

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Godara, Judicial Member)

I.T.A. No. 2302/Kol/2016

Assessment Year: 2013-14

&

I.T.A. No. 2303/Kol/2016

Assessment Year: 2013-14

Asstt. Commissioner of Income Tax, CC-2(1), Kolkata.....Appellant

Vs.

Harish Bagla.....Respondent

Jaisalmer Building

6, Ashoka Road

Kolkata - 700 027

[PAN : ABPPB 7430 D]

Appearances by:

Shri D.S. Damle, FCA & Shri Akkal Dudhewala, FCA, appeared on behalf of the assessee.

Dr. P.K. Srihari, CIT, D/R appearing on behalf of the Revenue.

Date of concluding the hearing : August 8th, 2019

Date of pronouncing the order : October 1st, 2019

ORDER

Per J. Sudhakar Reddy, AM :-

I.T.A. No. 2302/Kol/2016 is filed by the revenue directed against the order of the Id. Commissioner of Income Tax (Appeals)-20, Kolkata (Id. CIT(A)), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), dt. 27/09/2016, wherein he deleted the addition of Rs.3,52,70,734/-, made by the Assessing Officer in an order passed u/s 143(3) of the Act on 30/03/2015.

I.T.A. No. 2303/Kol/2016 is filed by the revenue directed against the order of the Id. CIT(A) dt. 27/09/2019, wherein the Id. CIT(A) had deleted the penalty imposed by the Assessing Officer u/s 271AAB of the Act, on account of disclosure made in a statement u/s 132(4) of the Act, during the course of search.

2. As the issues arising in both these appeals are based on the same facts, as suggested by both the parties, for the sake of convenience, they are heard together and disposed off by way of this common order.

3. Facts in brief:-

The assessee is an individual and derives income from salary, capital gain and other sources. He filed his return of income for the Assessment Year on 30/07/2013 disclosing total income of Rs.10,25,32,950/-. Later the assessee filed a revised return of income on 26/05/2014 declaring total income of Rs.13,78,43,680/-. A search and seizure operation u/s 132 of the Act, was conducted in the residential/office premises of the assessee. Cash of Rs.10,53,990/- was found, out of which Rs.9,50,000/- was seized. Further jewellery of 1,86,68,055/- was found from the residential premises and nothing was seized. From the locker of the assessee jewellery worth Rs.98,47,788/-, was found and nothing was seized.

The Assessing Officer passed order u/s 143(3) of the Act, dt. 30/03/2015, determining the total income of the assessee at Rs.13,78,48,400/-, i.e., the income declared by the assessee in the revised return of income. At para 4 of his order, the Assessing Officer observed as follows:-

"4. Considering the return of income filed, the documents and explanations filed during the course of hearing, total income of the assessee is computed as follows:-

	Amount (₹)	Amount (₹)
Income from Salary		67,20,000
Income from House Property	1,68,000	68,88,000
Income from LTCL	(2,306)	68,88,000
Income from Other sources	3,77,529	72,65,529
<u>Income undisclosed disclosed during search and Seizure Operation</u>	<u>13,07,03,000</u>	<u>13,79,68,529</u>
Income from Minor u/s 64(1A)	150	13,79,68,679
Gross Total Income		13,79,68,679
Less : Deduction Chapter VIA	1,25,000	13,78,43,679
Add: As discussed in point no. 3.1	721	13,78,44,400
Total Income (Rounded off)		13,78,44,400

{Emphasis ours}

3.1. Aggrieved the assessee carried the matter in appeal. Before the Id. CIT(A) the assessee contended that the addition of Rs.3,52,70,734/- was unsustainable on facts and in law since the aforesaid offer was conditional/adhoc offer given on behalf of the entire group out of abundant caution. The Id. CIT(A) called for a remand report, wherein he

directed the Assessing Officer to provide the specific incriminating material/documents unearthed during the course of search or during the assessment proceeding, based on which the sum of Rs.3,52,70,734/- brought to tax by the Assessing Officer as undisclosed income of the assessee. The Assessing Officer in his remand relied on the admission made by the assessee. The Id. CIT(A) deleted the addition for the various reasons given in his order, specifically on the ground that the addition in question is not based on any incriminating material found or seized during the course of search.

