आयकर अपीलीय अधिकरण 'बी' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ **ITA No.2534/Chny/2018**
(निर्धारण वर्ष / Assessment Year: 2013-14)

ACIT Central Circle-1(1), Chennai.	**बनाम**/ Vs.	**Shri Ghisulal Kothari** No.13/10, Sylvan Lodge Colony, 1st Cross Street, Kilpauk, Chennai – 600 010.
स्थायी लेखा सं./जीआइ आर सं./**PAN/GIR No. AADPK-8079-N**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओरसे/ **Assessee by**	:	Shri T. Vasudevan (Advocate) – Ld. AR
प्रत्यर्थी की ओरसे/**Revenue by**	:	Shri R.N. Sidhappaji (CIT) - Ld. DR

सुनवाई की तारीख/ **Date of Hearing**	:	20-04-2022
घोषणा की तारीख / **Date of Pronouncement**	:	13-07-2022

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by Revenue for Assessment Year (AY) 2013-14 arises out of the order of learned Commissioner of Income Tax (Appeals)-18, Chennai dated 31.05.2018 in the matter of penalty levied by Ld. AO U/S 271AAB vide order dated 29.09.2015. The grounds raised by the Revenue read as under:

> 1. The order of the learned Commissioner of Income Tax (Appeals) is erroneous on facts of the case and in law.

2. The ld. CIT(A) erred in directing the AO to levy penalty @ 10% as per the provisions of section 271AAB(l)(a) of the I.T. Act, 1961 to the extent of undisclosed income of Rs.91,64,109/-.

2.1 The ld. CIT(A) ought to have appreciated the fact that the assessee is squarely covered by clause (c) of section 271AAB(1) of the I.T. Act,1961, as the assessee has failed pay taxes on the undisclosed income. Accordingly, the AO had correctly levied penalty @30% on the undisclosed income of Rs.10,00,00,000/- admitted during the course of search action u/s 132 of the I.T. Act, 1961 and also in its return of income.

2.3 The ld. CIT(A) ought to have appreciated the fact that the assessee filed its return of income for the year under consideration without paying self assessment tax as computed by him on the income declared. In spite of issuing notice u/s 139(9), the assessee failed to rectify his mistake. In this background, the return was treated as invalid and as such the return was treated as if it was not filed. Accordingly, the assessment was completed u/s 144 r.w.s 153B(1)(b) of the I.T. Act, 1961. This clearly proves that the assessee is squarely covered under clause (c) of Explanation to Section 271AAB of the Act.

2.4 The ld. CIT(A) ought to have appreciated the fact that the undisclosed income was not recorded on or before the date of Search in the books of accounts and hence the AO has correctly levied penalty @ 30% on the undisclosed income of Rs.10,00,00,000/- as per the provisions of clause (c) of section 271AAB of the IT Act, based on the admission of the assessee relevant to the search records/seized materials.

3. For these grounds and any other ground including amendment of grounds that may be raised during the course of the appeal proceedings, the order of learned CIT(Appeals) may be set aside and that of the Assessing Officer be restored.

RELIEF CLAIMED IN APPEAL

The order of the learned CIT(Appeals) may be set aside and that of the Assessing Officer be restored.

As evident, the revenue is aggrieved by deletion of part of penalty as levied by Ld. AO u/s 271AAB.

2. The assessee has filed a petition u/r 27 of Income Tax (Appellate Tribunal) Rules, 1963 wherein the assessee seeks adjudication of issue of defect in show-cause notice as issued by Ld. AO u/s 271AAB of the Act. The assessee has submitted that Ld. AO has not mentioned the specific clause of applicable provisions under which the alleged default was committed by the assessee. It has been submitted that mentioning of specific clause in the notice is of paramount importance since each of the clauses viz. (a), (b) & (c) of Sec. 271AAB carries a specific charge and accordingly, the rates of penalty vary. In the absence of such a

specification, the notice is invalid as held by Hon'ble High court of Madras in **Pr. CIT V/s R. Elangovan** in its order dated 30.03.2021. In this case, it was held by Hon'ble Court that in the absence of notice mentioning the specific clause, the notice would be defective and the penalty would be unsustainable.

Since, the issue raised is a legal issue and the same goes to the root of the matter, the same is admitted. The grounds taken by the assessee read as under: -

1. The Commissioner of income Tax (Appeals) ought to have seen that the notice issued under Sec.271AAB of the Act is defective and hence invalid in law.
2. The CIT(A) ought to have seen that the notice is general in nature and does not state the specific clause in Sec.271AAB under which the case of the assessee falls and therefore the proceedings are untenable in law.
3. The CIT(A) ought to have seen that since each of the clauses in Sec.271AAB carries a specific charge and the rates of penalty varies accordingly, it is necessary for the notice to mention the clause under which the assessee is arraigned and in the absence of the same the notice is invalid in law.

3. The Ld. CIT-DR, drawing our attention to the factual matrix as well as the provisions of Sec.271AAB made elaborate submissions and justified the quantum of penalty as levied by Ld. AO. The Ld. CIT-DR also assailed the arguments that no specific charge was framed against the assessee. It was the submissions that levy of penalty was mandatory and the quantum was justified. For the same, reference has been made to the statutory provisions and reliance has been placed on various judicial pronouncements. The Ld. CIT-DR also sought distinction of facts in case laws as cited by Ld. AR.

The Ld. AR, on the other hand, submitted that the penalty was unsustainable in law since there was no undisclosed income. The Ld. AR made arguments to assail penalty on legal grounds for which reliance

has been placed on various judicial pronouncements, the copies of which have been placed on record. The Ld. AR submitted that penalty notice was defective and therefore, penalty is unsustainable in law.

