeal no. 424/2014-15, the Ld. CIT(A) deleted this penalty and allowed the assessee's appeal. The Relevant portion of order of the Ld. CIT(A) is reproduced as under:

"3. The appellant is one of the companies of the Nirala Group that was searched on 04.08.2011. The group, including the appellant, is mainly engaged in the business of real estate development. The key persons of the group were Sh. Suresh Kumar Garg, Sh Rakesh Mahajan and Sh. Iftikhar Ahmed. The search resulted in cash seizure of Rs. 53,98,000 and jewellery seizure of Rs. 10,52,124. A number of incriminating documents were also found and seized. Specific mention is made to pages 47-48 of annexure A-4 found from H-121, Sector-63, Noida, the corporate office of the group, which inter alia referred of cash receipts of Rs. 2,21,53,000 in addition to cheques,

received against booking for flats from various customers by Nirala Housing Pvt. Td. (the appellant company). Out of the total cash of Rs. 2,21,53,000, cash of Rs. 2,01,53,000 pertained to FY 10-11 and Rs. 20,00,000 to FY 11-12.

4. Post search, Sh Suresh Kumar Garg, one of the directors and shareholders in the Nirala group, disclosed before the DDIT Inv, Unit 1(3), New Delhi, a sum of Rs 10,00,00,000 as additional income of the entire group for FYs relevant to AYs 11-12 and 12-13. Subsequently, before the AO, on 20/3/2014, the 'bifurcation' of the 'surrendered income' amongst 4 companies of the group was provided as follows:

S.No.	Premises of Assessee	A.Y.	Additional business income	Remarks
1	Nirala Developers P.Ltd.	12-13	1,95,47,000	To be telescoped with addition made if any
2	PAN Realtors P Ltd.	12-13	5,00,00,000	
3	Nirala Infratech P Ltd.	12-12	75,00,000	Reduction of WIP
4	Nirala Housing P Ltd.	12-13	20,00,000	Advance from customers to be adjusted in PCM
		11-12	2,01,53,000	
5	Others	-	8,00,000	To be telescoped with addition made if any
	Total		10,00,00,000	

5. When confronted with the seized material [pages 47- 48 of annexure A-4 found from H-121, Sector-63, Noida] by DDIT(Inv), Sh Rakesh Mahajan, a director in the appellant company, stated u/s 131(l)(a) on 26.12.2011 in response to query 23 that the 2 pages contained the same details with respect to flat no, customer name, rate, total amount received, mode of receipt, etc; that the amounts received through cheque as reflected in these pages were duly recorded in the books of account of Nirala Housing Pvt Ltd; and that the unaccounted cash portion had 'already been offered for tax being

part of additional business income offered'.

6. *Since search had taken place on 04.08.2011, on which date the return for AY 11-12 was not due, the appellant showed the unaccounted cash receipts found at the time of search, in its books of accounts for FY 10-11 (at Rs 2,01,53,000) and FY 11-12 (at Rs 20,00,000), under the head 'current liabilities' on one side of the balance sheet and as cash available on the other. Since the appellant was following percentage completion method for revenue recognition as per the accounting standard AS-7, and in FY 10-11 and FY 11-12, the percentage of completion was below the bench mark of 25%, no income was declared for these years. When queried by the AO during the assessment proceedings, it was stated by the appellant that the unaccounted cash receipts of Rs 2,21,53,000, which was received as advances from customers for its project, would be offered to tax in the succeeding financial years, based on AS-7 and the percentage completion method. While passing the assessment order, the AO rightly noted that the assertion of the appellant - that it will offer the cash receipts as income in succeeding years - 'cannot be verified at this stage'. Accordingly, he added the cash of Rs 2,01,53,000 and Rs 20,00,000 in AY 11-12 and AY 12-13 respectively, on a protective basis. He also stated that in the event the appellant offered the aforementioned cash receipts as income in succeeding years, after due verification, the protective additions in AY 11-12 and AY 12-13 to that extent would stand deleted. The AO also initiated penalty proceedings u/s 271AAA and 271(l)(c). The appellant did not contest the assessment order passed by the AO on 28.03.2014.*

7. *In the penalty proceedings u/s 271AAA, the AO referred to the provisions of section 271AAA. , Stating that while the provision required the assessee to offer undisclosed income in its return, substantiate the manner in which the undisclosed income was derived, and also pay the tax liability arising thereon, the appellant had not met any of these conditions. It was stated that undisclosed income had not been offered in the return of income; that the assessee was trying to 'fool the department' by its offer of undisclosed income in the form of current liabilities; that it had not substantiated the manner in which the unaccounted income had been derived; and that tax had also not been paid by it. With these observations, the AO imposed penalty u/s 271AAA @ 10% on undisclosed income of Rs 2,01,53,000 in AY 11-12 and on undisclosed income of Rs 20,00,000 in AY 12-13, amounting to Rs 20,15,300 and Rs 2,00,000 respectively. Aggrieved by these orders, the appellant is in appeal.*

8. *In the written submissions, the AR has lodged a strong objection to the*

observation of the AO in para 4.1 of the impugned orders, where it was stated that the assessee was 'trying to fool the department by offering undisclosed income in the form of current liabilities and not paying any tax during the year'. He has requested that this remark of the AO may be deleted. While there is no provision to 'delete' the remarks of the AO in the appellate proceedings, in order to adjudicate upon the ground of appeal filed by the appellant in Form 35, it is essential to refer to the relevant facts of the case, which have already been referred above. Thus, it is an admitted fact that the cash reflected in the seized documents pertained to unaccounted cash, received by the appellant from customers at the time of booking of flats in FY 10-11 and FY 11-12. It is also a matter of record, as emanating from the assessment order of the relevant years, that the unaccounted cash receipts were eventually taken into the books after search and reflected under the head of current liabilities' in the balance sheet. The explanation of the appellant - that the sum was not offered as income in AYs 11-12 and 12-13 because it was following the percentage completion method and AS-7, and less than the bench mark of 25% of the project had been completed in those years - is also recorded and accepted in the assessment orders. Therefore, the observation of the AO in the impugned order about the appellant 'trying to fool the department' is not consistent with the facts and observations made in the assessment order.

9. *Coming to the contentions of the AR, it has been argued as per submission dated 17.3.2015, that the levy of penalty is against law, since the appellant's case 'comes squarely within the ambit of 271AAA(2)(i) and (ii)'. It was submitted that complete disclosure was made during the course of search and seizure proceedings, that the source was disclosed, and that the sum was in the nature of advance payments received from customers, and shown as current liabilities in FY 10-11 and FY 11-12 since the prescribed percentage of completion had not been achieved then. Reference was made to clause (iii) of sub-section (2) of section 271AAA, where the payment of tax and interest on undisclosed income was qualified by the phrase 'if any'. It was argued that tax and interest on the undisclosed income became payable only when the income of the appellant from its project became taxable, based on the accounting standard AS-7 followed by it and accepted by the AO while passing the assessment order. It was further stated that the project was delayed and was started only in FY 14-15, and that accordingly, advance tax of Rs 76.50 lakhs was paid for FY 14-15. Reference was made to the case of Crossing Infrastructure P Ltd v CIT 267 CTR 519 (All)-, and DCIT v Pioneer Marbles & Interiors P Ltd 144 TTJ 663 (Kol)."*

The present appeal before us in ITA No. 3531/Del/2015 is filed by Revenue against the aforesaid order of Ld. CIT(A) in the case of NHPL for A.Y. 2011-12.

(4.2) NHPL also filed appeal against levy of penalty U/s 271(1)(c) of I.T. Act for A.Y. 2012-13. Vide a separate order dated 20th March, 2015 in appeal no. 426/2014-15, the Ld. CIT(A) deleted penalty in respect of aforesaid Rs. 20,00,000/- but confirmed penalty in respect of the aforesaid Rs. 63,00,000/-. The relevant portion of the order of the Ld. CIT(A) is reproduced as under:

"3. *The appellant is one of the companies of the Nirala Group that was searched on 04.08.2011. The group, including the appellant, is mainly engaged in the business of real estate development. The key persons of the group were Sh. Suresh Kumar Garg, Sh Rakesh Mahajan and Sh. Iftikhar Ahmed. The search resulted in cash seizure of Rs. 53,98,000 and jewellery seizure of Rs. 10,52,124. A number of incriminating documents were also found and seized. Specific mention is made to pages 47-48 of annexure A-4 found from H-121, Sector-63, Noida, the corporate office of the group, which inter alia referred of cash receipts of Rs. 2,21,53,000 in addition to cheques, received against booking for flats from various customers by Nirala Housing Pvt. Td. (the appellant company). Out of the total cash of Rs. 2,21,53,000, cash of Rs. 2,01,53,000 pertained to FY 10-11 and Rs. 20,00,000 to FY 11-12.*

4. *Post search, Sh Suresh Kumar Garg, one of the directors and shareholders in the Nirala group, disclosed before the DDIT Inv, Unit 1(3), New Delhi, a sum of Rs 10,00,00,000 as additional income of the entire group for FYs relevant to AYs 11-12 and 12-13. Subsequently, before the AO, on 20/3/2014, the 'bifurcation' of the 'surrendered income' amongst 4 companies of the group was provided as follows:*

<i>S.No.</i>	<i>Premises of Assessee</i>	<i>A.Y.</i>	<i>Additional business income</i>	<i>Remarks</i>
<i>1</i>	<i>Nirala Developers P.Ltd.</i>	<i>12-13</i>	<i>1,95,47,000</i>	<i>To be telescoped with</i>
<i>2</i>	<i>PAN Realtors P</i>	<i>12-13</i>	<i>5,00,00,000</i>	

	<i>Ltd.</i>			<i>addition made if any</i>
3	<i>Nirala Infratech P Ltd.</i>	<i>12-12</i>	<i>75,00,000</i>	<i>Reductio of WIP</i>
4	<i>NiralaHousing P Ltd.</i>	<i>12-13</i>	<i>20,00,000</i>	<i>Advance from customers to be adjusted in PCM</i>
		<i>11-12</i>	<i>2,01,53,000</i>	
5	<i>Others</i>	<i>-</i>	<i>8,00,000</i>	<i>To be telescoped with addition made if any</i>
	<i>Total</i>		<i>10,00,00,000</i>	

5. When confronted with the seized material [pages 47- 48 of annexure A-4 found from H-121, Sector-63, Noida] by DDIT(Inv), Sh Rakesh Mahajan, a director in the appellant company, stated u/s 131(l)(a) on 26.12.2011 in response to query 23 that the 2 pages contained the same details with respect to flat no, customer name, rate, total amount received, mode of receipt, etc; that the amounts received through cheque as reflected in these pages were duly recorded in the books of account of Nirala Housing Pvt Ltd; and that the unaccounted cash portion had 'already been offered for tax being part of additional business income offered'.

6. Since search had taken place on 04.08.2011, on which date the return for AY 11-12 was not due, the appellant showed the unaccounted cash receipts found at the time of search, in its books of accounts for FY 10-11 (at Rs 2,01,53,000) and FY 11-12 (at Rs 20,00,000), under the head 'current liabilities' on one side of the balance sheet and as cash available on the other. Since the appellant was following percentage completion method for revenue recognition as per the accounting standard AS-7, and in FY 10-11 and FY 11-12, the percentage of completion was below the bench mark of 25%, no income was declared for these years. When queried by the AO during the assessment proceedings, it was stated by the appellant that the unaccounted cash receipts of Rs 2,21,53,000, which was received as advances from customers for its project, would be offered to tax in the succeeding financial years, based on AS-7 and the percentage completion method. While passing the assessment order, the AO rightly noted that the assertion of the appellant - that it will offer the cash receipts as income in succeeding

years - 'cannot be verified at this stage'. Accordingly, he added the cash of Rs 2,01,53,000 and Rs 20,00,000 in AY 11-12 and AY 12-13 respectively, on a protective basis. He also stated that in the event the appellant offered the aforementioned cash receipts as income in succeeding years, after due verification, the protective additions in AY 11-12 and AY 12-13 to that extent would stand deleted. The AO also initiated penalty proceedings u/s 271AAA and 271(l)(c). The appellant did not contest the assessment order passed by the AO on 28.03.2014.

7. In the penalty proceedings u/s 271AAA, the AO referred to the provisions of section 271AAA. , Stating that while the provision required the assessee to offer undisclosed income in its return, substantiate the manner in which the undisclosed income was derived, and also pay the tax liability arising thereon, the appellant had not met any of these conditions. It was stated that undisclosed income had not been offered in the return of income; that the assessee was trying to 'fool the department' by its offer of undisclosed income in the form of current liabilities; that it had not substantiated the manner in which the unaccounted income had been derived; and that tax had also not been paid by it. With these observations, the AO imposed penalty u/s 271AAA @ 10% on undisclosed income of Rs 2,01,53,000 in AY 11-12 and on undisclosed income of Rs 20,00,000 in AY 12-13, amounting to Rs 20,15,300 and Rs 2,00,000 respectively. Aggrieved by these orders, the appellant is in appeal.

8. In the written submissions, the AR has lodged a strong objection to the observation of the AO in para 4.1 of the impugned orders, where it was stated that the assessee was 'trying to fool the department by offering undisclosed income in the form of current liabilities and not paying any tax during the year'. He has requested that this remark of the AO may be deleted. While there is no provision to 'delete' the remarks of the AO in the appellate proceedings, in order to adjudicate upon the ground of appeal filed by the appellant in Form 35, it is essential to refer to the relevant facts of the case, which have already been referred above. Thus, it is an admitted fact that the cash reflected in the seized documents pertained to unaccounted cash, received by the appellant from customers at the time of booking of flats in FY 10-11 and FY 11-12. It is also a matter of record, as emanating from the assessment order of the relevant years, that the unaccounted cash receipts were eventually taken into the books after search and reflected under the head of current liabilities' in the balance sheet. The explanation of the appellant - that the sum was not offered as income in AYs 11-12 and 12-13 because it was following the percentage completion method and AS-7, and less than the bench mark of 25% of the project had been completed in those years - is also recorded

and accepted in the assessment orders. Therefore, the observation of the AO in the impugned order about the appellant 'trying to fool the department' is not consistent with the facts and observations made in the assessment order.

9. *Coming to the contentions of the AR, it has been argued as per submission dated 17.3.2015, that the levy of penalty is against law, since the appellant's case 'comes squarely within the ambit of 271AAA(2)(i) and (hi)'. It was submitted that complete disclosure was made during the course of search and seizure proceedings, that the source was disclosed, and that the sum was in the nature of advance payments received from customers, and shown as current liabilities in FY 10-11 and FY 11-12 since the prescribed percentage of completion had not been achieved then. Reference was made to clause (iii) of sub-section (2) of section 271AAA, where the payment of tax and interest on undisclosed income was qualified by the phrase 'if any'. It was argued that tax and interest on the undisclosed income became payable only when the income of the appellant from its project became taxable, based on the accounting standard AS-7 followed by it and accepted by the AO while passing the assessment order. It was further stated that the project was delayed and was started only in FY 14-15, and that accordingly, advance tax of Rs 76.50 lakhs was paid for FY 14-15. Reference was made to the case of Crossing Infrastructure P Ltd v CIT 267 CTR 519 (All)-, and DCIT v Pioneer Marbles & Interiors P Ltd 144 TTJ 663 (Kol).*

10. *In the written submission filed on 20.3.2015, it was stated that the AO had only commented upon the appellant's conduct with reference to clauses (ii) and (iii) of sub section (2) of section 271AAA and that since he had 'not commented anything' as far as clause (i) was concerned, it may be 'assumed that he had accepted that the declaration/surrender was made u/s 132(4)'. It was submitted that in the event of any doubt, all IT records along with the appraisal report of the Investigation wing may be summoned to ascertain if the disclosure was made u/s 132(4) or not. Stating that since the search, a 'partition' had taken place amongst the erstwhile directors of the group, no documents were available with the appellant. Further, referring to the Indian Evidence Act, it was requested that in the event of drawing any adverse inference, the documentary evidence 'specially the appraisal report' may be shown to the appellant. With regard to clause (ii) of sub section (2) of section 271AAA, it was submitted that since the appellant had stated that the income was 'additional business income', the requirement of 'substantiating the manner in which undisclosed income was derived' was met and the condition of clause (ii) satisfied. With regard to clause (iii) of sub section (2) of section 271AAA, the explanation given in the earlier submission was reiterated.*

11. The submissions of the AR, as contained in written submissions dated 17.3.2015 and 20.3.2015 are considered.

- 11.1 The appellant has sought to claim that sub-section (1) of section 271AAA was not applicable to its case because it was covered by sub-section (2) that prohibits the application of subsection (1). Broadly, sub-section (1) of section 271AAA provides for imposition of penalty @ 10% of the undisclosed income, while sub-section (2) of section 271AAA stipulates that the provisions of sub-section (1) will not apply if the assessee admits to undisclosed income in a statement u/s 132(4) made in the course of search and specifies the manner in which it was derived, substantiates the manner in which such income was derived, and pays the tax and interest thereon.
- 11.2 The relevant facts of this case is that, while Suresh Kumar Garg disclosed Rs 10 crores as 'additional business income' of the Nirala group for FY 10-11 and 11-12, in which the cash of Rs 2,21,53,000 pertaining to the appellant was subsequently claimed to be in eluded, the admission was not made u/s 132(4) of the Income Tax Act. The disclosure was in fact made by a typed letter addressed to DDIT(Inv), Unit-1(3), New Delhi, following search action on the Nirala group. This is evident from page 2 of the assessment order of the appellant for AY 11- 12 and 12-13, where the AO has reproduced the letter of Sh S K Garg to the DDIT. The said letter refers to the search on the group and seizure of certain valuables and documents and goes on to state that '**in order to avoid litigation and to buy peace of mind**', disclosure of Rs 10 crores was being made by the group as 'additional business income' for FY 10-11 and **11-12**.
- 11.3 Now since the letter of disclosure, stands reproduced in the assessment order of the appellant itself, it dispels all doubt about whether the disclosure of Rs 10 crores was made u/s 132(4) or not. Section 132(4) entails statement of any person who is found to be in possession or control of books of accounts, documents, money, bullion, jewellery or other valuable article or thing, upon examination on oath by the authorized officer during the course of search or seizure. It is thus crystal clear that the aforesaid disclosure of Rs 10 crores was not made before the authorised officer upon examination on oath during the course of search as contemplated in section 132(4). This is also evident from the various statements recorded u/s 132(4) of Suresh Kumar Garg on 4.8.2011, 5.8.2011 and 30.9.2011; Sh Rakesh Mahajan on and 2.9.2011; and Sh Iftikhar Ahmed on 4.8.2011, none of which refer to any disclosure at all.
- 11.4 It is also noted that the disclosure of Rs 10 crores was an omnibus declaration made by Sh S K Garg in respect of the entire group, without bifurcation and without specifying the manner in which it had been earned. The bifurcation of Rs 10 crores came much later, when a letter was filed before the AO on 20/3/2014, specifying the amounts and the companies in which the sums had been offered. The specific admission, about Rs 2,21,53,000 being the unaccounted cash receipts of the appellant company and its inclusion in the group disclosure of Rs 10 crores, was made for the first time by Sh Rakesh Mahajan (who continues to be the key person in the appellant company even after 'partition' of the group), only in response to query 23 on u/s 131(1A) in the chamber of DDIT(Inv). Thereafter, while filing the return of income for AY 11-12 and 12-13 (subsequent to search), the appellant showed the unaccounted cash receipts of Rs 2,01,54,000 and Rs 20,00,000 in its books for FY 10-11 and 11-12. These facts are part of the assessment orders of the appellant company for AY 11-12 and 12-13.

- 11.5 *It is thus evident from the facts narrated above that clause (i) of sub-section (2) of section 271AAA, requiring admission of undisclosed income u/s 132(4), is not fulfilled. Since it is apparent that the issue of disclosure of 'undisclosed income' of the appellant company was made on 26.12.2011 u/s 131(1A), the request of the appellant to show the 'appraisal report' (which in any case is a confidential document) is irrelevant. The other contention of the appellant, that since the AO did not make any specific comment, assumption may be made that the declaration/surrender was made u/s 132(4) - is also without merit.*
- 11.6 *The appellant has claimed that the clause (ii) of sub-section (2) of section 271AAA, that requires substantiation of the manner in which the undisclosed income was derived by the assessee, is met, since the seized material itself referred to it as cash advance received from customers against their booking of flat. In this regard, it is noted that since the appellant admitted about Rs 2,21,53,000 being the unaccounted cash receipts of the appellant company on 26.12.2011 u/s 131(1A) in the chamber of DDIT(Inv), the fulfillment towards clause (ii) of sub-section (2) of section 271AAA - the substantiation 'about the manner in which the undisclosed income was derived - came about on that date.*
- 11.7 *The appellant has also claimed that clause (iii) of sub-section (2) of section 271AAA, relating to the payment of tax and interest, is applicable only if these were due and that since this was not so in its case, the condition was not applicable to it. But this contention does not appear to be correct, since the words 'if any' is evidently used in the clause in connection with 'interest' and not 'tax'. It may be mentioned that 'undisclosed income' in all instances will suffer tax, but interest thereon, may or may not apply, depending upon the facts and circumstances of each case. In case of Pioneer Marbles & Interiors P Ltd (supra), the Hon'ble Tribunal noted that though no time limit had been set out in the statute, for immunity under sub section (2) of section 271AAA, tax and interest should have been paid well before the conclusion of the impugned penalty proceedings. In the case of the appellant, it is an admitted fact that tax was not paid on the undisclosed sums before the date of the impugned penalty orders. Therefore, clause (iii) of sub-section (2) of section 271AAA, requiring payment of tax, is also not fulfilled by the appellant.*
- 11.8 *Thus, the appellant cannot escape from the penalty envisaged in sub-section (1) of section 271AAA because clauses (i) and [ii] of sub-section (2) of section 271AAA are not met.*
- 11.9 *It may be also mentioned that penalty u/s 271AAA is rightly levied upon the appellant in AY 11-12 and AY 12-13, even though the additions made on account of seized material in the relevant assessment orders are made on protective basis. This is because the unaccounted receipt of Rs 2,21,53,000 constitutes 'undisclosed income' for 'specified previous year' as defined in the Explanation appended to section 271AAA.*
- 11.10 *As per Explanation (a) appended to section 271AAA, 'undisclosed income' means any income of specified previous year, represented wholly or partly by money, bullion, jewellery or other valuable article or thing or documents or transactions found in the course of search and which is not recorded in the books of accounts maintained in the normal course, or has not been disclosed to the CCIT or CIT before the date of search. Also, any income of specified previous year, represented wholly or partly by any entry in respect of expense recorded in the books of accounts maintained in the normal course, but which is found to be false because of search, is also defined as 'undisclosed income'. Thus, it is evident that the words 'undisclosed income' referred in section 271AAA, is not with reference to the 'total income' of any previous year relevant to assessment year, but with the income/earning in the generic sense of the term. Since as per the seized*

- document, the appellant received cash of Rs 2,21,53,000 from customers as part of advance against purchase of flats, and this was not recorded in its books of accounts maintained in the normal course, and had also not been disclosed to the CCIT or CIT before the date of search, it constituted its 'undisclosed income' within the meaning conferred by Explanation (a) appended to section 271AAA.*
- 11.11 *It is also relevant that the penalty u/s 271AAA applies only to 'specified previous year', which has been defined in Explanation (b) appended to section 271 AAA. Thus, the year in which search is conducted, and the year which had ended before the date of search but the date for filing the return of income u/s 139(1) had not expired before the date of search and the assessee had not furnished the return for that previous year, are 'specified previous year'. Since the date of search on the appellant was 4.8.2011, the previous year 10-11 had ended and the date for filing return u/s 139(1) had not expired and the appellant had not furnished the return for previous year 10-11, the previous year 10-11 and previous year 11-12 relevant to AY 11-12 and AY 12-13 respectively come within the meaning of 'specified previous year', as defined by Explanation (b) appended to section 271AAA.*
- 11.12 *Penalty u/s 271AAA is applicable in respect of previous years relevant to AY 11-12 and AY 12-13 since the documents relating to undisclosed income of Rs 2,01,53,000 and Rs 20,00,000 had been found in the course of search on the Nirala group and the unaccounted cash receipts were in respect of the specified previous years. In this manner, with **all the ingredients referred in the definition of 'undisclosed income' and 'specified previous year', as per Explanation appended to section 271AAA, fulfilled**, the imposition of penalty u/s 271AAA is confirmed in respect of AY 11-12 and AY 12-13.*
- 11.13 *The appellant has referred to some decisions, namely Crossing Infrastructure P Ltd (supra) and Pioneer Marbles & Interiors P Ltd (supra), but these do not help its case. In the case of the former, all the three conditions given in sub section (2) of section 271 AAA had been met. The latter decision was in the context of timeline relating to payment of tax. In the case of the appellant, it has already been noted that clauses (i) and (ii) in sub section (2) of section 271AAA were not met. The claim of the appellant about payment of Rs 76.50 lakhs as advance tax for FY 14-15 is not relevant to the matter of 'undisclosed income' relating to previous years 10-11 and 11-12.*
- 11.14 *In view of the discussion above and the facts of the case - where document containing details of undisclosed income of Rs 2,01,53,000 and Rs 20,00,000, received from customers as part of advance against purchase of flats, was found during search; where these cash receipts were not recorded in the books of accounts maintained in the normal course, and had also not been disclosed to the CCIT or CIT before the date of search; where subsequently these sums were reflected in the balance sheet; **but where no admission of the undisclosed income was made under section 132(4) and tax thereon was not paid till the passing of the impugned orders**, - the appellant is liable for penalty u/s 271AAA. Accordingly, the AO was justified in imposing penalty u/s 271AAA, determined at Rs 20,15,300 in AY 11-12 and Rs 2,00,000 in AY 12-13, being 10% of undisclosed income on Rs 2,01,53,000 and Rs 20,00,000 respectively. Consequently, the penalty orders are confirmed."*

The present appeal before us in ITA No. 3137/Del/2015 filed by NHPL is against the aforesaid order of Ld. CIT(A).

(5) At the time of hearing before us, the Ld. Counsel for assessee contended that penalty U/s 271(1)(c) of I.T. Act cannot be levied in respect of such income on which penalty U/s 271AAA has been levied, and for this purpose he drew our attention to Section 271AAA(3) of I.T. Act which expressly provides that 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). He further contended that no penalty can be levied either U/s 271(1)(c) or U/s 271AAA in respect of additions made on protective basis. He further submitted that the disclosure of Rs. 10,00,00,000/- made by the entire Nirala Group, which included disclosures by the NHPL and NDPL should be treated as disclosures made U/s 132(4) of I.T. Act for the purposes of Section 271AAA(2)(i) of I.T. Act and the disclosure made by Nirala Group should also be treated as sufficient compliance of requirements of Section 271AAA(2)(ii) of I.T. Act. He also contended that the NHPL followed Project Completion Method of accounting, and no tax was payable because no income was recognized under this method of accounting by NHPL for either of the two Assessment Years, viz A.Y 2011-12 and A.Y. 2012-13; and further, that no penalty was leviable either U/s 271(1)(c) or U/s 271AAA for either A.Y. 2011-12 or A.Y. 2012-13 because no income was recognized in accordance with Project Completion Method of accounting and no tax was payable. Thus, he submitted that assessee, NHPL and NDPL, were not liable for penalty U/s 271AAA of I.T. Act. He also relied on decisions reported in the following case laws:

1. ***Concrete Developers Vs ACIT C(C)-2(2) (Nagpur ITAT)***
2. ***Sita Ram Gupta v. Gupta ACIT, [2014] 151 ITD 449 (Delhi-Trib.)***

3. ***PCIT v. Swapna Enterprise, [2018] 401 ITR 488 (Gujarat)/ [2018] 302 CTR 504 (Gujarat)***
4. ***ACIT vs. Akshar Developers, [2017] 86 taxmann.com 251 (Mumbai-Trib.)***
5. ***M/s Kanakia Spaces Pvt. Ltd. v. AcIT, ITAT Mumbai (IT Appeal No. 6763 (Mum.) of 2011)]***
6. ***ACIT v. Shreenarayan Sitarma Mundra, [2017] 166 ITD 47 (Ahmedabad)***
7. ***UHDE India (P.) Ltd. v. ACIT, ITAT Mumbai, [2016] 45 ITR (T) 177***
8. ***Bhailal Manilal Patel v. CIT, [2014] 49 taxmann.com 539 (Gujarat)/[2015] 232 Taxman 483 (Gujarat)***
9. ***Calcutta High Court in CIT v. Super Steel (Sales) Co. [1989] 178 ITR 451***
10. ***CIT vs. Behari Lal Pyare Lal [1983] 141 ITR 32***
11. ***Abhay Kumar v. ACIT, [1997] 63 ITD 15 (Patna) (TM)***
12. ***Surjeet Singh Mahan Singh v. WTO, [1998] 64 ITD 104 (Delhi)/[1997] 59 TTJ 504 (Delhi)***

(6) The Ld. CIT (DR) vehemently supported the orders of Ld. CIT(A) as far as imposition of penalty U/s 271AAA of I.T. Act is concerned. He submitted that the assessee's claim that the disclosures of Rs. 10,00,00,000/- were made by the Nirala Group U/s 132(4) of I.T. Act was not borne out from record. He pointed out that the disclosure was made by the Nirala Group by way of a letter addressed to DDIT Investigation, Unit 1(3), New Delhi which is different from statement recorded on oath U/s 132(4) of I.T. Act. He further submitted that the assessee had failed to substantiate the manner in which the undisclosed income was derived. He also pointed out that NHPL had failed to pay the taxes, together with interest in respect of the undisclosed income in accordance with Section 271AAA(2)(iii) of I.T. Act, even in

respect of that income which was part of total disclosures of Rs. 10,00,00,000/- by the Nirala Group. Thus, he contended that both the assesseees, NHPL and NDPL had failed to fulfill the requirement U/s 271AAA(2)(i) and 271AAA(2)(ii) of I.T. Act and accordingly the assesseees were deservedly hit by Section 271AAA(1) of I.T. Act. He strongly relied on the orders of Ld. CIT(A) and AO and he also read out the relevant portions of their orders. In the case of NHPL, he submitted, even the provisions of Section 271AAA(2)(iii) of I.T. Act were not fulfilled; and thus the assessee was in any case hit by provisions of Section 271AAA(1) of I.T. Act. As far as penalty levied by the AO U/s 271(1)(c) of I.T. Act in the case of NHPL, for A.Y. 2011-12 and A.Y. 2012-13 is concerned, Ld. CIT(DR) relied on the orders of the AO.

(7) We have heard both sides patiently and attentively. We have also carefully considered the materials on record. We have taken note of the case laws and judicial precedents brought to our notice by the Ld. Counsel for assessee. We have also carefully perused the impugned orders of Ld. CIT(A) and the orders of the AO and we have further taken into consideration the case laws and judicial precedents referred therein.

(8) The two side (NHPL and NDPL on one side and Revenue on the other side) have disputed whether the disclosures made by the assesseees as part of the overall disclosures of Rs. 10,00,00,000/- by Nirala Group was disclosure U/s 132(4) of I.T. Act or not. The two sides (NHPL and NDPL on one side and Revenue on the other side) have also disputed whether though disclosure was made by Nirala Group, whether the two assesseees had substantiated the manner in which undisclosed income for the two

Assessment years 2011-12 and 2012-13, was derived. We notice that NHPL, instead of substantiating the manner in which undisclosed income for A.Y. 2011-12 and 2012-13 was derived; actually took a contrary stand during assessment proceedings that the income disclosed had not accrued to the assessee in accordance with Project Completion Method of accounting by the assessee. The surrendered income was not included in Return of income of NHPL for A.Ys. 2011-12 and 2012-13.

(8.1) It will be useful to refer to provisions of Section 271AAA and Section 132(4) of I.T. Act or convenience these provisions are reproduced as under:

" [Penalty where search has been initiated.

271AAA. (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 after the 1st day of June, 2007 [but before the 1st day of July, 2012], the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.*

(2) *Nothing contained in sub-section (1) shall apply if the assessee,-*

(i) *in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;*

(ii) *substantiates the manner in which the undisclosed income was derived; and*

(iii) *pays the tax, together with interest, if any, in respect of the undisclosed income.*

(3) *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).*

(4).....

Explanation....."

(8.1.1) On careful perusal of provisions of section 271AAA of I.T. Act, it can be readily inferred that, **in a case where search was initiated U/s 132 of I.T. Act during**

the period from 1/6/2007 to 30/06/2012, the assessee is required to pay penalty amounting to 10% of the undisclosed income, as a general rule. The only exceptions to this general rule are the cases in which the three conditions prescribed U/s 271AAA(2) are cumulatively fulfilled. If any one of the three conditions prescribed in clauses (i),(ii),(iii) of sub-section (2) of section 271AAA is not fulfilled, the assessee does not get the benefit of Section 271AAA(2) of I.T. Act and becomes liable to pay penalty U/s 271AAA(1) of I.T. Act. Thus, the failure of an assessee to pay tax, together with interest, is a clear default, attracting the penalty U/s 271AAA(1) read with section 271AAA(2)(iii) of I.T. Act. In the appeals before us, NHPL having failed to pay tax together, with interest, is in clear default of Section 271AAA(2)(iii) and, is thus hit by Section 271AAA(1) of I.T. Act. Further, **if an assessee fails to substantiate the manner in which the undisclosed income was derived, the assessee is hit by section 271AAA(1) of I.T. Act read with 271AAA(2)(ii) of I.T. Act.** In the appeals before us, one of the two assessees, NHPL, instead of substantiating the manner in which undisclosed income was derived, actually took a contrary stand, in contradiction of the disclosures made by Nirala Group during assessment proceedings, that the disclosed income had not accrued in accordance with Project Completion Method and thus was in clear default of Section 271AAA(2)(ii) of I.T. Act whereby it was hit by Section 271AAA(1) of I.T. Act. The relevant portions of orders of Ld. CIT(A), which have already been reproduced earlier in this Order have clearly established that both the assessees, NHPL and NDPL, had failed to substantiate the manner in which the

undisclosed income was derived; and for the detailed reasons given in her Orders, we agree with her finding on this issue. Further, to claim the benefit U/s 271AAA(2) Of I.T. Act, the admission of undisclosed income by an assessee is required to be made in a statement U/s 132(4) of I.T. Act and the assessee is further required to specify the manner in which such income have been derived. A perusal of Section 132(4) of I.T. Act shows that it is a statement recorded on oath by an Authorized Officer, during the course of search and seizure, during examination of a person found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing. Although the Ld. Counsel for assessee contended that the disclosures of Rs. 10,00,00,000/- by the Nirala Group, including disclosures by NHPL and NDPL was made in a statement U/s 132(4) of I.T. Act, he failed to file a copy of the statement recorded U/s 132(4) of I.T. Act. The assessees in appeal before us, NHPL and NDPL, having failed to substantiate the claim that the disclosures by Nirala Group was made U/s 132(4) of I.T. Act, we are unable to accept this claim. From the perusal of available records before us, it is found that this disclosures were made not U/s 132(4) of I.T. Act but instead, by way of letter addressed to DDIT Investigation, Unit 1(3), New Delhi. From the perusal of contents of this letter, it is also seen that the disclosures made in this letter by the Nirala Group did not contain specifics of the manner in which such income has been derived. Thus, the two assessees in appeals before us are in clear default of Section 271AAA(2)(i) of I.T. Act; and are consequently, hit by Section 271AAA(1) of I.T. Act.

(8.2) One of the contentions of the Ld. Counsel for the NHPL was that no penalty can be levied in respect of additions made by the Assessing Officer on protective basis. For these contentions, the Ld. Counsel for Assessee relied on the cases of Bhailal Manilal Patel (supra), Super Steel (Sales) Co. (supra), Abhay Kumar vs. ACIT (supra), and Surjeet Singh Mahan Singh vs. WTO (supra). However, on perusal of these precedents we find that the case of the Assessee in appeal before us is on entirely distinguishable facts. In the precedents cited by the Ld. Counsel for NHPL, the protective assessment was made on the respective assesseees whereas substantive additions were made on some other assesseees for the same assessment years; and in those cases the assessee in whose hands the income was liable to be taxed. However, in the case of NHPL before us, the protective addition has been made in the year under consideration whereas substantive addition was left to be made in a later year in the hands of the same assessee. The uncertainty in the case of NHPL before us was not in respect of the assessee in whose hands the income was to be added. The uncertainty was as to the year in which the addition is to be made. This uncertainty arose because of the changed stand of the assesseees, who initially surrendered undisclosed income after search U/s 132 of I.T. Act for the years under consideration; but later took a contrary stand by filing return showing nil income and taking the stand during assessment proceedings that the income will be recognized in later years in accordance with Project Completion Method of Accounting. Thus, the precedents cited on behalf of the assesseees by the Ld. Counsel are on entirely distinguishable facts and do not advance the case of NHPL. **When a protective addition is made because an assessee**

changes its stand leading to uncertainty about the year in which the income is to be assessed, the assessee cannot be permitted to benefit from uncertainty created by its own conduct. Further, we also note that in response to a query made by the Bench, at the time of hearing before us, the Ld. Counsel for assessees informed that the undisclosed income declared after search but not shown in the returns of income of NHPL, is yet to be recognized by the Assessee in any subsequent year on the basis of Project Completion Method. This subsequent conduct of the assessees, after surrendering undisclosed income pursuant to search U/s 132 of I.T. Act; in firstly not showing the declared income in the returns of income and secondly, in not recognizing any income in any later Assessment Year, despite substantial lapse of time; does not inspire much confidence about the bonafides of the assessee (NHPL). This subsequent conduct of NHPL, it is noticed, is in sharp contrast with the conduct of the other assessee in appeal before us, NDPL. As we have noticed earlier, NDPL included the amount of Rs. 1,95,47,000/- in its Return of income for A.Y. 2012-13 in accordance with the total disclosures of Rs. 10,00,00,000/- made by the Nirala Group unlike NHPL which failed to include Rs. 2,01,53,000/- and Rs. 20,00,000/- for A.Ys. 2011-12 and 2012-13 respectively in accordance with the total disclosures of Rs. 10,00,00,000/- made by the Nirala Group. Be that as it may, what is to be noted is that the additions made by the AO in the Assessment Orders have been accepted by the Assesseees and no appeal was filed by the Assesseees against the quantum additions made in the Assessment Orders. **When an assessee accepts the protective additions made in assessment order by not filing any appeal against it, the**

character of the additions changes from protective addition to substantive addition. A valid presumption can legitimately arrived at, that the same income, which is assessed in the hands of the assessee in one year and has been accepted by the assessee, will not be offered by the assessee in any subsequent year. Subsequent conduct of NHPL, is not recognizing any income under Project completion Method, in any subsequent year, despite substantial lapse of time imparts validity to this presumption. Thus, the character of the income assessed in the Assessment Orders, changed from protective additions (at the time of Assessment Order) to substantive additions at the time when penalty orders were passed by the AO because the NHPL has accepted the additions by not filing the appeals. As the character of the additions, at the time of penalty orders U/s 271AAA of I.T. Act had already undergone change from protective additions to substantive additions, the contentions raised by the Ld. Counsel for NHPL has no merit.

(9) In view of the aforementioned legal position as discussed earlier and also in view of the facts of the case as discussed earlier, we are of the view that both the assessees, NHPL and NDPL have failed to comply with Section 271AAA(2)(i) and Section 271AAA(2)(ii) of I.T. Act. In addition, NHPL has also failed to comply with Section 271AAA(2)(iii) of I.T. Act. It is readily inferred from perusal of Section 271AAA of I.T. Act that the three requirements U/s 271AAA(2) of I.T. Act, i.e., Sections 271AAA(2)(i), 271AAA(2)(ii), 271AAA(2)(iii) of I.T. Act are cumulatively required to be fulfilled by an Assessee, to escape penalty U/s 271AAA(1) of I.T. Act. Thus, both the assessees, NHPL and NDPL are hit by Section 271AAA(1) of I.T. Act. However, once penalty U/s

271AAA of I.T. Act has been levied in respect of undisclosed income, the AO was in error of law prescribed U/s 271AAA(3) of I.T. Act, in imposing further penalty U/s 271(1)(c) of I.T. Act in respect of the same undisclosed income. U/s 271AAA(3) of I.T. Act, there is clear embargo on the AO for imposing penalty U/s 271(1)(c) in respect of undisclosed income referred to in Section 271AAA(1) of I.T. Act. As far as penalty U/s 271(1)(c) of I.T. Act in the case of NHPL for A.Y. 2012-13 in respect of undisclosed income of Rs. 63,00,000/- is concerned, the Ld. CIT(A) has given detailed reasoning for confirming this penalty. The relevant portion of the order of the Ld. CIT(A) has already been reproduced in earlier part of this order, and we have noticed that the order of the Ld. CIT(A) derives support from the precedents in the cases of MAK Data P. Ltd. v. CIT (2013) 358 ITR 593/ 2013-TIOL-58-SC-IT, CIT v MAK Data P Ltd. 31 Taxman. Com 35 (Del)/352 ITR 1(Del), CIT v Acrotech Ltd. 42 Taxmann.com 20(Delhi), CIT v NG Technologies Ltd. 2014-TIOL-2182-HC-Del-IT, CIT v Kalindi Rail Nirman Engg Ltd. 2014-TIOL-536-HC-Del-IT. The Ld. Counsel for Assessee did not bring any material for our consideration to warrant any interference with order of Ld. CIT(A) as far as her decision to confirm the penalty U/s 271(1)(c) of I.T. Act in the case of NHPL for A.Y. 2012-13 in respect of undisclosed income of Rs. 63,00,000/- is concerned. In view of the detailed reasons given by the Ld. CIT(A) in her order, we agree with her decision to confirm the penalty U/s 271(1)(c) of I.T. Act in the case of NHPL for A.Y. 2012-13 in respect of undisclosed income of Rs. 63,00,000/-.

(10) In view of the foregoing discussions, Revenue's appeal vide ITA No. 3531/Del/2015 in the case of NHPL for A.Y. 2011-12 is dismissed; appeals of NHPL vide

ITA Nos. 3135, 3136/Del/2015 for A.Ys. 2011-12 and 2012-13 respectively are dismissed; appeal of NDPL vide ITA No. 3155/Del/2015 for A.Y. 2012-13 is dismissed; and appeal of NHPL vide ITA No. 3137/Del/2015 for A.Y. 2012-13 is also dismissed.

(11) In the result, all the five appeals are dismissed.

Order pronounced in the open court on 16th day of November 2018.

Sd/-
(S.K. YADAV)
JUDICIAL MEMBER

Sd/-
(ANADEE NATH MISSHRA)
ACCOUNTANT MEMBER

Dated: 16 .11.2018
Pooja/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	14 .11.2018.
Date on which the typed draft is placed before the dictating Member	16 .11.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	.11.18
Date on which the fair order comes back to the Sr. PS/PS	.11.18
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	