4. Aggrieved the revenue is in appeal before us.

5. The Id. D/R, submitted that there is only one issue in the appeal filed by the revenue and this relates to the deletion of Rs.3,52,70,734/- from the income chargeable to tax of the assessee. He submitted that the assessee in his statements u/s 132(4) of the Act on 29/02/2014 has made a disclosure of this amount of Rs.3,52,70,734/- and offered to pay tax and that the assessee has not retracted from this statement. Under these circumstances, he submitted that, as the facts of the assessee's case are in his special knowledge and based on these facts he had made a statement on oath, disclosing certain income, he is bound by the same and the burden of proving that his statement is wrong is on the assessee. Thus, he submits that when the statement is not retracted, the Id. CIT(A) was in error in deleting the addition. For the proposition that retraction should be made within a reasonable period and for cogent reasons he relied on the following case-law:-

- *Income Tax Officer vs Bipin Farashkhana reported in 2000 73 ITD 334 Ahd.*
- *Bannalal Jat Constructions (P) Ltd. vs. ACIT [2019] 106 taxmann.com 128 (SC)*

6. The Id. Counsel for the assessee, submitted that the assessee had only given an adhoc disclosure, as a matter of abundant caution in his statement recorded u/s 132(4) of the Act. He pointed out to the statement and submitted that, Shri Harish Bagla, had made a total voluntary adhoc disclosure and submitted that the amount of Rs.3,52,70,734/- was offered in addition to three major issues, for the reason that, certain loose papers have been found at various locations which contain recording of miscellaneous payments, etc., which might not have been recorded in the regular books of the company. He pointed out that in this very statement, he stated that, after carrying

out detailed examination and analysis of these records, the correct identity of the tax payer will be ascertained and accordingly taxes will be paid on such income. He relied on the order of the Id. CIT(A) and submitted that, the offer was conditional and adhoc on behalf of the entire group only to cover up for any omission of undisclosed income which may get detected from the voluminous documents found and seized during the course of search. He submitted that, other than the admitted additional income of Rs.31,47,29,266/- offered by the assessee and its entire group entities as stated above, no other additional/undisclosed income was detected from the seized documents by the Assessing Officer. He submitted that the Id. CIT(A) called for a remand report and that in the remand report, the Assessing Officer just relied upon the statement issued u/s 132(4) of the Act and failed to furnish any material based on which the addition was made. He relied on the CBDT Instruction F. No. 286/2/2003-IT (Inv. II), dt. 10th March, 2003 and submitted that the addition cannot be made based on mere statements recorded u/s 132(4) of the Act, recorded during the course of search and that too when the statement was adhoc and conditional. He relied on pages 11-12 of the order of the Id. CIT(A) and certain decisions in support of the same.

7. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

8. The addition in question in this case, has been made on a disclosure made by the assessee in statement u/s 132(4) of the Act, recorded on 29/10/2012. Surprisingly, this statement is in the form of a typed letter which is placed at pages 1 to 17 of the paper book. The reference to this figure is at page 6, wherein it is stated as follows:-

"In addition to these 3 major issues few stray and loose papers have also been found at various locations which contain recording of miscellaneous payments, expenses etc which may not have been recorded in the regular books of the company. In order to cover undisclosed income represented by such miscellaneous notings I wish to offer Rs.3.50 crores as income of the Group and pay taxes thereon. However after carrying out detailed analysis and examination of seized record the correct identity of tax payer will be ascertained and accordingly taxes will be paid on such income."

{Emphasis Ours}

8.1. The statement showing break up of income offered to tax is at annexure-2, a copy of which is at page 70 of the paper book. This is extracted for ready reference:-

PARTICULARS	FY 2012-13	TOTAL
HARISH BAGLA	95,432,266	95,432,266
AMRIT FEEDS LIMITED	176,154,000	176,154,000
AMRIT HATCHERIES PRIVATE LIMITED	27,388,000	27,388,000
AMRICON AGROVET PRIVATE LIMITED	15,755,000	15,755,000
	SUB-TOTAL	314,729,266
	ADD: ADDITIONAL SUM SUO MOTO OFFERED	35,270,734
	GRAND TOTAL	350,000,000

