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

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 122/JP/2018
निर्धारण वर्ष/Assessment Year :2015-16

Shri Krishna Kant Bansal, Rishabh Bhawan, Gumanpura, New Colony, Kota	बनाम Vs.	DCIT, Central Circle-03, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABRPB7862M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri S. R. Sharma &
Shri R. K. Bhatra (CA)
राजस्व की ओर से/ Revenue by : Smt. Runi Pal (JCIT)

सुनवाई की तारीख/ Date of Hearing : 30/09/2019
उदघोषणा की तारीख/Date of Pronouncement: 03/10/2019

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of ld. CIT(A)-4, Jaipur dated 21.11.2017 wherein the assessee has taken the following grounds of appeal:-

"1. That the notice issued by assessing officer for initiating the penalty u/s 271AAB of the I.T. Act, 1961 is not in accordance with law not being specifically pointing out the default for which the Ld. AO sought to impose penalty u/s 271AAB.

2. That without prejudice to the ground No. (1) above on the facts and in the circumstances of the case the Ld. CIT(A) is wrong, unjust and has erred in law in confirming penalty of Rs. 20,50,000/- imposed by the Ld. Assessing Officer u/s 271AAB of the I.T. Act, 1961."

2. Briefly the facts of the case are that the assessee is a partner in two partnership firms and deriving income in the form of interest and share in the profits from these two partnership firms. A search u/s 132 of the Act was conducted on 05.02.2015 in case of Bundi Silica Group, Kota and the assessee is part of the said Group. During the course of search proceedings, the statement of the assessee was recorded u/s 132(4) of the Act wherein he has declared undisclosed income of Rs. 2,05,00,000/- as additional income. Subsequently, the assessee e-filed its return of income on 29.09.2015 declaring total income of Rs. 2,31,97,900/- which includes additional income of Rs. 2,05,00,000/- offered to tax during the course of search. The assessment proceedings were subsequently completed u/s 143(3) r.w.s 153B(1)(b) wherein the returned income was accepted. The Assessing Officer separately initiated the penalty proceedings u/s 271AAB by way of issue of notice u/s 274 r.w.s 271AAB of the Act dated 09.12.2016 which was duly served on the assessee.

3. During the course of penalty proceedings, the Assessing Officer stated that all the essential requirement of section 271AAB(1)(a) are satisfied in the instant case and given that the assessee had admitted undisclosed income of Rs. 2,05,00,000/- in his statement u/s 132(4) of the Act and paid the taxes thereon before specified date, penalty @ 10% u/s 271AAB on the undisclosed income of Rs. 2,05,00,000/- amounting to Rs 20,50,000 was levied on the assessee.

4. Being aggrieved, the assessee carried the matter in appeal before ld. CIT(A). The ld. CIT(A) has confirmed the levy of penalty u/s 271AAB of the Act holding that the penalty is mandatory in nature and there is no discretion with the AO and unlike section 271AAA wherein immunity from imposition of penalty is possible subject to fulfillment of conditions in section 271AAA(2), there is no

immunity clause provided from penalty u/s 271AAB. Being aggrieved, the assessee is now in appeal before us.

5. At the outset, the ld AR submitted that the matter is squarely covered in favour of the assessee by the decision of the Coordinate Bench in other Group cases of the assessee in cases of Surajmal Bansal HUF, Jaipur vs. DCIT, Jaipur (ITA No. 124-127/JP/2018 dated 08/04/2019) wherein under identical set of facts and circumstances, the penalty was deleted by the Tribunal.

6. It was further submitted by the ld AR that the show cause notice issued by the Assessing Officer initiating the penalty proceedings has been issued in a routine manner without mentioning under which clause of section 271AAB of the Act, the assessee is liable for penalty. It was submitted that section 271AAB(1) has three clauses (a) to (c) and each clause of sub-section (1) to section 271AAB provides for separate rate of penalty and unless the same is specified, the assessee is not in a position to respond and thus, the principles of natural justice are violated. It was submitted that there is no application of mind on the part of the AO, at the time of issuing the show cause notice, as the show cause notice issued by the AO do not specify the undisclosed income on which the assessee is required to show cause. Even the AO has not given any ground for levy of penalty for which the assessee could put its defense. Thus in the absence of specific charge against the assessee, the assessee was not in a position to respond to the show cause notice issued by the AO. It was submitted that though the AO while passing the impugned order has imposed the penalty as per clause (a) of section 271AAB(1) of the Act, however, no such ground was specified in the show casue notice issued u/s 271AAB read with section 274 of the Act. In support, reliance was placed on the Hon'ble Karnataka High Court decision in the case of CIT vs. M/s SSA's Emerald Meadows reported in 2015 (11) TMI 1620, in case of Manjunatha Cotton &

Ginning Factory [2013] 359 ITR 565 (Karnataka) and various decisions of the Co-ordinate Benches of the Tribunal. It was accordingly submitted that notice issued u/s 271AAB is bad in law and therefore, the penalty levy u/s 271AAB(1)(a) deserves to be deleted.

7. It was further submitted that the lower authorities have erred in holding the levy of penalty u/s 271AAB of the Act as mandatory in nature. Drawing support from the decision of the Co-ordinate Bench in case of DCIT vs. Manish Agarwal reported in 92 Taxmann.com 81, it was submitted that imposition of penalty u/s 271AAB is not mandatory but discretion in nature depending upon the facts and circumstances of the each case.

8. It was further submitted that in the search proceedings carried out at the assessee's premises, no evidence was found during the course of search except Annexure-AS Exhibit-11 wherein certain figures, dates and cryptic names were written. The search parties added these figures which worked out to Rs. 1,99,25,000/- holding amounts as rupees given to various persons as advances for purchase of land. It was submitted that no incriminating material was found during the search and said Annexure-As Exhibit-11 was containing imaginary names and some figures. Further the officers of search proceedings and ld. AO didn't make any further enquiry/investigation regarding entries in the seized papers. It was submitted that the said entries in the pocket diary giving advances itself is not an undisclosed income. The Revenue authorities have exerted undue pressure and obtained the surrender of income from the assessee. In support, the reliance was placed on the CBDT Circular No. F. No. 286/2/2003-IT (Inv.) dated 10.03.2003 wherein the CBDT has expressed its concern about the practice of obtaining the confession of additional income during the course of search and seizure proceedings. It was submitted that the provisions of section 271AAB clearly requires that such undisclosed income to

be substantiated and, therefore, the assessee is required to specify the manner in which such income has been derived and further substantiate the same furnishing material available with him. In the absence of any record or material to show any undisclosed source of income, the entire disclosure was on papers is to avoid undue harassment and unwanted litigation and the assessee could not have substantiated such income so declared during the course of search. It was submitted that there is no iota of evidence that surrendered income was undisclosed income of the assessee. It was submitted that said surrender was made to buy piece and avoid long litigation with department on the request that no penalty proceedings etc. be initiated against it. In support, reliance was placed on the Co-ordinate Bench decision in case of ACIT vs. Marval Associates 92 Taxmann.com 109 wherein it was held that penalty u/s 271AAB is attracted on undisclosed income but not on admission made by the assessee u/s 132(4) of the Act. The AO must establish that there is undisclosed income on the basis of incriminating material. Further, reliance was placed on the Co-ordinate Bench in decision in case of Ajay Sharma vs. DCIT [2013] 30 taxmann.com 109 wherein it was held that addition on account of alleged receivables as per seized paper cannot be made as there is no direct material which leads and establishes that any income received by the assessee which has not been declared by the assessee. 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 there is no case for imposing penalty u/s 271AAB of the Act. Further, reliance was placed on the Co-ordinate Bench in decision in case of Sh. Rajendra Kumar Gupta vs. DCIT, CC-2, Jaipur *(ITA No. 359/JP/2017 dated 18.01.2019)* and it was submitted the facts of the said case squarely applies in case of assessee and therefore, the penalty so levied should be deleted.

9. It was further submitted that the assessee further declared a sum of Rs. 5,75,000/- on account of excess silver found during the course of search from residence. It is submitted that the silver items were personal items of the family members and holding is very old and reasonable looking to the size and status of family. The said silver items were received from both sides of relatives and friends at the time of marriage and thereafter on various other festivals and auspicious occasions. It is customary in Indian society that every parent, friends & relatives to present some gifts in silver etc. to her daughter & son in law at the time of marriage. The family of assessee is repute and means. Thus looking to the status of the family, customs of the society and other facts and circumstances the total silver found is reasonable and source of acquisition was explained. However, the assessee to buy piece and avoid litigation with department offered the said valuation of silver as his additional business income of the current year. However the department has not made any efforts to ascertain the year of acquisition of the silver and then to apply the rates as prevailing in the year of acquisition and some of the silver even not acquired by the assessee or the family members but is inherited, then the manner in which the disclosure is obtained on account of the silver would not represent the undisclosed income as defined in the explanation to section 271AAB of the Act. The Ld. AO has not determined it as income from other sources u/s 69 of the Income Tax Act in the assessment but accepted as income of current year. Therefore merely on the basis of surrender made in the search statement, this cannot be held as "Undisclosed Income" for the purpose of levy of penalty u/s 271AAB.

10. It was finally submitted that there is no valid ground given in the assessment order for initiating penalty proceedings, the initiation of penalty is statutorily defective, the assessee has filed its return of income in good faith including the additional income surrendered during the course of search to

purchase peace of mind and avoid litigation, assessment has been completed accepting the income declared by the assessee and there is no undisclosed income found during the course of search and penalty so levied should be deleted.

11. Per contra, the ld. DR heavily relied on the findings of the lower authorities. It was submitted by the ld DR that the assessee has surrendered the undisclosed income of Rs. 2,05,00,000/- in its statement recorded during the course of search u/s 132(4) of the Act and the said surrender is clearly an admission on the part of the assessee that there is undisclosed income which has been found during the course of search. Once the surrender of undisclosed income has been made by the assessee, there is no cause of action which lies with the Assessing Officer to establish further that there is any undisclosed income so earned by the assessee. In this case, the search was conducted on 5.02.2015 wherein the statement of the assessee was recorded u/s 132(4) wherein he has surrendered the amount of Rs 2,05,00,000. Subsequently, the assessee has disclosed the same in its return of income filed on 29.09.2015. Therefore, the assessee was having ample time to retract from said surrender, however there is no such retraction during post-search proceedings and even the assessee has included the same in its return of income. Even from the perusal of the assessee's statement, there is nothing which demonstrates that there is any forced surrender by the assessee. The contention of the ld AR therefore has thus no basis where he contends that the search party have exerted undue pressure and obtained surrender of income and therefore, there was no undisclosed income in the hands of the assessee. It was further submitted that the levy of penalty u/s 271AAB is mandatory is nature and reference was drawn to provisions of section 271AAA which provides for immunity from levy of penalty as against the provisions of section 271AAB wherein there is no such provision providing from immunity. It was accordingly

submitted that there is no infirmity in the order of the Assessing Officer wherein he has levied the penalty @ 10% of the undisclosed income as per the provisions of section 271AAB and order of the ld. CIT(A) who has confirmed the said levy should be upheld.

12. We have heard the rival contentions and pursued the material available on record. We find that under identical set of facts and circumstances of the case, in case of other Group cases where the search was conducted, matter relating to levy of penalty was examined at length by the Coordinate Bench in cases of **Surajmal Bansal HUF, Jaipur vs. DCIT, Jaipur** *(ITA No. 124-127/JP/2018 dated 08/04/2019)* wherein, the penalty was deleted by the Tribunal. The relevant findings of the Coordinate Bench read as under:

"11. We have heard the rival contentions and persued the material available on record. This Tribunal is taking a consistent view that levy of penalty u/s 271AAB is not automatic in nature but the AO has discretion to take a decision after arriving at the conclusion that the income disclosed by the assessee in the statement recorded U/s 132(4) of the Act is an undisclosed income in terms of Section 271AAB(1) r.w. explanation defining the undisclosed income. In this regard, we refer to the decision of the Tribunal in case of ***Rajendra Kumar Gupta vs DCIT (Supra)*** *wherein it was held as under:*

> *"12. Now, coming to the main ground of appeal. In this regard, the ld AR has raised the contention challenging the findings of the AO that penalty U/s 271AAB is mandatory in nature and there is no discretion with the Income tax authorities. It was submitted by the ld AR that in section 271AAB, the word 'may' is used instead of 'shall' so it is not mandatory but same is discretionary. It was submitted that it is settled position of law that penalties are not compulsory, not mandatory but are also discretionary considering the overall facts and circumstances of the*

case. In support, reliance was placed on provisions of section 158BFA(2) wherein similar phraselogy has been used by the legislature and the decisions of the Coordinate Benches in case of DCIT vs Manish Agarwal 92 taxmann.com 81 and ACIT vs Marvel Associates 92 taxmann.com 109.

13. Per contra, the ld. DR submitted that the assessee has surrendered the undisclosed income in his statement recorded u/s 132(4) and therefore, there cannot be any question of said surrender of income not falling in the definition of undisclosed income. It was submitted that the penalty U/s 271AAB is mandatory in nature and is imposed at the varying rate of 10%, 20% or 30% depending on the fulfillment of certain conditions therein. It was submitted that all the conditions specified in Section 271AAB have been fulfilled in the instant case, therefore, the penalty U/s 271AAB being in the nature of mandatory penalty and there being no discretion with the Income tax authorities, the penalty so imposed by the AO was rightly confirmed by the ld CIT(A) and the order of the ld CIT(A) should be upheld.

14. In this regard, we refer to the provisions of Section 271AAB which begins with the stipulation that the Assessing officer may direct the assessee and the assessee shall pay the penalty as per clause (a) to (c) so satisfied in sub-section (1) to Section 271AAB. Further, as per sub-section (3) of Section 271AAB, the provisions of section 274 and section 275 as far as may be applied in relation to penalty under this section which means that before levying the penalty, the Assessing officer has to issue a show-cause granting an opportunity to the assessee. Thus, the levy of penalty is not automatic but the Assessing officer has to decide based on facts and circumstances of the case. Similar view has been

taken by the various Co-ordinate Benches and useful reference can be drawn to the decision of the Co-ordinate Bench in case of ACIT vs Marvel Associates (supra) wherein it was held as under:

> *"5. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. During the appeal hearing, the Ld. A.R. vehemently argued that the A.O. has levied the penalty under the impression that the levy of penalty in the case of admission of income u/s 132(4) is mandatory. The Ld. A.R. further stated that penalty u/s 271AAB of the Act is not mandatory but discretionary. The provisions of section 271AAB of the Act is parimateria with that of section 158BFA of the Act relating to block assessment and accordingly argued that the levy of penalty under section 271AAB is not mandatory but discretionary. When there is reasonable cause, the penalty is not exigible. The Ld. A.R. taken us to the section 271AAB of the Act and also section 158BFA(2) of the Act and argued that the words used in section 271AAB of the Act and the words used in section 158BFA(2) of the Act are identical. Hence, argued that the penalty section 271AAB of the Act penalty is not automatic and it is on the merits of each case. For ready reference, we reproduce hereunder section 158BFA (2) of the Act and section 271AAB of the Act which reads as under:*
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> *271AAB [Penalty where search has been initiated]:*
>
> *(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of July, 2012, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him—*

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

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

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

(iii) On or before the specified date—

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

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

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

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

(ii) on or before the specified date-

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

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

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

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

Section 158BFA(2):

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

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

(i) such person has furnished a return under clause (a) of section 158BC;

(ii) the tax payable on the basis of such return has been paid or, if the assets seized consist of money, the assessee offers the money so seized to be adjusted against the tax

payable.

(iii) Evidence of tax paid is furnished along with the return; and

(iv) An appeal is not filed against the assessment of that part of income which is shown in the return:

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

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

Sub section (3) of section 271AAB:

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

7. The legislature has included the provisions of section 274 and section 275 of the Act in 271AAB of the Act with clear intention to consider the imposition of penalty judicially. Section 274 deals with the procedure for levy of penalty, wherein, it directs that no order imposing penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. Therefore, from plain reading of section 271AAB of the Act, it is evident that the penalty cannot be imposed unless the assessee is given a reasonable opportunity and assessee is being heard. Once the opportunity is given to the assessee, the penalty cannot be

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

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

12. For the purposes of levy of penalty, what has to be seen is that whether the surrender so made, in terms of statement of the assessee recorded u/s 132(4) during the course of search, falls in the definition of "undisclosed income" which has been specifically laid down in terms of clause (c) of explanation to section 271AAB which reads as under:

"(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."

13. In the instant case, during the course of search, a diary has been found wherein there are notings relating to advance given to certain persons towards purchase of land. The notings describe the name of certain persons, the amount advanced which ranges from Rs 25 lacs to Rs 70 lacs and the date of such advance is from 16.12.2014 to 28.01.2015 before the date of search on 5.02.2015. Therefore, what has been found during the course of search is certain entries relating to undisclosed advances/investment in purchase of land. Besides the said entries, there are no other documents/material in terms of full particulars and address of the person to whom the advance has been given, any agreement to sell, the description and location of the property etc, which has been found during the course of search. The assessee HUF is a partner in two partnership firms and derives income from share in the profit and interest from such partnership firms which it has reported in its return of income and therefore, as far as maintenance of books of accounts is concerned, the assessee HUF not carrying on any business is thus not required to maintain regular books of accounts. The diary found during the course of search and seizure at the premises of the assessee contains the entries of advances given for purchase of land and therefore, the said amount of advance given for purchase of land can be recorded in the capital account of the assessee. Thus the transactions found recorded in the diary are to be recorded in the capital account of the assessee as well as in the balance sheet prepared as on 31.03.2015 and not on the date of search as on 5.02.2015. These transactions are recorded in a diary which is nothing but "other documents" maintained in the normal course, then it cannot be presumed that the assessee would not have disclosed the same in the return of income to be filed after the date of search. Another question that arise for consideration is whether the advances so given for purchase of land qualify as "undisclosed income" as per definition given in the explanation to section 271AAB of the Act. An advance represents an outflow of funds and what has been envisaged by the legislature while

defining "undisclosed income" in section 271AAB is an inflow of funds which has not been recorded in the books of accounts or other documents on or before the date of search and not an outflow of funds. Further, the deeming fiction so envisaged in section 69 and 69B cannot be extended and applied automatically in context of section 271AAB which contains a specific definition of undisclosed income. An identical matter has come up for consideration before the Tribunal in case of ***Rajendra Kumar Gupta vs DCIT (Supra)*** *wherein it was held as under:*

> *"21. During the course of search, a note book (diary) has been found referred to as Ann. AS wherein there are certain notings relating to cash advances given to various persons totaling to Rs 82,80,000. Referring to the statement of the assessee in respect of these notings recorded u/s 132(4), ld CIT(A) has given a finding that the assessee has given a generalized statement without specifying the complete particulars of persons to whom loans were given and also failed to substantiate the same. The said findings have not been disputed by the Revenue and therefore, merely based on surrender and generalized statement of the assessee, in absence of anything specific to corroborate such entries, can it be said that such entries/notings represent undisclosed income of the assessee. As per the definition of undisclosed income u/s 271AAB, the said cash advances cannot be stated to be income which is represented by any money, bullion, jewellery or other valuable article or thing. Whether it can then be said that such undisclosed cash advances represents income by way of any entry in the books of account or other documents or transactions found in the course of a search under section 132. A cash advance per se represents an outflow of funds from the assessee's hand and an income per se represents an inflow of funds in the hands of the assessee.*

Therefore, once there is an inflow of funds by way of income, there can be subsequent outflow by way of an advance to any third party. Giving an advance and income thus connotes different meaning and connotation and thus cannot be used inter-changeably. In the definition of undisclosed income, where it talks about "income by way of any entry in the books of account or other documents or transactions found in the course of a search under section 132", what perhaps has been envisaged by the legislature is an inflow of funds in the hands of the assessee which has been found by way of any entry in the books of accounts or other documents, and which has not been recorded before the date of search in the books of accounts or other documents maintained by the assessee in the normal course and not vice-versa. We are also conscious of the fact that there are deeming provisions in terms of section 69 and 69B wherein such amounts may be deemed as income in absence of satisfactory explanation. In our view, the deeming fiction so envisaged under Section 69 and Section 69B cannot be extended and applied automatically in context of section 271AAB. It is a well-settled legal proposition that the deeming provisions are limited for the purposes that have been brought on the statute book and have therefore to be applied in the context of provisions wherein they have been brought on the statue book and not otherwise. In the instant case, the deeming provisions contained in section 69 and section 69B could have been applied in the context of bringing to tax such investments to tax in the quantum proceedings, though the fact of the matter is that the AO has not even invoked the said deeming provisions in the quantum proceedings. Therefore, even on this account, the deeming fiction cannot be extended to the penalty proceedings which are separate and distinct from the assessment proceedings and more so, where the provisions of section 271AAB provide for a specific definition of undisclosed income.

Where a specific definition of undisclosed income has been provided in Section 271AAB, being a penal provision, the same must be strictly construed and in light of satisfaction of conditions specified therein and it is not expected to examine other provisions where the same has been defined or deemed for the purposes of bringing the amount to tax. In light of the same, the undisclosed investment by way of advances can be subject matter of addition in the quantum proceedings, as the same has been surrendered during the course of search in the statement recorded u/s 132(4) and offered in the return of income, however the same cannot be said to qualify as an undisclosed income in the context of section 271AAB read with the explanation thereto and penalty so levied thereon deserved to be set-aside."

14. In light of above discussions and following the earlier decision of the Coordinate Bench of the Tribunal in the case of Rajendra Kumar Gupta (supra), we delete the penalty levied under section 271AAB of the Act on cash advances of Rs 2,25,00,000 towards purchase of land. Since the issue of levy of penalty U/s 271AAB of the Act has been decided on merits, therefore, the issue of validity of initiation of the penalty proceeding due to defective show cause notice become academic in nature and we do not propose to adjudicate the same.

15. In the result, the appeal of the assessee is allowed.

ITA No. 125/JP/18

16. In ITA No. 125/JP/18 in case of Ashok Bansal, both the parties submitted that the facts and circumstances of the case are identical except the fact that besides the surrender of additional income during the course of search consist

of cash advances of Rs 1,00,50,000 towards purchase of land, there is surrender on account of jewellery valued at Rs 49,62,554 found during the course of search.

17. As far as jewellery valued at Rs 49,62,554 which has been physically found in possession of the assessee, and which is in excess of what has been disclosed in the wealth tax return, during the course of search is concerned, there cannot be any dispute that the same represents undisclosed income so defined in section 271AAB and which has not been disclosed on or before the date of search. Regarding the contention of the ld AR that such jewellery is personal jewellery of the assessee and his family members and has been purchased out of past savings and/or has been received as gift in the past on various festivities and other auspicious occasions, these are contentions which are relevant for determining the nature and source of such undisclosed income for the purposes of determining the quantum of penalty which can be levied and which we find that the lower authorities have duly considered while levying penalty @ 10%. In the result, we confirm the levy of penalty @ 10% on the undisclosed income of Rs 49,62,554."

16. We find that the facts and circumstances of the case is similar the aforesaid case and following the decision of the Coordinate Bench (supra), we delete the penalty levied under section 271AAB of the Act on cash advances of Rs 1,99,25,000 towards purchase of land. The levy of penalty @ 10% on the excess silver found during the course of search and valued at Rs 575,000 is however confirmed.

17. Since the issue of levy of penalty U/s 271AAB of the Act has been decided on merits, therefore, the issue of validity of initiation of the penalty

proceeding due to defective show cause notice become academic in nature and we do not propose to adjudicate the same.

In the result, appeal of the assessee is partly allowed.

Order pronounced in the Open Court on 03/10/2019.

Sd/-	Sd/-
(संदीप गोसाई)	(विक्रम सिंह यादव)
(Sandeep Gosain)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 03/10/2019
*Ganesh Kr.
आदेश की प्रतिलिपि अग्रेशित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- Shri Krishna Kant Bansal, Kota
2. प्रत्यर्थी/ The Respondent- DCIT, Central Circle-03, Jaipur
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur.
6. गार्ड फाईल/ Guard File {ITA No. 122/JP/2018}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar