आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ,"बी",चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, 'B', CHANDIGARH

श्री संजय गर्ग, न्यायिकसदस्य एवं श्रीमती अन्नपूर्णा गुप्ता, लेखा सदस्य
BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND
Ms. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

आयकरअपीलसं./**ITA No.695/CHD/2018**
निर्धारणवर्ष / Assessment Year :2014-15

M/s SEL Textiles Limited, 273-74,G.T. Road, Dhandari Kalan, Ludhiana	बनाम	The DCIT, Central Circle-III, Ludhiana
स्थायीलेखासं./PAN No: AANCS0401M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारितीकीओरसे/Assessee by : Shri Ashwani Kumar, CA
राजस्वकीओरसे/ Revenue by : Sh. Ram Mohan, CIT DR

सुनवाईकीतारीख/Date of Hearing : 28.01.2019
उदघोषणाकीतारीख/Date of Pronouncement : 18.04.2019

आदेश/Order

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 02.03.2018of the Commissioner of Income Tax (Appeals)-2,Jalandhar [hereinafter referred to as CIT(A)].

2. The assessee has taken following grounds of appeal:-

1. *That order passed u/s 250(6) of the Income Tax Act, 1961 by the Ld. Commissioner of Income Tax (Appeals)-2, Jalandhar upholding the levy of penalty u/s 271AAB at ₹ 4,31,99,747/- is against law and facts on the file in as much as no such penalty was exigible in the facts and circumstances of the case.*

2. *That the Ld. Commissioner of Income Tax was not justified to uphold the penalty u/s 271AAB despite the fact that penalty was initiated by the Ld. Assessing Officer u/s 271AAB(1)(a) whereas while levying penalty, it was levied u/s 271AAB(1)(c).*

3. *That the Ld. C!T(A) gravely erred in upholding the penalty despite the fact that the additional amount declared at ₹ 14.00 Crores did not fall within the ambit of definition of "undisclosed income" as defined in Section 271AAB(3)(c).*

3. The facts of the case in brief are that the assessee is a Limited Company engaged in the business of manufacturing of yarns and towels and also trading in knitted cloth and towels. Consequent to search u/s 132 of the Income Tax Act, 1961 on 11-09-2013 on SEL Group, the assessee filed return on 28-11-2014 declaring loss at Rs. 41,93,29,760/- which included a sum of Rs. 14.00 Crores as additional income declared at the hands of the assesseein a statementrecorded u/s 132(4) of the Income Tax Act, 1961 during search action. This return was subsequently revised on 26-02-2015 declaring loss at Rs. 41,50,72,313/- by adding a sum of Rs. 39,99,258/- on account of profit on stock found short. Both the amounts of Rs. 14.00 crores and Rs. 9,99,258/- were part of the total surrender of Rs. 80.00 crores made by SEL Group of cases while making a statement u/s 132(4) of the Income Tax Act,1961. Assessment was framed by the Ld. Assessing Officer computing the total income at Rs.33,73,75,950/- after making various additions / disallowances vide order dated 30-03-2016. The Assessing Officer also issued a penalty notice under Clause (a) of Sec. 271 AAB asking the assessee to show cause as to why penalty be not imposed in respect of undisclosed income found/surrendered during search action. A detailed reply was filed vide letter dated 26-09-2016. The Ld. Assessing Officer after going through the reply passed an

order u/s 271 AAB on 30-09-2016 whereby levied penalty under Clause (c) of Sec. 271AAB at Rs. 4,31,99,747/-.

4. Being aggrieved by the above orderof the Assessing officer levying the penalty under clause(c) of section 271AAB of the Act, the assessee preferred appeal before the CIT(A) but remained unsuccessful.Thus, the assessee has come inappeal before us.

5. We have heard the rivalcontentions and have also gone through the record. The Ld. Counsel for the assessee has submitted that the provisions of section 271AAB of the Income-tax Act, 1961 (in short 'the Act') arenot attracted at all in the case inhand. He has submitted that the income declared by the assessee during the search actiondoes not fall within the definition of ‘undisclosed income’ as defined under the provisions of section 271AAB of the Act.

6. The Ld. DR, on the other hand, has submitted that the assessee himself had surrendered an amount of ₹ 14,39,99,258/- as its undisclosed income of the year and since the assessee did not substantiate the manner of earning of the said income, hence, the Assessing officer rightly imposed the penalty under the provisions of seciton271AAB (1)(c) of the Act.He has furthersubmitted that evenotherwise, as per the provisions of section 271AAB of the Act, the levy of penalty is mandatory. However, the rate at which thepenalty is to be levied depends upon certain conditions as enumerated inclause (a), clause (b) and clause (c) respectively to sub

section(1) to section 271ABB of the Act. He, in this respect has relied uponthe decision of the Hon'ble Allahabad High Court in the case of ‘Principal CIT Vs. Shri Sandeep Chandak’ and Ors., ITA No. 122 of 2017 order dated 27.11.2017.

7. In rebuttal, the Ld. AR has submitted that as per the provisions of section 274 of the Act whichis made applicable inrelation to thepenalty referred to section 271AAB, thelevy ofpenalty is not mandatory. He, in this respect has relied upon the following decisions of the CoordinateBenches’:-

> ACIT Vs. Marvel Associates, ITA No. 147/Vizag/2017 order dated 16.3.2018 (ITAT Visakhapatnam Bench);
>
> DCIT Vs. M/s Rashmi Metaliks Ltd., ITA No. 1608/Kolkata/2017 dated 1.2.2019; (ITAT Kolkata Bench);
>
> DCIT Vs. Rashmi Cement Ltd, ITA No. 1606/Kolkata/2017 order dated 28.2.2019((ITAT Kolkata Bench).

8. We have considered the rival contentions of the Ld. Counsel for the parties and gone through the record,also examined the relevant provisions of the Act and case laws on the issue. For the sake of ready reference, the relevant provisions of section 271AAB and section 274 of the Income Tax Act are reproduced as under:

> **“Penalty where search has been initiated**
>
> 271AAB: (1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of July, 2012, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him—

(a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such assessee—

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

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

(iii) On or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, does not admit the undisclosed income; and

(ii) on or before the specified date—

(A) declares such income in the return of income furnished for the specified previous year; and

(B) pays the tax, together with interest, if any, in respect of the undisclosed income;

(c) a sum which shall not be less than thirty per cent but which shall not exceed ninety per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).

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

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

Explanation:--- For the purpose of this section,__

(a).....

(b).....

(c) "undisclosed income" means—

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of

account or other documents or transactions found in the course of a search under section 132, which has—

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

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

(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.

Section 274

Procedure

274 (1) No order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard.

(2) No order imposing a penalty under this Chapter shall be made-

(a) by the Income- tax Officer, where the penalty exceeds ten thousand rupees;

(b) by the Assistant Commissioner, where the penalty exceeds twenty thousand rupees, except with the prior approval of the Deputy Commissioner.]

(3) An income- tax authority on making an order under this Chapter imposing a penalty, unless he is himself the Assessing Officer, shall forthwith send a copy of such order to the Assessing Officer.

9. It is pertinent to mention here that Co-ordinate Kolkata Bench of the Tribunal in the case of " M/s. Rashmi Metaliks Ltd." (supra) has extensively analyzed the aforesaid provisions of section 217AAB while further relying upon the decision of the Visakhapatnam Bench of the ITAT in the case of 'ACIT Vs. Marvel Associates'(supra) and other case laws. The relevant part of the said order of Kolkata Bench is reproduced as under:

" At the outset we note that it has been the submission of the AO as well

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

> "6. Careful reading of section 271AAB of the Act, the words used are 'AO may direct' and 'the assessee shall pay by way of penalty'. Similar words are used section 158BFA(2) of the Act. The word may direct indicates the discretion to the AO. Further, sub section (3) of section 271AAB of the Act, fortifies this view. ……..
>
> ……. 7. The legislature has included the provisions of section 274 and section 275 of the Act in 271AAB of the Act with clear intention to consider the imposition of penalty judicially. Section 274 deals with the procedure for levy of penalty, wherein, it directs that no order imposing penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. Therefore, from plain reading of section 271AAB of the Act, it is evident that the penalty cannot be imposed unless the assessee is given a reasonable opportunity and assessee is being heard. Once the opportunity is given to the assessee, the penalty cannot be mandatory and it is on the basis of the facts and merits placed before the A.O. Once the A.O. is bound by the Act to hear the assessee and to give reasonable opportunity to explain his case, there is no mandatory requirement of imposing penalty, because the opportunity of being heard and reasonable opportunity is not a mere formality but it is to adhere to the principles of natural justice. Hon'ble A.P. High Court in the case of RadhakrishnaVihar in ITTA No.740/2011 while dealing with the

> penalty u/s 158BFA held that 'we are of the opinion that while the words shall be liable under sub section (1) of section 158BFA of the Act that are entitled to be mandatory, the words may direct in sub section 2 there of intended to directory'. In other words, while payment of interest is mandatory levy of penalty is discretionary. It is trite position of law that discretion is vested and authority has to be exercised in a reasonable and rational manner depending upon the facts and circumstances of the each case. Plain reading of section 271AAB and 274 of the Act indicates that the imposition of penalty u/s 271AAB of the Act is not mandatory but directory. Accordingly we hold that the penalty u/s 271AAB is not mandatory but to be imposed on merits of the each case."

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

…….. 11. So for the reasons as aforerstated and relying on the Hon'ble Andhra Pradesh High Court ratio in Radha Krishna Vihar (supra), we cannot agree with the Revenue that the levy of penalty under Section 271AAB was mandatory and automatic. We further note that the penalty leviable under Section 271AAB must have necessary and proximate nexus with discovery of 'undisclosed income' in the course or as a result of search. The expression 'undisclosed income' for the purposes of levy of penalty u/s 271AAB has a definite and specific meaning and the said word or expression does not have any loose or colloquial meaning.

Unless and until income offered to tax by an assessee comes within the mischief of undisclosed income and that too of the specified previous year it is not open for the AO to invoke provisions of Section 271AAB of the Act. …….

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

13. The second limb of sub-clause (i) provides that 'undisclosed income' shall mean any income represented either wholly or partly by any entry in the books of accounts or other documents or transactions found in the course of search under Section 132 but which were not recorded on or

before the date of search in the books of accounts or other documents maintained in the normal course relating to such previous year or otherwise not been disclosed to the Commissioner before the date of search. We find that even in respect of the second limb no material or evidence has been brought on record by the AO which showed that the income of Rs.69 crores was represented by any entry in the books of accounts or other documents or transactions found in the course of search. ……..

…….. 14. From the foregoing findings recorded by the AO in Para 7 of the assessment order, we find that save & except making reference to the voluntary offer made through joint declaration petition dated 18.04.2013, the AO had not brought on record any incriminating material found in the course of search from which one could infer that the income of Rs.69 crores was represented in part or whole by any entry made in the books of accounts or other documents or transactions found in the course of search…….

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

……..16. From the foregoing discussion and material on record, we find that applying both the limbs contained in clause (c) of Explanation to Section 271AAB, the additional income of Rs.69 crores offered by the assessee through its joint declaration was neither represented by any assets found in the course of search nor represented by any entry made

in the books of accounts or other documents or transactions found in the course of search. We therefore find that the income voluntarily offered by the assessee did not come within the ambit and scope of the expression 'undisclosed income' as defined for the purposes of Section 271AAB of the Act.

17. From the plain reading of Section 271AAB we find that the levy of penalty is permissible if and only if there exists 'undisclosed income'. Finding or unearthing of undisclosed income in the course or as a result of search conducted u/s 132 of the Act is sine qua non for invoking penal provisions of Section 271AAB of the Act. Discovery and consequent assessment of undisclosed income is a condition precedent for levy of penalty under Section 271AAB of the Act. It has to be borne in mind that every offer of the assessee to pay tax on his or her income in the course of recording of statement u/s 132 does not amount to finding of 'undisclosed income'. A mere offer or disclosure by an assessee to pay tax on some additional amount with a view to avoid protracted litigation cannot and does not amount to discovery of undisclosed income for the purposes of levy penalty u/s 271AAB of the Act. The Legislature has all along been conscious in providing for levy of penalty only in respect of "undisclosed income". We find that in all penal provisions such as Explanation 5A of Section 271(1)(c), Section 271AAA & Section 271AAB, the Legislature has restricted the scope of penal provision only to "undisclosed income" and not assessed total income. Moreover the term/expression "undisclosed income" has been defined by the Legislature in all such penal provisions in a specific and restricted manner and not in an inclusive manner. For that reason the definition of undisclosed income nowhere provides that the said expression shall "include" all and every species of income but the word used is undisclosed income "means". The conscious use of the expression "means" in contradistinction to the use of word "includes" indicate that the Legislature intended to restrict the scope of penal provisions only to income which came within the ken of the said expression and not beyond. Applying the definition of undisclosed income to the income of Rs.69 crores, we find that such income was offered in the statement recorded u/s 132(4) of the Act at the time of search. However only for

the said reason, it could not be brought within the ambit of undisclosed income particularly when such income was not represented by any valuable asset or entry in books of accounts or which was not found as a result of search not recorded in the books. We therefore find much force in the Ld. AR's arguments that since the sum of Rs.69 crores voluntarily offered to tax was not in the nature of undisclosed income, the levy of penalty u/s 271AAB was unsustainable.

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

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

19. We also rely on the decision of this coordinate Bench of Tribunal in the case of DCIT Vs Liladhar Agarwal in ITA No. 1605/Kol/2017 dated 26.12.2018 wherein identical issue had come up for consideration and the Tribunal upheld the CIT(A)'s order deleting the levy of penalty since

there was no material to suggest that the income offered to tax was a consequence of any valuable asset or any entry found in any books or other documents seized in the course of search. ….

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

> "9. Penalty u/s 271AAB attracts on undisclosed income but not on admission made by the assessee u/s 132(4). The AO must establish that there is undisclosed income on the basis of incriminating material. In the instant case a loose sheet was found according to the A.O., it was incriminating material evidencing the undisclosed income. In the penalty order the AO observed that loose sheet shows the cost per square feet is Rs.3571/- per sft. and assessee stated to have submitted in sworn statement cost per sq. feet at Rs.2200/- to Rs.2300/- per sq. feet. However neither the AO nor the Ld.CIT(A) has verified the cost of construction with the books and projections found at the time of search. The counsel argued that it was mere projection but not the actuals. The write up heading also mentioned that summary of the projected profitability statement. There is no evidence to establish that projections reflected in the loose sheet is real. No other material was found during the course of search indicating the undisclosed income. There was no money, bullion, jewellery or valuable article or thing or entry in the books of accounts or documents transactions were found during the course of search indicating the assets not recorded in the books of accounts or other documents maintained in the normal course, wholly or partly. The revenue did not find any undisclosed asset, any other undisclosed income or the inflation of expenditure during the search/ assessment proceedings. Though a loose sheet of page No.107 of Annexure A/GS/MA/1 was found that does not indicate any suppression of income but it is only projection of profit statement. The amount of Rs.3571/- mentioned in the projections refers to cost and profit which is approximate sale price but not the cost as stated by the AO in the penalty order. The cost of construction in the projections projected at Rs.2177/- which is in synch with the statement given by the assessee. The AO was happy with the disclosure given by the assessee and did not verify the factual position with the books of accounts and projections and bring the evidence to unearth the undisclosed income. Neither the A.O. nor the investigation wing linked the cost of profit or cost of asset to the entries in the books of accounts or to the sales conducted by the assessee to the sale deeds. Therefore, we are unable to accept the contention of the revenue that the loose sheet found during the course of search indicates any undisclosed income or asset or inflation of expenditure. The Hon'ble ITAT Delhi Bench in the case of Ajay Sharma v. Dy. CIT [2013] 30 taxmann.com 109 held that with respect to the addition on account of alleged receivables as per seized paper, there is no direct material which leads and establishes that any income received by the assessee has not been declared by

the assessee. An addition has been made on the basis of loose document, which did not closely prove any concealment or furnishing of inaccurate particulars by the assessee. Hence penalty u/s 158BFA (2) of the Act is not leviable.

The facts of the assessee's case shows that there was no undisclosed income found during the course of search and no incriminating material was found, hence we hold that there is no case for imposing penalty u/s 271AAB of the Act, accordingly, we set aside the order of the lower authorities and cancel the penalty u/s 271AAB of the Act.

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

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

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

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

We find that out of these four items of surrenders only advances of Rs. 80,00,000/- is based on the incriminating material and all other items are not based on the seized material. The interest on advances/ debtors is only an estimated amount disclosed during the year but no record or any document was found during the search and seizure action. As regards the excess stock we find from the record as produced before us by the ld. DR that the valuation report is based on the market price of the gold Jewellery prevailing on the date of search as against the cost or realization wherever is less. Therefore, the computation of excess stock based on the market price of the stock cannot be considered as undisclosed income of the assessee as it is the subject matter of regular assessment and cannot be regarded as undisclosed income based on incriminating material. There is no such fact either recorded during the search and seizure proceeding or in the assessment order or in the penalty proceeding to show that there was discrepancy in the stock as recorded in the books of account and found at the time of search. In the absence of any discrepancy in the quantity of stock the valuation of the stock is

purely a question of assessment and cannot be held as undisclosed income detected during the course of search and seizure proceeding. Therefore, to the extent of excess stock based on the valuation report the disclosure of the income by the assessee would not fall in the category of undisclosed income as per explanation to Section 271AAB of the Act. It is not the case of the Revenue that any stock of jewellery was found which is not recorded in the books of account but the value of stock is computed based on the valuation report of the departmental valuer. Once the difference in the value of stock is only due to market price as against the cost of the said stock, the same will not fall in the ambit of undisclosed income as defined under clause-(c) of explanation -1 of section 271AAB of the Act.

19. Similarly the accrued interest of Rs. 20,00,000/- is also only estimated and not based on any incriminating documents. This amount was estimated as there were advances as per the entries of the seized material. Even otherwise accrued interest is dependent on the outcome of the levy of penalty in respect of advances given by the assessee. We have considered the issueof advances for the assessment year 2013-14 and accordingly in view of our finding on the said issue the penalty U/s 271AAB of the Act is not sustainable in respect of the surrender amount of Rs. 1,65,38,920/-."

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

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

10. Now coming to the facts of the case before us, the assessee in this case has surrendered as total income of ₹ 14,39,99,158/- during the search action carried out at his premises u/s 132 of the Act, out of which₹ 14 crores was surrendered to cover any disallowance of expenses/additions, whereas, the remaining amount of ₹ 39,99,158/- was surrendered representing profit earned onstock found short. Thereafterthe assessee filed its return of income and duly included the surrendered amount in its income for the purpose of taxation. The Assessing officer carried out the assessment proceedings u/s 143(3) of the Act and independently scrutinized and verified the different heads of income and expenditure and computed the additional income of ₹ 33,13,304/- on account of stock found short duringsearch action, however, giving the assessee set off of amount of ₹ 39,99,158/- surrendered under the head 'profit onstock found short' added the balance amount of ₹ 2,58,20,577/- into the income of the assessee on account of stock found short during the search action. Apartfrom that, the Assessing officer had made the additional disallowance of ₹2,83,98,545/- under section 14A of the Act which was in addition to the suomotu disallowance of ₹ 3,45,49,868/- returned by the assessee in this repect in his Income tax return.The Assessing officer also made an addition of ₹2,25,54,011/- u/s 36 (1)(iii) of the Act. Though the assessee during the assessment proceedings submitted that the set off of ₹14 crores declared on account of disallowance by the assessee of expenses/additions be given to the assessee, however, the Assessing officer rejected the above contention of the assessee since the assessee had not given any bifurcation of any surrendered income of ₹ 14 crores. Apart from that, the Assessing officer has made an addition of ₹ 9,23,231/- u/s 36(1) (v) of the Income Tax act and assessed the total income at a loss of ₹ 33,73,75,950/- as against the loss declared / returned by the assesseeat ₹ 41,50,72,313/-.

11. The relevant fact in this case is that though the Assessing officer

examined individually each and every item of income and expenditure and made separate disallowances, however, the Assessing officer didnot point out any excess or wrong expenditure claimed so far as the surrender of ₹ 14 crores on account of disallowance of expenditure / addition was concerned. Even the Assessing officer did not allow the telescopic benefit / set off of the amount surrendered as against the disallowance made by the Assessing officer under the provisions of section 40A, 36 (1)(iii) and 36 (1)(v) of the Act. There is no mention in the assessment order that the assessee had claimed any extra or inadmissible expenditure in respect of any other item. It also apparent from the facts on the file that even during the search action, no incriminating material in respect of excessive or inadmissible expenditure was found during the search action.The assessee simply surrendered the amount of ₹ 14,39,99,158/- and in the bifurcation offered ₹ 39.99 lacs towardsprofits of stock found short and remaining amount or ₹ 14 crores wassurrendered on account of disallowance of expenses/addition. However, neitherduring the search actionnor during the assessment proceedings, no such disallowance of expenditure and consequent addition has been made exceptas discussed above. However, the Assessing officer has added the aforesaid disallowance made by him separately into the income of the assessee. So far as the disallowance u/s 14A is concerned, the assessee had taken a plea before the Assessing officer that it did not earn any tax-exempt income during the year. Furthermore, that investments were made out

of its own / interest free funds available with the assesseeand that no disallowance u/s 14A of the Act waswarranted. Similar plea was also taken by the assessee in respect of disallowance made u/s 36(1)(iii) of the Act that the advances/investmentswere made by the assessee out of its own/interest free funds available with it. A plea was also taken that the advances were given out of commercial expediency. So far as the disallowance u/s 36(1)(v) was concerned, a plea was taken that the contribution to Employees ProvidentFund was made within the stipulatedperiod and that no disallowance was attracted.

12. Considering the nature of disallowance made by the Assessing officer and the plea of the assessee, it is quite apparent that the issue of disallowance of expenditure on the aforesaid three issues was a debatable one and in fact in the light of the various decisions of the Hon'ble High Courts, the assessee has a fair case on merits and that it cannot be said that there was any intentional act on the part ofthe assessee to claim any inadmissible expenditure, rather, the assessee had put a bonafide claim of the allowance/expenditure on these issues. What we wish to convey through the aforesaid discussion is that even despite certain disallowances made by the Assessing officer, as discussed above, it cannot be said that assessee had claimed any inadmissible expenditure which would fall within the definition of “undisclosed income” as defined under the provisions of section271AAB of the Act. Except the aforesaid disallowance made by the Assessing officer on debatable issues, there is no case of the

Department in respect of any inadmissible expenditure claimed by the assessee which would cover the surrendered income of ₹ 14 cores. From the facts on the file, it isestablished that the aforesaid surrender of ₹ 14 crores was based on the mere statement of the assessee andnothing incriminating material which would constitute "undisclosed income" asper the provisions of section 271AAB of the Act was detected or foundduring the search action. In view of the various case laws as discussed above, the aforesaid amount for ₹14 cores wouldnotfall in the definition of 'undisclosed income' as defined under section 271AAB of the Act and, hence, the penalty is not leviable on the said amount under the provisions of section 271AAB of the Act.

13. So far as the reliance of the Ld. DR on the decision in the case of Hon'ble Allahabad High Court in the case of 'Principal CIT Vs. Shri Sandeep Chandak' and Ors. (supra) is concerned, as discussed in the aforesaid decision of the Coordinate Bench of the Tribunal in 'DCIT Vs. Rashmi Cement Ltd, (supra) the facts in the case of Principal CIT Vs. Shri Sandeep Chandak' and Ors (supra) are distinguishable and do not apply to the facts and circumstances of the case in hand in the light of the discussion made in the above referred to decision of the Kolkata Bench of the Tribunal.

14. However, so far as the surrenderedamount of ₹ 39.99 lacs is concerned, same wasoffered on account of profits on stock found short during the search action. Admittedly,the stock was found short

duringthe search action. In fact, the Assessing officer apart from the above surrender of ₹ 39.99 lacs has made further addition of ₹ 2.58 cores onthis issue. It is apparent that the aforesaid profit onshort stock were notaccounted for by the assesseebut was only detected during the search action. However, the assessee has substantiated the manner of earning of the said income which include the surrender income of ₹ 39.99 lacs, hence, penalty @ 10% is leviable on the aforesaid amount asper the provisions of section 271AAB (1)(a) of the I.T. Act.

14. In view of this, the penalty in this case is restricted to 10% of the surrendered income of ₹ 39,99,158/- on account of stock found short as per the provisions of section 271AAB (1)(a) of the Act. However, the remaining part of the penalty is ordered to be deleted.

In the result, theappeal of the assessee stands partly allowed.

Sd/-	Sd/-
(अन्नपूर्णा गुप्ता / ANNAPURNA GUPTA)	**(संजय गर्ग / SANJAY GARG)**
लेखा सदस्य/ Accountant Member	**न्यायिक सदस्य/ Judicial Member**

Dated :18.04.2019
"आर.के."

आदेशकीप्रतिलिपिअग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त/ CIT
4. आयकरआयुक्त (अपील)/ The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयआधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्डफाईल/ Guard File

आदेशानुसार/ By order,
सहायकपंजीकार/ Assistant Registrar