8.2. The Id. CIT(A) has at page 11 & 12 of his order held as follows:-

"I have considered the findings given by the Aa in the assessment order and in the remand report. I have also considered the written submission filed by the AR along with different case laws. I find that the assessee's offer to pay tax on Rs.35210734/- was prompted by abundant caution and with a view to cover any undisclosed income that could be detected with reference to voluminous loose papers and documents which were seized from various locations of Amrit Group. The assessee had offered to pay tax on the sum of Rs.35270734/- only with a view to avoid penal consequences that would have arisen if in the course of assessment proceedings any additional undisclosed income would have been unearthed by the AO from examination of the seized documents & papers. However it transpired that save & except the income which the appellant had offered with reference to seized documents ID marked AF-3 & HB-2, totaling Rs.9,54,32,266/-; the AO did not find or detect any additional income from examination of seized records, papers & documents. In the remand report the AO has also not reported that any additional undisclosed income was detected in the case of any other group assesses against which the set off against the said sum of Rs.35270734/- was claimed. In the circumstances therefore I find force in the AR's submissions that save & except the voluntary offer, the department did not have in its possession any incriminating document or evidence to support the fact that the assessee had in fact earned any undisclosed income amounting to Rs.35270734/-. On the contrary however the assessee's statements before the ADIT(Inv.), Kolkata as also the AO clearly establish that Rs.35270734/- was offered as undisclosed income only on the basis of abundant caution and to cover detection of additional undisclosed income by the AO from the examination of the seized documents & records during the course of assessment. However ultimately after the examination was conducted by the AO, he was unable to correlate the income of Rs.35270734/- with any incriminating seized material or asset found or unearthed as a consequence of search u/s 132. It is by now settled legal proposition that any income which can be assessed as undisclosed income of an assessee, it is necessary for the AO to establish nexus between the income assessed and incriminating documents or evidence found in the course of search. In particular before any item of income is assessed as assessee's undisclosed income involving search cases u/ s 132, it is incumbent on the AO to prove a rational and tangible connection between the income assessed and incriminating evidence found or with entry in any seized records or any undisclosed asset or valuable found. Unless such direct and proximate cause or nexus is established, an AO is not permitted to assess the income merely on the basis of a voluntary offer made to pay tax on income.

I have considered the written submission and different case laws brought on this issue by the AR. I find that the jurisdictional bench of ITAT in the case of DCIT vs Vivekanand Verma in ITA No.1784/Kol/2012 has held that no addition could lawfully be made on the basis of only disclosure when there is no corroborative or direct evidence to support the disclosure. I also find that the CBDT's circular dated 12-03~2003 on this issue which was relied upon by the Madras High Court in the cases of M Narayanan & Bros vs ACIT (supra) and CIT vs Khader Khan Son (supra) and the Gujarat High Court in the case of Chetnaben j Shah vs IT [order dt.14-07-2016 in

Tax Appeal No.1437 of 2007]. The CBDT has clearly instructed that the AO should rely on credible evidence and that the material gathered in search should form the basis for framing the assessment order. In another order the jurisdictional Kolkata bench of ITAT in the case of ACIT vs Usha Agarwal (ITA No.142/Kol/2014) has given a categorical finding that only a statement recorded during search cannot be the basis of any addition without bringing corroborative evidence on record and finally the Hon'ble Supreme Court in the case of Pullangode Rubber Produce Co Ltd vs State of Kerala [1973] 91 ITR 18 noted that an admission is an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect. In the present case I find that apart from the statement recorded at the time of search, no piece of corroborative evidence was either found during the search nor brought on record by further post search investigation either by the investigation wing officer or by the AO during the assessment proceeding. Therefore the total addition of Rs.35270734/- cannot be sustained only on the basis of the statement recorded during the search operation. Thus respectfully following the ratio decided by the Jurisdictional bench of ITAT different High Courts and the Hon'ble Supreme Court in case laws referred/discussed above, assessee's appeal on ground no 1, 2 and 3 are allowed."

8.2.1. The Assessing Officer in the remand report, a copy of which is placed at the page 48 of the paper book, stated as follows:-

*"Therefore, assessee made the disclosure of Rs.3.52 Crores considering the stray and loose paper which has been found during the course of search & seizure operation which contain which contain recording of miscellaneous payments expenses etc. **which may not have been recorded in the regular books of the company.**"*

8.3. We now consider the case-law cited by the parties. The Hon'ble Rajasthan High Court's Jodhpur Division Bench, in the case of *CIT vs. Prakash Azad in Income Tax Appeal No. 184/2013, judgment dt. 15/03/2019*, held as follows:-

"We have given our thoughtful consideration to the submissions advanced at the bar and have gone through the impugned judgment and the material available on record.

It is not in dispute that the entire case of the appellant Revenue is based on the confession of the assessee which was extracted during the search/seizure and survey proceedings. It is also not in dispute that the assessee retracted the confession on 27.7.2009. It is also an admitted position from the record that the allegation of the Revenue that the assessee had undisclosed income over and above what was mentioned in the return, is based sheerly on the confession and no corroborative material or substantive proof was collected by the Revenue during the search/seizure and survey proceedings. In this background, we are of the firm opinion that the circular No.286/2/2003-IT (Inv.II) dated 10.3.2003 which has been reiterated in circular F.No.286/98/2013-IT (Inv.II) dated 18.12.2014 issued by the Board and the general principles of appreciation of evidence would definitely come into play and while appreciating the rival contentions, the Court would definitely require corroboration of the confessional statement by credible and tangible evidence failing which, it will be considered totally unsafe to rely solely upon the confession for upholding the liability fastened upon the assessee by the ACIT. Since, in the case at hand, admittedly, the Income Tax Authorities did not collect any tangible, corroborative evidence so as to substantiate the allegation of undisclosed income, manifestly, the view taken by the I.T.A.T. in the impugned judgment that the department failed to provide cogent, tangible and satisfactory evidence regarding the additional undisclosed income of the assessee, is absolutely justified and the impugned judgment cannot be termed to be illegal or

perverse by any stretch of imagination warranting interference therein in exercise of the appellate jurisdiction of this Court. We are duly satisfied that no substantial question of law is involved in the matter so as to question the legality or validity of the impugned judgment.

Hence, the appeal being devoid of merit is hereby dismissed."

9. In our view, this case-law do not apply to the facts of this case. The assessee has in his disclosure in a statement u/s 132(4) of the Act, stated that he would analyse and examine the seized material, loose papers, expenses which were not recorded in the books etc. which constitute incriminating material, would correctly identify the tax payers and then accordingly pay taxes on such income. True to his statement, the assessee offered to tax this amount, by *suo-moto* disclosing the same in his return of income and paid taxes thereon. The Assessing Officer had only accepted the return of income of the assessee. He did not make any addition, as alleged. No fault can be found of the Assessing Officer, for accepting the return of income of the assessee. The Id. CIT(A) was wrong in deleting the amount disclosed by the assessee in his return of income. The assessee should not have any grievance. Thus, we reverse the order of the Id. CIT(A) and restore the order of the Assessing Officer, wherein the Assessing Officer accepted the return of income filed by the assessee. **In the result, this appeal of the revenue is allowed.**

10. Now we take up ITA No. 2303/Kol/2016, wherein, the levy of penalty u/s 271 AAB of the Act, is challenged by the revenue.

11. After hearing rival contentions, we find that the Id. CIT(A) at page 9 and 10 of his order held as follows:-

"I have considered the findings of the AO in the penalty order and the remand report vide his letter No. ACIT /CC-2(1)/Kol/remand report/2015- 16/1543 dated 15/16-09-2016 duly forwarded by the Addl.CIT vide his letter No. Addl.CIT Range-2(c)/Kol/remand report/ 16-17/2120 dated 19-09-2016. I find that in the return of income filed for AY 2013-14, the assessee had offered Rs.130703000/- as his undisclosed income for the AY 2013-14. The said amount inter alia included the following items:

- a) Entries found pertaining to undisclosed jewellery Rs.17878225/-*
- b) Entries found pertaining to undisclosed investment Rs. 77554041/-*
- c) Voluntary offer made in statement u/ s 132(4) Rs.35270734/-*

Since the assessee had himself offered Rs.130703000/- as undisclosed income; the AO invoked provisions of section 271AAB of the Act and levied penalty @ 10% amounting to Rs.130703000/-. From the submissions it is apparent that the assessee has not challenged the levy of penalty with reference to the income of Rs. 95432266/- which admittedly represented undisclosed income which was

correlated with entries found in the seized documents and which was not recorded in the regular books of the assessee. The assessee has however disputed the levy of penalty with regard to Rs.35270734/- which he had offered as a matter of abundant caution on behalf of the entire Amrit Group. In the quantum appeal against the assessment order, I have held that the said addition of Rs.35270734/- did not have any co-relation with any incriminating material or evidence or with any undisclosed asset or valuable found in the course of search. The addition was made solely on the basis of voluntary offer of the assessee to cover detection of any additional undisclosed income during assessment proceedings from examination of seized documents and records. However ultimately the AO could not detect any additional undisclosed income from examination of the seized records but the income was assessed only on the basis of assessee's voluntary offer which was made out of abundant caution. For these reasons therefore, the addition made in the regular assessment was deleted. Since the addition itself has been deleted, there is no reason to sustain the, penalty levied u/s 271AAB of the Act. Further I also find that since the alleged undisclosed income has been assessed solely on the basis of assessee's voluntary offer and not with reference to any entry in books of accounts or incriminating documents found nor such addition has been made with reference to any undisclosed asset or valuable in the course of search, the said sum of Rs..35270734/- also does not come within the ambit of 'undisclosed income' as defined in Explanation to section 271AAB of the Act. Viewed from any angle therefore, there is no reason to sustain the penalty levied u/s 271AAB of the Act with reference to undisclosed income of RS.35270734/-. Accordingly the AO is directed to restrict the quantum of penalty u/s 271AAB to Rs. 9543230/- in place of Rs.130703000/- as levied in the impugned order. The AO shall accordingly modify the impugned order.

11.1. Admittedly, the disclosure in question is based on any material found during the course of search. But the amount of Rs.3,52,70,734/- does not represent any unexplained money, jewellery, valuable article or any other asset. No such asset has been identified by the Assessing Officer in the assessment proceedings. The Id. D/R, could not also bring to our notice any such asset. As the Assessing Officer as well as the Id. D/R have failed to bring on record that the sum of Rs.3,52,70,734/- represents any entry in respect of expenses which are found to be false nor has this sum been assessed based on any document which is found to be false, sub-clause (c) & (d) of sub-section (ii) of Section 271AAB of the Act, are also not attracted, in addition to sub-clause (a) of sub-section (ii) of Section 271AAB of the Act.

12. The Chandigarh Bench of the ITAT in the case of *Sandeep Bansal v. ACIT in ITA No. 1679/Chd/2017; Assessment Year 2014-15, order dt. 01/07/2019*, has considered the issue and held as follows:-

“11. We have heard the rival contentions and gone through the orders of the authorities below. We have also gone through the decision of the ITA T Chandigarh Bench in the case of M/s SEL Textiles Limited (supra).

We are in agreement with the contention of the Ld.Counsel for the assessee that the income surrendered in the present case of Rs.15.36 crores did A.Y.2014-15 not represent undisclosed income as defined in [section 271AAB](#) of the Act for the purpose of levy of penalty thereon. As is evident from the statement of Shri Satpal Bansal recorded during search the assessee was unable to offer any explanation at that point of time regarding the discrepancy found and had made the surrender only to buy peace of mind. Even in the surrender letter filed thereafter giving bifurcation of the surrender made in the hands of different assesseees, the assessee had admitted that it had been unable to go through the voluminous documents impounded during search and was, therefore, tentatively surrendering the amounts in different hands, which in the hands of the assessee amounted to Rs.5.65 crores to cover up any possible discrepancy. Clearly, there was nothing concrete representing any transaction not recorded in the books of the assessee, which the department had found in the documents impounded and on account of which, therefore, the surrender was made. Even the Revenue has not pointed out what discrepancies were noted in the documents impounded, to which the surrender could be attributed. Therefore, clearly for A.Y.2014-15 all purposes the surrender was a general surrender to buy peace of mind only and was not backed by any documentary evidence or otherwise representing any asset or any transaction not recorded in the books of the assessee. Therefore, by any stretch of logic, the surrender made by the assessee could not be said to be undisclosed income of the assessee. We find that the I T A T C Chandigarh Bench in the case of M/s SEL Textiles Limited (supra) had deleted a identical penalty levied after findings that the income surrendered did not represent any undisclosed income of the assessee.

The I.T.A.T. discussed various decisions of the Coordinate Benches in this regard, wherein it was held that the penalty u/s 271AB of the Act was not automatic and binding on the A.O. and was leviable only if undisclosed income represented by any asset or entry or transaction in any document which was not reflected in the books of the assessee, was found during the course of search. It was categorically held in the said decision that bald offer made by the assessee to pay tax on additional income in the statement u/s 132(4) of the Act, could not be A.Y.2014-15 considered as undisclosed income within the meaning of [section 271AAB](#) of the Act.

12. In view of the facts as discussed above by us that except for general surrender made by the assessee there was no incriminating material representing undisclosed income found during the course of search and, therefore, we hold that this was not a fit case for levy of penalty u/s 271AAB of the Act. We, therefore, set aside the order of the Ld.CIT(A) and direct deletion of penalty levied in the present case amounting to Rs.5.65 crores. Ground of appeal No.4 raised by the assessee is allowed.”

13. This Bench of the Tribunal in the case of *DCIT, CC-2(2), Kolkata vs. M/s. Rashmi Metaliks Ltd.* in ITA No. 1608/Kol/2017, order dt. 01/02/2019, held as follows:-

“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/ 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 assessee'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. The relevant findings of the Tribunal are as follows:

4. Learned CIT.DR vehemently contends during the course of hearing that the Assessing Officer had rightly invoked the impugned penal provision as stipulated u/s 271AAB on account of search operation in issue conducted in assessee's case on 20.12.2012. He heavily relies upon assessee's admission stating his undisclosed income of ₹2,79,15,065/- . His case therefore is that the same formed sufficient reasons for the Assessing Officer to impose the impugned penalty. We sought to know from learned CIT-DR as to whether the authorized officer had found any specified asset i.e. any money, bullion, jewellery or other valuable article or things as per explanation (c) forming of sec. 271AAB. There is no such material indicated during the course of hearing. We find that co-ordinate bench's order in ITA No.538/Kol/2017 in ACIT vs. Sri KanwarSain Gupta decided on 29.06.2018 declines Revenue's identical arguments para 3-4 follows as under:-

"3. We now come to the impugned penalty proceedings. The Assessing Officer levied penalty in question in his order dated 23.02.2016 by quoting [section 271AAB](#) of the Act on the ground that all the relevant conditions stipulated therein stood duly satisfied qua the above stated undisclosed income.

The CIT(A) reverses the Assessing Officer's action as follows:

"I find that during the search and seizure operation u/s 132 in this case no evidences regarding concealment/undisclosed income in the form of cash seizure/papers/documents/stock etc were found and seized. Nothing incriminating/no evidences were found regarding Rs.1 crore which was offered for taxation by the assessee suomoto in order to buy peace of mind. I also find that neither the officers in the investigation wing in the post search investigation nor the Assessing Officer during assessment process found any discriminating evidence of undisclosed income other than the statement of the assessee for making the addition of Rs.1 crore.

Further I find that the AO has levied penalty u/s 271AAB (1)(a). This section reads like sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.

Thus, it is clear that in order to levy penalty two things are essential (1) undisclosed income and (2) specified previous year. Here in this case Rs.1 crore was offered for taxation by the assessee suomoto in the statement recorded at the time of search. From the ratio decided by the Hon'ble Supreme Court in the case of Sudarshan Silk & Saries (supra), it is clear that only the statement of the assessee without any corroborating evidence cannot be the only basis for levying penalty. Here it is also clear that from the statement of the assessee one cannot point out which amount of undisclosed income pertains to which specified previous year. In this situation, where nothing is clear from assessee's statement recorded at the time of search, the action of the AO to levy penalty u/s 271AAB(1)(a) on the amount offered by the assessee suomoto to buy peace of mind, cannot be justified. The Hon'ble Supreme Court has also categorically decided the ratio that penalty cannot be levied on the amount offered by the assessee in order to buy peace of mind (in the case of Sudarshan Silk & Saries (supra)]. Thus, respectfully following the ratio decided by the Hon'ble Supreme Court, the AO is directed to delete the penalty u/s 271AAB(1)(a). Accordingly, assessee's appeal on grounds no 1, 2 and 3 are allowed. "

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 assessee'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."

We adopt above detailed reasoning mutatis mutandis to affirm the CIT(A)'s findings under challenge deleting the impugned penalty. The Revenue's appeal in ITA No.1605/Kol/2017 fails therefore."

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 sq. ft. 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 issue of 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."

14. Consistent with the view taken therein, we find no infirmity in the order of the ld. CIT(A) to the extent, wherein he has cancelled the penalty levied u/s 271AAB of the Act as the amount in question is not undisclosed income as defined in this Section 271AAB of the Act as it does not represent any unexplained money, jewellery, valuable article or any other assets, nor does it represent any false document or expenditure. Accordingly, this appeal of the revenue is dismissed.

15. In the result, the I.T. Appeal in ITA No. 2303/Kol/2016 is allowed and I.T. Appeal in ITA No. 2303/Kol/2016, is dismissed.

Kolkata, the 1st day of October, 2019.

Sd/-
[S.S. Godara]
 Judicial Member

Sd/-
[J. Sudhakar Reddy]
 Accountant Member

Dated : 01.10.2019
 {SC SPS}

Copy of the order forwarded to:

- 1. Harish Bagla**
Jaisalmer Building
6, Ashoka Road
Kolkata - 700 027
- 2. Asstt. Commissioner of Income Tax, CC-2(1), Kolkata**
3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches