

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES 'A' JAIPUR

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

आयकर अपील सं./ITA No. 845/JP/2018
निर्धारण वर्ष/Assessment Year :2015-16

Shri Anil Ghatiwala Krishna Bhawan, Nath Optical Building, Chaura Rasta, Jaipur	बनाम Vs.	Dy. Commissioner of Income-Tax Central Circle-3, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACQPG5049K		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से / Assessee by : Sh. S. R. Sharma (CA) &
Sh. Rajnikant Bhatra (CA)
राजस्व की ओर से / Revenue by : Smt. Runi Pal (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 12/10/2020
उदघोषणा की तारीख / Date of Pronouncement: 11/01/2021

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order passed by the Id. CIT(A)-04, Jaipur dated 02.04.2018 pertaining to A.Y 2015-16 wherein the grounds of appeal taken by the assessee reads as under:-

- "1. That the Ld. CIT(A) is wrong, unjust and has erred in law in confirming penalty of Rs. 4,95,189/- imposed by the assessing officer u/s 271AAB of the Act.*
- 2. That the CIT(A) is wrong and has erred in law in confirming the said penalty of Rs. 4,95,189/- u/s 271AAB of the Act, holding that it is mandatory in nature and not discretionary and so assessing officer is correct in law while imposing penalty on appellant.*

3. *That the CIT(A) is wrong and has erred in law in confirming the said penalty of Rs. 4,95,189/- u/s 271AAB imposed by assessing officer although the notice issued by assessing officer for initiating the penalty u/s 271AAB of the I.T. Act, 1961 is not in accordance with law not being specifically pointing out the default for which the ld. AO sought to impose penalty u/s 271AAB.*

4. *That the Ld. CIT(A) is wrong in confirming penalty of Rs. 4,95,189/- u/s 271AAB of the Act in as much the penalty was levied by assessing officer simply on the basis that the assessee admitted the income of Rs. 49,51,885/- and disclosed in the return without proving that the said income was 'undisclosed income' of assessee within the meaning of section 271AAB of I.T. Act, 1961."*

2. Briefly the facts of the case are that the assessee derives income from house property, business and other sources. A search u/s 132 of the Act was conducted on 05.02.2015 in case of Bundi Silica Group, Kota and the assessee was part of the said Group. During the course of search proceedings, the statement of the assessee was recorded u/s 132(4) of the Act wherein he has declared undisclosed income of Rs. 49,51,885/-. Subsequently, the assessee filed his original return of income on 27.09.2015 declaring total income of Rs. 73,37,190/- which includes additional income of Rs. 49,51,885/- offered to tax during the course of search. The assessment proceedings were subsequently completed u/s 143(3) r.w.s 153B(1)(b) at an assessed income of Rs 77,55,460/-. The Assessing Officer separately initiated the penalty proceedings u/s 271AAB in respect of undisclosed income of Rs 49,51,885/- by way of issue of notice u/s 274 r.w.s 271AAB of the Act dated 28.12.2016 which was duly served on the assessee.

3. During the course of penalty proceedings, the Assessing Officer stated that all the essential requirements of section 271AAB(1)(a) are satisfied in the instant case and given that the assessee had admitted undisclosed income of Rs. 49,51,885/- in its statements u/s 132(4) of the Act, paid the taxes together with interest thereon and filed his return of income before the specified date, penalty @ 10% u/s 271AAB on the undisclosed income of Rs. 49,51,885/- amounting to Rs 4,95,189/- was levied on the assessee.

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

5. During the course of hearing, the Id. AR submitted that the show cause notice dated 28.12.2016 issued by the Assessing Officer initiating the penalty proceedings has been issued in a routine manner without mentioning under which clause of section 271AAB of the Act, the assessee is liable for penalty. It is submitted that section 271AAB(1) has three clauses (a) to (c) and each clause of sub-section (1) to section 271AAB provides for a separate rate of penalty and unless the same is specified, the assessee is not in a position to respond and thus, the principles of natural justice are violated. It was submitted that there is no application of mind on the part of the AO, at the time of issuing the show cause notice, as the show cause notice issued by the AO does not specify the undisclosed income on which the assessee is required to show cause. Even the AO has not given any ground for levy of penalty for which the assessee could put his defense. Thus in the absence of specific

charge against the assessee, the assessee was not in a position to respond to the show cause notice issued by the AO. It was submitted that though the AO while passing the impugned order has imposed the penalty as per clause (a) of section 271AAB(1) of the Act, however, no such ground was specified in the show cause notice issued u/s 271AAB read with section 274 of the Act. In support, reliance was placed on the Hon'ble Karnataka High Court decision in the case of CIT vs. M/s SSA's Emerald Meadows reported in 2015 (11) TMI 1620, in case of Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565 (Karnataka) and various decisions of the Co-ordinate Benches of the Tribunal. It was accordingly submitted that notice issued u/s 271AAB is bad in law and therefore, the penalty levy u/s 271AAB(1)(a) deserves to be deleted.

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

7. It was further submitted that in this case, search u/s 132 of the Act was carried out in assessee's premises but no evidence was found during the course of search except Ann. A Exhibit- 1 page no. 1 to 3. That on said pages no. 1 to 3 of said exhibit, total alleged advance figure of Rs.37,00,000/- were written. The search party held this amount as undisclosed cash advance. The assessee stated in his statement that said surrender was made to buy piece and avoid long litigation with department on the request that no penalty proceedings etc. be initiated against him. It was submitted that thus no incriminating material was found during the search and said Annex-A Exhibit- 1 page no. 1-3 was containing imaginary name and figure. Further the officers of search

proceedings and Ld. A.O. made no further enquiry/investigation regarding entries made in the seized papers. The said entries in the seized paper giving advances itself are not an undisclosed income. The revenue authorities have exerted undue pressure and obtained the surrender of income from the assessee. The CBDT in this regard issued a circular F.No.286/2/2003-IT(Inv.) dated 10-03-2003 and has expressed its concern about the practice of confession of additional income during the course of search and seizure proceedings and, therefore, clarified that the confession during the course of search and survey operation do not serve any useful purpose. There should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Department. The Board has again issued a Circular dated 18th December, 2014 and advised the taxing authorities to avoid obtaining admission of undisclosed income under coercion/undue influence. It was submitted that the provisions of section 271AAB clearly requires that such undisclosed income to be substantiated and, therefore, the assessee is required to specify the manner in which such income has been derived and further substantiate the same furnishing material available with him. In the absence of any record or material to show any undisclosed source of income, the entire disclosure was on papers is to avoid undue harassment and unwanted litigation and the assessee could not have substantiated such income so declared during the course of search. It was submitted that there is no iota of evidence that surrendered income was undisclosed income of the assessee. It was submitted that said surrender was made to buy piece and avoid long litigation with department on the request that no penalty proceedings etc. be initiated against it. In support, reliance was placed on the Co-ordinate Bench decision in case of ACIT vs. Marval Associates 92 Taxmann.com 109 wherein it was held that penalty u/s 271AAB is attracted on undisclosed income but not on admission made by the assessee u/s 132(4) of the Act. The AO must establish that there

is undisclosed income on the basis of incriminating material. Further, reliance was placed on the Co-ordinate Bench in decision in case of Ajay Sharma vs. DCIT [2013] 30 taxmann.com 109 wherein it was held that addition on account of alleged receivables as per seized paper cannot be made as there is no direct material which leads and establishes that any income received by the assessee which has not been declared by the assessee. The facts of the assessee's case shows that there was no undisclosed income found during the course of search and no incriminating material was found, hence there is no case for imposing penalty u/s 271AAB of the Act. Further, reliance was placed on the Co-ordinate Bench decisions in case of Sh. Rajendra Kumar Gupta vs. DCIT, CC-2, Jaipur (*ITA No. 359/JP/2017 dated 18.01.2019*) and Suraj Mal Bansal HUF and other cases vs DCIT, CC-3, Jaipur (*ITA No. 124-127/JP/18 dated 8.04.2019*), it was submitted the facts of the said case squarely applies in case of assessee and therefore, the penalty so levied should be deleted.

8. It was further submitted that during the course of search, Rs 8,94,800/- was found from residence of assessee and Rs.3,54,000/- was found from locker of Smt. Nirmala Ghatiwala. The search party, out of Rs.8,94,800/- seized cash of Rs.8,00,000/- as undisclosed cash and accepted the remaining cash of Rs.94000/- as genuine (Rs.94000/- was cash balance of his wife's proprietorship business.) It was submitted that the said cash found was not a undisclosed income rather it is his accumulated savings over the period out of withdrawals made by him. The Ld AO has not determined it as income from other sources u/s 69 of Income Tax Act in the assessment but accepted as business income of current year. Therefore merely on the basis of surrender made in the search statement, this cannot be held as "Undisclosed Income" for the purpose of levy of penalty u/s 271AAB.

9. It was further submitted that during the course of search in the statement recorded u/s 132(4) of the I.T. Act, 1961 the assessee offered a sum

of Rs.4,51,885/- as his additional business income on account of profit earned on alleged unaccounted sale. In this connection in the course of search, the departmental valuer valued the total value of stock at his business premises at Rs.99,37,587/- whereas investigation team calculated/arrived the figure of closing stock as per books at Rs.1,49,88,578/- by applying the G.P. rate of preceding year i.e. 8.95% on his total sales. Accordingly investigation team concluded that the stock is short by Rs.50,48,991/- (1,49,88,578 – 99,37,587). The search team applied the G.P. rate of 8.95% on said alleged short stock of Rs.50,48,991/- and taken the surrender of Rs.4,51,885/- as undisclosed profit element on unrecorded sales from assessee in the statement recorded during the course of search. The said alleged profit of Rs.4,51,885/- offered by assessee as his additional business income is nothing but the difference in valuation of stock. Thus no short stock found during the course search. It is only difference in valuation of stock valued by registered valuer. It is submitted that there is no short stock found during the course of search. No documentary evidence or papers relevant to unrecorded sales were found during the course of search. More particularly, assessee has no unexplained purchases or sales. There is no real income and no short stock. Without establishing real income, no penalty can be imposed presuming the hypothetical income. Accordingly it was submitted that said alleged profit element on alleged unaccounted sales does not meet the definition of undisclosed income given in Section 271AAB. The assessee in his statement to avoid the protracted and imposed litigation and to buy peace of mind, made surrender and disclosed the same in his return of income. The Ld AO has also not determined it as income from other sources u/s 69 of Income Tax Act in the assessment but accepted as income of current year. Therefore merely on the basis of surrender made in the search statement, this cannot be held as "Undisclosed Income" for the purpose of levy of penalty u/s 271AAB.

10. Per contra, the Id. DR heavily relied on the findings of the lower authorities. It was submitted by the Id DR that the assessee has surrendered the undisclosed income of Rs. 49,51,885/- in its statement recorded during the course of search u/s 132(4) of the Act and the said surrender is clearly an admission on the part of the assessee that there is undisclosed income which has been found during the course of search. Once the surrender of undisclosed income has been made by the assessee, there is no cause of action which lies with the Assessing Officer to establish further that there is any undisclosed income so earned by the assessee. In this case, the search was conducted on 5.02.2015 wherein the statement of the assessee was recorded u/s 132(4) wherein he has surrendered the amount of Rs 49,51,885/-. Subsequently, the assessee has disclosed the same in its return of income filed on 27.09.2015. Therefore, the assessee was having ample time to retract from said surrender, however there is no such retraction during post-search proceedings and even the assessee has included the same in its return of income. Even from the perusal of the assessee's statement, there is nothing which demonstrates that there is any forced surrender by the assessee. The contention of the Id AR therefore has thus no basis where he contends that the search party have exerted undue pressure and obtained surrender of income and therefore, there was no undisclosed income in the hands of the assessee. It was further submitted that the levy of penalty u/s 271AAB is mandatory in nature and reference was drawn to provisions of section 271AAA which provides for immunity from levy of penalty as against the provisions of section 271AAB wherein there is no such provision providing for immunity. It was accordingly submitted that there is no infirmity in the order of the Assessing Officer wherein he has levied the penalty @ 10% of the undisclosed income as per the provisions of section 271AAB and order of the Id. CIT(A) who has confirmed the said levy should be upheld.

11. We have heard the rival contentions and perused the material available on record. Regarding various legal contentions raised by the Id AR, we find that the **Coordinate Bench** in case of **Rajendra Kumar Gupta** (supra) has exhaustively dealt with each of these contentions and we deem it appropriate to refer to its findings which read as under:

"6. Heard both the parties. The penalty proceedings are separate from assessment proceedings, which are initiated with the issue of notice u/s. 274 and culminate with passing of the penalty order u/s. 271AAB of the Act. Further, there cannot be any dispute that the assessee should be confronted with the charge against him which is sine qua non for any valid penalty proceedings. It is only when the assessee is made aware of such a charge against him that he can present his contentions. Thus prescribing the charge in the penalty notice and penalty order is must. Absence of a charge in the penalty notice and not finding the assessee guilty of a clear offence in the penalty order vitiates the penalty order.

7. The question that arises for consideration is the nature of charge(s) specified under section 271AAB of the Act. Whether it provides for a singular charge of undisclosed income for the specified previous year found during the course of search initiated under section 132 on or after the 1st day of July, 2012 or it provides for multiples charges as so contended by the Id AR in terms of clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB of the Act.

8. On close reading of provisions of Section 271AAB, we find that the primary condition or charge for levy of penalty is the existence of undisclosed income for the specified previous year found during the course of search in the case of assessee. Once the said primary condition or charge is satisfied, for the purposes of quantifying the penalty, the

Assessing officer has to examine the satisfaction of ancillary conditions as specified under clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB. Merely because the quantum of penalty varies from 10% to 30% subject to compliances with the ancillary conditions, it cannot be said that where the AO has initiated the penalty under section 271AAB, there is any ambiguity in the charge or there is any lack of application of mind on part of the Assessing officer. Further, the levy of penalty under Section 271AAB is not based on addition made and investigation/enquiry conducted during the course of assessment proceedings, rather it is based on search conducted on the assessee on or after the 1st day of July, 2012, in such a situation, where the penalty show-cause notice is issued u/s 271AAB, the Assessing officer is making the assessee aware of the charge against him in terms of undisclosed income found during the course of search and thus, the assessee is granted an opportunity to refute such charge and file his explanations/submissions. Unlike provisions of section 271(1)(c) which provides for separate charge of "concealment of particulars of income" or "furnishing of inaccurate particulars of income", there is a singular charge under section 271AAB i.e, of the existence of undisclosed income for the specified previous year which is found during the course of search in the case of the assessee. Therefore, in the instant case, where the notice dated 23.02.2015 is issued to the assessee to show-cause why penalty should not be levied u/s 271AAB of the Act in respect of undisclosed income of the specified previous year, the assessee is made aware of the specific charge against him and an opportunity has thus been given to him to rebut such charge and therefore, we donot see any infirmity in the initiation of the penalty proceedings and consequent penalty order so passed by the AO. A similar view has been taken by the

Co-ordinate Bench in case of Mahesh Kumar Jain & others (ITA No. 630/JP/17 & others dated 27.11.2017) wherein it was held as under:

"10. The first and foremost question that arises for consideration is the nature of penalty provisions as contained in section 271AAB(1)(a) and 271AAB(1)(c). In other words, whether these provisions provide for levy of penalty on account of separate and independent charges or these provision provide for levy of penalty for the same charge under section 271AAB, however, subject to satisfaction of the prescribed conditions, the quantum of penalty may vary as specified in the respective sub-clauses of 271AAB of the Act.

11. In this regard, we refer to the provisions of section 271AAB which are reproduced as under:

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

- (a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such assessee—*
 - (i) in the course of 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) on or before the specified date—*
 - (A) pays the tax, together with interest, if any, in respect of the undisclosed income; and*
 - (B) furnishes the return of income for the specified previous year declaring su*

undisclosed income therein;

- (b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—*
 - (i) in the course of the search, in a statement under sub-section (4) of [section 132](#), does not admit the undisclosed income; and*
 - (ii) on or before the specified date—*
 - (A) declares such income in the return of income furnished for the specified previous year; and*
 - (B) pays the tax, together with interest, if any, in respect of the undisclosed income;*
- (c) a sum which shall not be less than thirty percent but which shall not exceed ninety percent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).*

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

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

Explanation.—For the purposes of this section,—

- (a) "specified date" means the due date of furnishing of return of income under sub-section (1) of [section 139](#) or the date on which the period specified in the notice issued under [section 153A](#) for furnishing of return of income expires, as the case may be;*
- (b) "specified previous year" means the previous year—*
 - (i) which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of [section 139](#) for such year has not expired before the date of search and the assessee has*

not furnished the return of income for the previous year before the date of search; or

(ii) in which search was conducted;

(c) "undisclosed income"

means—

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under [section 132](#), which has—

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

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

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

12. On reading of the above provisions, it provides that the Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under [section 132](#) on or after the 1st day of July, 2012, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of 10% of the undisclosed income of the specified previous year, if such assessee, in the course of the search, in a

statement under sub-section (4) of [section 132](#), admits the undisclosed income and satisfies other conditions as provided in 271AAB(1)(a). It further provides that where the declaration of undisclosed income is not made by the searched person in the course of search but is declared in the return of income furnished for the specified previous year and subject to satisfaction of other conditions, penalty @ 20% is payable by him. It further provides that where the declaration of undisclosed income is neither made by the searched person in the course of search nor declared in the return of income furnished for the specified previous year and additions are made during the course of assessment proceedings, penalty which can vary from 30% to 90% is payable by him.

13. Both the provisions as contained in section 271AAB(1)(a) and 271AAB(1)(c) thus provides for levy of penalty in cases where search has been initiated under [section 132](#) on or after the 1st day of July, 2012 and quantum of penalty has been kept at 10% where there is declaration in the statement recorded during the course of search, and where there is neither a declaration in the statement u/s 132(4) recorded during the course of search nor a declaration in the return of income, the penalty has been kept at a higher pedestal which can vary from 30% to 90%. Further, it is noted that the provisions of section 271AAB overrides section 271(1)(c) which infact contain provisions for levy of penalty under two separate limbs- concealment of particulars of income or furnishing inaccurate particulars of income. Further, the decision of the Hon'ble Supreme Court in case of SAS Emerald Meadows (supra) rendered in the context of two separate limbs/charges under section 271(1)(c) therefore doesn't support the case of the assessee company. In our considered view, both the provisions of section 271AAB(1)(a) and

271AAB(1)(c) provides for levy of penalty for an identical charge i.e, undisclosed income for the specified previous year which is found during the course of search initiated under section 132 on or after the 1st day of July, 2012. Therefore, we are unable to accede to the contention of the Id AR that the Id CIT(A) has erred in confirming the levy of penalty u/s 271AAB(1)(a) which provides for a separate and independent charge and comes under different section than the provisions of section 271AAB(1)(c) which has been specifically invoked by the AO.”

9. Further, even for sake of argument, if it is assumed that primary charge of undisclosed income has to be read along with ancillary conditions and thus multiples charges have been prescribed in terms of clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB and where the Assessing officer has not stated the specified charge at the time of initiation of penalty proceedings, in our considered view, such uncertain charge at the stage of initiation of penalty proceedings can be made good with a clear-cut charge in the penalty order. In any case, existence of a clear-cut charge in penalty order is a must so as to validate any penalty order and so long as there is a clear finding in the penalty order, no infirmity can be said to arise in terms of initiating of such proceedings and subsequent penalty order. In this regard, reference can be made to the Three Member Bench decision in case of HPCL Mittal Energy vs Add. CIT reported in 97 Taxmann.com 03. Though the said decision has been rendered in context of section 271(1)(C), it has laid down certain legal proposition revolving around initiation of penalty proceeding and charges towards levy of penalty and we found the same equally relevant in context of section 271AAB for the limited context of examining multiple charges and therefore, deem it relevant to consider the same for the purposes of present appeal.

10. *The Coordinate Bench in the aforesaid decision after analyzing catena of judicial pronouncements, including the decision of Hon'ble Karnataka High Court in case of Manjunatha Cotton and Ginning Factory (supra) which has also been cited by the Id AR in the instant case held as under:-*

"15. The moot question is that what should be the nature of specification of a charge by the AO at the stage of initiation of penalty proceedings and at the time of passing the penalty order. Is the AO required to specify in the penalty notice/order as to whether it is a case of 'concealment of particulars of income'; or 'furnishing of inaccurate particulars of income'; or both of them, which can be expressed by using the word 'and' between the two expressions. When the AO is satisfied that it is a clear-cut case of concealment of particulars of income, he must specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. The AO cannot initiate penalty on the charge of 'concealment of particulars of income', but ultimately find the assessee guilty in the penalty order of 'furnishing inaccurate particulars of income'. In the same manner, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of 'furnishing of inaccurate particulars of income', he must again specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. After initiating penalty on the charge of 'furnishing of inaccurate particulars of income', he cannot impose penalty by finding the assessee guilty of 'concealment of particulars of income'. Again, he cannot be uncertain in the penalty order as to concealment or furnishing of

inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of imposition of penalty u/s. 271(l)(c) of the Act on two or more additions/disallowances, one or more falling under the expression 'concealment of particulars of income' and the other under the 'furnishing of inaccurate particulars of income', he must specify it so by using the word 'and' between the two expressions in the notice at the time of initiation of penalty proceedings. If he remains convinced in the penalty proceedings that the penalty was rightly initiated on such counts and imposes penalty accordingly, he must specifically find the assessee guilty of 'concealment of particulars of income' and also 'furnishing of inaccurate particulars of income' in the penalty order. If the charge is not levied in the above manner in all the three clear-cut situations discussed above in the penalty notice and also in the penalty order, the penalty order becomes unsustainable in law.

16. The Hon'ble Karnataka High Court in CIT v. Manjunatha Cotton and Ginning Factory has held that a person who is accused of the conditions mentioned in section 271 should be made known about the grounds on which they intend imposing penalty on him as section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in section 271(l)(c) do not exist as such he is not liable to pay penalty. The Hon'ble High Court went on to hold that: 'Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income.... But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law..... Thus once the proceedings

are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid'.

17. In Manu Engg. Works (supra) penalty was imposed by noting: 'that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income'. Striking down the penalty, the Hon'ble High Court held that: 'it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down.'

18. In Padma Ram Bharali (supra), the Hon'ble High Court did not sustain penalty levied u/s. 271(l)(c) when: 'the initiation of the penalty proceeding was for concealment of the particulars of income. But the Tribunal finally held that the assessee would be deemed to have concealed the particulars of income or to have furnished inaccurate particulars of such income.'

19. Thus it is evident that when the AO is satisfied at the stage of initiation of penalty proceedings of a clear-cut charge against the assessee in any of the three situations discussed above (say, concealment of particulars of income), but imposes penalty by holding the assessee as guilty of the other charge (say, furnishing of inaccurate particulars of income) or an uncertain charge (concealment of particulars

of income/furnishing of inaccurate particulars of income), the penalty cannot be sustained.

20. Another crucial factor to be kept in mind is that the satisfaction of the AO as to a clear-cut charge leveled by him in the penalty notice or the penalty order must concur with the actual default. If the clear-cut charge in the penalty notice or the penalty order is that of 'concealment of particulars of income', but it turns out to be a case of 'furnishing of inaccurate particulars of such income' or vice-versa, then also the penalty order cannot legally stand.

21. Apart from the above three situations in which the AO has clear-cut satisfaction, there can be another fourth situation as well. It may be when it is definitely a case of under-reporting of income by the assessee for which an addition/disallowance has been made, but the AO is not sure at the stage of initiation of penalty proceedings of the precise charge as to 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income'. In such circumstances, he may use slash between the two expressions at the time of initiation of penalty proceedings. However, during the penalty proceedings, he must get decisive, which should be reflected in the penalty order, as to whether the assessee is guilty of 'concealment of particulars of income' or 'furnishing of inaccurate particulars of such income'. Uncertain charge at the time of initiation of penalty, must necessarily be substituted with a conclusive default at the time of passing the penalty order. If the penalty is initiated with doubt and also concluded with a doubt as to the concealment of particulars of income or furnishing of inaccurate particulars of such income etc., the penalty order is vitiated. If on the other hand, if the penalty is initiated with an uncertain charge of

'concealment of particulars of income/furnishing of inaccurate particulars of income' etc., but the assessee is ultimately found to be guilty of a specific charge of either 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income', then no fault can be found in the penalty order.

22. In Manu Engineering Works (supra), the Hon'ble Gujarat High Court noticed that the charge at the stage of initiation of penalty proceedings as well in the penalty order was uncertain and the expression used at both the stages was concealment of particulars of income and/or furnishing of inaccurate particulars of such income. It struck down the penalty by holding that the assessee must have been found to be guilty of a certain charge in the penalty order. It, however, did not find anything amiss with the initiation of penalty on such uncertain charge, which is vivid from the following observations : —

'We find from the order of the IAC, in the penalty proceedings, that is, the final conclusion as expressed in para. 4 of the order: "I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income". Now, the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee.'

23. It is thus evident that uncertain charge at the stage of initiation of penalty proceedings can be made good with a clear-cut charge in the

penalty order. In any case, existence of a clear-cut charge in penalty order is a must so as to validate any penalty order.”

11. In the instant case, the notice initiating the penalty proceedings talks about initiation of penalty proceedings U/s 271AAB of the Act in respect of undisclosed income of the specified previous year. However, while passing the penalty proceedings, the Assessing officer has given a clear finding as reflected in the penalty order that the assessee is liable for penalty U/s 271AAB(1)(a) which provides for levy of penalty @ 10% of the undisclosed income. As held by the Coordinate Bench (supra), the uncertain charge at the time of initiation of penalty has been made good and substituted with a conclusive default at the time of passing the penalty order and that in such a case, no fault can be found in the penalty order. In such a case, we do not see any infirmity in the initiation of penalty proceedings and consequent penalty order so passed by the Assessing officer and the contentions so raised by the Id AR in this regard cannot be accepted. Further, we find that the decision of the Coordinate Bench in case of R Elangovan (supra) so relied upon by the Id AR, has been rendered without taking into consideration the earlier decision of the Co-ordinate Bench in case of Mahesh Jain (Supra) and decision of the larger Bench of the Tribunal in case of ONGC Mittal (Supra) which has duly considered the decision in case of Manjunatha (supra) and thus doesn't act as a binding precedent. As far as decision of the Hon'ble Rajasthan High Court is concerned, we find that the same in fact supports the case of the Revenue as a definite finding has been recorded in the penalty order. In light of above discussions, the additional ground so raised by the assessee is hereby dismissed.

12. *Now, coming to the main ground of appeal. In this regard, the Id AR has raised the contention challenging the findings of the AO that penalty U/s 271AAB is mandatory in nature and there is no discretion with the Income tax authorities. It was submitted by the Id AR that in section 271AAB, the word 'may' is used instead of 'shall' so it is not mandatory but same is discretionary. It was submitted that it is settled position of law that penalties are not compulsory, not mandatory but are also discretionary considering the overall facts and circumstances of the case. In support, reliance was placed on provisions of section 158BFA(2) wherein similar phrasology has been used by the legislature and the decisions of the Coordinate Benches in case of DCIT vs Manish Agarwal 92 taxmann.com 81 and ACIT vs Marvel Associates 92 taxmann.com 109.*

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

14. *In this regard, we refer to the provisions of Section 271AAB which begins with the stipulation that the Assessing officer may direct the*

assessee and the assessee shall pay the penalty as per clause (a) to (c) so satisfied in sub-section (1) to Section 271AAB. Further, as per sub-section (3) of Section 271AAB, the provisions of section 274 and section 275 as far as may be applied in relation to penalty under this section which means that before levying the penalty, the Assessing officer has to issue a show-cause granting an opportunity to the assessee. Thus, the levy of penalty is not automatic but the Assessing officer has to decide based on facts and circumstances of the case. Similar view has been taken by the various Co-ordinate Benches and useful reference can be drawn to the decision of the Co-ordinate Bench in case of ACIT vs Marvel Associates (supra) wherein it was held as under:

"5. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. During the appeal hearing, the Ld. A.R. vehemently argued that the A.O. has levied the penalty under the impression that the levy of penalty in the case of admission of income u/s 132(4) is mandatory. The Ld. A.R. further stated that penalty u/s 271AAB of the Act is not mandatory but discretionary. The provisions of section 271AAB of the Act is parimateria with that of section 158BFA of the Act relating to block assessment and accordingly argued that the levy of penalty under section 271AAB is not mandatory but discretionary. When there is reasonable cause, the penalty is not exigible. The Ld. A.R. taken us to the section 271AAB of the Act and also section 158BFA(2) of the Act and argued that the words used in section 271AAB of the Act and the words used in section 158BFA(2) of the Act are identical. Hence, argued that the penalty section 271AAB of the Act penalty is not automatic and it is on the merits of each case. For ready

reference, we reproduce hereunder section 158BFA (2) of the Act and section 271AAB of the Act which reads as under:

271AAB [Penalty where search has been initiated]:

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

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

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

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

(iii) On or before the specified date—

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

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

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

- (i) in the course of the search, in a statement under sub-section (4_) of section 132, does not admit the undisclosed income; and*
- (ii) on or before the specified date-*
 - (A) declares such income in the return of income furnished for the specified previous year; and*
 - (B) pays the tax, together with interest, if any, in respect of the undisclosed income;*
 - (C) a sum which shall not be less than thirty per cent but which shall not exceed ninety per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).*

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

Section 158BFA(2):

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

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

- (i) such person has furnished a return under clause (a) of section 158BC;*
- (ii) the tax payable on the basis of such return has been paid or, if the assets seized consist of money, the assessee offers the money so seized to be adjusted against the tax payable.*
- (iii) Evidence of tax paid is furnished along with the return; and*
- (iv) An appeal is not filed against the assessment of that part of income which is shown in the return:*

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

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

Sub section (3) of section 271AAB:

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

7. The legislature has included the provisions of section 274 and section 275 of the Act in 271AAB of the Act with clear intention to consider the imposition of penalty judicially. Section 274 deals with the procedure for levy of penalty, wherein, it directs that no order imposing penalty shall be made unless the assessee has been

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

15. *Therefore, we agree with the contentions of the Id AR that the levy of penalty under section 271AAB is not mandatory. In the instant case, it therefore needs to be examined whether there is any basis for levy of*

penalty or non-levy thereof and the same will depend upon the facts and circumstances of the present case which we shall discuss in subsequent paragraphs.

16. Another contention which was raised by the Id AR is that during the course of search, no undisclosed income was found as defined U/s 271AAB. Further in the case search u/s 132 of the Act was carried out in assessee's premises but no evidence was found during the course of search except Ann. AS which was found wherein from page No. 1 to 7 certain figures, dates, cryptic names and/or places were written. The search parties totaled those figures to be Rs. 82,80,000/- holding that amount has been given to various person as advances The assessee also offered a sum of Rs.17,20,000/- in his statement recorded u/s 132(4) of the Act as his additional income for the current year to compensate the defect (if any) found in his books of accounts. The assessee also stated in his statement that said surrender was made to buy piece and avoid long litigation with department on the request that no penalty proceedings etc. be initiated against him. Thus no incriminating material was found during the search and said Annex-AS was containing imaginary names and some figures. Further the officers of search proceedings and Ld. A.O. made no further enquiry/investigation regarding entries made in the seized papers. The surrender of current years income by assessee of Rs. 1,00,00,000/- was just to buy peace by assessee which also he categorically stated in statement u/s 132 (4). The said entry in the pocket diary giving advances itself is not an undisclosed income. And there is no discrepancy which has been found by the Assessing officer and accordingly, there cannot be any undisclosed income in respect of sum of Rs.17,20,000/-as well.

17. *It was submitted that the Revenue authorities have exerted undue, uncalled for and an unwarranted pressure and obtained surrender of income and therefore, there was no undisclosed income in the hands of the assessee. It was submitted that such confessional statement violates Board's circular dated 10.03.2003 and 18.12.2014. It was submitted that such forceful admission does not comply with the spirit of the law. The provisions of Section 271AAB(1)(a)(ii) clearly requires that such undisclosed income admitted U/s 132(4) requires to be substantiated. In other words, the assessee is required to specify the manner in which such income has been derived and further substantiate the same by furnishing material available with him. In the instance case, no such substantiation was done as in fact there existed no undisclosed income. The entire disclosure was on paper and assessee admitted such disclosure to avoid undue harassment and unwanted litigation.*

18. *It was further submitted that the penalty U/s 271AAB is attracted on undisclosed income but not on admission made by the assessee U/s 132(4) of the Act. The AO must establish that there is undisclosed income on the basis of some incriminating material. In the instant case, a diary was found which according to the A.O, it was incriminating material evidencing the undisclosed income. In the penalty order the AO observed nothing related to the diary. However, neither the AO nor the Ld.CIT(A) has verified the contents of the diary as the same was maintained as books of accounts. No other material was found during the course of search indicating the undisclosed income. There is no discrepancy which has been found by the Assessing officer and therefore, there cannot be any undisclosed income in respect of sum of Rs.17,20,000/-as*

well. 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 diary was found that does not indicate any suppression of income. Similarly, no discrepancy was found in the books of accounts. The AO was happy with the disclosure given by the assessee and did not verify the factual position with the books of accounts and other documents. The Tribunal in the case of Ajay Sharma vs. DCIT (2012) 32CCH 334 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, therefore the penalty levied by the Learned Assessing Officer and confirmed by the Learned CIT(A) deserves to be deleted.

19. In order to appreciate the aforesaid contentions of the Id AR, we refer to the statement of the assessee recorded during the

course of search u/s 132(4) and the relevant extract thereof is reproduced as under for sake of reference:-

"प्रश्न 14 सर्च की कार्यवाही के दौरान आपके निवास स्थान से रूपयों लेन-देन की कच्ची पर्चियों पाई गई, कृपया इन पर्चियों के बारे में स्पष्ट करें?"

उत्तर मैंने मेरे निवास स्थान पर पाई गई सातों पर्चियों को भली भांति पूर्वक पढ़ लिया है, ये रूपयें मैंने विभिन्न लोगों को उधार दिये हैं जिनका उल्लेख मेरी Regular Books of Accounts में नहीं है। इन पर्चियों का जोड़ 82 लाख 80 हजार रूपयें है चूंकि इन रूपयों का उल्लेख में मेरी Books में नहीं है। अतः मैं उपरोक्त 82 लाख 80 हजार को अपनी अघोशित आय मानते हुए इसे करारोपण हेतु समर्पित करता हूँ साथ ही मैं 17 लाख 20 हजार की अतिरिक्त आय को जोड़ते हुए कुल 1 करोड़ की आय को करारोपण हेतु समर्पित करता हूँ। उपरोक्त 17 लाख 20 हजार रूपयें की अतिरिक्त अघोशित आय मैं अपनी मानसिक शांति के लिए करारोपण के लिए समर्पित किये हैं। यदि मेरी लेखा बहियों में कोई कमी पाई जाती है। तो इसे इस 17 लाख 20 हजार से समायोजित कर दिया जायें। इसके ऊपर समयानुसार मैं अग्रिम कर जमा करवा दूंगा।

प्रश्न 15 क्या आपको और कुछ कहना है?

उत्तर कहना है कि उपरोक्त 1 करोड़ रूपये मन की शांति के लिए Surrender किया है। मेरा आपसे निवेदन है कि उक्त पर किसी प्रकार का Penalty, Prosecution एवं ब्याज न लगाया जायें....."

20. In this case, the search was conducted on 31.10.2012 wherein the statement of the assessee was recorded u/s 132(4) wherein he has surrendered the amount of Rs 1,00,00,000. Subsequently, almost after a year, the assessee has disclosed the same in his return of income filed on 16.10.2013. Therefore, the assessee was having ample time to retract from said surrender; however there is no such retraction during post-search proceedings and even the assessee has included the same in his return of income. Even from the perusal of the statement, there is nothing which demonstrates that there is any forced surrender by

the assessee. The contention of the Id AR therefore has no legal leg to stand where he contends that the Revenue authorities have exerted undue pressure and obtained surrender of income and therefore, there was no undisclosed income in the hands of the assessee. In any case, the assessment proceedings have attained finality where such undisclosed income has been offered and brought to tax. For the purposes of levy of penalty, what has to be seen is whether the surrender so made, in terms of statement of the assessee recorded u/s 132(4) during the course of search, falls in the definition of "undisclosed income" which has been specifically laid down in terms of clause (c) of explanation to section 271AAB which reads as under:

"(c) "undisclosed income" means—

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has—

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

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

(ii) any income of the specified previous year represented, either

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

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

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

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

22. Regarding surrender of Rs 17,20,000 made on account of other discrepancies if any found in the books of accounts, in absence of any such discrepancy so found by the Assessing officer either during the assessment or penalty proceedings, the said surrender may be the basis for assessment but can't form the basis for levy of penalty which are separate and distinct proceedings in absence of a specific finding as to how the same qualify as an undisclosed income so defined u/s 271AAB of the Act. Hence, penalty levied thereon is liable to be set-aside."

12. In the aforesaid decision so passed by the Coordinate Bench, it has held that the primary condition or charge for levy of penalty is the existence of undisclosed income as so defined for the specified previous year found during the course of search in the case of assessee. Once the said primary condition or charge is satisfied, for the purposes of quantifying the penalty, the Assessing officer has to examine the satisfaction of ancillary conditions as specified under clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB. Merely because the quantum of penalty varies from 10% to 30% subject to compliances with the ancillary conditions, it cannot be said that where the AO

has initiated the penalty under section 271AAB, there is any ambiguity in the charge or there is any lack of application of mind on part of the Assessing officer. Further, the levy of penalty under Section 271AAB is not based on addition made and investigation/enquiry conducted during the course of assessment proceedings, rather it is based on search conducted on the assessee on or after the 1st day of July, 2012, in such a situation, where the penalty show-cause notice is issued u/s 271AAB, the Assessing officer is making the assessee aware of the charge against him in terms of undisclosed income found during the course of search and thus, the assessee is granted an opportunity to refute such charge and file his explanations/submissions. Unlike provisions of section 271(1)(c) which provides for separate charge of "concealment of particulars of income" or "furnishing of inaccurate particulars of income", there is a singular charge under section 271AAB i.e, of the existence of undisclosed income for the specified previous year which is found during the course of search in the case of the assessee. We entirely agree with the said findings and observations so made by the Coordinate Bench and in the instant case, where the notice dated 28.12.2016 was issued to the assessee to show-cause why penalty should not be levied u/s 271AAB of the Act in respect of undisclosed income of the specified previous year, the assessee was made aware of the specific charge against him and an opportunity has thus been given to him to rebut such charge and therefore, we donot see any infirmity in the initiation of the penalty proceedings and consequent penalty order so passed by the AO.

13. Further, in the aforesaid decision, the Coordinate Bench has held that even if it is assumed that primary charge of undisclosed income has to be read along with ancillary conditions and thus multiples charges have been prescribed in terms of clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB and where the Assessing officer has not stated the specified charge at

the time of initiation of penalty proceedings, such uncertain charge at the stage of initiation of penalty proceedings can be made good with a clear-cut charge in the penalty order. In the instant case, we find that while passing the penalty proceedings, the Assessing officer has given a clear finding as reflected in the penalty order that the assessee is liable for penalty U/s 271AAB(1)(a) which provides for levy of penalty @ 10% of the undisclosed income. As held by the Coordinate Bench (supra), the uncertain charge at the time of initiation of penalty has been made good and substituted with a conclusive default at the time of passing the penalty order and that in such a case, no fault can be found in the penalty order. Therefore, the contentions advanced by the Id AR in this regard cannot be accepted.

14. Now, coming to other contentions raised by the Id AR that the levy of penalty under section 271AAB is not mandatory but discretionary in nature, we agree with the said contentions following the detailed reasoning given by the Coordinate Bench in aforesaid decision.

15. Another contention raised by the Id AR is that the Revenue authorities have exerted undue pressure and obtained surrender of income and therefore, there was no undisclosed income in the hands of the assessee. In this case, the search was conducted on 5.02.2015 wherein the statement of the assessee was recorded u/s 132(4) wherein he has surrendered the amount of Rs 49,51,885/-. Subsequently, the assessee has disclosed the same in his return of income filed on 27.09.2015. Therefore, the assessee was having ample time to retract from said surrender; however there is no such retraction during post-search proceedings and even the assessee has included the same in his return of income. Even from the perusal of the statement, there is nothing which demonstrates that there is any forced surrender by the assessee.

The contention of the Id AR therefore has no basis where he contends that the Revenue authorities have exerted undue pressure and obtained surrender of income and therefore, there was no undisclosed income in the hands of the assessee. In any case, the assessment proceedings have attained finality where such undisclosed income has been offered and brought to tax.

16. For the purposes of levy of penalty, what has to be seen is whether the surrender so made, in terms of statement of the assessee recorded u/s 132(4) during the course of search, falls in the definition of "undisclosed income" which has been specifically laid down in terms of clause (c) of explanation to section 271AAB of the Act. The assessee in his statement had disclosed cash advances of Rs 37,00,000, Rs 8,00,000 on account of cash and Rs 451,885/- on account of profit on accounted sales. Regarding cash advance of Rs 37,00,000, we find that during the course of search, exhibit 1 pages 1-3 have been impounded where there are certain notings relating to advance given to certain persons and contains the date, the amount in lacs and name of persons in abbreviation. Besides the said notings, there are no other documents/material disclosing full name and address of the persons to whom the advance has been given, purpose for which such advance has been given, any agreement, etc, which has been found during the course of search. Therefore, mere notings in certain loose papers without any further corroboration cannot be held as conclusive to demonstrate any transactions which have been undertaken by the assessee and which have not been disclosed to the Revenue. In any case, an advance represents an outflow of funds and what has been envisaged by the legislature while defining "undisclosed income" in section 271AAB is an inflow of funds which has not been recorded in the books of accounts or other documents on or before the date of search and not an outflow of funds. Further, the deeming fiction so envisaged in section 69 and 69B cannot be extended and applied automatically

in context of section 271AAB which contains a specific definition of undisclosed income. Similar view has been taken by the Coordinate Bench in case of **Suraj Mal Bansal** (supra) where it was held as under:

"13. In the instant case, during the course of search, a diary has been found wherein there are notings relating to advance given to certain persons towards purchase of land. The notings describe the name of certain persons, the amount advanced which ranges from Rs 25 lacs to Rs 70 lacs and the date of such advance is from 16.12.2014 to 28.01.2015 before the date of search on 5.02.2015. Therefore, what has been found during the course of search is certain entries relating to undisclosed advances/investment in purchase of land. Besides the said entries, there are no other documents/material in terms of full particulars and address of the person to whom the advance has been given, any agreement to sell, the description and location of the property etc, which has been found during the course of search. The assessee HUF is a partner in two partnership firms and derives income from share in the profit and interest from such partnership firms which it has reported in its return of income and therefore, as far as maintenance of books of accounts is concerned, the assessee HUF not carrying on any business is thus not required to maintain regular books of accounts. The diary found during the course of search and seizure at the premises of the assessee contains the entries of advances given for purchase of land and therefore, the said amount of advance given for purchase of land can be recorded in the capital account of the assessee. Thus the transactions found recorded in the diary are to be recorded in the capital account of the assessee as well as in the balance sheet prepared as on 31.03.2015 and not on the date of search as on 5.02.2015. These transactions are recorded in a diary which is nothing but "other documents" maintained in

the normal course, then it cannot be presumed that the assessee would not have disclosed the same in the return of income to be filed after the date of search. Another question that arise for consideration is whether the advances so given for purchase of land qualify as "undisclosed income" as per definition given in the explanation to section 271AAB of the Act. An advance represents an outflow of funds and what has been envisaged by the legislature while defining "undisclosed income" in section 271AAB is an inflow of funds which has not been recorded in the books of accounts or other documents on or before the date of search and not an outflow of funds. Further, the deeming fiction so envisaged in section 69 and 69B cannot be extended and applied automatically in context of section 271AAB which contains a specific definition of undisclosed income. An identical matter has come up for consideration before the Tribunal in case of Rajendra Kumar Gupta vs DCIT (Supra) wherein it was held as under:

"21. During the course of search, a note book (diary) has been found referred to as Ann. AS wherein there are certain notings relating to cash advances given to various persons totaling to Rs 82,80,000. Referring to the statement of the assessee in respect of these notings recorded u/s 132(4), Id CIT(A) has given a finding that the assessee has given a generalized statement without specifying the complete particulars of persons to whom loans were given and also failed to substantiate the same. The said findings have not been disputed by the Revenue and therefore, merely based on surrender and generalized statement of the assessee, in absence of anything specific to corroborate such entries, can it be said that such entries/notings represent undisclosed income of the assessee. As per the definition of undisclosed

income u/s 271AAB, the said cash advances cannot be stated to be income which is represented by any money, bullion, jewellery or other valuable article or thing. Whether it can then be said that such undisclosed cash advances represents income by way of any entry in the books of account or other documents or transactions found in the course of a search under section 132. A cash advance per se represents an outflow of funds from the assessee's hand and an income per se represents an inflow of funds in the hands of the assessee. Therefore, once there is an inflow of funds by way of income, there can be subsequent outflow by way of an advance to any third party. Giving an advance and income thus connotes different meaning and connotation and thus cannot be used inter-changeably. In the definition of undisclosed income, where it talks about "income by way of any entry in the books of account or other documents or transactions found in the course of a search under section 132", what perhaps has been envisaged by the legislature is an inflow of funds in the hands of the assessee which has been found by way of any entry in the books of accounts or other documents, and which has not been recorded before the date of search in the books of accounts or other documents maintained by the assessee in the normal course and not vice-versa. We are also conscious of the fact that there are deeming provisions in terms of section 69 and 69B wherein such amounts may be deemed as income in absence of satisfactory explanation. In our view, the deeming fiction so envisaged under Section 69 and Section 69B cannot be extended and applied automatically in context of section 271AAB. It is a well-settled legal proposition that the deeming provisions are limited for the purposes that have been brought on the statute

book and have therefore to be applied in the context of provisions wherein they have been brought on the statue book and not otherwise. In the instant case, the deeming provisions contained in section 69 and section 69B could have been applied in the context of bringing to tax such investments to tax in the quantum proceedings, though the fact of the matter is that the AO has not even invoked the said deeming provisions in the quantum proceedings. Therefore, even on this account, the deeming fiction cannot be extended to the penalty proceedings which are separate and distinct from the assessment proceedings and more so, where the provisions of section 271AAB provide for a specific definition of undisclosed income. Where a specific definition of undisclosed income has been provided in Section 271AAB, being a penal provision, the same must be strictly construed and in light of satisfaction of conditions specified therein and it is not expected to examine other provisions where the same has been defined or deemed for the purposes of bringing the amount to tax. In light of the same, the undisclosed investment by way of advances can be subject matter of addition in the quantum proceedings, as the same has been surrendered during the course of search in the statement recorded u/s 132(4) and offered in the return of income, however the same cannot be said to qualify as an undisclosed income in the context of section 271AAB read with the explanation thereto and penalty so levied thereon deserved to be set-aside.”

17. In light of above discussions and following the earlier decisions of the Coordinate Bench of the Tribunal in the case of Suraj Mal Bansal and Rajendra Kumar Gupta (supra), we delete the penalty levied under section 271AAB of

the Act on cash advances of Rs 37,00,000/- as the same doesn't satisfy the requirement of undisclosed income as so defined U/s 271AAB of the Act.

18. As far as cash amounting to Rs 8,00,000/- which has been physically found in possession of the assessee during the course of search is concerned, there cannot be any dispute that the same represents undisclosed income so defined in section 271AAB and which has not been disclosed on or before the date of search. Regarding the contention of the Id AR that cash so found represents past accumulated savings, we find that these are contentions which are relevant for determining the nature and source of such undisclosed income for the purposes of determining the quantum of penalty which can be levied and which we find that the lower authorities have duly considered while levying penalty @ 10%. The fact that such cash has been found in possession of the assessee and remain undisclosed to the Revenue is not under dispute and thus represents undisclosed income as so defined. In the result, we confirm the levy of penalty @ 10% on the undisclosed income of Rs 8,00,000/-.

19. Regarding disclosure of Rs 4,51,885/-, the Id AR has contended that the Revenue has applied previous year's gross profit rate of 8.95% on alleged short stock of Rs 50,48,991/- and taken surrender of Rs 4,51,885 as alleged profit on unaccounted sales, however, the same merely represent difference in valuation of stock and no short stock has been found during the course of search. We however find that the assessee has not disputed such valuation during the search or post-search proceedings and therefore, as far as valuation of stock is concerned, the same has attained finality in the quantum proceedings. The question is whether the difference in stock is arising out of and limited to valuation of stock, can the same qualify as undisclosed income. In this regard, we refer to **Co-ordinate Bench** decision in case of **Silver Arts and Palace vs DCIT** (ITA No. 236/JP/18 dated 11.02.2019) wherein it was held as under:

"28. In the instant case, stock of gems, gold, silver and studded jewellery, precious and semi-precious stones, wooden articles, ivory items, marble items, other handicraft items and textile and readymade good were found during the course of search. These are goods which are regularly traded by the assessee and are thus stock-in-trade of the assessee firm. In this regard, what has to be determined is the income of such previous year which is represented by such stock of goods which is not found recorded in the books of accounts maintained by the assessee in the normal course relating to such previous year. The valuation of such excess stock is required to determine the investment which has been made in such excess stock and which has remained undisclosed to the Revenue authorities. The investment in stock is thus the function of price or cost at which stock has been purchased by the assessee and therefore, what is to be determined at the cost price of such stock and not the market price. Where such stock is ultimately sold, any profit arising therefrom would be brought to tax in regular course and the determination of market price would be relevant at that point in time. In other words, the value at which such stock has been acquired by the assessee and not the value which such stock can fetch in the market or the fair market value of such stock.

29. In the instant case, it is noted that the assessee in the penalty proceedings before the Assessing officer and thereafter during the appellate proceedings before the Id CIT(A) has contended that the valuation of the goods classified as "Valuable items" has been done at market rate as on the date of search and in respect of goods classified as "other than valuable items", besides the fact that valuation has been done on the basis of market value, the valuation so done is tentative and on lump-sum basis. It has been contended that valuation has been done without considering the cost disclosed in the regular books of accounts

and without considering the well-accepted accounting policy which has been followed by the assessee firm where it values its stock at lower of cost and net realizable value. We find that in the penalty proceedings, there is no such exercise which has been undertaken by the Assessing officer to determine the cost of the goods so found during the course of search. The Assessing officer has merely gone by the surrender made during the course of search and such surrender has been made based on market value as on the date of search. In our view, given that the assessee has disclosed the whole of the amount surrendered during the course of search in its return of income, the amount so surrendered and disclosed in the return of income is subject matter of assessment and has rightly been brought to tax in the quantum proceedings. However, as far as present penalty proceedings u/s 271AAB are concerned which is solely based on the search proceedings and anyways independent of the assessment proceedings, the Assessing officer is required to give a specific finding that there is an undisclosed income found during the course of search in terms of undisclosed stock and which has not been recorded in the books of account. The undisclosed stock could be in terms of physically identifiable stock not found recorded in the books of accounts or the stock not found recorded at the appropriate value so determined by the Assessing officer. In the instant case, we find that the Assessing officer has merely gone by the surrender statement where the stock has been valued at market price prevailing as on the date of search and has not examined the matter from the perspective of determining separate identifiable stock not found recorded in the books of accounts and also the cost of such stock which is not recorded in the books of accounts. There is no finding that there is any excess stock which has been physically found and which has not been recorded in the books of accounts as on the date of search. In light of above discussions, it is

thus clear that difference in stock of goods as per books and as found at the time of search is on account of valuation of such stock at the market value instead of cost and the same cannot be a basis to hold that it represent undisclosed income so defined in explanation to section 271AAB of the Act and the penalty levied thereon is liable to be set-aside.

In the instant case as well, we find that the department valuer has carried out the valuation of stock as per the market value as on the date of search and the same has resulted in difference in valuation which cannot be a basis to hold that it represent undisclosed income so defined in explanation to section 271AAB of the Act and the penalty levied thereon is hereby deleted.

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

Order pronounced in the open Court on 11/01/2021.

Sd/-
(संदीप गोसाई)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 11/01/2021

*Ganesh Kr.

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Sh. Anil Ghatiwala, Jaipur
2. प्रत्यर्थी / The Respondent- DCIT, Central Circle-03, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 845/JP/2018}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

