

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
DELHI BENCH "E", NEW DELHI**

**BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER  
AND  
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

ITA No. 6333/Del/2016  
A.Y. 2010-11

Mahender Kumar Valecha H. No. S-324, Greater Kailash, New Delhi  PAN:ADVPV0436E	VS	DCIT, Central Circle-1, Faridabad
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

Present for Appellant : Sh. Somil Agarwal, Adv  
Present for Respondent : Ms. Rakhi Vimal, Sr. DR

**ORDER**

**Per Anadee Nath Misshra, AM**

(A) This appeal has been filed by the assessee against the order dated 7.10.2016 passed by Learned Commissioner of Income Tax-3, Gurgaon [in short, "Ld. CIT"] pertaining to 2010-11 assessment year. The assessee has raised following grounds of appeal:-

*i. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not deleting the penalty of Rs. 2,23,539/- fully, which was levied by Ld. AO and that too without assuming jurisdiction as per law and without appreciating the facts and circumstances of the case.*

*ii. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the levy of penalty u/s 271AAA, more so when penalty was initiated & levied by Ld. AO only on the ground that*

*manner of earning undisclosed income was not substantiated and thus, Ld. CIT(A) has exceeded the jurisdiction.*

*iii. In any view of the matter and in any case, imposition of penalty u/s 271AAA and confirmed by Ld. CIT(A) is bad in law and against the facts and circumstances of the case."*

(B). In this case, assessment order under section 143(3) read with section 153A of Income Tax Act was passed by Assessing Officer ("AO" for short) on 28.12.2011 in which the total income was assessed at Rs. 52,04,180/- as against returned income of Rs. 7,87,073/-. The relevant portion of the assessment order is reproduced as under:-

By virtue of authorization of the Director of Income Tax (Investigation), Chandigarh, under section 132(1) of the I.T. Act, 1961, the group cases of M/s. Imperial Auto Industries Ltd., Faridabad were subjected to search and seizure operations on 02.09.2009. Search & Survey operations were also conducted at the business as well as residential premises in the cases which are closely associated with M/s. Imperial Auto Industries Ltd. Search operation u/s 132(1) was also carried out on 02-09-2009, at the residential premises of the assessee, Sh. Mahinder Kumar Valecha, H. No. S - 324, GK - II, New Delhi. Cash, jewellery and documents/ books were seized and impounded in the course of search operation from the residential premises of the assessee. Copies of panchnamas and annexure were handed over to the assessee during search operation.

2. Assessment jurisdiction over the assessee has since been transferred to Central Circle - I, Faridabad by the Commissioner of Income Tax, Delhi - VII, New Delhi vide his office order F. No. CIT-VII/Centralization/2009-10/1605 dated 14.12.2009 effective from 14.12.2009.

3. Return of income for the A. Y. 2010-11 was filed on 21.10.2011 declaring an income of Rs. 7,87,070/-. The assessee derived income from business and profession and income from other sources. Notice u/s 142(1) for the asstt. year 2010-11 dated 14.01.2011 was issued to the assessee fixing the case for 24.01.2011. Notice u/s 142(1) alongwith detailed questionnaire of the I. T. Act was issued on 28.02.2011 fixing the case for 22.03.2011. Assessment proceedings were attended by the A.Rs. of the assessee Sh. Kaushal Bansal, Advocate and Sh. Pankaj Kumar from time to time and necessary details were obtained and placed on file. The main issues involved are discussed as under:-

**4. Cash found.**

During the course of search and seizure operation conducted at the residence of the assessee, cash amounting to Rs. 2,77,200 was found out of which cash of Rs. 2,00,000 was seized by the authorized as no proper explanation was offered by the assessee.

During the course of assessment proceedings vide this office notice dated 28-02-2011, assessee was asked to explain the source of cash found at the residence of the assessee. In response to above letter, assessee in his reply letter dated 01-12-2011, submitted that "an amount of Rs. 2,77,200 was found as cash out of which Rs. 2 lacs was seized and the balance amount was returned. Infact the amount of Rs. 77,200 found was not seized in view of the same belonging to all family members and out of their past savings and accumulated income. In such a large family consisting of 8 members including very old females, this much of cash jointly belonging to all is quit reasonable and the source may be accepted and treated as explained. The amount of Rs 2,00,000 which was seized from the assessee is part of total undisclosed income of Rs. 8,00,000 declared by the assessee relating to assessment to year 2010-11 as per letter of declaration come statement u/s 132(4) submitted by the assessee dated 07-09-2009 at the time of search"

On the basis of declaration dated 07-09-2009 it is noticed that the cash of Rs. 2,00,000 has been declared by the assessee in his statement recorded during search proceedings. As for as the matter regarding balance cash of Rs. 77,200/- is concerned no documentary evidence in support of his exclamation has been filed by the assessee. Therefore this amount of Rs. 77,200 is added total income of the assessee for the assessment of year 2010-11. Penalty proceeding of U/S 271AAA are initiated separately.

**Addition of Rs. 77,200**

**5. Jewellery**

During the course of search proceeding conducting at the residence of the assessee jewellery of Rs. 39,37,792 was found but not seized. During the course of assessment proceedings, assessee was asked to explain the source of jewellery found in possession of the assessee. In response to above assessee in his letter dated 01-12-2011 submitted that the jewellery found at the residence was belonging to different 9 family members and as per CBDT instruction No. 1194 the jewellery may be treated as out of declare sources.

I have considered the submission offered by the assessee but not found to be reasonable on grounds that the CBDT instruction is applicable at the time of search operation so that proper benefit of each female member of 500 gram and male member of 100 gram and female child of 250 gram is allowed at the time of seizure made by the authorized officer. But during the course of assessment proceedings the assessee has to explain the source of purchase of jewellery in this case assessee has not furnished any evidence with regard to source of investment for purchase of jewellery, therefore the whole amount of Rs. 39,37,792/- is added back in the total of the assessee income under section 69 of the I. T. Act. penalty proceedings U/S 271AAA are initiated separately.

**Addition of Rs. 39,37,792/-**

**6. Documents/Loose papers :-**

During the course of search and seizure operation, some documents were found and seized from the residence of the assessee as per panchnama dated 03.09.2009. From verification of entries recorded in Annexure - A - 3 , Page No. - 4 - 9 thereof, assessee has made a surrender of Rs. 15,00,000/- including cash of Rs. 2,00,000/- seized from his residence. Assessee vide letter dated 07.09.09 submitted the following breakup of Rs. 15,00,000/-.

S.No.	Particulars	A.Y. 2009-10	A.Y. 2010-11
1.	Income relating to business of construction activity.	7,00,000/-	6,00,000/-
2.	Cash found and seized.	-	2,00,000/-
	<b>Total</b>	<b>7,00,000/-</b>	<b>8,00,000/-</b>

The above pages i.e. page Nos. 4-9 of Annexure - A - 3 are scanned hereunder :-

~~15000~~

Work 1200

Wall 1800 Sq feet  
 with Plaster  
 Both side 112 feet out side Room & Park  
 348 Drive way  
 105 feet  
2550 Sq feet x 60

✓ Window Grill - 6400  
 ✓ Gate - 15500  
 ✓ Gate Nali wali Jale - 1750 ✓  
 ✓ Electrical Meter - 3800  
 Boring - 5500  
 Mithi - Rs 31200 48 x 650  
 ✓ Water connect - 1920 2000  
 ✓ Gravel on Gate - 12000  
 ✓ Koli Stone Drive way - 975 Sq feet x 60  
 ✓ Ramp on side Jale - 165 x 30  
 ✓ Plaster on Sidewalk - 1500 Sq feet  
 7 base wall x 10  
 ✓ Leveling of Mithi - Rs 3500

Area - 755

Wall, 1427 X 60

Grill window - 4500 ✓

Gate - 15500 ✓

Mitti - 182m - 282650

Leveling - 2500

Mith

Jalli in Gate - 1350

Mech. Electrical - 3800

Boaring - 550

Kole Stone - 600 Sq feet X 60  
Driveway

Granite in Gate - 12000

Maintenance

SP4

Area = 155

Water 100 ft x 100 ft - 1182 sq feet x 65

Travel

Rate of Labor 5000 + 2000

Window Grill - 4500

Cat Jali Nali - 1350

Meth - 17550 (27 x 650)

Mith Landip - 2500 ✓

Booring - 5500

Water Harvest -

Meth - 3800

Water connect - 2000

Rate slo - 600 x 65

Ramp - 150 x 30

Grill over <sup>door</sup> wall - 16000

door hls - 7550

Area - 1200 X 750 = 900000  
 Wall with plaster - 1950 - 1760 X 60 = 105600

Gate - 15500  
 Small window - 7800  
 M.H. = 35100 54 X 650  
 Leveling - 4500  
 Kola Stone - 940 Sifet X 65 = 61100  
 Ramp = 180 X 30 = 5400  
 Gate jali - 1720  
 Boundary - 5500  
 Mesh - 3800  
 Concrete work - 2000  
 Plaster without wall  
 on wall which were already

56 157

(8)

Area = 2770

Wall =

Plash wall = 2080 x 10 = 1465

Ramp = 231 81 feet 571 way 1371

out side = 150 feet

oil wall

in side out side Gal = 2600

Mitti = 67600 (1048650)

Barnaf = 11000

Mitti covering = 5000

P.O.P. =

Gal =

Middle wall =

tile on roof = 2790 x 30

(10)

Handwritten notes on a page, including calculations and a list of items:

2462 = 21

376

2086

376

Vanita

374	—	761895
15	—	1136350
409	—	730945
119	—	1183000
50	—	950000
156,57	—	2186790

Mani Khera (S) 11/11/2011

Bouncy J. Packer

12 — Gladfimer

Marbon Lela

From the contents of above pages, it is observed that entries recorded on these pages seem to be work done by the assessee. On Page No. - 9, there are some calculation, total of which comes to Rs. 62,31,110/-. Some figures are also recorded which are circled and some are not circled. From the perusal of entries recorded on this page it is noticed that on the left hand side the assessee has mentioned where he has done his work and at the right hand side he has shown receipts from that house.

During the course of asstt. proceedings, assessee was asked to explain the surrendered amount pertaining to him and get it verified from his returns of income and also from his records. He was also requested to intimate the details of tax paid on surrendered amount.

The assessee vide his letter dated 01.12.2011 has submitted that he had declared Rs. 15 lac as undisclosed income u/s 132(4). After verifying the facts explained by the assessee, it is noted that out of the total surrender of Rs. 15 lac assessee has declared the surrendered amount of Rs. 8,00,000/- in his return filed for the A.Y. 2010-11 and Rs. 7,00,000/- in the A. Y. 2009-10. C of Rs. 2,77,200/- was found and out of it Rs. 2,00,000/- was seized from the residential premise



Sh. Mahender Kumar Valecha, S-324, G.K.-II, New Delhi. Statement on oath of Sh. Mahender Kumar Valecha was recorded on 02.09.09 when the search was still in progress. The relevant extracts of

the same is reproduced below:

*Q.: As per inventory of cash found during the search cash of Rs. 2,77,200/- has been found as against 1.5 to 2.0 lacs estimated before the search. Please reconcile the same and explain the sources thereof?  
A.: Some money of grand mother, mother and sister is having the difference in this cash."*

Assessee has declared his income u/s 44AD @ 8% on Rs. 68.89 lacs which comes to Rs. 5,51,120/-, whereas the assessee has made a disclosure of Rs. 6 lac on this issue. Thus the total disclosure of Rs. 8 lac has been declared by the assessee in his return of income. In this regard it is pertinent to mention here that the case of the assessee does not fall under the preview of section 44AD as the assessee is not involved in construction work as per details furnished, assessee is a contractor and doing business in the capacity of partner as well as in his individual capacity. Further, the total of his receipts has been shown at Rs. 68.89 lacs therefore, section 44AD is not applicable in this case. In his reply letter dated 01.12.2011 assessee submitted that he has made a surrender of Rs. 15,00,000/- and has declared the same in his returns of income for the A.Y. 2009-10 and 2010-11. The surrendered income has been declared in the year under reference but the same is not accepted on the grounds that during the assessment proceedings assessee could not produce any evidence with regard to his involvement in construction work. Assessee could not prove the above facts and also failed to prove that the case of the assessee falls u/s 44AD therefore, the disclosure made by the assessee is not accepted. As per the amount of receipts disclosed by the assessee are Rs. 68.89 lacs and he has to maintain the books of accounts as per provisions of section 44AA which he has not maintained therefore penalty proceedings u/s 271A are initiated in this case. As far as the matter regarding his disclosure is concerned, it is also not accepted therefore keeping in view the total facts of the case the profit of the assessee on the above amount of Rs. 68.89 lacs is determined @ 10% instead of 8% declared by him and accordingly his income is determined at Rs. 6,88,900/- as against Rs. 6,00,000/- surrendered by the assessee on this account. Thus an addition of Rs. 88,900/- is added back in the total income of the assessee. In view of the above assessee has not substantiate the manner in which the undisclosed income was earned by him and declared in his statement recorded u/s 132(4) therefore, penalty u/s 271AAA are initiated separately.

(Addition Rs. 88,900/-)

#### **7. Inadmissible deduction**

the assessee with his return of income filed copy of computation of taxable income. from the perusal of detail filed by the assessee, it is notice that the assessee has declared Rs. 8,00,000 surrendered by him which relates to the business of construction and cash of Rs. 2,00,000 at his residence. Assessee has also declared Rs. 1,01,785 as his profit U/S 44 A.D thereafter the assessee has claimed deduction under chapter VI of the IT Act amounting to Rs. 1,15,000/- and balance taxable income is reflected at Rs. 7,87,073. From the above tax of the case it is conceded that the assessee has claimed wrong deduction. If the surrendered income is not declared than there will be no profit in business of the assessee and his income will going minus. Therefore the deduction claimed by the assessee from the surrendered amount his not allowed. Further the assessee has not furnished any evidence that his income comes under the provision of section 44 AD of IT Act. the surrendered business income of 6 lacs also pertains to the assessment year under reference. If the income declared by the assessee is added to the declared income in such situation the provision sector 44 AD are not applicable in this case.

From the above discussion, it is considered that in the case of the assessee provision of section 44 AD are not admissible but section 44 AB are applicable. The assessee failed to maintain books of account therefore penalty proceedings U/S 271A are initiated. Further the books are not get audited therefore penalty proceedings are sector 271 B are also initiated in this case.

In view of the above, the deduction claimed of Rs. 1,15,000 is restricted to the income declared by the assessee other than the surrendered income which is Rs. 1,01,785 and the excess deduction of Rs. 13,215 is disallowed and added in the total income of the assessee.

**Addition of Rs. 13,215/-**

**8. low drawings**

During the course of assessment proceeding assessee has furnished copy of bank account statements. From the parasol of this bank account it is noticed that assessee not has made any withdrawal for his household expenses. The withdrawal from the banks were made only for investment made in saving scheme like, KVP and shares etc. taking in the total No. of family members and status of the assessee it is restimated that assessee incurred Rs. 25,000 per month for meeting out his household expenses which has not been disclosed by him. Therefore an addition of Rs. 3,00,000 is made in the total income of the assessee on account of low drawings. Penalty proceeding U/S 271AAA are initiated in this case.

**Addition of Rs. 3,00,000**

With the above remarks, total income of the assessee is computed as under:

Income as per return	Rs. 7,87,073 ✓
Addition as per para 4	Rs. 77,200
Addition as per para 5	Rs. 39,37,792 ✓
Addition as per para 6	Rs. 88,900/-
Addition as per para 7	Rs. 13,215
Addition as per para 8	Rs. 3,00,000 ✓
	Rs. 52,04,180

Assessed. Issue necessary documents. Charge interest U/S 234A, 234B and 234C as applicable. Issue penalty notice U/S 271AAA and u/s 271A.

This order has been passed with the prior approval of Addl. Commissioner of Income Tax, Range Central Chandigarh vide his office letter No. Addl.CIT/Central/Chd./2011-12/4730 dated 28.12.2011.

(C). The assessee filed appeal before the Commissioner of Income Tax (Appeals), Gurgaon [in short, "Ld. CIT"]. Vide order dated 19.10.2012 of the learned CIT(A), partial relief was allowed to the assessee. Relevant portion of the order of learned CIT(A) is reproduced as under:-

"4.1 In ground of appeal no. 3 the assessee has agitated against the addition of Rs. 77,200/- out of the total cash found Rs. 2,77,200/- at the residence. This was explained as belonging to various family members of the assessee comprising of 5 adults and three children, stating that in a joint family the amount of Rs. 77,200/- was very reasonable. It was further contended that Rs. 2 lacs was not seized by the search team indicating that the same was treated explained and disclosed. It was further submitted that taxing the same in the hands of only the assessee was arbitrary.

4.2. The Id. AO on the other hand at para 4 of the impugned assessment order staled that the seizure of Rs. 2 lacs out of cash found of Rs.2.77,200/- was that no proper

explanation was offered by the assessee. The Ld. AO has further stated that the assessee in the letter of declaration dated 07,09.2009 had specified that the cash of Rs. 2 lacs was part of Rs. 8 lakhs declared in the statement recorded u/s 132(4) and therefore accepting the same, proceeded to add back Rs. 77,200/-.

4.3 I have considered the submissions. It is not disputed that Rs. 2 lakhs has been surrendered out of Rs. 2,77,200/- found. As regards the balance, the arguments of the assessee has some force that in a family of 7 adults and one minor who is 16 years of age, the cash amount of Rs.77,200/- was reasonable, but the issue is not the reasonability but the requirement on the part of the assessee to explain the source of accumulation by assessee as well as the other members of the family. There is nothing put forth by the assessee that the other family members are having their own means of income Moreover in this case at Ground of appeal no 7, the issue is regarding low withdrawals for household expenses. Thus, I am inclined to hold that the assessee has not been able to substantiate his plea for deleting the addition in his hands. In other words, the assessee fails on this ground of appeal.

5. In the next ground of appeal no. 4 the assessee has agitated against the addition of Rs. 39,37,792/- on a/c of unexplained investment in jewellery u/s 69 relating to jewellery found but not seized. It was argued that out of the total jewellery found at the residence and bank lockers of different family members comprised of jewellery Rs. 38,36,417/- and silver utensils Rs. 1,01,375/- and that no jewellery was seized. Referring to the Hindu Customs and culture prevalent in the Indian society where jewellery are gifted at different occasion and inherited, it was the case of the assessee that jewellery to extend not required to be seized , may be treated as explained and quoted several case laws:

*CIT vs. Ms Aggarwal (HUF) (2008) DTR 169 (MR)*  
*GITvs. Ratanlal Vyaparilal Jain 45 DTR 290 (Guj.)*  
*Rajendra C. Shah vs. Jt. CIT (2007) 158 Taxman 170 (Mum.)*  
*Dy. CIT vs. Arjun Dass Kalwani 101 ITD 337 (Jodh)*  
*Smt. Bommana Swama Rekha vs. Asstt. CIT 95 TTJ 885 (visakha)*  
*Smt. Sulochna Devi Jaiswal vs. Dy. CIT TTJ 974 (Jab)*

5.1 I have considered the submissions of the assessee and the impugned assessment order. The Ld AO had proceeded to add the entire amount as no explanation to the source of the jewellery was provided. The assessee in his submission dated 28.9.2012 had further contended that total jewellery found weighed 2855.4 gms, the chart is reproduced below:

S. No.	Name	Weight
1	Locker No. 223 in name of Smt. Renu Valecha & Smt. Savitri Devi (PB 38, 39)	383.600 grams
2.	Smt. Kiran Batra wife of Kapil Batra R/o S-324, GK-II (PB 37)	122.600 grams
3.	Smt. Renu Valecha, Smt. Savitri Devi, Smt. Bhagwan Devi & Smt. Asha Mehta R/o S-324, GK-II (PB 40, 41)	1083.500 grams
4.	Locker No. 675 OBC Branch GK II in name of Smt. Renu Valecha (PB 40, 41)	666.300 grams
	Total	2855.400 grams

*It was inter alia submitted that the total weight of jewellery found is of 2855.4 grams of jewellery and if jewellery found of Mrs. Kiran Batra weighing 122.6grams is excluded the balance jewellery remains only 2732.8 grams. Mrs. Kiran Batra is the relative of assessee (wife of Brother-in-law) whose jewellery was separately valued at the time of search. Thus, in the case of assessee and his family members, jewellery found of 2.732.8 grams need no explanation and sources thereof. The jewellery of Mrs. Kiran Batra weighting 122.6grams, further needs no explanation as the same belongs to relative of the assessee (wife of Brother in law) and therefore, the net jewellery found considered only 2332.8 belonging to eight family members of assessee which is much less than the quantify that can be owned by assessee family and needs no source of explanation, and therefore the addition made of Rs. 39,37,792/- in the hands of the assessee ought to have been deleted as in any case it cannot be said to be the jewellery of the assessee alone.*

*5.2 I have gone through assessee's submission and the impugned assessment order. It is a fact that total jewellery of Rs. 39,37,792/- was found and no surrender on this account was made by the assessee. It is also a fact that no documentary evidence as to the source of investment was filed. It is also appreciated that in the Hindu custom gold ornaments are gifted during auspicious occasions. Instruction No. 1916 dated 11.05.1994 of the CBDT, which was also referred to by the assessee, relates to exemptions from seizure to some extent in respect of the family members, ft does not however exclude jewellery found from being assessed if sources of acquisition are not satisfactorily explained. The Instruction mentions that in case of person not assessed to wealth tax, gold jewellery and ornaments to the extent of 500 gm per married lady. 250 gm per unmarried lady and 100 grams per male member of the family need not be seized.. It further provides that having regard to the status of the family and custom and practice of the community to which the family belongs, the officer may exclude a larger quantity of jewellery and ornaments from seizure.*

*Consequently, one needs to fairly consider the gamut of the facts of the case viz. the credit worthiness of each of the individual members of the family, the status of the family, the customs of Hindu society and the marital period to examine the sources of acquisition of jewellery if justifiable in the absence of anything found to the contrary. The assessee submits that the family comprised of 5 adults including his mother and grandmother as well as his sister and three children, a son and two daughters. As the jewellery found is found belonging to other family members too. both at residence and locker, and as they are living in a joint household, I would think that it is not correct to tax the seized jewellery in the assessee's hands only. As for Mrs. Kiran Batra relative of assessee whose jewellery was separately valued at the time of search, the same is not considered. Thus, in the case of assessee and his family members, jewellery found works out to 2732.8 grams. No doubt, the assessee has not given- any explanation nor provided any evidence as to the manner of acquisition of the jewellery by either self or any of the family members. But. one cannot dispute the fact, that it is part of the Indian tradition and social norm that jewellery or cash is gifted during certain occasions viz, marriage, birth and other auspicious ceremonies which have to be taken into consideration. Therefore considering the facts and circumstances of the case, and taking the benefit of the CBDT Instruction to a great extent, to determine the quantity which 'would generally be held by the family members, I consider a rebate to the extent of 1500 grams of jewellery in respect of the entire family will be appropriate. The difference in grams is therefore treated as unaccounted jewellery.*

Accordingly, the addition by the Ld. AO is to be restricted to the balance after giving the benefit of 1500 grams only and while giving the appeal effect, the value of the jewellery may be worked out. Consequently, this ground of appeal is partly allowed.

6. In ground of Appeal no. 5, the addition of Rs. 88,900/- u/s 44AD has been challenged. As per written submissions, income in the case of civil contractor where no books of accounts are maintained is to be estimated @ 8% of the turnover as provided u/s 44AD of the Income Tax Act, 1961. The Ld. AO estimated 10% of income of total turnover found undisclosed. It is submitted that Ld. AO has accepted the returned income filed by the assessee for all assessment years i.e. 2004-05 to 2009-10 and accepted 8% Gross profit from construction business in these years. Therefore in this year too there is no change and following consistency the rate of 8% may kindly be applied on turnover and excess addition of 2% may kindly be deleted.

6.1 The issue has been dealt at length by the Ld. AO at para 6. It transpires that some loose documents were found and seized from the residence of the assessee as a result of which a surrender of Rs. 15,00,000/- including cash of Rs. 2,00,000/- which was seized. As per break-up given of Rs. 15,00,000/-, an amount of Rs. 7,00,000/- has been offered for AY 2009-10 and Rs. 8,00,000/- for AY 2010-11. The Ld. AO however rejected assessee's contention of falling within the ambit of section 44AD as the assessee is found not involved in construction work as per details furnished and that the assessee was a contractor doing business in the capacity of a partner as well as in his individual capacity. Further that the total receipts had been shown at Rs. 68.89 lacs and therefore, section 44AD was not applicable. As regards the surrendered income for the year under reference the same was not accepted as evidence of involvement in construction work was not produced. Therefore, the Ld. AO proceeded to determine the profit @ 10% instead of 8% leading to the addition of Rs. 88,900/-.

6.3 I have carefully considered the submissions of the assessee as well as the impugned order. Though the argument of the assessee on rule of consistency is appreciated, the Ld. AO has come to a specific finding on the basis of seized documents which has not been challenged by the assessee. Therefore, I have no reason to interfere with the action of the Ld. AO.

7. The ground of Appeal No. 6 relate to deduction claimed under Chapter VIA not allowed Rs. 13,125/-, wherein it is submitted that when the undisclosed income is assessed to tax, the assessee cannot be denied deductions which are eligible under Chapter VIA of Income Tax Act, 1961."

7.1 At para 7 of the impugned order the Ld. AO's case is that if the surrendered income had not been declared then there would be no profit in the business and the income would be in the negative. Therefore the deduction claimed from the surrendered income was not allowed.

7.2. Having considered the issue.. I am inclined to hold that since the amount paid by the assessee out of his undisclosed income has been taxed, then the eligible claim under Chapter VIA is to be allowed. Hence assessee succeeds on this ground.

8. In ground of appeal no. 7 addition of Rs. 3,00,000/-- towards tow drawings has been agitated by the assessee. Assessee submitted a chart of household expenses incurred year to year which are progressive. It was submitted that during the year a total amount of Rs. 3,48,000/- was incurred by the assessee and his family members for household expenses. Assessee has submitted the cash flow chart (refer PB 48) which shows opening cash in hand of Rs. 9,29,372/- and closing balance of Rs. 6,72,612/-. The details of withdrawals made are Rs. 75,000/- out of cash, Rs. 1,37,550/- out of credit cards. Besides this, the other family members have also contributed to the household expenses as per details given here under:-

1. Bhagwan Devi	Rs. 65,000/- (PB 44)
2. SavitriDevi	Rs. 10,000/-(PB 45)
3. Asha Mehta	Rs. 1,20,000/-(PB 46)
4. Renu Valecha	Rs. 36,000/- (PB 47)
5. Mahinder Valecha	Rs. 75,000/-(PB 48)
6. Neha Valecha	Rs. 42,000/- (PB 43)

Thus, the total of above comes to Rs. 3,48,000/-. Ld. AO made addition of Rs. 3,00,000/- alleging that no withdrawal was made by assessee from his bank account and considering the total number of family members, estimated the household expenses @ Rs. 25,000/- per month and made an addition of Rs. 3,00,000/-. It was assessee's case that all family members have contributed to household expenses, so the Ld. AO made the addition without appreciating the withdrawal and contribution of other family members towards household expenses.

8.1 It is seen from the impugned assessment order that the addition on the estimate basis on Rs.25,000/- per month for household expenses had been made as no withdrawals were found made from banks on going through the copy of bank statements.

8.2 I have carefully considered the submissions of the assessee. The chart furnished does not hold any strength as they have not been substantiated and were not placed for consideration before the Id AC). The other contention that Rs. 75,000/" was cash withdrawal, other than the credit card payments of Rs.1,37,550/- is rather meagre for such a large family with a reasonable decent standard of living. The Ld AO had also specifically noted that there was no withdrawals from the bank towards household expenditure, which the assessee has controverted. However, while adjudicating Ground of appeal no 3, the cash seized has been added back while the rest found has been surrendered. Therefore, i am of the considered view that this adhoc estimation added back in this ground of appeal without any incriminating evidence whether direct or circumstantial cannot be sustained.

9. In Ground of appeal no.8, the issue is regarding the adjustment of cash found and seized during search amounting to Rs. 2,00,000/- towards payment of Advance Tax Liability which was not allowed.

9.1 On this issue of adjustment of seized cash, the jurisdictional High Court in CIT vs. Arun Kapoor (2011) 334 ITR 351 (P&H), the Hon'ble High Court has upheld the action of adjustment of seized cash. In another decision of jurisdictional High Court in CIT vs. Ashok Kumar (2011) 334 ITR 355 (P&H), it was held as under at para 5 that is-reproduced:

*"In CIT vs. Arun Kapoor, IT Appeal No. 149 of 2003 decided on 27 July, 2.010, this court had occasion to consider similar issue where it has been held that the assessee is entitled to adjustment of seized cash amount towards advance tax liability from the date of making the application in that regard, In the present case, the assessee had made request of adjustment of the advance tax liability of Rs. 3,14,312 against the seized amount of Rs. 5.90,000/- on 28<sup>th</sup> Aug. 1989. Since the first instalment of Advance Tax was payable on 15th Sept. 1989 and the request for adjustment having been made on 28<sup>th</sup> Aug., 1989 and reminder on 12th Sept. 1989, no interest was exigible under ss. 234A and 234B of the Act. The tribunal has rightly held that the assessee was entitled to adjustment of the said amount and no interest could be charged on that basis. Therefore, no fault could be found with the approach adopted by the tribunal."*

*In other words the assessee was entitled to adjustment of seized cash. The Ld. AO while giving appeal effect shall ascertain from the assessment record and the investigation wing if required, giving credence to the applications made by the assessee for adjustment of seized cash. Accordingly for statistical purposes, this ground of appeal is allowed.”*

**(D)** The assessee as well as Revenue filed appeal in Income Tax Appellate Tribunal vide order dated 15.1.2016 on Coordinate Bench of Income Tax Appellate Tribunal (for short “the ITAT”) Delhi in ITA Nos. 6396/Del/2012 and 81/Del/2013. The appeals of assessee as well as Revenue were disposed of in the consolidated order. The relevant portion of the order dated 15.01.2016 of ITAT Delhi Benches is reproduced as under:-

*3. The assessee derived income from business and profession as well as income from other sources. Return of income for the A.Y 2010-11 was filed on 21/10/2011 declaring an income of Rs.7,87,070/-. During the course of search and seizure operation conducted at the residence of the assessee, cash amounting to Rs.2,77,200/- was found, out of which cash of Rs.2,00,000 was seized by the authorities as no proper explanation was offered by the assessee. The assessee in his reply submitted that an amount of Rs.2,77,200/- was found as cash out of which Rs.2 lacs was seized and the balance amount was returned. In fact the amount of Rs. 77,200/- found was not seized in view of the same belonging to all family members and out of their past savings and accumulated income. According to assessee, in such a large family consisting of 8 members including very old females, this much of cash jointly belonging to all was quite reasonable and requested the Assessing Officer to accept the source and treat the same as explained. The amount of Rs.2,00,000 which was seized from the assessee was part of total undisclosed income of Rs.8,00,000/- declared by the assessee relating to Assessment Year 2010-11 as per letter of declaration-cum-statement u/s 132(4) submitted by the assessee dated 7/9/2009 at the time of search. From the said letter, it was noticed that the cash of Rs.2,00,000 was declared by the assessee in his statement recorded during search proceedings. As far as the matter regarding balance cash of Rs.77,200/- was concerned no documentary evidence in support of his explanation was filed by the assessee. Therefore this amount of Rs.77,200/- was added to total income of the assessee for the assessment year 2010-11. During the course of search proceeding conducted at the residence of the assessee jewellery of Rs.39,37,792/- was found but not seized. Assessee in his letter dated 1/12/2011 submitted that the jewelry found at the residence was belonging to different 9 family members and as per CBDT instruction No. 1194 the jewellery may be treated as out of declare sources. The Assessing Officer considered the submission offered by the assessee but did not find reasonable on grounds that the CBDT instruction is applicable at the time of search operation so that proper benefit of each female member of 500 gram and male member of 100 gram and female child of 250 gram has to be allowed at the time of seizure made by the authorized officer. But during the course of assessment proceedings the assessee explained the source of purchase of jewellery in this case. Assessee did not furnish any evidence with regard to source of investment for purchase of jewellery, therefore, the whole amount of*

Rs.39,37,792/- was added back in the total of the assessee income u/s 69 of the Income Tax Act, 1961 by the Assessing Officer. As relates to addition of Rs. 88,900/- under Section 44AD of the Income Tax Act, 1961, the Assessing Officer rejected the assessee's contention of falling within the ambit of section 44AD as the assessee was not found involved in construction work as per details furnished and that the assessee was a contractor doing business in the capacity of a partner as well in his individual capacity. The total receipts shown at Rs. 68.89 lacs, therefore, Section 44AD was held not applicable by the AO. As regards the surrendered income for the year under reference the same was not accepted by Assessing Officer as evidence of involvement in construction work was not produced. Therefore, the Assessing Officer proceeded to determine the profit @ 10% instead of 8% leading to the addition of Rs. 88,900/-. As relates to low drawing, the AO made addition of Rs.3,00,000/- stating that no withdrawal was made by assessee from his bank account and considering the total number of family members, estimated the household expenses @ Rs. 25,000/- per month.

4. The CIT(A) made addition of Rs. 77,200/-, as Rs. 2 lakhs has been surrendered by the assessee. As relates to jewellery of Rs.39,37,792/- the CIT(A) held that in hindu custom gold ornaments are gifted during auspicious occasions. Instruction no. 1916 dated 11.05.1994 of the CBDT, which was also referred to by the assessee, relates to exemptions from seizure to some extent in respect of the family member. It does not however exclude jewellery found from being assessed if sources of acquisition are not satisfactorily explained. The Instruction mentions that in case of person not assessed to wealth tax, gold jewellery and ornaments to the extent of 500 gms. Per married lady, 250 gms. Per unmarried lady and 100 gms. per male member of the family need not be seized. It further provides that having regard to the status of the family and custom and practice of the community to which the family belongs, the officer may exclude a larger quantity of jewellery and ornaments from seizure. Therefore restricted the addition to the balance after giving the benefit of 1500grams and directed the Assessing Officer to work out value of jewellery after giving appeal effect. The CIT(A) has uphold the finding of the Assessing Officer as relates to addition of Rs. 88,900/- under Section 44AD. As relates to low drawing addition of Rs. 3,00,000/- by the AO, the CIT(A) held that this adhoc estimation added back without any incriminating evidence whether direct or circumstantial cannot be sustain.

5. The AR submitted that Ground No. 1 relates to addition of Rs. 77,200/- out of the cash found as unexplained which was confirmed by CIT(A). A sum of Rs. 2,77,200/- was found out of which Rs. 2,000,00/- was surrendered for which there is no dispute but the balance amount of Rs.77,200/- which was explained to be past saving of 8 members family was not accepted by any of the authorities. Though Ld. CIT(A) finds force in the argument of the assessee that it is reasonable to have Rs.77,200/- by a family of eight members but in the breath she held that there was no necessity to keep cash. It is submitted that family of the assessee consists of super senior citizens of 92 years, 80 years and therefore for such kind of a family to have reasonable amount of cash to meet any medical contingency is not something which is improbable. The family members detail showing super senior citizen in the family was annexed to pg. 60 of the Paper Book filed by the assessee. Ground no. 2 the AR submitted relating to the addition of Rs. 39,37,792/- made by Ld.AO, as unexplained jewellery on the ground that jewellery found at the time of search amounting to Rs.39,37,792 was not explained by the assessee. Ld. CIT (A) has allowed the rebate to the extent of 1500 gms. and confirmed the addition for the balance jewellery. Jewellery weighing 2855.400 gms. were found on the date of search. Assessee was living in joint family consisting of 8 family members and as per CBDT Instruction, the jewellery comes to 2700 gms. and if value of gold of Rs. 1522/gm applicable on the date is applied, it comes to 41.09 lacs as against the value of jewellery of Rs. 39.37 lakhs found during the course of search. Hence there should be no question of any addition on account of jewellery.

Case laws on which reliance is made by the AR as follows:.

*CIT vs. MS Aggarwal (HUF) (2008) 11 DTR 169 (MP)*  
*CIT vs. Ratanlal Vyaparilal Jain (2010) 45 DTR 290 (Guj.)*  
*Rajendra C. Shah vs. Jt. CIT (2007) 158 Taxman 170 (Mum.)*  
*Dy.CIT vs. Arjun Dass Kalwani 101 ITD 337 (Jodh.)*  
*Smt. Bommana Swama Rekha Vs. Asst. CIT 95 TTJ 885 (Visakha)*  
*Sint. Sulochna Devi Jaiswal vs. Dy. CIT 90 TTJ 974 (Jab)*

6. The AR further submitted as relates to Ground No.3 that Ld.AO made addition of Rs.88,900/- on the ground that assessee had turnover Rs. 68.89 lakhs on which assessee has declared income at the rate of 8% but section 44AD being not applicable, profit rates of 10% should be applied which comes to Rs.6,88,900/- and since assessee has surrender Rs.6 lakhs, the excess amount of Rs.88,900/- was treated as unexplained income and which was confirmed by CIT(A). Case of the assessee is that assessee is into the business since last several years income from which was being shown u/s 44AD at the rate of 8 % and therefore the same percentage to be applied in the year under appeal. Even if it is assumed that sec 44AD is not applicable, the fact remains that the assessee was showing his income at 8% which was accepted also and thus in year under appeal also, same percentage of profit be applied, more so when there is no basis or evidences for applying higher rate of 10%. Next contention of the appellant is that assessee has made surrender of Rs.2 lakhs also on account of cash found which should be telescoped against the said addition of Rs. 88,900/-. The copies of return/assessment order of the assessee accepting 8% profits were annexed to pg. 6 to 32 of the Paper Book filed by the assessee. As relates to Ground No.4 the AR submitted that since CIT(A) has deleted the addition, hence not aggrieved.

7. The AR further submitted that First ground of departmental appeal is common with Ground No. 2 of the assessee's appeal. GROUND NO.2 it relates to the addition of Rs.3,00,000/- deleted by Ld. CIT(A)Ld. A.O. has discussed this issue in Para—8 of the assessment order whereas Ld. CIT(A) has discussed this issue in Para 8 at Page 8-9 of the CIT(A)'s order. The AR submitted that there was no adverse evidence and the addition was made on estimate and that the total withdrawal by the family members was Rs. 3,48,000/- The chart given to Ld. A.O. which shows that total withdrawal was more than the withdrawals made in earlier years. The cash flow chart of various members of the family showing the amount of withdrawal was annexed to pg. 41 to 45 of the Paper Book filed by the assessee. As relates to GROUND NO.3 it relates to the adjustments of seized cash towards the advance tax liability. Ld. CIT(A) has discussed this issue in Para—9 and case laws mentioned therein.

8. The DR relied upon the Assessment order and stated that the Assessing Officer has passed proper order. As relates to Section 44AD the DR submitted that contradictory statement was made and therefore the AO has rightly stated that it is not covered under Section 44AD of the Income Tax Act, 1961. Ad hoc 8% cannot be taken into account as books of account not maintained. As relates to Department's appeal, the DR submitted that the CIT(A) has wrongly deleted the addition made by the AO on the jewellery restricting the same as to the balance after giving the benefit of 1500 grams only and while giving the appeal effect, the value of the jewellery may be worked out. The DR further submitted that the deletion of house hold withdrawals to the restriction of Rs.77,200/- and adjusting the seizure cash of Rs.2,00,000/- is also not correct as assessee could not produce any evidence to that effect.

9. We have perused all the records and proceedings as well as heard both the parties. It is pertinent to note that as relates to addition sustaining to Rs. 77,200/- out of cash of Rs.2,77,200/- was properly explained by the assessee and there was case made out to the extent that there were several members in the family who would require the medical assistance

*at any time. The fact that Rs.2,00,000/- was surrendered by the assessee should be in support of the assessee and hence the said addition of Rs.77,200/- is allowable and AO as well as CIT(A) has overlooked the said factor. As relates to the Gold jewellery the CIT(A) has rightly directed the AO restricting the same as to the balance after giving the benefit of 1500 grams only and while giving the appeal effect, the value of the jewellery may be worked out. As relates to the addition of Rs. 88,900/- on account of undeclared business income, the CIT(A) has justified its finding by stating that AO has come to the conclusion on the basis of the seized documents which was not challenged by the assessee at any point of time. The addition on account of low drawings made by the assessee for household expenses to the extent of Rs. 3,00,000/- are properly dealt by the CIT(A). Therefore, the appeal of the assessee in respect of ground no. 1 is allowed. As relates to Ground no. 2, 3, 4 are dismissed. The appeal of the Revenue is dismissed in view of the findings given in respect of assessee's appeal."*

[E] The assessee filed a Miscellaneous Application ("MA", for short) seeking rectification of the aforesaid order dated 15.1.2016 of Co-ordinate Bench of ITAT Delhi; which was disposed of vide order dated 25.8.2017 of Coordinate Bench of ITAT Delhi in MA No. 72/Del/2016. Relevant portion of the aforesaid order dated 25.8.2017 is reproduced as under:-

*This Miscellaneous Application is filed by the assessee in respect of the order of the Co-ordinate Bench in ITA No. 6396/Del/2012 for Assessment Year 2010-11 passed on 15/1/2016 stating that the following errors have crept in the order of the Co-ordinate Bench which needs rectification:-*

- (a) *Not considering the decision of the Hon'ble Gujarat High Court and CBDT Instruction No. 1916 dated 11<sup>th</sup> May, 1994 with respect to Ground No. 2 for granting the quantum of gold held by 8 persons in the families.*
- (b) *Not considering the argument of the assessee while deciding Ground No. 3 of the appeal of the assessee stating that profit @ 10% or 7% was argued before the Bench but he has not considered.*

*2. The Ld. AR submitted that decision of the Hon'ble Gujarat High Court in 330 ITR 351 cited before the Bench but it was not considered for the purpose of granting relief vide Instruction No. 1916 dated 11<sup>th</sup> May, 1994 with respect to the jewellery held by the family members of the assessee. He further submitted that with respect to Ground No. 3 wherein the Learned Assessing Officer has upheld estimation of profit from the persons of the assessee @10% instead of 8% for which the assessee was assessed or prior years as well as the rate of profit stated in u/s 44AD for also 8%.*

*3. Therefore, the Ld. AR submitted that inadvertent errors which are prayed for rectification.*

*4. The Ld. Departmental Representative submitted vehemently that there is no error in the order of Co-ordinate Bench.*

5. We have carefully considered the contention of the both the parties and also perused the order passed by the Co-ordinate Bench in the impugned M.A, Instruction No. 1914 dated 11<sup>th</sup> may 1994 was noted by the Co-ordinate Bench in Para No. 5 of the order along with the decision of the Hon'ble Gujrat High Court in CIT Vs. Ratan Lal Vijay Lal Jain. Therefore, it is apparent that not considering the decision of Hon'ble High Court cited before the Bench is an apparent error which needs to be rectified. In view of this to the extent of grant of relief to the assessee on account of jewellery held by the family members as per CBDT Instruction No. 1916 dated 11<sup>th</sup> May, 1994 the details of which are submitted in the paper book where there are 8 members in the family. In view of this, Ground No. 2 of the appeal of the assessee is adjudicated as under:-

*“The Ld. Assessing Officer is directed to consider the CBDT Instruction No. 1916 dated 11<sup>th</sup> May 1994 with respect to the family members in case of the assessee and following the decision of the Gujarat High Court in CIT Vs. Ratan Lal Vijay Lal Jain. The relief may be computed with respect to the married, unmarried women and male members. If the jewellery is found within the limit then addition may be deleted or if it is found in excess then to that extent addition is sustained.”*

6. In the result, Ground No. 2 of the appeal of the assessee is adjudicated as under:-

*“ With respect to the second aspect of the M.A thee argument of Ld. AR that profit @ 8% is stated by Section 44AD was not considered in the reason that in past errors to the profit from the business of the assessee was computed @ 8% then there is no reason to compute the income of the assessee @ 10% this year. The Ld. Assessing Officer may verify records the past assessment of the assessee and if it is found that is assessed @ 8% of the profit the income of the assessee may be computed accordingly.”*

[F] In the meantime, the Assessing Officer passed order under section 271AAA of Income Tax Act vide order dated 30.3.2014, levying penalty amounting to Rs. 2,23,539/-. The relevant portion of the aforesaid order dated 30.03.2014 of the Assessing Officer is reproduced as under:-

*“3. The following additions were made at the time of assessment u/s 143(3) r.w.s. 153A of the Act:*

*a. Addition of Rs. 39,37,792/- on account of the jewellery found from premises of the assessee, the source of which was not explained by the assessee at the time of assessment proceedings. The basis of addition as above is discussed below:*

*During the course of search proceeding conducting at the residence of the assessee jewellery of Rs. 39, 37,792 was found but not seized. During the course of assessment proceedings, assessee was asked to explain the source of jewellery found*

*in possession of the assessee. in response to above assessee in his letter dated 01-12-2011 submitted that the jewellery found at the residence was belonging to different 9 family members and as per CBDT instruction No. 1194 the jewellery may be treated as out of declare sources.*

*I have considered the submission offered by the assessee but not found to be reasonable on grounds that the CBDT instruction is applicable at the time of search operation so that proper benefit of each female member of 500 gram and male member of 100 gram and female child of 250 gram is allowed at the time of seizure made by the authorized officer. But during the course of assessment proceedings the assessee has to explain the source of purchase of jewellery in this case assessee has not furnished any evidence with regard to source of investment for purchase of jewellery, therefore the whole amount of Rs. 39,37,792/- is added back in the total of the assessee income under section 69 of the I.T. Act. penalty proceedings U/S 271 AAA are initiated separately.*

*b. Addition of Rs.77, 2201- on account of the unexplained cash out of total cash of Rs.2, 77,220/- found at the time of search and seizure at the premises of the assessee. Further, the assessee had surrendered an undisclosed income of Rs.2,00,000/- u/s 132( 4) of the Act based on the cash found during the course of search from the premises of the assessee which is discussed as below:*

*During the course of search and seizure operation conducted at the residence of the assessee, cash amounting to Rs. 2,77,200/- was found out of which cash of Rs. 2,00,000 was seized by the authorized as no proper explanation was offered by the assessee.*

*During the course of assessment proceedings vide this office notice dated 28-02-2011, assessee was ask to explained the source of cash found at the residence of the assessee. In response to above letter, assessee in his reply letter dated 01 -12-2011, submitted that "an amount of Rs. 2,77,200/- was found as cash out of which Rs. 2 lacs was seized and the balance amount was returned. Inflect the amount of Rs. 77,200 found was not seized in view of the same belonging to all family members and out of their past savings and accumulated income. In such a large family consisting of 8 - members including very old females, this much of cash jointly belonging to all is quite reasonable and the source may be accepted and treated as explained. The amount of Rs 2,00,000 which was seized from the assessee is part of total undisclosed income of Rs. 8,00,000 declared by the assessee relating to assessment to year 2010-11 as per letter of declaration come statement U/S 132(4) submitted by the assessee dated 07-09-2009 at the time of search".*

*From the letter of declaration dated 07-09-2009 it was noticed that the cash of Rs. 2, 00,000/- had been declared by the assessee in his statement recorded during search proceedings. As for as the matter regarding balance cash of Rs. 77,200/- is concerned for documentary evidence in support of his explanation has been filed by the assessee. Therefore this amount of Rs. 77,200/- was added total income of the assessee for the assessment of year 2010-11. Penalty proceeding of U/S 271AAA were initiated separately on this issue."*

c. Addition of Rs. 88,990/- u/s 44AD of the Act applying the rate of profit of 10% on the turnover of the business of the assessee instead of 8% as shown by the assessee in its books of accounts.

d. the addition of Rs. 13,125/- on account of disallowance of deduction claimed under chapter-VIA of the Act.

e. The addition of Rs. 3,00,000/- on account of the low household drawings.

4. Being aggrieved by the order of the assessing officer, the assessee filed an appeal before the Ld. CIT (A), Central; Gurgaon who vide her dated 19.10.2012 passed the order where part relief was allowed to the assessee which is discussed as below:

i. The addition of Rs. 77,220/- has been on account of the unexplained cash out of total cash of Rs. 2,77,220/- found at the time of search and seizure at the premises of the assessee.

ii. Further, in respect of the total addition of Rs. 39,37,792/- on account of jewellery found during the course of search from the premises of the assessee, the Ld. CIT(A) has allowed the relief to the extent of 1500 gms out of the total 2855.40 gms in view of the Instruction No. 1916 dated 11.05.1994 of the CBDT which comes relief of Rs. 20,68,602/-. Accordingly, the amount of addition on which the penalty proceedings are applicable is left to 18,69,189/-.

iii. The other additions of Rs. 88,990/- u/s 44AD have been upheld, as the same was based on the seized documents which have not been challenged by the assessee.

iv. Further, the addition of Rs. 13,125/- on account of disallowance of deduction claimed under chapter-VIA of the Act has been deleted.

v. The addition of Rs. 3,00,000/- on account of the low household drawings has also been deleted.

5. In view of the above facts the assessee was given one more opportunity by this office vide notice u/s 271AAA dated 11.02.2014 fixed for hearing on 25.02.2014. In response to the above notice the assessee has filed a written reply dated 04.03.2014, the extracts of which are as under:-

*“Please refer to your notice dated 11.02.2014, it is submitted that the assessee has not committed any default u/s 271AAA. Moreover, without prejudice to the above it is submitted that the assessee has complied with the conditions mentioned u/s 271AAA for availing the immunity. Therefore, the penalty may please be dropped. It is further requested that the default if any may please be made known in details so that a reply may be filed further.”*

6. The above contentions made by the assessee cannot be accepted due to the following

i. Before discussing the penalty, it would be pertinent to note that penalty proceedings u/s 271AAA of the Act were initiated and applicable in

*respect of surrender of Rs. 2,77,220/- on account of unexplained cash found made by the assessee, addition on account of jewellery amounting to Rs. 18,69,189/- out of total jewellery of Rs. 39,37,792/- found from the assessee's premises during the course of search and addition of Rs. 88,990/- u/s 44AD of the Act.*

- ii. *Now coming to the initiation of penalty u/s 271AAA of the Income Tax Act, the section precludes the assessee gets immunity from levy of penalty only if the condition mentioned in sub-section 2 of Section 271AAA are met by the assessee. The same are discussed below.*

a. *Nothing contained in sub-section (1) shall apply if the assessee ---*

- (i) *In the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;*  
 (ii) *Substantiates the manner in which the undisclosed income was derived; and*  
 (iii) *Pays the tax, together with interest, if any, in respect of the undisclosed income.*

iii. *From the plain reading of the above section, it is seen that the immunity from levy of penalty is available to the assessee only if the assessee admits the undisclosed income found during the course of search, substantiate the manner in which the income was earned and also pays the taxes in respect of the undisclosed income.*

iv) *In the said case the assessee has not been able to specify and substantiate the manner in which the income for investment in jewellery was earned by her.*

v) *The manner of earning of undisclosed income by which the assessee invested in the purchase of jewellery and earning cash can only be ascertained if the assessee provided how the unaccounted money was generated ;names and addresses of the persons who provided them and mode of the same. Secondly, making of investment in jewellery is only the of use the unaccounted money whereas the source is to be ascertained by the assessee only. The intent of legislature when section 271AAA was introduced in statute was that it was only meant to not to put hardship on honest taxpayers or de taxpayers who had already voluntarily declared their income in their return.*

*Since the assessee has failed to specify and substantiate the manner in which the undisclosed income has been earned, I am satisfied that provisions of section 271 AAA are leviable in the case of the assessee on an undisclosed income of Rs.22,35,399/-."*

[G]. The assessee filed an appeal against the aforesaid order dated 30.3.2014 of the AO before the learned CIT(A)-3 Gurgaon who, vide impugned appellate order dated 7.10.2016, partly confirmed the penalty. The relevant portion of

aforesaid impugned order dated 7.10.2016 of the learned CIT(A)-3 Gurgaon is reproduced as under:-

*"I have gone through the penalty order passed by the AO and submissions of the appellant and the following facts emerge:-*

*The AO has imposed the penalty on the following additions confirmed by CITA(appeals).*

*Addition on account of unexplained cash Rs. 77,220/-.*

*Addition on account of unexplained jewellery Rs. 18,69,189/-.*

*Addition u/s 44AD Rs. 88,900/-*

*Addition on account of cash surrendered Rs. 2,00,000/-*

*It has further been stated that the appellant has failed to substantiate the manner in which the undisclosed income has been earned.*

*In view of the same, penalty u/s 271AAA amounting Rs. 2,23,539/- has been levied on undisclosed income of Rs. 22,35,399/-*

*The appellant has made following submissions:-*

*The addition of Rs. 77,200/- has been deleted by ITAT.*

*Further, it has been submitted that appellant had surrendered income of Rs. 8,00,000/- and filed copy of return for the year under consideration.*

*The contention of the appellant cannot be accepted because:-*

*The AO has imposed penalty on the undisclosed income computed for the specified previous year.*

*b) The appellant does not even fulfill the conditions for immunity of penalty u/s 271AAA of the act specified in section 271AAA(2) (i) and (iii) regarding admitting the undisclosed income in statement u/s 132(4) in the course of search nor the taxes have been paid alongwith interest in respect of undisclosed income.*

*c) It is apparent that the appellant has not paid any taxes on the amount not surrendered, further, with regard to income surrendered amounting Rs. 8,00,000/- shown in return filed for the year under consideration, the taxes alongwith interest have been paid on 05.07.2016 as apparent from the submission filed by the appellant, more than 2 years after the penalty order was passed.*

*The case of the appellant is directly covered by Hon'ble ITAT's order in DCIT vs Pioneer Marble and Interiors (P) Ltd (2012) 68 DTR 1 (Kol.'A')/ 144 TTJ 663 (Kol'A') wherein it is been held that once the entire tax and interest have been duly paid within the time limit as per the notice of demand under section 156 and well before the conclusion of impugned penalty proceedings, the assessee cannot be denied immunity*

*under section 271AAA(2) and the penalty under section 271AAA was rightly cancelled. The appellant has paid taxes more than 2 year after the penalty order has been passed.*

*In view of the above discussion, the penalty imposed by the AO is confirmed except penalty on the amount of Rs. 77,200/- which has been deleted by Hon'ble ITAT. AO may give relief of Rs. 7,720/- accordingly."*

[H]. The present appeal before us has been filed by the assessee against the aforesaid impugned order dated 7.10.2016 of the learned CIT(A)-3, Gurgaon. In the course of appellate proceedings hearing in Income Tax Appellate Tribunal ("ITAT" for short) for the present appeal, a paper book was filed by the assessee's side, containing orders passed in the following cases:

*CIT vs. MS Aggarwal (HUF) (2008) 11 DTR 169 (MP)*

*CIT vs. Ratanlal Vyaparilal Jain (2010) 45 DTR 290 (Guj.)*

*Rajendra C. Shah vs. Jt. CIT (2007) 158 Taxman 170 (Mum.)*

*Dy.CIT vs. Arjun Dass Kalwani 101 ITD 337 (Jodh.)*

*Smt. Bommana Swama Rekha Vs. Asst. CIT 95 TTJ 885 (Visakha)*

*Sint. Sulochna Devi Jaiswal vs. Dy. CIT 90 TTJ 974 (Jab)*

[I]. At the time of hearing before the us, the learned counsel for the assessee submitted that the AO is yet to give effect to the aforesaid order dated 25.8.2017 of ITAT read with aforesaid order dated 15.1.2016 of ITAT, Delhi. In view of this, the learned AR as well as the learned Departmental Representative appearing for Revenue submitted that the issues in dispute in present appeal may be remanded back to the AO for fresh order in accordance with law, after giving effect to the aforesaid orders dated 25.8.2017 and 15.1.2016 of ITAT, Delhi.

[J]. In view of the foregoing, and as both sides have agreed before us at the time of hearing of this appeal, we set aside impugned appellate order dated 7.10.2016 of the learned Commissioner of Income Tax (A)-3, Gurgaon and restore the issues in dispute in the present appeal before us to the file of the AO for fresh order in accordance with law after giving effect to aforesaid orders dated 25.8.2017 and 15.1.2016 of Income Tax Appellate Tribunal.

[K]. For statistical purposes, the appeal is partly allowed.

Order pronounced in the open court on 11/12/2019.

*Sd/-*

**(H.S. SIDHU)**  
**Judicial Member**

**Date:** 11/12/2019

SH

*Sd/-*

**(ANADEE NATH MISSHRA)**  
**Accountant Member**

Copy forwarded to:-

1. Appellant –
2. Respondent –
3. CIT
4. CIT (A)
5. DR, ITAT