

आयकरअपीलीयअधिकरण, 'सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI

श्रीमहावीर सिंह, उपाध्यक्षएवंश्री मनोज कुमार अग्रवाल, लेखा सदस्यके समक्ष

**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

आयकरअपीलसं./ITA No.: **287/CHNY/2021**

निर्धारण वर्ष/Assessment Year:2015-16

Shri Narendra C. Maher,
No.49, Barnaby Road,
Kilpauk, Chennai – 600 010.

The DCIT,
v. Central Circle -1(3),
Chennai.

PAN: AAHPM 8353R

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

&

आयकरअपीलसं./ITA No.: **288/CHNY/2021**

निर्धारण वर्ष/Assessment Year:2015-16

Shri Mahendra K. Maher,
No.49, Barnaby Road,
Kilpauk, Chennai – 600 010.

The DCIT,
v. Central Circle -1(3),
Chennai.

PAN: AAHPM 9707H

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

&

आयकरअपीलसं./ITA No.: **289/CHNY/2021**

निर्धारण वर्ष/Assessment Year:2015-16

Shri Siddharth N. Maher,
No.49, Barnaby Road,
Kilpauk, Chennai – 600 010.

The DCIT,
v. Central Circle -1(3),
Chennai.

PAN: AAHPM 8368G

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

निर्धारितकी ओर से/Assessee by : Shri G. Baskar & Shri I. Dinesh,
Advocates
राजस्वकीओरसे /Revenue by : Shri P. Sajit Kumar, JCIT
सुनवाई की तारीख/Date of Hearing : 14.06.2022
घोषणा की तारीख/Date of Pronouncement : 22.06.2022

आदेश /O R D E R

PER MAHAVIR SINGH, VP:

These three appeals by three different assesseees are arising out of the orders of Commissioner of Income Tax (Appeals)-18, Chennai in ITA No.30/20-21/CIT(A)-18, 28/20-21/CIT(A)-18 & 29/20-21/CIT(A)-18, all orders dated 27.04.2021. The assessments were framed by the ACIT, Central Circle 1(3), Chennai for assessment year 2015-16 vide orders of even date 29.12.2016 u/s.143(3) r.w.s. 153B(1)(b) of the Income Tax Act, 1961 (hereinafter the 'Act'). The penalties under dispute are levied by the DCIT, Central Circle 1(3), Chennai in all three assesseees cases u/s.271AAB(1) of the Act, vide orders of even date 23.03.2020.

2. The only issue in all these three appeals of assessee is as regards to the order of CIT(A) confirming the levy of penalty by the AO u/s.271AAB of the Act when there was no undisclosed income defined u/s.271AAB of the Act and there is no specified previous

year represented by undisclosed income in the assessee's cases. For this issue, all the three assessee's have raised identically worded grounds and grounds raised in ITA No.287/Chny/2021 in the case of Narendra C. Maher read as under:-

- 1). The order of the learned CIT(A) -18, Chennai is against the provisions of law and contrary to the facts of the case and is therefore unsustainable.
- 2). The learned CIT(A) erred in confirming the penalty levied U/S271AAB of the Income Tax Act, 1961 without appreciating that there was no undisclosed income as defined under sec 27 1AAB.
- 3). The learned CIT(A) erred in not appreciating that U/S271AAB undisclosed income should be income of the Specified Previous Year represented by an undisclosed asset and an estimated income by a deeming provision does not constitute such undisclosed income.

2.1 As facts and circumstances are exactly identical in all the three assessee's and the issue is exactly identical on the issue of jewellery found during the course of search and treated by the AO as undisclosed and levied penalty on the addition made on account of undisclosed jewellery in all the three cases, we will take the facts from ITA No.287/Chny/2021 and will decide the issue.

3. Brief facts are that a search and seizure operation was conducted by the Income-tax authorities u/s.132 of the Act in the case of Sugal and Daman group of cases on 20.11.2014, during

which the premises of above three assessees were also covered. During the course of assessment proceedings, the AO framed assessment and made addition of Rs.44,08,288/- in the present assessee on account of unexplained investment u/s.69 of the Act and initiated penalty proceedings u/s.271AAB of the Act. The assessee in quantum appeal before CIT(A) argued his matter and CIT(A) sustained the addition only to the extent of Rs.9,05,818/- which has become final and no further appeal was preferred. Similar is the position in other two assessees. The AO going through the provisions of section 271AAB of the Act, although noted the fact that the CIT(A) in quantum appeals have restricted the addition on estimate basis going into various factors such as family status, community and social norms, traditions, geographical orientations etc., but fact remains that the assessee has made investment in gold which is unexplained to the extent of Rs.9,05,818/-. Accordingly, the AO levied penalty @ 30% of the undisclosed income by observing as under:-

“On going through the above, it can be seen that the case of the assessee does not fall under clauses (a) and (6) of section 271AAB. Therefore, the penalty in the case is to be levied at the rate of 30% of the undisclosed income as per clause (e) of section 271AAB of the Act. The undisclosed income of the assessee on giving effect to the order of the CIT(A) is Rs. 9,05,818/- The penalty leviable at 30% works out to Rs. 2,71, 745/-. Therefore, an amount of Rs. 2,71,745/- is levied as penalty as per clause (c) of section 271AAB of the Act”.

4. Aggrieved, assessee preferred appeal before CIT(A) against deletion as well as against confirmation of penalty @ 30% as against levied by AO at 30%. The CIT(A) also confirmed the action of the AO vide para 10 & 11 as under:-

10. On a careful reading of the provisions of S271AAB, it becomes clear the AO may, in respect of specified years, in relation to undisclosed income, levy penalty of (a)10% if the taxpayer admits the undisclosed income u/s 132(4) ; substantiates the manner of earning such undisclosed income and files return of income before the specified date and pays tax;(b) (a)20% if the taxpayer does not admit undisclosed income u/s 132(4); discloses such undisclosed income and files return of income within the due date and pays tax after substantiating the manner in which such income was derived; and (c) 30%, if the taxpayer does not fall under either of the condition prescribed in (a) or (b) supra.

11. In the appellant's case, it is not disputed that the AY under consideration is a specified year; the appellant was in possession of certain quantum of unexplained jewellery; and the appellant could not explain the source for jewellery the value of which is Rs. 9,05,818/-. It is vital to observe that the factum of the impugned income represented by unexplained jewellery had not been disclosed to the Pr.CCIT or PCIT or CIT before the date of search; and that the income manifested in terms of source of the acquisition of the impugned jewellery had not been documented, as the possession of the impugned jewellery was brought to light only due to and during search proceedings. Thus, on appraisal of the facts of the case and appreciation of the provisions of law, I am of the view that the afore-mentioned income represented by the impugned unexplained jewellery falls within the definition of undisclosed income as enunciated in Explanation (c) to the said section. Further, the appellant's case does not fall under clauses (a) or (b) of section 271 AAB(1) of the Act and consequently and as a corollary the same is covered by section 271AAB(1)(c) of the Act.

Aggrieved, assessee is in appeal before the Tribunal.

5. On behalf of assessee, we have heard Id. Senior Counsel, Shri G. Baskar and on behalf of the Revenue, Id. Senior DR, Shri P. Sajit Kumar, JCIT argued.

6. Before us, Id.counsel for the assessee filed the details of unexplained income in respect of jewellery found and jewellery offered in wealth-tax return and treated as unexplained by AO and thereby deleted by CIT(A). The assessee filed details in relation to all three assessees which are as under:-

ITA No.287/CHNY/2021

Narendra C. Maher

Chart filed by the Appellant relating to Jewellery

Total jewellery found during search	2294.80 gms	29.61 cts
Jewellery offered in WT return	1312.52 gms	
Jewellery deemed to be unexplained as per AO	982.28 gms	29.61 cts

Jewellery treated as unexplained by AO belonging to		CIT(A)			
		Deleted (gms)	Confirmed	Value of gold- Rs.	Value of diamond – Rs.
Appellant	36.8 gms	36.8	-	@ 2386/- = Rs.4,87,412/-	@43,584/-= Rs.4,18,406/-
Mrinalini (wife)	584 gms	468	116 gms		
Tej Maher (daughter)	188.28 gms	100	88.28 gms Gold / 9.60 cts diamond		
Chanchelben	497.60 gms	497.60	-		
Total				Rs.9,05,868/-	

ITA No.288/CHNY/2021

Mahendra Maher

Chart filed by the Appellant relating to Jewellery

Total jewellery found during search	1806.54 gms
Jewellery offered in WT return	1292.28 gms
Jewellery deemed to be unexplained as per AO	545.26 gms

Jewellery treated as unexplained by AO belonging to		CIT(A)		
		Deleted (gms)	Confirmed (gms)	Value - Rs.
Appellant	145.25 gms	66.5	78.75	@ 2,409 = 6,78,013/-
Mridula (wife)	150.51 gms	47.8	102.7	
Hemali (Daughter)	249.50 gms	149.5	100	
Total	545.26 gms	263.8	281.45	

ITA No.289/CHNY/2021

Siddarth Maher

Chart filed by the Appellant relating to Jewellery

Total jewellery found during search	1948.40 gms
Jewellery offered in WT return	255 gms
Jewellery deemed to be unexplained as per AO	1604.8 gms

Jewellery treated as unexplained by AO belonging to		CIT(A)		
		Deleted (gms)	Confirmed (gms)	Value - Rs.
Appellant	229 gms	125	104	@2,374/-= Rs.8,11,196/-
Preethi (wife)	645.7 gms	500	145.7	
Sana (Daughter)	242 gms	150	92	
Veena / Anil	488.10 gms	488.10	-	

6.1 The Id.counsel from the above charts stated that the total jewellery found from the premises of these assesseees and finally assessed in term of quantity as well as in term of value is just below 10% and this 10% is due to variation of various factors and this is just purely estimation. The Id.counsel stated that on estimation,

penalty u/s.271AAB of the Act cannot be levied and for this, he relied on the Co-ordinate Bench decision of ITAT, Jaipur in the case of Padam Chand Pungliya vs. ACIT, (2020) 113 taxmann.com 446 (Jaipur-Trib), wherein it is held that once the jewellery was not found to be purchased during the year under consideration, then the same cannot be treated as an undisclosed income for the year under consideration which is specified previous year. Also, the manner in which the disclosure is obtained on account of the jewellery would not represent the UDI as defined in the explanation to section 271AAB of the Act. The Id.counsel for the assessee also argued that the provision begins with the stipulation that the AO may direct the assessee himself that this penalty is discretionary and not mandatory. It is pari-materia to section 273 of the Act. He argued that the word 'may' used in this section be read with the reasonable cause given in section 271B of the Act. He relied on the above Jaipur Bench decision apart from various decisions particularly the decision of ITAT, Visakapatnam in the case of Marvel Associates, 92 taxmann.com 109.

7. On the other hand, the Id. Senior DR argued that the assessee has argued that Penalty u/s 271AAB of the Act is discretionary on account of use of the language "The Assessing Officer may," by

the legislation. However, it was submitted by Id.senior DR that penalties u/s 270A (Misreporting), 271AAB and 271AAC are not discretionary. For the assessing officer to drop any penalty, the discretion should be available to him in the respective provisions of the act. He argued that Section 273B of the Act gives the discretion to AO to drop penalty proceedings initiated under following sections, if assessee proves that there is reasonable cause for failure :-

'Notwithstanding anything contained in the provisions of clause (b) of sub-section (1) of section 271, section 271BB, section 271C, section 271 CA, section 271D, section 271E, section 271F, section 271FA, section 271 GB, section 271IL, section 271-1, section 271J, clause (c) or clause (d) of sub-section (1) 271A, section 271AM, section 271B, section 271BA, section 271FAB, section 271 FB, section 271G, section 271GA, section or sub-section (2) of section 272A, sub-section (1) of section 272AA or section 272B or sub-section) or sub-section (1A) of section 272BB or sub-section (1) of section 272BBB or clause (b) of sub-section (1) or clause (b) or clause (c) of sub-section (2) of section 273, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure'

7.1 The Id.senior DR argued that if one may observe, the sections 271(1)(c), 270A, 271AAB and 271AAC are not included, so penalty proceedings initiated under these sections can be dropped only if the law provides for the same in the section itself, which is provided by way of Explanation-1 of section 271(1)(c) and for under reporting u/s 270A, by way of clause(a) of sub-section (6). Thus, it

will be mandatory to levy of penalty for misreporting u/s 270A, 271AAB and 271AAC. The words 'may' is used in these sections to give an opportunity of being heard to the assessee to facilitate the assessee to submit its case, if it does not fall under the criteria mentioned in the respective provisions. Hence, if penalty is initiated for misreporting the assessee should be given an opportunity to explain as to why its case does not fit within clauses mentioned in 270(9) and it falls within 270A(6) and hence penalty will be not leviable. Similarly, in respect of 271AAB, the assessee should be given an opportunity to explain why its penalty should be 30% instead of 60%. For this limited reason the word 'may' is used in these provisions. As the provisions does not empower the AO to accept the explanation offered by assessee, once for the given facts of the assessee the section gets attracted, and drop the penalty, the penalty under these provisions are mandatory. Even the government intention is to reduce the discretionary powers of the authorities. This is clear as per the budget speech dated February, 29, 2016 of the Finance Minister wherein the intention of brining in section 270A was explained.

"Levy of heavy penalty for concealment of income has over the years resulted in large number of disputes despite a number of decisions of the Apex court on interpretation of statutory provisions and principles guiding imposition of penalty. At present the Income-tax Officer has discretion to levy penalty at the rate of 100% to 300% of tax sought to be evaded. I propose to modify the

entire scheme of penalty by providing different categories of misdemeanor with graded penalty and thereby substantially reducing the discretionary power of the tax officers. The penalty rates will now be 50% of tax in case of underreporting of income and 200% of tax where there is misreporting of facts. Remission of penalty is also proposed in certain circumstances where taxes are paid and appeal is not filed" and in explanatory notes, it is mentioned that the amendments is made for the following reason.

62.1 Under the existing provisions, penalty on account of concealment of particulars of income or furnishing inaccurate particulars of income is leviable under section 271(1) (c) of the Income-tax Act. In order to rationalize and bring objectivity, certainty and clarity in the penalty provisions, section 271 of the Income-tax Act has been made non- applicable in relation to any assessment for the assessment year commencing on or after the 1st of April, 2017 and subsequent assessment years and penalty shall be levied under the newly inserted section 270A of the Income-tax Act with effect from 1st of April, 2017. The new section 270A of the Income-tax Act provides for levy of penalty in cases of under reporting and misreporting of income.”

7.2 He finally stated that the amendments were to remove the discretion and make more administration based. In the case decisions of ITAT's relied by the counsel, no serious analysis of the various penalty provisions, the intent of the legislation, the continual evolution of direct tax administration from discretionary to non-discretionary regime through streamlining and simplification of tax and penalty rates with the intension to bring in transparency and ascertainability of liability on triggering of an event etc. are not been discussed. Hence, such bald orders passed cannot lay down the law and be a precedent.

8. We have heard rival contentions and gone through the facts and circumstances of the case. The first fact is that, as is evident from the charts filed by the assessee relating to addition of jewellery, the jewellery is inherited and acquired in this year or received any gift or pertaining to any specified year is not clear. It is noted that the jewellery found in term of quantity and value and finally addition confirmed by CIT(A) in all three cases remains only to the extent of 10%. The 10% addition sustained on estimate may be on various reasons like valuation of jewellery by estimate in quantity and determination of value i.e., rate. We noted that this all depend on the social circumstances, family status and other consideration for holding of jewellery. But, the Revenue could not prove in these cases that jewellery pertains to any specified year, i.e., assessment year 2015-16. Cumulative of these factors is considered which seems that excess jewellery to the extent of 10% on estimate basis cannot attract penalty u/s.271AAB of the Act because this is simpliciter estimation.

8.1 As regards to the arguments of Id.counsel for the assessee as well as Id. Senior DR, we have to consider the issue whether penalty is mandatory or discretionary. This issue has been considered by the Co-ordinate Bench decision of Jaipur in the case of Padam

Chand Punliya, *supra* wherein another decision of Vizag Bench of this Tribunal in the case of Marvel Associates, *supra* also considered as under:-

“The section begins with the stipulation that the AO "may" direct the assessee shall pay by way of penalty if the conditions as prescribed under clauses (a) to (c) are satisfied. As per sub-section (3) of section 271AAB the provisions of section 274 and 275 as far as may be applied in relation to the penalty referred in this section which means that before imposing the penalty under sec. 271AAB, the AO has to issue a show cause notice and give a proper opportunity of hearing to the assessee. Thus the levy of penalty u/s. 271AAB is not automatic but the A.O. has to take a decision to impose the penalty after giving a proper opportunity of hearing to the assessee. It is statutory requirement that the explanation of the assessee for not fulfilling the conditions as prescribed u/s 271AAB of the Act is required to be considered by the AO and particularly whether the explanation furnished by the assessee is bonafide and non-compliance of the same is due to the reason beyond the control of the assessee. Therefore, the penalty u/s 271AAB is not a consequential act but the AO has to first initiate proceedings by issuing a show cause notice and after considering the explanation and reply of the assessee has to take a decision. This requirement of giving an opportunity of hearing itself makes it clear that the penalty u/s 271AAB is not mandatory but the AO has to take a decision based on the facts and circumstances of the case otherwise there is no requirement of issuing any notice for initiation of proceedings but the levy of penalty would be consequential and only computation of the quantum was to be done by the AO as in the case of levy of interest and fee u/s 234A to E. Even the quantum of penalty leviable u/s 271AAB is also subject to the condition prescribed under clauses (a) to (c) of sub-section (1) and the AO has to again give a finding for levy of penalty @ 10% or 20% or 30% of the undisclosed income. Thus the AO is bound to take a decision as to what default is committed by the assessee and which particular clause of section 271AAB(1) is attracted on such default. Further, mere disclosure of income under section 132(4) would not ipso facto par take the character of undisclosed income but the facts of each case are required to be analyzed in objective manner so as to attract the provisions of section 271AAB of the Act. Since it is not automatic but the AO has to give a finding that the case of the assessee falls in the ambit of undisclosed income as defined in

Explanation to the said section. Therefore, the provisions of section 271AAB stipulate that the AO may come to the conclusion that the assessee shall pay the penalty. The only mandatory aspect in the provision is the quantum of penalty as specified under clauses (a) to (c) of Sec. 271AAB(1) of the Act as 10% to 30% or more as against the discretion given to the AO as per the provisions of section 271(1)(c) of the Act where the AO has the discretion to levy the penalty from 100% to 300% of the tax sought to be evaded. Thus the AO is duty bound to come to the conclusion that the case of the assessee is fit for levy of penalty under section 271AAB and then only the quantum of penalty being 10% or 20% or 30% has to be determined subject to the explanation of the assessee for the defaults.

5. Before we proceed further, the decisions relied upon by the Id. D/R are to be considered. In the case of Principal CIT vs. Sandeep Chandak & Others (supra) the issue before the Hon'ble High Court was the defect in the notice issued under section 271AAB on account of mentioning wrong provision of the Act being 271(1)(c) of the Act. The Hon'ble High Court after considering the fact that the show cause notice issued by the AO though mentions section 271(1) in the caption of the said notice, however, the body of the show cause notice clearly mentions section 271AAB, which was fully comprehended by the assessee as reveals in the reply filed by the assessee against the said show cause notice. Hence the Hon'ble High Court has held as under :-

" The Id. A.Rs have also challenged that the caption of the notice mentioned only Section 271 and not 271AAB. In this respect, the copy of notice has been produced by the Id. A.R. before me. It is seen that the Id. A.R is correct in observing that the section of penalty has not been correctly mentioned by the AO in the caption. However, the AO will get the benefit of section 292BB of the Income Tax Act, 1961 because firstly, the assessee has raised no objection before the AO in this regard. Secondly, last line of the notice clearly mentions section 271AAB. Thirdly, the assessee has given reply to said notice which shows that the assessee fully comprehended the implication of the notice that it is for section 271AAB.

The assessee has also challenged that the principles of natural justice has not followed by the AO. The detailed submissions of A.R in this regard has already been reproduced above. The A.R did not produce any evidence to show that he was not given proper opportunity of hearing. It is clear from the penalty order that the AO has given penalty notice and which was also

replied by the assessee. Therefore, in my opinion, principle of natural justice has not been violated. Thus in view of above discussion penalty imposed by AO u/s 271AAB of the Act is confirmed."

Thus it was found by the Hon'ble High Court that the mistake in mentioning the section in the show cause notice is covered under section 292BB and the AO will get the benefit of the same. The said decision will not help the case of the revenue so far as the issue involves the merits of levy of penalty under section 271AAB. As regards the decision of Kolkata Benches of the Tribunal in the case of DCIT vs. Amit Agarwal (supra), we find that the said decision was subsequently recalled by the Tribunal and a fresh order dated 14th March, 2018 was passed by the Tribunal in favour of the assessee. Therefore, the decision relied upon by the ld. D/R is no more in existence.

6. The question whether levy of penalty under section 271AAB by the AO is mandatory or discretionary has been considered by the Visakhapatnam Bench of this Tribunal in case of ACIT vs. M/s. Marvel Associates (supra) in para 5 to 7 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 1 st 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."

Thus the Tribunal has held that the levy of penalty under section 271AAB is not mandatory but the AO has the discretion to take a decision and shall be based on judicious decision of the AO. Hence we fortify our view by the above decisions of Tribunal in case of ACIT vs. Marvel Associates."

Thus the Tribunal has analyzed all the relevant provisions of the Act as well as various decisions on this point including the decision of Hon'ble Allahabad High Court in the case of Pr. CIT vs. Sandeep Chandak, 405 ITR 648 (Allahabad) relied upon by the Id. D/R and then arrived at the conclusion that the penalty under section 271AAB is not mandatory but the AO has the discretion to take a decision and the same should be based on judicious decision of the AO. Accordingly following the earlier decision of this Tribunal in the case of Ravi Mathur vs. DCIT (supra), we hold that the levy of penalty under section 271AAB is not mandatory but the AO has a discretion after considering all the relevant aspects of the case and then to satisfy himself that the case of the assessee falls in the definition of undisclosed income as provided in the explanation to section 271AAB of the Act.

8.2 We noted that the penalty u/s.271AAB of the Act is discretionary and not mandatory as noted by various Co-ordinate Bench decisions and hence, by taking the quantum found in all these three cases and the quantum added in all these is just less than 10%, which is negligible and can be ignored easily due to various reasons noted above. In view of the facts and circumstances, we delete the penalties in these three cases, levied by the AO and confirmed by the CIT(A) u/s.271AAB of the Act and allow these three appeals of assessees.

9. In the result, the appeals filed by the assessees in ITA Nos.287, 288 & 289/Chny/2021 are allowed.

Order pronounced in the open court on 22nd June, 2022 at Chennai.

Sd/-

(मनोज कुमार अग्रवाल)

(MANOJ KUMAR AGGARWAL)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 22nd June, 2022

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|-------------------------|------------------------------|
| 1. निर्धारिती/Assessee | 2. राजस्व/Revenue | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF. |