Having heard rival submissions and after going through the orders of lower authorities as well as judicial pronouncements as cited before us, our adjudication would be as under.

Assessment Proceedings

4.1 The assessee group was subjected to search action u/s 132 on 18.12.2012. The assessee offered returned income of Rs.1062.90 Lacs on 31.01.2014 which was substantially accepted in the assessment order passed on 31.03.2015 u/s 144 r.w.s. 153(1)(b) of the Act. The only addition / disallowance made in the assessment order was disallowance u/s 14A and treatment of agricultural income for Rs.3.43 Lacs. However, since self-assessment tax was not paid and the assessee failed to rectify the defect, the return was treated as not filed and the assessment was made on best judgment basis u/s 144.

4.2 During the course of search, excess jewellery and cash was found besides allegation of unaccounted investment in purchase of land and development of various properties. Gold weighing 33222.400 grams, diamond weighing 496.790 carats and silver weighing 460 Kg was found and inventorized. The difference in physical quantity so found and as declared in the wealth tax returns was found to be 186 grams (gold), 142 carats (diamond), and 23 Kg (silver). The same could be tabulated as under: -

Jewellery Item	Found during the Course of Search	Jewellery declared in the Wealth Tax Returns of the Family Members	Excess	Value
Gold Jewellery	33322.400 Gms	33136.400 Gms	186 Gms	Rs.5 Lacs
Diamond	496.790 Carats	354.750 Carats	142 Carats	Rs.57 Lacs

Silver	460 Kgs	437 Kgs	23 Kgs	Rs.13 Lacs
			Total	Rs.75 Lacs

The excess jewellery was valued at Rs.75 Lacs. The cash amounting to Rs.110.83 Lacs was also found out from the group as a whole, out of which Rs.88.10 Lacs was seized. The same was as under: -

Premises in Which Found	Cash Found	Cash Seized
M/s. Kamachi Steel Ltd. 664/400, Thiruvattiyur High Road, Tondiarpet, Chennai	Rs. 68.55 Lakhs	Rs. 50.60 Lakhs
Residence at 13/10, Sylvan Lodge Colony, 1st Street, Kilpauk, Chennai	Rs. 42.28 Lakhs	Rs. 37.50 Lakhs
Total	**Rs. 110.83 Lakhs**	**Rs. 88.10 Lakhs**

Since the assessee and his family members were not able to furnish the exact detail of expenditure on development of immoveable properties and could not substantiate the source and manner in which the money was advanced, the assessee and his three brothers decided to admit the income of Rs.40 Crores. Such admission made by the assessee and his three brothers was as under: -

(Rs. in Lacs)

Description	Sh. Ghisulal Kothari	Sh. Shantilal Kothari	Sh. Sardarmal Kothari	Sh. Kewal Chand Kothari	Total
Investment in Gold, Diamond & Silver Jewellery	18.75	18.75	18.75	18.75	75.00
Cash	100.00	0.00	0.00	0.00	100.00
Investment in Development of Land at various places owned by the four Brothers	131.25	231.25	231.25	231.25	825.00
Advance paid through Brokers for purchase of lands to various agriculturist	750.00	750.00	750.00	750.00	3000.00
Total	1000.00	1000.00	1000.00	1000.00	4000.00

Accordingly, the income of Rs.10 Crores was admitted by each of the four brothers in their respective return of income.

4.3 Consequently, the assessment was framed by Ld. AO and penalty proceedings were initiated in the body of assessment order as under: -

> Assessed. Demand Notice is issued. Penalty proceedings u/s 271AAB and 271(1)(c) is initiated separately. Penalty u/s 271F is also initiated.

It could be seen that Ld. AO initiated penalty under various provisions and subsequently, issued show-cause notice to the assessee to defend the proposed penalty u/s 271AAB.

Penalty Proceedings

5.1 During penalty proceedings, a show-cause notice was issued by Ld. AO to the assessee on 31.03.2015 u/s 274 r.w.s. 271 which was followed by another letter dated 16.09.2015 wherein the assessee was show-caused as to why the penalty should not be imposed. The relevant content of notice dated 31.03.2015 read as under: -

> Whereas in the course of proceedings before me for the A.Y 2013-14, it appears to me that you
> # have without reasonable cause failed to furnish a valid return of income which you were required to furnish under section 139(1) or by a notice given under section 139(2)/148 of the Income tax Act, 1961, No…… dated……..or have without reasonable cause failed to furnish it within the time allowed and the manner by the said section 39(1) or by such section – 271F.
>
> ~~Have without reasonable cause to comply with a notice under section 142(1)/143(2) of the Income Tax Act, 1961 No……dated……~~
>
> # Have concealed the particulars of your income or have furnished inaccurate particulars of such income – 271(1)(c)
> # Have admitted income of ₹ 10 crores, but has not substantiated the manner in which the income has been earned and also has not filed a valid return of income by paying the tax on the admitted income – 271AAB.
>
> You are hereby requested to appear before me at 11:30 AM on 26/05/2015 and show cause why an order imposing a penalty on you should not be made u/s. 271 of the Income Tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative, you may show cause in writing on or before the said date which will be considered before any such order is made under section 271.

5.2 The assessee defended the penalty on the ground that it had duly explained the manner in which the income of Rs.10 Crores was earned and the application of income was also explained. The said income was duly offered in the return of income and it had already paid self-

assessment tax of Rs.163.10 Lacs including the cash seized. Since the assessee was not able to recover the advances given for purchase of land, the remaining tax could not be paid. Accordingly, the assessee requested Ld. AO to drop the proceedings u/s 271AAB of the Act.

5.3 However, negating the assessee's submissions, Ld. AO alleged that the assessee failed to substantiate the manner in which the undisclosed income was derived and also failed to pay the tax together with the interest on or before the specified date. Accordingly, penalty as specified in clause (c) of Sec. 271AAB(1) would apply to the fact of the case. Applying the said rate, the assessee was held liable to pay penalty of 30% of the undisclosed income. In other words, the penalty of Rs.3 Crores was levied on alleged undisclosed income of Rs.10 Crores as reflected by the assessee in the return of income.

Appellate proceedings

6.1 During appellate proceedings, the assessee, inter-alia, contended that in statement recorded u/s 132(4), the assessee was not confronted with any incriminating material found during the course of search. The assessee was not questioned about generation of undisclosed income by the investigating team. The mandate of Sec.271AAB was to levy penalty on the 'undisclosed income'. The term 'undisclosed income' should emanate from the search records / search material whereas in the instance case, the penalty was levied based on the admission of the assessee without any support from the search record / search materials. The assessee submitted that admission was not related to any seized material and therefore, the penalty was unjustified. No concrete material or document was confronted to the assessee in order to arrive at the 'undisclosed income' of the assessee. Rather the assessee, on its own,

came forward and admit undisclosed income voluntarily. Nevertheless, no material or document was found and seized by the department nor any question was raised regarding the undisclosed income while recording statement u/s 132(4). To support the same, reliance was placed on various decisions of the Tribunal.

6.2 In the additional submissions, it was reiterated that except for excess jewellery or cash, there was no other incriminating material. The assessee did not admit any undisclosed income in the statement made u/s 132(4). It was only during post search enquiries, the assessee came forward voluntarily to disclose additional income. The assessee submitted that the disclosure was made in the return of income and tax liability was discharged by payment of taxes and partly by remitting the refund amount received by the related entities. Another line of argument was that it was not mandatory to levy the penalty since as per the statutory provisions, Ld. AO may impose penalty considering the facts and circumstances of each case.

6.3 The Ld. CIT(A) duly considered the statement recorded by the assessee on 18.12.2012 and subsequent statement recorded from assessee's brother on 14.02.2013. The Ld. CIT(A) also considered the assessee's submissions as above. It was observed that the assessee did not admit any undisclosed income in the statement recorded u/s 132(4) and the assessee was not confronted with any specific undisclosed investments which the assessee had made. What was not disclosed was excess cash and jewellery. It was only during post search enquiries, the assessee came forward to disclose additional income before investigation officer even though no incriminating documents were found and seized during search operations. The same was

evidenced by the copy of Panchnama wherein there was no seizure with respect to investment in immoveable properties and money advanced for purchase of land. As per the seizure made in Panchnama, the value of jewellery not disclosed by the assessee in the wealth tax return was only Rs.84.09 Lacs and cash found was only Rs.7.54 Lacs. After perusal of statutory provisions, Ld. CIT(A) came to a conclusion that entire disclosure may not fall under the definition of 'undisclosed income' if it could not be relatable to some asset / documents / entry found during the course of search operations. The mandate of Sec.271AAB is to levy penalty on the 'undisclosed income'. The determination of 'undisclosed income' should emanate from the search records / search material. The undisclosed income, as defined in Sec.271AAB, would mean (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 the other documents or transactions found in the course of a search under section 132, which has not been recorded on or before the date of search in the books of account or other documents maintained in the normal courses relating to such previous year, or otherwise not been disclosed to the appropriate authority 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.

6.4 The Ld. CIT(A) further noted that stringent proof would be required to impose the penalty in respect of the items of additions taken into

consideration for levy of penalty. Any addition made to the returned income would not automatically call for levy of penalty. It must be proved beyond doubt that there was actually an income which was not disclosed. Accordingly, the aforesaid voluntary admission would not fall within the purview of undisclosed income. The income undisclosed, in the present case, would be undisclosed income of Rs.84.09 Lacs representing excess jewellery and Rs.7.54 Lacs excess cash as stated in the Panchnama.

6.5 The relevant observations of Ld. CIT(A), in this regard, were as under: -

> **9.8.** Therefore, it was contended by the appellant during the course of appellate proceedings that, the above said items of addition was not based on any seized materials or documents found during the course of search action pointing out undisclosed income. It is therefore not fair or legally correct to levy penalty in regard to the above said addition.
>
> **9.9.** It was submitted that the appellant had voluntarily come forward to disclose the above additional income before the Deputy Director of Income-tax (Inv) against the unexplained investments found during the course of the search operations. However in the statements originally recorded u/s. 132(4) of the Act, the appellant was not confronted about any specific investments the appellant had made which is not disclosed other than the excess cash and diamond as detailed above. It is submitted that the appellant had not admitted any undisclosed income in the statements recorded by the investigation officer. Only during the post search enquiry, the appellant came forward to disclose additional income before the Investigation officer even though no incriminating documents were found by the department during the course of the search action u/s. 132 of the Act in the nature of undisclosed business activity carried out by the, appellant or investments in properties or expenditure made by the appellant which could not be explained by the appellant.
>
> **9.10.** The appellant submitted that the above facts are very much available on the statements recorded from the appellant and also reflected in the Panchanama. In the Panchanama also, there was no mention of any material seized. In clause 5 of Panchanama where the details of materials found and seized is mentioned, all the sub-clauses from (i) were struck off. In clause 6 of Panchanama where the details of materials found and not seized, all the sub-clauses from (i) to (ii) h'ave been struck off. Therefore, it is clear from the Panchanama that no materials were found and seized at the time of search. A copy of the Panchanama was also submitted before me for perusal.
>
> **9.11.** Further, it was submitted that, even though no incriminating materials were found or seized by the department during the course of search operations u/s.132 c Act, with regard to Undisclosed Investments in the property, the appellant's group

came forward to admit a total additional income of Rs.40 crores originally for the entire group considering the possibility of some commissions or omissions committed by the appellant and other members of the group. The specific amounts could not be arrived at as there were no undisclosed investments or income detected by the Investigation wing of the department.

9.12. It was also submitted that, only in order to buy peace with the department and in considering the probable omission and commission that the appellant could have committed, the appellant came forward to admit additional income over and above the cash and investments in excess gold, diamond and silver found at the time of the search and had admitted the income under the head "Income from other sources". The entire cash found and seized in the group is admitted in the case of Shri. Ghisulal Kothari (brother of the appellant)

9.13. The AR argued that, all these discrepancies observed by the AO form part of the regular books of accounts and nothing outside the books of accounts. In these circumstances, in order to cover the deficiencies, the appellant agreed to offer additional income of Rs.40 Crores for the entire group to avoid protracted litigation and to cooperate with the department, the additional income was offered. The appellant argued that, there was no seizure of items **with regard to investments in immovable properties of Rs.131.25 Lakhs and Rs.750 Lakhs for the money advanced through brokers for purchase of lands** which were not supported by any seized materials/incriminating documents. There is no material on record for undisclosed investments in immovable properties except statements recorded u/s 132(4). There was no corroborative evidence that were seized by the department during the course of search & seizure action u/s 132 for the addition made of Rs.131.25 Lakhs and Rs.750 Lakhs as mentioned in clause (c) of Sub-section (3) of Sec.271AAB, where "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 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....."

9.14. Further, it was submitted that, even though no documents were found with regard to investments in immovable properties the appellant had come forward to admit the additional income under the head "Other Sources" considering the omissions and commissions made as explained earlier before the Investigation Officer and adopting net accretion to asset method. However, the A.O. proceeded to conclude that the appellant had not disclosed the manner in which the unaccounted income was earned by the appellant and that the tax due were not paid and concluded the appellant's case is not covered by the provisions of Section 271AAB(1)(a) or (b) of the Act and levied penalty invoking the provisions under section 271AAB(1)(c) of the Act and a penalty at 30% was levied on the entire additional income admitted by the appellant.

9.15. Further, during the course of appellate proceedings, the AR explained regarding the inventory of jewellery made in the course of search and submitted before me the details of Valuation Report made by the Registered valuer by the

department. The AR also explained with regard to inventory of cash found and seized and submitted the Panchanama for verification. The scanned copy of the same is affixed here as under:-

……

On perusal of the above details, a reconciliation chart was drawn as under in respect of weight and description of items with regard to jewellery actually found and also for the cash actually seized in respect of each appellant:

DETAILS OF CASH/GOLD/DIAMOND AND SILVER FOUND AND SEIZED DURING THE COURSE OF SEARCH ACTION U/S. 132 OF THE ACT AS PER PANCHANAMA AND STATEMENTS RECORDED									
Actual as per Wealth Tax Return and Valuation Report									
Details of Investments found during the course of search									
Name of the Assessee	Gold Grams	Diamond Carat	Silver Kgs	Value Gold per Gram	Value Diamond Per Carat	Value Silver per Gram	Cash		TOTAL VALUE OF JEWELLERY AND CASH
Ghisulal Kothari and Family				2688	40410	56521	Found	Seized	
As per wealth tax return	11804.500	118.400	149.050				7,54,780	7,00,000	
Physically found	13240.600	210.750	163.950						
Difference	1436.100	92.350	14.900	38,60,237	37,06,929	8,42,163		7,00,000	91,64,109

Jewellery	84,09,329
Cash	7,54,780
Total	91,64,109

From the above chart, it is relevant to note that, the value of jewellery not disclosed in the Wealth-tax return was only Rs.84,09,3297- and the cash found was only Rs.7,54,780/-

9.18. The Panchanama and the valuation report drawn are a speaking one and it contains narration in respect of various figures noted therein. Therefore, the appellant has relied upon the speaking document and not a dumb document.

9.19. On the facts of the case, the order of penalty is passed only because of the admission of the appellant. The entire disclosure of income at the time of search operation may not fall under the definition of undisclosed income if it could not be relatable to some assets /documents/entry found during the course of search operation.

9.20. In a block assessment, undisclosed income has to be determined or the basis of the material and evidence detected in the course of the search action.

9.21. Thus, the statements recorded under the circumstances of the case under consideration are not having good evidentiary value.

9.22. The mandate of the provisions of section 271AAB of the Act is to levy penalty on the undisclosed income computed and the term 'undisclosed income' is also defined in the said section inasmuch as the determination of the undisclosed income in the assessment should emanate from the search records/search materials. On the facts of the case, the penalty was levied based on the admission of the appellant without any support from the search records/seized materials.

9.23. The definition of undisclosed income is defined in the said section itself under which Clause (c) of Explanation to Section 271 AAB of the Income Tax Act, 1961 which is reproduced below:

(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 the 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 courses relating to such previous year, or
(B) otherwise not been disclosed to the 58[Principal Chief Commissioner or JCommissioner 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.]

9.24. The mere fact of addition on voluntary admission, particularly when the assessment is made on the inference flowing from the inability of the assessee to establish the case pleaded by him, will not be sufficient for the purpose of imposition of penalty. Stringent proof is required to impose penalty in respect of the items of additions taken into consideration for levy of penalty. Any addition made to the returned income would not automatically call for levy of penalty. It must be proved beyond doubt that, there was actually income and further that income was not disclosed.

9.25. In view of the aforesaid discussion, the voluntary admission of Rs.10 Crores made by the assessee for his inability to establish the case does not fall within the purview of "Undisclosed Income" as defined in Section 271AAB of the Act. Therefore, the observation of the A.O. that only as a result of search such additional income of Rs.10 Crores were offered to tax does not hold any water.

9.26. Therefore, the A.O.is directed to restrict the Penalty only to the extent of undisclosed income of Rs.84,09,329/- pertaining to the excess Jewellery and the cash found during the course of the search proceedings amounting to Rs.7,54,780/- as specified in Panchanama.

6.6 Regarding rate at which the penalty would be levied, it was noted by Ld. CIT(A) that there were huge refunds in group entities and these entities had submitted 'No objection letters' before jurisdictional CIT to determine the refund and adjust the same towards tax liability of the assessee. However, the same was not accepted. Subsequently, refunds were issued and entire tax demand was paid by the assessee. Considering the same, the penalty was to be restricted to the extent of 10% of undisclosed income of Rs.91.64 Lacs. In other words, the appeal was partly allowed. Aggrieved, as aforesaid the revenue is in further appeal before us.

Our findings and Adjudication

7. We find that the basic facts leading to imposition of penalty are not in dispute. The assessee group was subjected to search action u/s 132 on 18.12.2012. During the course of search, excess cash and jewellery was found. The excess jewellery was valued at Rs.75 Lacs whereas excess cash was found for Rs.110.83 Lacs. The admission of excess cash of Rs.100 Lacs has been made by the present assessee whereas the admission of Rs.75 Lacs has been made by all the four brothers in equal proportion. However, it also discernible that except for excess cash or jewellery, no other incriminating material or documents have been found by the searched team which is evident from the copies of Panchnama as placed on record. This fact has also been noted by Ld. CIT(A) in the impugned order and the same form the very basis of adjudication of Ld. CIT(A).

8. Upon perusal of documents on record, we find that during the course of search proceedings, a statement was recorded from the assessee u/s 132(4) which is placed on page nos.20 to 35 of the paper-book. The copy of the Panchnama in assessee's case is also placed on record which shows seizure of cash from the assessee. Upon perusal of statement dated 18.12.2012, it could be gathered that it is a general statement wherein no incriminating material has been confronted to the assessee and no question with respect to undisclosed income has been put to the assessee. Another statement has been recorded on next day i.e., 19.12.2012. Upon perusal of question no.6, it could be seen that the assessee was required to explain the variance in the amount of cash found. The assessee, in the reply, has sought time to furnish the requisite details to reconcile the discrepancies. However, there is no

admission in the statement of the assessee regarding any 'undisclosed income'. No question with respect to any other incriminating material is shown to have been put to the assessee in this statement also.

9. Subsequently, during post search proceedings, the assessee group has agreed to offer lump sum Rs.40 Crore collectively to tax which has been confirmed by another assessee i.e., Shri Sardarmal M. Kothari in statement recorded on 14.02.2013 which is placed on page nos. 63 to 65 of paper-book. However, in this statement also, no incriminating material or documents have been confronted to that assessee. The relevant extract of this statement is as under: -

> Q.4. During the course of lifting of prohibitory order today at your residence and also at the residence of your brothers, the following jewellery, diamonds and silver were found and inventorized. On the basis of the same the following figures are arrived at:

No.	Name of the assessee	Gold (in gram)	Diamond (in carat)	Silver (in kgs)
1	Ghisulal Kothari and family members			
a)	As per wealth tax return	11804.500	128.400	172
b)	As per physical inventorization	13240.600	210.750	163
2	Sardarmal Kothari and family members			
a)	As per wealth tax return	3920.85	37.5	62
3	Shanthilal Kothari & family members			
a)	As per wealth tax return	9975.700	10.50	107
b)	As per physical inventorization	7071.800	170.090	113
4	Kewalchand Kothari			
a)	As per wealth tax return	9667.05	93.350	102
b)	As per physical inventorization	3541.900	3.26	59
	Total weight jewellery of all family members			
a)	As per wealth tax return	33136.15	354.750	443
b)	As per physical inventorization	33322.400	496.790	466
	Difference/ Discrepancy	186 grams	142 carats	23 kilos

> From the above it can be seen that there is discrepancy of about 186 grams in gold, 142 carats of diamond and 23 kgs. in silver. Please explain why there is apparent discrepancy on these jewellery items.

> Ans. Sir, during the course of our family functions etc. we used to get gifts mostly in gold and silver. The figures shown as per the return are as on 31.03.2012. Now almost 10 months have passed and during the period small purchases in respect of gold and silver might have been made by my family In respect of diamond, I want to say that my brother's son members. Shri Mukesh was married recently and daughter-in-law brought some gold and diamonds as stridhan. The exact quantity as per wealth tax return could be furnished very shortly. I am told that the mother of daughter-in-law gave the gold and diamond out of her declared wealth. I will furnish the confirmation shortly. Despite all these things, I do admit there is an excess of diamonds about 100 carats.
> Q.5. During the course of post search proceedings Rs.40 crores was offered as Kindly tell me the breakup of the unaccounted income assessee wise year wise.
> Ans. Sir, permit me a day's time to file detailed letter/affidavit in respect of the above.

10. At this juncture, it would be useful to take note of statutory provisions of Sec.271AAB. As per the provisions, the assesseing officer may direct the assessee to pay, by way of penalty, a sum computed at specified rates of 10%, 20% or 30% of undisclosed income. The undisclosed income has been defined in explanation (c) 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 the 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 courses 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 have been found to be so had the search not been conducted.

Upon perusal, it could be seen that ‘undisclosed income’ in the explanation would mean any income which is represented wholly or partly by any money, bullion, jewellery or other valuable article or thing or

any entry in the books of account or the other documents or transactions found in the course of a search under section 132 which has remained unrecorded or otherwise not disclosed to the specified revenue authorities. Thus, there is a clear and direct association between the income on one hand and assets / documents on the other hand found during the course of search. A logical deduction could be made that the 'undisclosed income' has to be necessarily represented by any money, bullion, jewellery or other valuable article or thing or any book entry or transactions found in the course of a search u/s 132 which has remained unrecorded or otherwise not disclosed to the specified revenue authorities. If the 'undisclosed income' is not represented as aforesaid, the same could not be considered as 'undisclosed income' within the meaning of this Section. Applying the same to the facts of the present case, it could be concluded that voluntary admission which is so unrepresented could not be held to be 'undisclosed income' for the purpose of imposition of penalty u/s 271AAB.

11. We are also of the considered opinion that imposition of penalty is not automatic but it would apply on peculiar facts and circumstances of each case. Merely because the voluntary admission has been made by the assessee which is not represented by any incriminating material found during the course of search action, the same would not justify the imposition of penalty. The same is also evident from Clause (3) of Sec.271AAB which provide that the provisions of Section 274 and 275 would apply in relation to the penalty referred to in this Section. As per the provisions of Sec.274, no order imposing penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. The logic is simple. The principle of natural

justice would demand that the aggrieved party is given an opportunity of hearing to defend its case. It is only after the defense of the accused has been considered, the authorities could proceed with penal consequences. Had the imposition of penalty been automatic, such an opportunity would have no relevance and no opportunity would be required to be given to the assessee. It is only after the assessee has been heard and Ld. AO finds it a fit case for imposition of penalty, the penalty could be levied on the assessee.

12. Our aforesaid views find support from the decision of co-ordinate bench of Nagpur Tribunal in **Chandra Suresh Kothari V/s DCIT (135 Taxmann.com 275; 20.12.2021)** which held as under: -

> **16.** On a perusal of the provisions of section 271AAB, it is evident that the section 271AAB is self-contained. There can be no doubt that there is no discretion with the AO as the parameters by which the AO or the tax authorities are bound in regard to the rate of penalty and the circumstances on the basis of which the penal provision can be attracted are self-explanatory. It can be noticed that the Co-ordinate Benches of the Tribunal have categorically held that the expression 'undisclosed income' is given a definite and specific meaning and the word has not been described in an inclusive manner so as to enable the tax authorities to give wider or elastic meaning which enables them to bring within its ambit the species of income not specifically covered by the definition. Moreover, such penal provisions are required to be interpreted in a strict, specific and restricted manner and not in an inclusive manner. If the surrendered income does not fall in the definition of "undisclosed income" as defined u/s. 271AAB of the Act, the penalty is not warranted. It can be further noted that the penalty under section 271AAB can be initiated in respect of undisclosed income as defined in the section 271AAB itself found during the search action, independent of the assessment proceedings. Though, the fact in a case that the assessee has been able to explain the source of the alleged 'undisclosed income' maybe relevant for final imposition of the penalty, however, for initiation of the penalty proceedings, the provisions of section 271AAB are self-contained and are not dependent upon commencement or finalization of the assessment proceedings. It is further pertinent to note here it is not mandatory for the AO to invoke provisions of section 271AAB of the Act in each and every case of levy of penalty pursuant to search action. Assessee has neither made any surrender of any undisclosed income during the search action nor the penalty has been initiated on the basis of undisclosed income found during such search action. In view of the above factual position, the impugned order of the AO imposing the penalty on the assessee under section 271AAB of the Act does not pass the mandate of the provisions of section 271AAB of the Act, therefore, the same being

bad in law is hereby quashed and we direct to delete the penalty levied u/s. 271AAB of Rs. 10,87,500/-.

13. Similar is the decision of Patna Tribunal in **Shiv Bhagwan Gupta V/s ACIT (125 Taxmann.com 306; 11.02.2021)** which, after considering catena of decisions on the issue, held as under: -

> **8.** So far as issue of levy of penalty u/s 271AAB of the Act whether is mandatory or not is concerned, the issue has been dealt with by the Co-ordinate Chandigarh Bench of the Tribunal in the case of *SEL Textiles Ltd.* v. *Dy. CIT* [IT Appeal No. 695 (Chd.) of 2018, dated 18-4-2019]. The Tribunal in the above case has relied upon the decisions of the Coordinate Benches of the Tribunal in the cases of *Asstt. CIT* v. *Marvel Associates* [2018] 92 taxmann.com 109/170 ITD 353 (Visakhapatnam); *Dy. CIT* v. *Rashmi Metaliks Ltd.* [IT Appeal No. 1608 (Kol.) of 2017, dated 1-2-2019]; *Dy. CIT* v. *Rashmi Cement Ltd.* [IT Appeal No. 1606 (Kol.) of 2017, dated 28-2-2019]. The co-ordinate Chandigarh bench of the Tribunal (*supra*) after analyzing the aforesaid decisions, wherein, reliance has also been placed on the decisions of the Hon'ble High Courts has held that levy of penalty u/s 271AAB of the Act is not mandatory. It has also been noted that the Legislature has consciously used the word 'may' in contradistinction to the word 'shall' in the opening words of section 271AAB of the Act. That the choice of the expression 'may' and not 'shall' in the opening section of 271AAB shows that the Legislature did not intend to make the levy of penalty statutory, automatic and binding on the Assessing Officer but the Assessing Officer has been given discretion in the matter of levy of penalty. Further that as per sub section (3) of section 271AAB of the Act, the provisions of sections 274 and 275 of the Act have been made applicable in relation to the penalty referred to section 271AAB of the Act. It has been further observed that 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 competent authority. It has also been held that the penalty u/s 271AAB will not be attracted if the surrendered income would not fall in the definition of 'undisclosed income' as defined under explanation to section 271AAB of the Act.
>
> **9.** On a perusal of the provisions of section 271AAB, it is evident that the Section 271AAB is self-contained. There can be no doubt that there is no discretion with the AO as the parameters by which the AO or the tax authorities are bound in regard to the rate of penalty and the circumstances on the basis of which the penal provision can be attracted are self-explanatory. It can be noticed that the Co-ordinate Benches of the Tribunal have categorically held that the expression 'undisclosed income' is given a definite and specific meaning and the word has not been described in an inclusive manner so as to enable the tax authorities to give wider or elastic meaning which enables them to bring within its ambit the species of income not specifically covered by the definition. Moreover, such penal provisions are

required to be interpreted in a strict, specific and restricted manner and not in an inclusive manner. If the surrendered income does not fall in the definition of "undisclosed income" as defined u/s 271AAB of the Act, the penalty is not warranted. It can be further noted that the penalty under section 271AAB can be initiated in respect of undisclosed income as defined in the section 271AAB itself found during the search action, independent of the assessment proceedings. Though, the fact in a case that the assessee has been able to explain the source of the alleged 'undisclosed income' may be relevant for final imposition of the penalty, however, for initiation of the penalty proceedings, the provisions of section 271AAB are self contained and are not dependent upon commencement or finalization of the assessment proceedings. It is further pertinent to note here it is not mandatory for the AO to invoke provisions of section 271AAB of the Act in each every case of levy of penalty pursuant to search action. There is no bar to the assessing Officer to initiate penalty proceedings u/s 271(1)(*c*) of the Act even in cases involving search actions if in the facts and circumstances of the case, it is so warranted. The only bar is that no penalty under the provisions of section 270A or section 271(1)(*c*) of the Act shall be imposed in respect of the undisclosed income, as defined u/s 271AAB of the Act, unearthed during the search action carried out u/s 132 of the Act. It is to be noted that the provisions of section 271AAB and section 271(1)(*c*) of the Act simultaneously existed and were operational till the provisions of section 271AAC become effective from 1-4-2017.

10. The Assessing Officer has levied penalty @ 10% of the alleged undisclosed income, however, it is a matter of record in this case that the assessee has not made any surrender of any undisclosed income during the search action. The assessing officer has not initiated the penalty proceedings u/s 271AAB of the Act on the basis of or in consequence of the said search action, rather the assessing officer, has initiated the penalty proceedings during the assessment proceedings solely on the ground that the assessee has disclosed certain income from undisclosed sources in the return of income and paid due taxes thereupon. The relevant part of the assessment order in this respect is reproduced as under:

"The assessee has filed return u/s 139 showing income of Rs. 2808270/-The assessee has disclosed income of Rs. 2179221/-during the year on account of undisclosed jewellery. Penalty u/s 271AAB is initiated."

A perusal of the above reproduced relevant part of the assessment order reveals that the assessing officer has not mentioned about unearthing of any undisclosed income as defined u/s 271AAB of the Act during search action carried out at the premises of the assessee. In my view, the income declared by the assessee in the return of income or found or assessed by the Assessing officer in the assessment proceedings may be relevant for assessment of the income under section 68/69 and other related provisions of the Act and also for the levy of penalty under section 271(1)(*c*) of the Act in view of the relevant provisions of section 68/69 and 271(1)(*c*) of the Act. However, for the levy of penalty u/s.271AAB, the case must fall within the four corners of the definition of expression "undisclosed income" as defined u/s 271AAB itself. The assessee in this case is an individual and has earned income from partnership firm and interest income. The assessee has neither earned any business income nor earned any income exceeding Rs. 50 lakhs so as to require mandatory filing of personal assets and liabilities or to maintain books of account; even the assessee is not required to otherwise disclose any such income to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of search; the alleged income is not any income

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. Assessee has neither made any surrender of any undisclosed income during the search action nor the penalty has been initiated on the basis of undisclosed income found during such search action. In view of the above factual position, the impugned order of the AO imposing the penalty on the assessee under section 271AAB of the Act does not pass the mandate of the provisions of section 271AAB of the Act, therefore, the same being bad in law is hereby quashed.

14. The coordinate bench of Chennai Tribunal in **ACIT V/s Shri S.Martin (ITA No.2382/Chny/2016 & ors; 05.10.2018)** similarly held as under: -

20. This is the only definition available for "undisclosed income" in the Income-tax Act, 1961. Therefore, on the basis of material found during the course of search operation, if the Assessing Officer comes to a conclusion that the material found represents wholly or partly of the assessee's income, which would not have been disclosed but for the purpose of search, may be construed as undisclosed income. In this case, it is not the case of the Revenue that any incriminating or other material was found during the course of search operation which represents wholly or partly the undisclosed income of the assessee. It is a definite case of the Revenue that the assessee offered an additional income of ₹50 Crores. Therefore, offer made by the assessee is not admitted on the basis of any material or document, bullion, etc. Therefore, as rightly found by the CIT(Appeals), this cannot be construed as undisclosed income for the purpose of levy of penalty under Section 271AAB of the Act. Hence, the CIT(Appeals) has rightly deleted the penalty levied by the Assessing Officer. This Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

The facts of the present case match with the facts of the above case law of Chennai Tribunal. Similar is the decision of Ahmedabad Tribunal in **Bharatkumar N.Parikh V/s DCIT (ITA No.2493/Ahd/2018; 23.09.2019).**

15. Considering the ratio of all the decisions as aforesaid, we are of the considered opinion that Ld. CIT(A) has clinched the issue in the right perspective. Therefore, we confirm the impugned order, however, with enhancement. It could be observed that excess cash was found for Rs.68.55 Lacs from the premises of M/s Kamachi Steel Ltd. which was owned up by the assessee and disclosure was made. Therefore, besides

own cash, the assessee would be liable for penalty on this excess cash of Rs.68.55 Lacs also. We order so.

16. Regarding the rate of penalty also, we concur with the adjudication of Ld. CIT(A) since it is undisputed fact that part payment of taxes was already made by the assessee along with return of income. The substantial refunds were due to the associated entities which aggregated to more than Rs.341.49 Lacs for AYs 2009-10 and 2013-14 to 2015-16 (page no.59 of the paper book). More refunds of Rs.508.24 Lacs were due for AYs 2016-17 & 2017-18 (page no.60 of the paper book). The assessee had filed 'No objection letters' and requested for adjustment of the same which was rejected. Subsequently, when the refunds were issued, the tax liability was settled by the assessee. Further, a part of the tax liability was also settled by the assessee group by way of seizure of cash of Rs.88.10 Lacs by the department. Nevertheless, the amount seized as well as paid by the assessee along with return of income would amount to more than the penalty sustained by Ld. CIT(A) in the impugned order, which we have substantially confirmed. Therefore, we confirm the stand of Ld. CIT(A), in this regard.

17. In the result, the appeal of the revenue stands partly allowed.

Assessee's Petition u/r 27

18. The Ld. AR has assailed the penalty on legal grounds. The Ld. AR relied on various judicial pronouncements and submitted that the notice was defective and bad-in-law. The notice did not specify the specific clause of Sec.271AAB which was applicable to the case of the assessee. The Ld. AR submitted that each of the clauses of Sec.271AAB carries a specific charge and rates of penalty vary. The Ld. CIT-DR, on the other hand, vehemently contested the legal grounds, and

likewise relied on various judicial pronouncements to support the case of the assessee.

19. We find that while framing the assessment order, Ld. AO initiated penalty proceedings in the body of assessment order as under: -

> Assessed. Demand Notice is issued. Penalty proceedings u/s 271AAB and 271(1)(c) is initiated separately. Penalty u/s 271F is also initiated.

It could be seen that Ld. AO initiated penalty under various provisions and subsequently, issued show-cause notice to the assessee to defend the proposed penalty u/s 271AAB. Subsequently, a show-cause notice was issued by Ld. AO to the assessee on 31.03.2015 the substantial portion of which read as under: -

> Whereas in the course of proceedings before me for the A.Y 2013-14, it appears to me that you
> # have without reasonable cause failed to furnish a valid return of income which you were required to furnish under section 139(1) or by a notice given under section 139(2)/148 of the Income tax Act, 1961, No……. dated……..or have without reasonable cause failed to furnish it within the time allowed and the manner by the said section 139(1) or by such section – 271F.
>
> ~~Have without reasonable cause to comply with a notice under section 142(1)/143(2) of the Income Tax Act, 1961 No……dated……~~
>
> # Have concealed the particulars of your income or have furnished inaccurate particulars of such income – 271(1)(c)
> # Have admitted income of ₹ 10 crores, but has not substantiated the manner in which the income has been earned and also has not filed a valid return of income by paying the tax on the admitted income – 271AAB.
>
> You are hereby requested to appear before me at 11:30 AM on 26/05/2015 and show cause why an order imposing a penalty on you should not be made u/s. 271 of the Income Tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative, you may show cause in writing on or before the said date which will be considered before any such order is made under section 271.

Upon perusal of the same, it could be seen that besides penalty u/s 271F, Ld. AO has proposed penalty u/s 271(1)(c) as well as u/s 271AAB in the assessment order. For the same, the assessee has been put to

notice and the specific amount has been mentioned against Sec.271AAB for which the penalty was proposed by Ld. AO. Upon perusal of these documents, we find that there was no room of any confusion or doubt. The penalty was initiated under specific provisions which were confronted to the assessee with specific mention of the amount which was subject matter of penalty proceedings. In fact, the assessee defended the penalty proceedings before Ld. AO as well as during appellate proceedings and submitted that the provisions of Sec.271AAB would not apply to the disclosure made by the assessee. This being the case, the arguments of Ld. AR could not be accepted.

20. The case law of Hon'ble High Court of Madras in **Gangotri Textiles Ltd. V/s DCIT (121 Taxmann.com 171; 25.08.2020)** supports our view. In this case, Hon'ble Court refused to entertain similar plea raised by the assessee at appellate stage. This decision considers earlier decision rendered in **Sundaram Finance Ltd. V/s ACIT (93 Taxmann.com 250; 23.04.2018).** The subsequent decision of Hon'ble High Court of Madras in **Pr. CIT V/s R. Elangovan (TCA Nos.770 & ors; 30.03.2021),** as referred to by Ld. AR, has not considered any of the aforesaid decisions. Moreover, in this case, the quantum of addition for which penalty was proposed, was not specified in the show-cause notice issued by Ld. AO. Therefore, this case law is factually distinguishable.

21. Finally considering the facts and circumstances of the case, we are not inclined to accept the legal grounds as urged by the assessee. The petition stand dismissed.

Conclusion

22. The revenue's appeal stands partly allowed in terms of our above order.

Order pronounced on 13th July, 2022.

Sd/-	**Sd/-**
(MAHAVIR SINGH)	**(MANOJ KUMAR AGGARWAL)**
उपाध्यक्ष /VICE PRESIDENT	**लेखा सदस्य / ACCOUNTANT MEMBER**

चेन्नई / Chennai; दिनांक / Dated : 13-07-2022.
EDN/-

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त (अपील)/CIT(A) 4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF